

2007

Martha D. Casper, widow of C. Lynn Barraclough,  
Deceased v. Labor Commission of Utah, Andrus  
Transportation and National Union Fire Insurance :  
Reply Brief

Utah Court of Appeals

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## IN THE UTAH COURT OF APPEALS

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MARTHA D. CASPER, widow of  
C. LYNN BARRACLOUGH, Deceased,

Petitioner/Appellant,

v.

LABOR COMMISSION OF UTAH,  
ANDRUS TRANSPORTATION and  
NATIONAL UNION FIRE INSURANCE,

Respondents/Appellees.

Case No. 20070324-CA

Labor Commission No. 97-0886

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### REPLY BRIEF OF PETITIONER MARTHA D. CASPER

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#### PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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

FILED  
UTAH APPELLATE COURT

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**PETITIONER RESPECTFULLY REQUEST ORAL ARGUMENT  
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## **JURISDICTION OF THE COURT**

The jurisdiction of this Court to hear this dispute is not disputed by the parties.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

Petitioner set forth her issues in her Docketing Statement and in her initial Brief before this Court. Respondents did not file a cross-appeal. Respondent's do not dispute Petitioner's stated Issues on Appeal as valid but rather, cynically rephrase them in order to get an apparently more favorable standard of review. This is improper and an abuse of appellate procedure. The "Issues" section of Respondent's Brief should be stricken and not considered .

In particular, Respondents allege that the Utah labor Commission is the ultimate fact finder and that the Utah Appellate Courts are without jurisdiction to review the Labor Commissions findings of legal or medical causation. This novel claim is unprecedented in Utah law and is refuted in detail below.

## **DETERMINATIVE STATUTE AND RULE**

Respondent's citation to Determinative Statutes and Rules is at best confusing as they entirely ignore the central, and most obvious Rule regarding Requests for Admissionss, *i.e.*, Rule 36 of the Utah Rule of Civil Procedure. Otherwise Respondents repeatedly rely on Statutes and Rules not in effect at the time of Mr. Barraclough's death.

## **STATEMENT OF FACTS**

Once again there is no real dispute between the parties as to the operative

facts. Respondent's do not allege that Petitioner omitted any relevant fact or failed to marshal any required evidence. Respondent's Statement of Facts offers nothing new or disputed but merely recharacterizes the facts in a slanted and argumentative presentation. While such may be proper in the argument portion of the Brief, it is improper in the Statement of Facts.

As no defect, omission or failure to marshal the evidence in Petitioner's Statement of the Facts is claimed by Respondents, their argumentative Statement of Facts should also be stricken and not considered by this Court.

### **SUMMARY OF REPLY**

The Respondent Employer/Carrier failed to timely deny a Request for Admissions that the Deceased was injured/died while acting within the course and scope of his employment. Pursuant to the Rule 36 of the Utah Rules of Civil Procedure that Request is deemed admitted and concedes liability for the industrial accident.

Because the Deceased did not have a documented preexisting condition which would trigger the higher burden of proof under Allen v. Industrial Commission, 729 P.2d 15, 18 (Utah 1986), any exertion connected with the employment satisfies the medical causation test. Therefore, Petitioner established legal and medical causation by showing that the Deceased suffered an industrial accident while driving a truck for the Employer.



## ARGUMENT

### I

#### RESPONDENTS FAILURE TO TIMELY RESPOND TO PETITIONER'S REQUESTS FOR ADMISSIONS RESULTED IN THE REQUESTS BEING DEEMED ADMITTED AS A MATTER OF LAW.

It is not disputed that the Respondent's failed to timely respond to two separate sets of Requests for Admissions. (R1 at 87-90 and R1 at 188-190). The Respondent's answers were 56 days and 6 days late, respectively and thus they were deemed admitted by operation of law.

The Requests for Admissions that Respondents failed to timely answer established that the Deceased was injured while acting in the course and scope of employment.

Rule 36 (a) (2) of the Utah Rules of Civil Procedure provides in relevant part that:

(a) (1) A party may serve upon any other party a written request for the Admissions, ... of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact... .

(a) (2) ... The matter is admitted unless, with thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the Admissions a written answer or objection addressed to the matter. ...

(b) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the Admissions. ...

Respondents claim that discovery in administrative proceedings is only

available “if the governing statutes or agency rules so provide.” (Citing Pilcher v. Department of Social Services, 663 P.2d 450, 453 (Utah 1983) and Beaver County v. Utah State Tax Commission, 916 P.2d 344, 352-53 (Utah 1996)). The problem with Respondent’s analysis is that the governing statutes and agency rules in effect at the time of Petitioner’s claim did allow for the use of Requests for Admissions.

Utah Code Annotated, Section 63-46b-7 (1997, as amended), the statute in effect at the time of Petitioner’s claim permitted the parties in an administrative claim to “conduct discovery according to the Utah Rules of Civil Procedure.” The Administrative Rules adopted by the Labor Commission and in effect at the time of the Petitioner’s claim did not address, preclude or exclude the use of Requests for Admissions in workers compensation claims. Utah Administrative Code R602–2-1 (1997).

Utah workers’ compensation law is very clear that an injured/deceased worker is entitled to the law in effect at the time of his industrial injury/death. “The rights and liabilities of the parties are determined on the basis of the law as it existed at the time of the occurrence of the industrial accident.” Kaiser Steel Corp. v. Ind. Comm., 704 P.2d 1168, 1171 f.n.1 (Utah 1985). Utah Const. Co. v. Matheson, 534 P.2d 1238 (Utah 1975). Silver King Coalition Mines Co. v. Ind. Comm., 268 P.2d 689, 691 (Utah 1954). Moore v. American Coal Co., 737 P.2d 789 (Utah 1987). Lantham Co. v. Ind. Comm., 717 P.2d 255, 256 at f.n.1 (Utah 1986). “Later statutes or amendments may not be applied retroactively to deprive a party of rights or impose greater liability unless the later statute clarifies or amplifies how the earlier law

should have been understood.” Kennecott Corp. v. Ind. Comm., 740 P.2d 305 (Utah App. 1987). Oakland Construction Co. v. Ind. Comm., 520 P.2d 208, 210 (Utah 1974).

The Administrative Code in effect at that time, while not specifically mentioning Requests for Admissions did not preclude their use and Requests for Admissions in workers’ compensation cases was a standard discovery device frequently used by both injured workers and employer/carriers. It was not until 2002 that Utah Administrative Code R602-2-1.F was changed to state that “Discovery shall not include requests for Admissions.” This amendment was added to specifically, and for the first time, preclude the use of Requests for Admissions.

The Respondents cite Utah Code Annotated, Section 34A-2-802 (2007) for the proposition that the Labor Commission, Appeals Board and Administrative Law Judges are “not bound by the usual common law or statutory rules of evidence or by any technical or formal rules or procedure...”. However, this statute was not in effect at the time of the filing of this claim.

In any event, it is well established that should there be any conflict between the Utah Code and the Utah Administrative Code, the provisions of the Utah Code apply. Thus, Utah Code Annotated, Section 63-46b-7 (1997, as amended) which directed that discovery in administrative claims should be done pursuant to the Utah Rules of Civil Procedure controls and overrides any contrary provision or implication in the Utah Administrative Code.

The Respondents object to this as “rigid adherence to technical procedure.”

This is mere sophistry designed to ameliorate their wilful failure to comply with the applicable Rules of Discovery. Although Rule 36 is strict in its requirements, the Rule is not rigid. The Respondents did not file any Motion or seek relief in any way from the deemed admitted Requests for Admissions. The Respondents could have moved to be excused from deemed Admissions by arguing due cause for their late responses and the Labor Commission could have stricken the Requests of Admissions or allowed the late answers. The Respondents never requested relief from their late answers nor did the Labor Commission grant it.

In Tuck v. Godfrey, 981 P.2d 407 (Utah App.1999) the Utah Court of Appeals held that:

Any challenge to the merits of a discovery request must be timely filed and put before the trial court, or the claim will be waived (citing Schoney v. Memorial Estates, Inc. 790 P.2d 734, 586 (Utah Ct. App. 1990) and Amica Mutual Insurance Company v. Schettler, 768 P.2d 950, 962 (Utah Ct. App. 1989)).

Although these cases involved regular Trial Courts and not Administrative Agencies, the reasoning is applicable. A challenge to discovery requests must be timely made. The fact that the Respondents in this case did not challenge the Requests for Admissions before the Labor Commission, or request relief from the deemed Admissions and that they answered the Requests (albeit late), even though they claimed they were not required to do so is powerful evidence that the Requests were properly propounded and were entitled to enforcement pursuant to the provisions of the Utah Rules of Civil Procedure.

Although Tuck concerned Requests for Production of Documents its

conclusion is very applicable here:

At no time during the proceedings before the trial court did Godfrey object to the discovery requests as they applied to him. On the contrary, Godfrey sought no protective order requesting relief from having to produce the documents, even though the request was made of him twice. Godfrey waived his argument that he had no duty to produce the documents. (Id. at 413).

If Respondents really believed that they were not obligated to answer Requests for Admissions one would expect that they would not have answered them at all, or would ask for a Protective Order. However, Respondents did go on to respond to the Requests although in regards to four of the Requests almost two months late. The very fact that they did respond indicates that they felt that they had an obligation to respond.

Respondents, finally, in desperation allege that even if the Requests are admitted, they do not establish legal and medical causation. (Respondent's Brief at 29). The six relevant Requests for Admissions are as follows:

On December 12, 1997,

1. Admit that on or about November 19, 1996, the Deceased was injured while acting in the course and scope of employment.
2. Admit that the Applicant's claim is not barred by any applicable statute of limitation.(R1 at 87-90),

and on April 20, 1999,

1. Admit that the Deceased's myocardial infarction occurred while he was driving one of the Employer's trucks;
2. Admit that the Deceased's myocardial infarction occurred after he was dispatched by the Employer to travel on a job or jobs for and/or at the direction of the Employer;

3. Admit that the Deceased performed services for the Employer on the day when his myocardial infarction occurred; and
4. Admit that the Deceased's myocardial infarction occurred while he was at work for the Employer. (R1 at 188-190).

The logical sequence of the Requests establishes that Mr. Barraclough was injured while acting in the course and scope of his employment (establishing legal causation) and that his heart attack occurred while driving the employer's truck, at the Employer's direction and while at work. (Medical causation).

The Labor Commission's gratuitous suggestion that "The connection between Mr. Barraclough's work and his death should be decided according to the evidence actually presented by the parties" (R3 at 619) cannot not be taken as granting Respondents relief from the deemed Admissions. Under Rule 36 untimely responses to Requests are deemed admitted.

Petitioner has made a diligent search and is unable to find any decision or ruling of the Utah Labor Commission prior to 2002, which precluded the use of Requests for Admissions or granted relief from deemed Admissions without the showing of due cause. It is significant that Respondents do not cite any Labor Commission case disallowing the use of Requests for Admissions.

The Labor Commission refused to find that the Admissions were legally deemed admitted, ruling that "the connection between Mr. Barraclough's work and his death should be decided according to the evidence actually presented by the parties." (R3 at 619). Since all six Requests for Admissions were deemed

admitted by operation of law, pursuant to the Utah Rules of Civil Procedure concerning Requests for Admissions, the Administrative Law Judge and the Labor Commission erred and should have entered an appropriate award of benefits based upon them.

## II

### **PETITIONER ESTABLISHED LEGAL AND MEDICAL CAUSATION BY SHOWING THAT THE DECEASED SUFFERED AN INDUSTRIAL ACCIDENT WHILE DRIVING A TRUCK FOR THE EMPLOYER.**

The parties are in agreement that there are two prerequisites for a finding of a compensable death under the Utah Workers' Compensation Act: the death must be (1) by accident, and (2) there must be a causal connection between the death and the Deceased's employment. Allen v. Industrial Commission, 729 P.2d 15, 18 (Utah 1986).

Respondents also do not dispute that the Petitioner has satisfied the requirement of proving that the Deceased's death was an accident within the meaning of the Workers' Compensation Act. His heart attack was not planned nor foreseen and was obviously unexpected and unintended. Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1081 (Utah 1986).

The Labor Commission found that the Petitioner failed to establish both legal and medical causation. (R1 at 619). Petitioner continues to assert that Finding was in error.

#### **A. Appellate Courts can review Labor Commission Findings of Legal and Medical Causation.**

Respondents allege that the Labor Commission is the “ultimate fact finding authority for workers’ compensation proceedings” and that the Appellate Courts are without jurisdiction to review the Labor Commission’s findings of legal or medical causation. Although they cite several cases in support, they misinterpret dicta in those cases and ignore an avalanche of cases wherein this Court has in fact reviewed and reversed the Labor Commission’s Findings of legal and medical causation.

For example, Respondents cite Speirs v. Southern Utah University, 2002 UT App 389, 60 P.3d 42 (2002) as supporting this principle. An impartial and fair reading of Speirs, however, shows that the Respondents have cited dicta that has not been subsequently cited or followed by this Court. Indeed, Speirs only stands for the principal that the Labor Commission should be deferred to “... because, when reasonable conflicting views arise, it is the Commission’s province to draw inferences and resolve those conflicts.” *Id* at 45. The Speirs Court went on to specifically acknowledge that they were entitled to adjudge the reasonableness or rationality of the ALJ and Commission’s decisions. *Id* at 45.

The other cases cited by Respondents for this speciosis proposition are Tintic Standard Mining Co. v. Industrial Commission, 110 P.2d 367, 368-69 (Utah 1941) and Wheritt v. Industrial Commission 110 P.2d 374, 376 (Utah 1941). Those cases are each over almost 70 years old, are dicta and have not been held as controlling precedent. They are directly contrary to well over 100 subsequent cases in which this



Court has exercised appellate review of the Labor Commission's (and formerly Industrial Commission's) findings of legal and medical causation. In this regard it is important to note that it was not until 1986 that the Utah Supreme Court in Allen *Id.* even announced the requirement that Utah industrial compensation cases be analyzed in terms of legal and medical causation. The argument that two cases some 40 years prior prevented such an analysis is ludicrous. Although a named party to this appeal, the Utah Labor Commission has not filed any Brief supporting Respondents claim. It is in any event ,an unprecedented argument that this Court should summarily reject.

#### **B. Petitioner Established Legal Causation.**

The standard of legal causation varies depending on the Deceased's medical condition at the time of the accident. "[W]hen a claimant has no preexisting risk factors, any exertion connected with the employment . . . will satisfy the legal causation test." Lancaster v. Gilbert Development, 736 P.2d 237, 239 (Utah 1987). If the Deceased had a preexisting medical condition, there is a higher standard of proof. Specifically, he is required to prove that the employment contributed something substantial to increase the risk he already faced in everyday life because of his prior condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that incurred in normal, everyday non-employment life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from personal risk rather than exertions at work. Worker's Compensation

Fund v. Industrial Commission, 761 P.2d 572, 574 (Utah Ct. App. 1988).

There is no medical or other reliable evidence that the Deceased was ever treated for heart problems, had any prior heart problems or had any cardiac risk factors present at the time of his death. His past medical history is unremarkable with the exception of having venous thrombosis and a pulmonary embolism several years prior without significant complications. In addition, and confirming that fact, is a pre-employment physical dated July 11, 1996, required by the Defendants, a mere 4 months prior to the Deceased's heart attack and death, which showed no signs of any medical problems. In fact, he was characterized as being "healthy no problem" and was cleared for work and employment as a long-haul truck driver. (R4 at 28).

Given that determination, the Deceased's employment activity need only have involved usual or ordinary exertion. Price River Coal at 1082, n.1 and Allen at 26. Driving a long haul 18-wheel truck clearly qualifies as "any exertion" for medical causation purposes.

The Labor Commission's Finding that the decedent suffered from a pre-existing heart condition is entirely based on postmortem speculation. There is no medical evidence before his death showing that Mr. Barraclough had a preexisting heart condition. The Respondent's medical experts engaged in conjecture and speculation after his death and did not refer to any medical support for their views before his death. At best, they have a brief medical report that he had chest pains five years prior but there was no diagnosis of a heart condition based on those symptoms. Even a layman knows that chest pains are not necessarily synonymous with heart

problems. There was also no autopsy or postmortem examination made of Mr. Barraclough. There are no objective clinical findings upon which any of the medical experts or the Labor Commission could rely in finding a pre-existing heart condition.

The Respondent/Employer's own doctor who did provide a mandatory Department of Transportation pre-employment physical of the Deceased found that he was "healthy no problem" and cleared him for work, four months prior to his death. Respondents should be estoppel from certifying that the Deceased was healthy and cleared for working as a long haul truck driver and then subsequently claiming a mere 4 months latter that his heart attack while at work on his first solo drive was the result of a pre-existing condition.

As a final matter, the Labor Commission adopted the findings of the Administrative Law Judge and did not make any independent findings of its own. (R2 at 619). The ALJ, however, only found that the Petitioner had failed to establish medical causation. The ALJ did not find that there was any failure to establish legal causation and the Labor Commission made no independent findings or conclusions would support that result.

### **C. Petitioner Established Medical Causation.**

Medical causation is determined by the medical evidence. Allen, 729 P.2d at 22. The Medical Panel in this cause is largely discussed above since the parties dispute largely lies on whether the Deceased had a pre-existing heart condition. All of Respondent's medical evidence is entirely post-mortem speculation. The Respondent/Employer had certified Mr. Barraclough as healthy and capable of

performing the duties of a long-haul truck driver. This legally required medical certification was done by Dr. Moore, the same doctor that Respondents now rely upon that the Deceased had “numbness on the left side of his body years before the heart attack” (Respondent’s Brief at 34). Significantly, Respondents do not introduce any evidence from Dr. Moore post mortem that support their conclusion that he found that Mr. Barraclough had a pre-existing heart condition. There is no medical evidence that his prior “numbness on the left side of his body” was at all ever diagnosed as a pre-existing heart condition by anyone other than Respondent’s lawyers.

Respondent’s also heavily rely upon the post-mortem reports of John Bell, a witness with no acknowledged medical training, that Mr. Barraclough experienced “chest pains” prior to his death (but significantly while under training with the Respondent/Employer to be a truck driver). Mr. Bell had no expertise and never ventured the medical opinion that Mr. Barraclough had a pre-existing heart condition.

All other medical opinions where mere speculation without physical examination prior to Mr. Barraclough’s heart attack or with reference to clinical findings post-mortem. Any such opinions are necessarily the result of mere speculation and are contradicted by other medical experts in the field of heart disease, to wit Dr. Frank G. Yanowitz, a a Board Certified Cardiac physician and Associate Professor of Medicine at the University of Utah School of Medicine, who filed a detailed medical report filed with the Commission, enclosing his curriculum vita by cover letter dated December 9, 1997. Dr. Yanowtiz’s expertise in cardiac cases involving alleged industrial accidents and occupational exposures is well know in the

industrial community. He has served on several Commission Medical Panels, lectured at workers compensation seminars and provided written reports and testified in industrial Hearings in several of the leading Utah heart industrial cardiac cases. As such he has been in the forefront of industrial medicine related to cardiac claims. (R1 at 68-85).

Dr. Yanowitz in a well reasoned medical report concluded that “It is likely that the anxiety and stress of having to drive solo for the first time contributed to the timing of his fatal coronary event ....” (R4 at 14). Dr. Yanowitz noted that his [Mr. Barralough’s] previous history was only significant in having venous thrombosis and pulmonary embolism several years prior without significant complications or sequelae. Dr. Yanowitz also noted that the Deceased was not known to have any significant coronary risk factors. (R4 at 13-14).

### III

#### **PETITIONER IS ENTITLED TO HAVE THE FACTS, LAW AND ANY DOUBT ARISING THEREFROM RESOLVED IN FAVOR OF AWARDING BENEFITS.**

Petitioner does not claim that she is entitled to any award merely because she has filed a claim only that if there is doubt, that doubt must be liberally construed in favor of awarding benefits. Respondents concede this important principle but merely allege that there is no doubt. The medical records indicate contrary opinions and the need for weighing of those opinions. There is no evidence that the Labor Commission recognized this principle.

This well accepted principle of law was not applied in this case, however. It is

one in which, because of the circumstances of Mr. Barraclough's non-witnessed death, there is no direct evidence regarding what the Deceased had been doing the day of his accident, and particularly, shortly before he turned his truck around to return to St. George for medical treatment and was subsequently found on the side of the road slumped against the steering wheel of his truck.

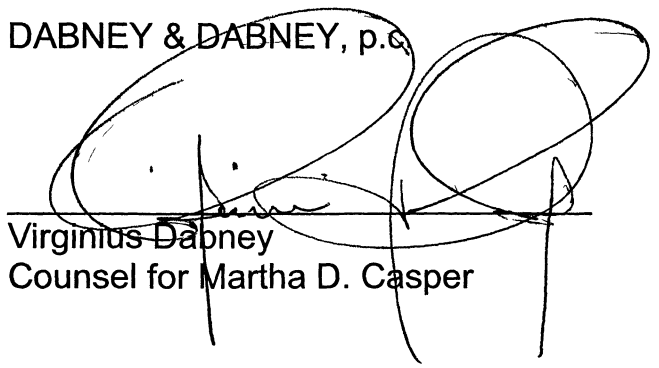
This is an classic case for resolving any doubts raised from in evidence in favor of awarding benefits, and reversing the Findings, Conclusions and Order of the Labor Commission denying benefits in this case.

**CONCLUSION/STATEMENT OF RELIEF SOUGHT**

The Labor Commission's Order denying benefits should be reversed and remanded with directions to enter an award for the payment of benefits.

DATED this 17th day of December, 2007.

DABNEY & DABNEY, p.c.

  
Virginius Dabney  
Counsel for Martha D. Casper

## CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2007, a copy of the foregoing  
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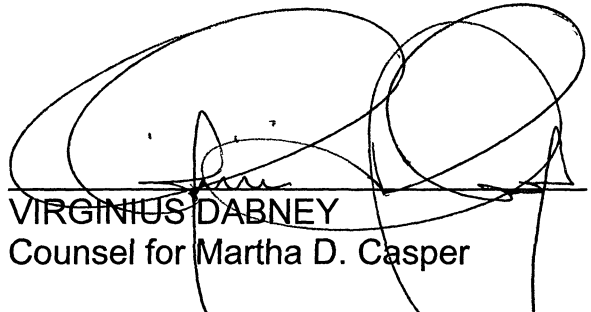
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