

## Brigham Young University Law School BYU Law Digital Commons

---

Utah Supreme Court Briefs (1965 –)

---

1982

# Steaven R. Hester v. South Ogden City and State Insurance Fund : Brief of Plaintiff and Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

James R. Hasenyager; Marquardt, Hasenyager & Custen; Attorneys for Plaintiff-Appellant;  
James R. Black; Black and Moore;

---

### Recommended Citation

Brief of Appellant, *Hester v. South Ogden City*, No. 18220 (Utah Supreme Court, 1982).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2892](https://digitalcommons.law.byu.edu/uofu_sc2/2892)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

STEAVEN R. HESTER, :  
Plaintiff/Appellant, :  
vs. : Case No. 18220  
SOUTH OGDEN CITY and :  
STATE INSURANCE FUND, :  
Defendant/Respondent.

---

\*\*\*\*\*

BRIEF OF PLAINTIFF, APPELLANT

STEAVEN R. HESTER

\*\*\*\*\*

James R. Hasenyager  
MARQUARDT, HASENAYGER & CUSTEN  
635 Twenty-Fifth Street  
Ogden, Utah 84401

Attorney for Plaintiff/Appellant

James R. Black  
BLACK AND MOORE  
Suite 500, Ten West Broadway  
Salt Lake City, Utah 84101

FILED

JUN 22 1982

---

Clerk, Supreme Court, Utah

TABLE OF CASES AND AUTHORITIES

CASES

<u>Kaiser Steel Corp. v. Monfredi</u> 631 P.2d 888 (1981)	. . . . .	6
<u>Sabo's Electronic Service v. Carl E. Sabo</u> P.2d (1982)	. . . . .	6
<u>Stoddard v. Stoddard</u> 642 P.2d 743 (1982)	. . . . .	7

TABLE OF CONTENTS

PRELIMINARY STATEMENT . . . . . 1  
DISPOSITION IN INDUSTRIAL COMMISSION . . . . . 2  
RELIEF SOUGHT ON REIVEW . . . . . 3  
FACTS . . . . . 3  
ARGUMENT . . . . . 5

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

STEAVERN R. HESTER,                   :  
          Plaintiff/Appellant,       :  
vs.                                       :  
  :  
SOUTH OGDEN CITY and               :  
STATE INSURANCE FUND,               :  
  :  
          Defendant/Respondent.

---

PRELIMINARY STATEMENT

On October 29, 1981 the Industrial Commission of Utah, the Honorable Joseph Foley Presiding, issued its decision (R.356-358) in a workmen's compensation case, that appellant Steaven R. Hester had sustained an industrial injury to his left knee on June 5, 1978 while working for South Ogden City as a garbage collector when a garbage truck backed into his leg entitling Mr. Hester to receive certain workmen's compensation benefits. There were three separate operations performed on the left knee itself over the succeeding year in attempts to repair the damage. The three knee operations were, in turn, followed by two left hip surgeries in attempts to relieve significant pain that had developed in Mr. Hester's left hip which in the medical judgment of his treating orthopedic surgeon was causally related to the knee

injury. The Industrial Commission, however, based on a medical panel report finding no connection between the left knee injury and the left hip pain, denied temporary total compensation benefits, permanent partial disability and payment of medical expenses for the left hip surgeries and following recovery times. It is from the denial of benefits and nonpayment of medical expenses associated with the two left hip surgeries that appellant seeks review and reversal of the Industrial Commission order.

#### DISPOSITION IN INDUSTRIAL COMMISSION

After an initial injury hearing followed by a medical panel hearing the Industrial Commission issued its written order that South Ogden City, through its insurance carrier the State Insurance Fund, pay Mr. Hester temporary total disability benefits for a period of 52 weeks and one day commencing from the date of Mr. Hester's injury on June 5, 1978; that there was no finding of permanent partial disability in the left knee; that two subsequent surgeries on Mr. Hester's left hip were unrelated to the industrial injury of June 5, 1978, Mr. Hester being therefore ineligible for any award of temporary total or permanent partial disability payments concerning the left hip and that certain medical payments be made only on the left knee.

A Motion for Review seeking inclusion of the left hip condition for purposes of calculating Mr. Hester's workmen's compensation entitlements was filed with the Industrial Commission on November 4, 1981 (R.367-368) along with a supporting memorandum (R.360-366). By order dated December 24, 1981 the Industrial Commission denied the motion for review and affirmed the decision of the Administrative hearing officer (R.369-370).

#### RELIEF SOUGHT ON REVIEW

Appellant Steven R. Hester requests that the decision of the Industrial Commission be reversed to the extent that it denies him workmen's compensation benefits for the problems which arose in his left hip following the left knee injury.

#### FACTS

On June 5, 1978 appellant was employed by South Ogden City as a garbage collector. (R.13) He had been employed for 2-3 months prior to his injury as both a garbage collector and truck driver. (R.14) On the day of his injury he was standing behind the truck emptying a can when the truck was backed into his left leg. (R.14) The leg was bent backwards in the knee joint. (R.15) Mr. Hester stayed on the job throughout the day then went

to the St. Benedict's Hospital Emergency Room that evening where he was referred to Dr. Fred Brewer an orthopedic surgeon. Dr. Brewer attempted to treat the knee injury conservatively. That failed and on July 18, 1978, in the first of five operations, Dr. Brewer performed an arthroscopy and excision of an inflamed pre-patellar bursa. The first operation failed to relieve Mr. Hester's pain and on October 16, 1978 Dr. Brewer reoperated again removing the pre-patellar bursa which had reoccurred. Once again the pre-patellar bursa redeveloped requiring a third operation on March 5, 1979. The third operation, as related directly to the knee injury, was successful.

During the period of time between his initial injury and the third knee operation in March, 1979 Mr. Hester had been forced to walk with a limp due to the painful, swollen condition of his left knee. (R.16) Following the third left knee operation due to the long period of abnormal use of the left leg during which the leg suffered 2 centimeters of atrophy (R.295-299) Mr. Hester developed significant pain in his left hip. (R.287) Thereafter, in September 1979 and again on March 24, 1981 Dr. Brewer operated on Mr. Hester to release the fascialata over the greater trochanter (the iliotibial band of musculature) at the left hip. The hip problems



were in Dr. Brewer's opinion to a reasonable medical certainty related to the left knee injury.

Q. To a reasonable medical certainty, Dr. Brewer, do you have an opinion as to whether the problem in the left hip is related to his injuries to his left knee?

A. I think it is related indirectly. The prolonged and frustrating period of continued knee problems despite three operations, all of which were essentially to do the same thing, during that entire period of time I don't feel that he had proper knee function; and I suspected that he contracted the iliotibial band, that this has contributed to the situation at his hip for those reasons. (R.285)

Only after recovery from the fifth operation did Dr. Brewer feel that Mr. Hester was able to return to some sort of employment.

Thereafter, at the request of the Industrial Commission Mr. Hester was examined by a medical panel consisting of Dr. Charles Swindler and a psychiatrist Dr. Richard Iverson. Dr. Swindler concluded that the hip condition was not related directly or indirectly to the knee injury or year long recovery period although he offered no alternative hypothesis for the problem.

#### ARGUMENT

The scope of review in Industrial Commission cases is "whether the Commission's findings are 'arbitrary or

capricious,' or 'wholly without cause' or contrary to the 'one [inevitable] conclusion from the evidence' or without 'any substantial evidence" to support them. Only then should the Commission's findings be displaced. Sabo's Electronic Service v. Carl E. Sabo P2d , 1982; Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (1981).

Appellant contends that in this case the findings of the Industrial Commission are arbitrary and capricious as well as contrary to the one inevitable conclusion which should have been drawn from the evidence in this case. In addition, for reasons which are unknown, and certainly not contained in its Findings of Fact, the Industrial Commission wholly and without cause completely ignored or rejected the findings of the treating orthopedic surgeon.

Dr. Brewer, as the treating orthopedic surgeon, was intimately familiar with Mr. Hester's original injury to the left knee. He observed the repeated swelling of the knee; he observed Mr. Hester's limping gait, which continued unbroken for almost a year; performed the three knee operations; and concluded that the limping gait caused the hip condition thereafter requiring two more operations to release the constriction of the iliotibial musculature in Mr. Hester's hip. His opinion, although certainly not binding on the Industrial Commission,

ought to have been given great weight, or if rejected to have been rejected for clear and specific reasons contained in the written Findings of Fact which should have been set out for purposes of review. This was not done in this instance. The case of Stoddard v. Stoddard, 642 P.2d 743 (1982) is dispositive on the need for written findings of fact in this regard.

Secondly, while admitting the possibility of a causal connection between the knee injury and the hip condition (although rejecting that possibility) Dr. Swindler, chairman of the medical panel itself, acknowledged that Dr. Brewer as the treating surgeon was in the best position to judge the severity of the injury and the affects of the injury on the patients overall condition. In response to a question by Mr. Black (attorney for the State Insurance Fund) regarding a reasonable period of recuperation following three surgery, Dr. Swindler stated that he could not make such a judgment

Q. Based upon what records that you did see, what would be a reasonable period?

A. I don't think I could do that.

Q. What would be necessary for you to make that determination?

A. I think that the surgeon who took care of the patient is the best individual to give you that answer. He knows what the

problem was. He knows what he saw. He knows what the patient had and has a pretty good idea of what was going on. (R. 272-273)

If the medical panel doctor is willing to acknowledge the superior capability of the treating physician to make such a judgment on the question of a reasonable recuperative period following the knee surgeries, then the treating physician is likewise in a better position to give the most authoritative testimony regarding the connection between the left knee injury and the later developing left hip condition. In that circumstance the treating physicians opinion ought to be entitled to great weight absent a showing of bias or prejudice in favor of his patient (absent here) and that opinion should not be rejected except upon compelling testimony to the contrary and clearly enunciated reasons for rejection of the testimony.

Tied in with the Industrial Commission's rejection of the opinion of the treating surgeon was the acceptance of the opinion of the medical panel that there was no connection between the left knee injury and the hip condition because there was no obvious organic pathology connecting the two conditions, demonstratable by objective means. (R.269-271) Yet, Dr. Swindler acknowledged that Mr. Hester's type of problem might very well have no means

of being objectively verified at the late date of the medical panel examination. (R.269-271) Again, with the type of problem which developed the only reliable testimony which could be given concerning the connection of the injuries had to be that of Dr. Brewer who observed the problems as they developed and before they were no longer manifest by direct observation and concluded that one condition was, in fact, tied to the other. (R.285) Likewise Dr. Swindler could offer no other alternative reason for development of the hip condition which was objectively verified by Dr. Brewer in two separate surgical operations. Therefore, the one inevitable conclusion which should have been drawn from the evidence was that abnormal use of the left leg with the limping gait for a period of almost one year caused a constriction of the iliotibial musculature which after two operations was sufficiently released to allow a near normal return to use of the left leg.

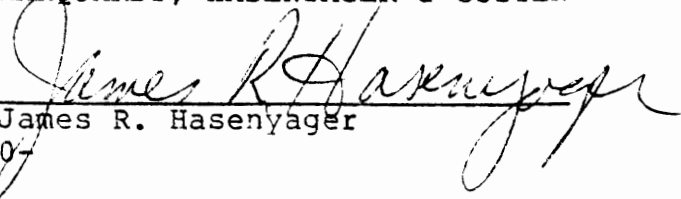
Medical panel examinations are often of benefit to the Industrial Commission in making its decisions and to the claimant in assessing needs for future medical care and treatment resulting from a work related injury. Nonetheless, in certain instances, as here, some injuries are not readily susceptible of accurate analysis by a

medical panel long after the conditions giving rise to the needed treatment have been abated and no obvious objective markers remain which can permit a reasonable assessment of the effect of the left knee upon the left hip. Logically the connection is apparent. Medically the connection was apparent and verifiable at the time the conditions were actively in progress. Now those conditions, much like a fever, are gone although certainly if in a fever case a treating physician noted the presence of the fever no one would argue about its presence though it too could not later be objectively verified. The one inevitable conclusion is that the two conditions were related and Mr. Hester is entitled to receive temporary total disability payments through June 1981, the reasonable recovery period following his second hip operation on March 24, 1981, and permanent partial disability to which he might now be entitled as well as payment of the medical bills from those two hip operations.

WHEREFORE, appellant asks that the decision of the Industrial Commission denying workmen's compensation benefits for his two hip operations be reversed.

DATED this 17th day of June, 1982.

MARQUARDT, HASENYAGER & CUSTEN

  
James R. Hasenyager

-10-

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of June, 1982, I mailed two true and correct copies of the foregoing Brief, postage prepaid, to James R. Black, Attorney for Defendants, Suite 500, Ten West Broadway, Salt Lake City, Utah 84101.

  
Suzanne W. Mangel, Secretary