

1998

# Mark Sandman vs. Triumph Group and Liberty Mutual Insurance Company: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MARK SANDMAN,

Applicant and Petitioner,

vs.

TRIUMPH GROUP and LIBERTY  
MUTUAL INSURANCE COMPANY,

Defendants and Respondents.

Appellate Court Case No. 980110-CA

Priority No. 7

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**REPLY BRIEF OF PETITIONER**

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Petition for Review from the Board of Review  
of the Industrial Commission of Utah  
Benjamin A. Sims  
Administrative Law Judge

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**FILED**

Utah Court of Appeals

JUL 17 1998

**PETITIONER RESPECTFULLY REQUESTS ORAL  
ARGUMENT AND THAT THIS CASE BE REPORTED**

Julia D'Alesandro  
Clerk of the Court

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**REPLY BRIEF OF PETITIONER**

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**ARGUMENT**

**A. RESPONDENT’S ATTEMPT TO CHANGE THE ISSUE IN THIS CASE IS IMPROPER**

In its brief, Petitioner, (Hereinafter “Sandman”), raises one issue:

Was the finding by the Administrative Law Judge that petitioner failed to report his injury to his employer/supervisor within 180 days of the injury as required by UTAH CODE 34A-2-407(2) adequate when petitioner’s supervisor testified that petitioner reported a work injury to him on the date of the injury?<sup>1</sup>

Apparently dissatisfied with the issue as presented by Sandman, Respondent, (Hereinafter “Triumph”), offers its own issue which is entirely dissimilar to that raised by Sandman:

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<sup>1</sup> Brief of Petitioner at page 1.

Whether Petitioner's Medical records, Petitioner's conduct, Petitioner's own statements against interest, and the testimony of Petitioner's co-workers-as found by the Labor Commission-constitute substantial evidence to support the Labor Commission's Order.<sup>2</sup>

While the rules permit an appellee to present its own issues of the case if dissatisfied with the issues presented by the appellant pursuant to Utah R. App. P. 24(b)(1), there is no authority that allows an appellee to simply substitute an entirely different issue for that of an appellant.<sup>3</sup> The issue set forth in Sandman's brief is taken from a specific finding of the Administrative Law Judge:

The supervisor was aware that the petitioner had previously existing back problems. The petitioner has complained to him regularly prior to the alleged accident about his back problems. **The supervisor is certain that an industrial accident was not reported to him.** No **form** was filled out and no injury was ever **reported** by petitioner. The petitioner had indicated to the supervisor that the problems did not relate to work.

Thus, the evidence does not rise to a preponderance that the petitioner ever reported the back injury to his employer within 180 days of December 27, 1994. . . . (Emphasis added). R 172.<sup>4</sup>

It is clear this is the only finding from which Sandman appeals. As set forth in Sandman's brief, it is clear that Sandman's supervisor was notified the day of Sandman's accident and the 180 day requirement had been met.<sup>5</sup> There is no legitimate reason for Triumph's ignoring the issue

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<sup>2</sup> Brief of Respondents at page 1

<sup>3</sup> Research of Rule 24 Utah R. App. P. reveals no case law where an appellee has proffered an issue entirely dissimilar to the issue raised by an appellant.

<sup>4</sup> Brief of Petitioner at page 7

<sup>5</sup> As those facts have already been briefed by Sandman, they will not be addressed here.

presented by Sandman and offering an issue that is irrelevant. The only issue before the Court is that set forth in Sandman's brief and it is the only issue which should be considered on this appeal.

#### B. SANDMAN MARSHALED ALL UNFAVORABLE RELEVANT EVIDENCE

Having changed the issue to one that Sandman had never seen before, Triumph creates another issue:

Whether Petitioner's failure to marshal the evidence is fatal to his attack on the Labor Commission's evidentiary findings.<sup>6</sup>

In support of its argument, Triumph outlines numerous facts it claims are relevant, but went unrevealed. However, Facts 5-21 in Triumph's brief have no connection to the issue of whether Sandman reported his injury to his supervisor, Al Kyker, within 180 days of his accident. Without reciting the facts verbatim, it is sufficient to note that they refer to information contained in medical records, whether a physician's report of injury was filed, who paid for medical treatment, when work releases were issued, and conversations with other supervisors. Those facts have nothing to do with the issue of whether the injury was reported to Al Kyker within 180 days.

The additional transcript actually provides favorable relevant evidence to Sandman. Mr. Sandman testified that he told his supervisor, Al Kyker, of the accident on the day it occurred. (T. at 26). Also, Herbert Schmith, a co-worker testified that on the date of accident Sandman informed him that he had reported an accident to Kyker and that Kyker had told him to go to the hospital. (T. at 71-72).

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<sup>6</sup> Brief of Respondents at page 1

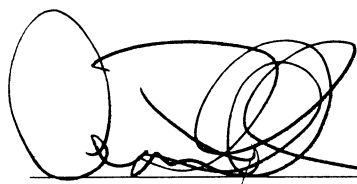
The remaining relevant facts (1-4) were already revealed and provided in the transcript paid for and furnished by Sandman. The allegation Sandman failed to marshal the evidence is spurious. The fact Sandman reported his injury to Al Kyker is clear. The Administrative Law Judge's ruling is clearly contrary to that testimony. Respondent cannot refute that evidence on the merits. Therefore, it has created an issue that is not properly before the Court and argues that Sandman has failed to marshal evidence to an issue that is irrelevant.

### CONCLUSION

The only issue Sandman raises in his appeal is whether the Administrative Law Judge's determination that Sandman never reported his industrial injury to his supervisor, Al Kyker, within 180 days was proper. The testimony of Al Kyker, Mark Sandman and Herbert Schmith is clear that he did. The evidence is in the record and the Judge simply ignored it or missed it due to the passage of time from the date of hearing and the issuance of the order.

Triumph's argument regarding the 180 day notice issue is tenuous at best. Instead of providing real proof, it attempts to divert the attention of the Court. First, it presents an immaterial issue unrelated to that in Sandman's brief. Then it claims Sandman failed to marshal evidence regarding an irrelevant issue of which he had no knowledge. This is not proper and should not be permitted. This Court should reverse the finding of the Labor Commission that Sandman did not give notice to his employer, remand this case for a determination of benefits and award costs as appropriate.

DATED this 17<sup>th</sup> day of July 1998.



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Aaron J. Prsbrey  
Attorney for Applicant/Petitioner



**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of July, 1998, a copy of the foregoing REPLY BRIEF OF PETITIONER was mailed, postage prepaid, as follows:

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