

1987

James T. Griffith v. The Industrial Commission of Utah, Workers Compensation Fund, and or Cedar City Coca Cola Bottling Company, Second Injury Fund : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

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NO.

870208-CA

JAMES T. GRIFFITH,

Applicant-Appellant,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH, WORKERS COMPENSATION
FUND, and or CEDAR CITY COCA
COLA BOTTLING COMPANY,
SECOND INJURY FUND,

Defendants-Respondents

Case No. 870208-CA

Classification Priority 6

BRIEF OF DEFENDANTS/RESPONDENTS, WORKERS COMPENSATION FUND,
and/or CEDAR CITY COCA COLA BOTTLING COMPANY

Petition for Review of an Order of the Industrial
Commission of the State of Utah affirming the Order of its
Administrative Law Judge, Janet L. Moffitt.

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Court of Appeals

JAMES T. GRIFFITH,
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vs.
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IN THE UTAH COURT OF APPEALS

JAMES T. GRIFFITH,)	
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Applicant-Appellant,)	
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vs.)	
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Case No. 870208-CA		
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)	
Defendants-Respondents)	

BRIEF OF DEFENDANTS/RESPONDENTS, WORKERS COMPENSATION FUND,
and/or CEDAR CITY COCA COLA BOTTLING COMPANY

JURISDICTION AND NATURE OF PRECEEDINGS

This is an original proceeding seeking review by the Utah Court of Appeals of an Order of the Industrial Commission of Utah which denied the applicant's application for temporary total disability compensation for the period of May 3, 1985 through December 29, 1985.

This Court is authorized to conduct a review of the Commission's Order pursuant to the provisions of Section 35-1-83, Utah Code Annotated. (1953, as amended)

STATEMENT OF THE ISSUES

The sole issue in this case is whether or not the Industrial Commission of Utah acted arbitrarily and capriciously in denying the Applicant-Appellant temporary total disability compensation from the Workers Compensation Fund of Utah for the period of May 3, 1985 through December 29, 1985.

DETERMINATIVE STATUTES

35-1-65. U.C.A., 1953, AS AMENDED. TEMPORARY DISABILITY - AMOUNT OF PAYMENTS - STATE AVERAGE WEEKLY WAGE DEFINED.

(1) In case of temporary disability, the employee shall receive 66 2/3% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in chapters 1 and 2 of this Title shall be determined by the commission as follows: on or about June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

35-1-84. U.C.A., 1953, AS AMENDED. (EFFECTIVE THROUGH DECEMBER 31, 1987). FURNISHING AND CERTIFYING PROCEEDINGS AND TRANSCRIPT TO SUPREME COURT - POWER OF COURT TO AFFIRM OR SET ASIDE AWARD - GROUNDS FOR SETTING ASIDE.

Upon the filing of the action for review the court shall direct the commission to furnish and certify to the Supreme Court, within twenty days, all proceedings and the transcript of evidence taken in the case, and the matter shall be determined upon the record of the commission as certified by it. Upon such review the court may affirm or set aside such award, but only upon the following grounds:

(1) That the commission acted without or in excess of its powers;

(2) That the findings of fact do not support the award.

31-1-85, U.C.A., 1953, AS AMENDED. (EFFECTIVE THROUGH DECEMBER 31, 1987). DUTY OF COMMISSION TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW - FILING - CONCLUSIVENESS ON QUESTION OF FACT - REVIEW - COURT JUDGMENT.

After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the award.

35-1-88. U.C.A., 1953, AS AMENDED. RULES OF EVIDENCE
AND PROCEDURE BEFORE COMMISSION AND HEARING EXAMINER -
ADMISSIBLE EVIDENCE.

Neither the commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the workmen's compensation act.

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

(a) Depositions and sworn testimony presented in open hearings.

(b) Reports of attending or examining physicians, or of pathologists.

(c) Reports of investigators appointed by the commission.

(d) Reports of employers, including copies of time sheets, book accounts or other records.

(e) Hospital records in the case of an injured or diseased employee.

STATEMENT OF THE CASE

The Applicant-Appellant herein has a long history of injury, both industrial and non-industrial, to both his left and right ankles. While the original Application for Hearing was filed on an injury occurring in December of 1983; at hearing, and at issue before this Court, is an injury occurring on April 16, 1985. Subsequent to the administrative hearing in this matter, a single member medical panel was convened, and initially found that while the left ankle problems were all industrially related, the right ankle problem was not industrially related. Additionally, it was the panel's opinion that the Applicant-Appellant would not be entitled to any temporary total disability beyond the date of May 3, 1985. (R.252) Objections to the medical panel were filed by the Applicant-Appellant, and, after a review of the Applicant-Appellant's objections, the medical panel changed his opinion indicating in a one-sentence reply that the right ankle injury and surgery for that ankle should be considered industrial. Because of the confusion created by the Medical Panel Report, the Administrative Law Judge contacted counsel with the request that the issue of temporary total disability be negotiated. The Workers Compensation Fund, for settlement purposes, offered to pay temporary total disability compensation from the date of surgery, December 30, 1985,

to April 2, 1986, the date the Applicant-Appellant was released to return to work by the treating physician, Dr. D. Ross McNaught. As there was no basis on which to base temporary total disability compensation, for the period of May 3, 1985 through December 29, 1985, the Workers Compensation Fund denied liability for this period. Along with the Workers Compensation Fund's letter dated February 11, 1987 containing its proposal for settlement, substantial evidence was attached for the Applicant-Appellant's review. (R.229-242) The Applicant-Appellant refused this offer of settlement and requested that the Administrative Law Judge rule on the issue of temporary total disability for this period. (R.220) The Administrative Law Judge, based upon the evidence submitted, concluded that the Applicant-Appellant herein was not entitled to temporary total disability compensation for the period of May 3, 1985 through December 29, 1985. Following the Administrative Law Judge's Order denying these benefits, the Applicant-Appellant asked the Administrative Law Judge for a reconsideration of her decision. (R.256-257) The Administrative Law Judge, on April 7, 1987, responded to the Applicant-Appellant, indicating,

This letter will confirm our conversation of April 6, 1987. As I indicated at that time, your letter of March 19, 1987, has been considered, and I am not inclined to change my findings with regard to the period of temporary total disability. I think it is fairly clear from the record that your client was not able to have ankle surgery during that time because he

was stabilizing medically from other problems. In addition, he had several aggravations of his ankle problems which were not industrially related." (R.260)

Subsequent to the Judge's denial of the request for reconsideration, the Applicant-Appellant filed a Motion for Review with the Industrial Commission. After a thorough review of the Commission file, the Motion for Review was denied, unanimously, by the Industrial Commission. (R.273-274) This appeal was then filed.

SUMMARY OF ARGUMENT

1. The general standard of review for this Court in reviewing Industrial Commission findings is that the Commission's findings will be upheld in the absence of a showing that the order is arbitrary and capricious.

2. When reviewing the Commission's findings as to issues of fact, the Commission will be upheld if the findings are not contrary to the law or the evidence submitted.

3. The issue of disability is a matter of fact. As such, the Commission's determination of disability must be based upon all of the relevant facts submitted.

4. The Administrative Law Judge's Order, as approved by the Industrial Commission, was supported by substantial medical evidence and other testimony reviewed pursuant to Section 35-1-88, Utah Code Annotated, 1953, as amended.

5. The burden of proof is on the Applicant to establish disability. This burden has not been met by the Applicant-Appellant herein.

6. In cases where disability is being claimed, the applicant must prove that the industrial injury is the direct and proximate cause of the claimed disability.

ARGUMENT

I

THE GENERAL STANDARD OF REVIEW FOR THIS COURT IN REVIEWING INDUSTRIAL COMMISSION FINDINGS IS THAT THE COMMISSION'S FINDINGS WILL BE UPHELD IN THE ABSENCE OF A SHOWING THAT THE ORDER IS ARBITRARY AND CAPRICIOUS.

The Supreme Court of Utah in the case of Blaine v. Industrial Commission of Utah, 700 P.2d 1084, 1086 (Utah 1985), set forth the standard of review to be used on appeals taken from Industrial Commission decisions. The opinion states:

This Court's standard of review of the Commission's records is set forth in U.C.A., 1953, Section 35-1-84, which provides that the Court may affirm or set aside an order of the Commission only upon the following grounds:

- (1) That the Commission acted without or in excess of its powers;
- (2) That the findings of the fact do not support the award.

This Court has interpreted the foregoing statutory standard on numerous occasions and has concluded that the Commission's findings are not to be displaced in the absence of a showing that they are arbitrary and capricious. [Footnote omitted]

The "arbitrary and capricious" standard was reaffirmed in the case of Rushton v. Gelco Express, 732 P.2d 109, 111 (Utah 1986). In Rushton, the Court held:

On an appeal from a decision by the Commission, this Court will not disturb the findings and orders of the Commission unless they are arbitrary and capricious, and they are arbitrary and capricious when they are contrary to the evidence or without any reasonable basis in the evidence.

Because the Administrative Law Judge's decision was based on the evidence submitted at the time of hearing, the decision was not arbitrary and capricious and therefore, should not be overturned.

ARGUMENT

II

WHEN REVIEWING THE COMMISSION'S FINDINGS AS TO ISSUES OF FACT, THE COMMISSION WILL BE UPHELD IF THE FINDINGS ARE NOT CONTRARY TO THE LAW OR THE EVIDENCE SUBMITTED.

The determinative statutes in this regard are contained in Sections 35-1-84 and 35-1-85, U.C.A. 1953. These statutes were interpreted by the Supreme Court of Utah in the case of Savage v. Industrial Commission, 565 P.2d 782 (Utah 1977) The Savage opinion reads in pertinent part:

A look at appropriate statutes is necessary to determine whether this court can set aside the decision and order of the Commission.

Section 35-1-85, U.C.A. 1953, reads:

After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; Such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the

court shall enter judgment either affirming or setting aside the award. (Emphasis added.)

Clearly the court, pursuant to the foregoing section and in the absence of an obvious abuse of discretion or under circumstances where the ruling is contrary to the evidence, does not have the authority to review findings of fact made by the Commission, and by implication, has only the power to consider issues of law dealing with the commission's decisions.

Id. at 783.

This review standard is additionally indicated in Section 35-1-84, U.C.A. 1953, and is likewise addressed by the Savage Court:

Section 35-1-84, U.C.A. 1953, also limits the review of these matters by the court. That section provides in part as follows:

. . . upon such review the court may affirm or set aside such award, but only upon the following grounds:

- (1) That the commission acted without or in excess of its powers;
- (2) That the findings of fact do not support the award.

Looking at the evidence and the record in light most favorable to the Commission's findings, as we are obliged to do, the court will not interfere with the orders of the Commission unless it appears contrary to law or contrary to the evidence. [Emphasis added]

Id. at 783.

It is quite evident from the statutory mandate and the clear interpretation given by the Supreme Court of Utah, that the Appellate Court should not overturn Commission orders

absent a finding that the order is contrary to the law or the evidence submitted.

ARGUMENT

III

THE ISSUE OF DISABILITY IS A MATTER OF FACT. AS SUCH, THE COMMISSION'S DETERMINATION OF DISABILITY MUST BE BASED UPON ALL OF THE RELEVANT FACTS SUBMITTED.

In the case of Kaiser Steel Corporation v. Industrial Commission, of State of Utah, 709 P.2d 1168 (Utah 1985), the Supreme Court more particularly sets forth the reviewing standard in cases where disability is the issue of fact to be reviewed. In the Kaiser case, the Supreme Court holds:

While disability claims are liberally construed in favor of awarding benefits, Prows v. Industrial Commission, Utah, 610 P.2d 1362 (1980), we do not overturn the Commission's findings on appeal unless they are arbitrary or capricious, wholly without cause, contrary to the one inevitable conclusion from the evidence, or without any substantial evidence to support them. Kincheloe v. Coca-cola Bottling Co. of Odgen, Utah, 656 P.2d 440 (1982); Kaiser Steel Corp. v. Monfredi, Utah, 631 P.2d 888 (1981).

Id. at 1169.

The Supreme Court in this case indicated that if there was any substantial evidence to support the Commission's findings as to claims for disability, the Court would not overturn the Commission's findings.

Additionally, in the case of Shipley v. C & W Contracting Co., 528 P.2d 153 (Utah 1974), the Supreme Court

indicates that when considering issues of fact in determining disability, all witnesses may be considered. The Shipley court states:

We have no disagreement with the plaintiff's argument that it would be unjust and impermissible for the Commission to obdurately ignore clear, credible, and uncontradicted evidence so that its action is arbitrary and unreasonable. Yet is not necessarily bound to accept the opinions of any witness or witnesses, expert or otherwise, as to what its determination should be. If it were so, it should be obvious that this would turn the prerogative entirely over to the expert witness and would relieve the Commission of both its prerogative and its responsibility. This would be especially true in the case like this where it would seem that the question as to the degree of plaintiff's disability, both as to the percentage and the permanency thereof, and how it compares to specific disabilities listed in the statute, is not a problem in mathematics which can be determined with absolute certainty, but involves the exercise of some judgment upon which reasonable minds might vary in their conclusions. [Footnotes omitted]

Id. at 155.

Section 35-1-88, as reproduced above in the Determinative Statutes section of this brief, refers to evidence, in addition to witnesses' testimony, that may be reviewed by the Administrative Law Judge and the Industrial Commission.

The Rushton court interprets Section 35-1-88, as follows:

U.C.A., 1953, Section 35-1-88 permits the Commission to receive all 'relevant and material evidence,' including Commission-appointed investigators' reports and attending or examining physicians' reports. U.C.A., 1953, Section 35-1-85, requires the Commission to make findings of fact and provides that those findings are conclusive. Moreover, decisions from the Court have repeatedly reaffirmed the fact-finding role of the Commission and have stated that the Commission must look at all relevant evidence in reaching its findings without being restricted to giving evidence from specific witnesses more weight than that from other witnesses. (See Shipley v. C & W Contracting Co., 528 P.2d 153, 155 (Utah 1974) (the Commission is not necessarily bound to accept the opinions of any witness or witnesses, expert or otherwise); Mollerup Van Lines v. Adams, 16 Utah P.2d 235, 240, 398 P.2d 882, 885 (1965) (the Commission had both the prerogative and duty to view the entire testimony of the medical panel doctor and believe those statements that impressed it). As the foregoing authorities indicate, the Commission is the principal fact finder and, as such, may review all relevant evidence.

Id. at 111, 112.

In I.G.A. Food Fair v. Martin, 584 P.2d 828 (Utah 1978), the Supreme Court again delineated the responsibility of the Industrial Commission to review all evidence submitted, and from that, to draw conclusions which are fairly and reasonably derived from the facts. In the Martin case, the Court states:

. . . in so discharging its responsibility, it was the prerogative and the duty of the Commission to consider not only the report of the medical panel, but also all of the other evidence and to draw whatever inferences and deductions fairly and reasonably could be derived therefrom.

Id. at 830.

It is apparent from the above referenced cases that the directive from the Supreme Court to the Industrial Commission of Utah has been to evaluate all of the facts, whether medical or otherwise, in making a final determination as to the issue of fact concerning disability.

ARGUMENT

IV

THE ADMINISTRATIVE LAW JUDGE'S ORDER, AS APPROVED BY THE INDUSTRIAL COMMISSION, WAS SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE AND OTHER TESTIMONY REVIEWED PURSUANT TO SECTION 35-1-88, UTAH CODE ANNOTATED, 1953, AS AMENDED.

Before establishing that there was substantial evidence supporting the Administrative Law Judge's Order and the Commission's affirmation, the facts as set forth by the Applicant-Appellant must be reviewed. On page 6 of the Applicant-Appellant's brief, the first paragraph reviews a few of the injuries documented for the Applicant-Appellant. The brief does, however, leave out a number of additional injuries which are documented in the record. The Applicant-Appellant sustained an injury to his left ankle in December of 1978, another in March of 1979, and a sprain to his right ankle on March 12, 1984. (R.250, 164) The reference to the reports oment of dical panel in the middle of page 7 of the Applicant-Appellant's brief should refer to the record at page 203, 204, and 219 rather than the indication that the medical panel was additionally evidenced on page 214.

The Defendants-Respondents take strong exception to the Applicant-Appellant's indications beginning on the bottom of page 7 of the Applicant-Appellant's brief that there were "lengthy attempts at treating the Applicant-Appellant in a conservative fashion without having to resort to surgery." For this proposition, the Applicant-Appellant refers to the record at page 226. The letter contained on page 226 says nothing whatsoever of conservative care. Rather, it directly refers to the concern with the Applicant-Appellant's other "severe medical problems" which had caused a cardiac arrest with the same surgery on the opposite ankle. Continuing on page 8, it is alleged that stabilization of the Applicant-Appellant's hypertension must be achieved before surgery. For this allegation, the Applicant-Appellant refers to the record at page 222. Page 222 contains a letter from the Applicant-Appellant stating:

It is our position that Mr. Griffith could not be treated surgically as he was on December 30, 1985, until Dr. Alfaro was able to bring his blood pressure within acceptable limits. (R.222)

While the Defendants-Respondents would admit that hypertension was one of the concerns considered before surgery, a letter directly from the Applicant-Appellant stating the position of the Applicant-Appellant will hardly support an allegation of medical fact.

In the first complete paragraph of page 8 of the Applicant-Appellant's brief, it is indicated:

The conservative treatment as attempted by Dr. McNaught did not successfully treat the Applicant-Appellant's injury and once his hypertension was stabilized, surgery was performed on December 30, 1985. (R.252)

The Defendants-Respondents would admit that the Judge's findings do indicate that once the Applicant-Appellant's other conditions had stabilized, surgery was performed. However, once again the Applicant-Appellant alleges a conservative treatment program which is neither supported by the Judge's findings contained in the record from 249 through 255, nor is it supported anywhere else in the record.

The facts of the case as included in the record are substantially different from those contained in the Applicant-Appellant's brief. The facts contained in the record support the fact that the Administrative Law Judge's Order, as affirmed by the entire Commission, was based on substantial evidence.

Regarding the claimed injury of April 16, 1985, the records would indicate that the Applicant-Appellant's first visit for medical treatment was on April 16, 1985. That record indicates:

Examination shows mild swelling of the ankle, both laterally and medially with associated tenderness and a limited range of motion, but is clinically stable. X-rays at Valley View Medical Center showed no evidence of fracture. The ankle has been braced and he will be off work for at least one week and will be checked in the office at that time. (R.119, Addendum p. 1) [Emphasis added]

The x-rays, taken also on April 16, 1985, the date of the alleged injury, indicate a history of frequent sprains and twists. (R. 120) The record also documents additional injuries prior to April 16, 1985. (R.47, 48, 164) The Applicant-Appellant by his own testimony reports intermittent problems with both ankles prior to 1981. (R.81) On April 16, 1985, the treating physician indicates that the Applicant-Appellant is "clinically stable". The doctor also indicates that the Applicant-Appellant would be off work for at least one week, after which his condition would be rechecked. (R.119)

The next visit appears to be on May 2, 1985. (R.118 Addendum p. 2) The letter written by Dr. McNaught to the State Insurance Fund (Workers Compensation Fund) on May 2 indicates, "A history of having rather severe sprains of both ankles." In regards to the right ankle injury, Dr. McNaught records:

When examined today, the symptoms have settled down nicely with a good range of motion and no pain or swelling and the ankle has been immobilized in a brace. He informed me at this time that they had given away his job at the Coca Cola Company and have advised retraining.

After our conversation today, I think that retraining would be indicated in this individual to try to get him into some type of lighter work that he will be able to continue at for an extended period of time. (R.118, Addendum p. 2)

The medical evidence available to the Administrative Law Judge would indicate a history of severe sprains of both

ankles, (R.118), radiological evidence of frequent sprains and twists of the right ankle as indicated on the date of injury, (R.120), and a finding of clinical stability. (R.119) Additionally, Dr. McNaught indicates on May 2, 1985 that the Applicant-Appellant had no pain, no swelling, and a good range of motion. (R.118) It is also noted that the Applicant-Appellant had lost his job and had been advised by his physician to obtain retraining. A recommendation to be retrained in a lighter type of work is highly indicative of a stabilized condition. Very few physicians recommend retraining while an injured employee is still in the healing process. The Applicant-Appellant discontinued his physical therapy as of May 1, 1985, (R.211) and there was no indication in the doctor's letter of May 2, 1985, that a return appointment was necessary. There is also no evidence of a change in the Applicant-Appellant's ankle condition between May 2, 1985 and December 30, 1985, again, indicating medical stability. The Applicant-Appellant suffered from chronic ligamentous instability. (R.105) This same condition had already been surgically treated on the Applicant-Appellant's opposite ankle. This is supported in the record as indicated above.

As of May 2, 1985, the Applicant-Appellant had recovered from the temporary aggravation of April 16, 1985 as indicated by the doctor's note that the Applicant-Appellant had no pain, no swelling, and a good range of motion. (R.118) The Judge found that subsequent to Dr. McNaught's letter of May 2,

1985, the Applicant-Appellant re-injured the ankle in May of 1985, and again in June of 1985, both in non-industrial situations. (R.251). The Judge also notes that the Applicant-Appellant went on a family trip to Chicago in June of 1985. (R.251, 252) This was substantiated by the Applicant-Appellant's own testimony at pages 61, 63, 90, and 91 of the Court's record. The Administrative Law Judge also found several other non-industrial aggravations during that time. (R.252) These aggravations were supported medically at page 115 of the Court's record.

The Applicant-Appellant's brief alleges that Dr. McNaught was attempting conservative treatment during this period. There is no support for this allegation in the record. Indeed, the record would reflect that there was no actual treatment for over three months, from May 2, 1985 through August 14, 1985. If conservative treatment were actually recommended, it would be reasonable to assume that there would be some actual "treatment" involved. Indeed, the treatment rendered on and after August 14, 1985 involved only the Applicant-Appellant's non-related medical problems. There is no treatment specifically for the Applicant-Appellant's right ankle. The last time that the Applicant-Appellant was seen for the April 16, 1985 aggravation was May 2, 1985 at which time no further treatment, other than a brace, was recommended, and no further office visits were scheduled. Even the plaintiff himself was aware that he had been released from

treatment by Dr. McNaught. This is evidenced in the Applicant-Appellant's testimony at page 92 of the record. When the Applicant-Appellant was questioned about a hospital admission in October of 1985, the Applicant-Appellant responds,

Q. Could you have been admitted in the Dixie Medical Center in October of '85?

A. No.

Mr. Shumate: Just last October.

A. No. Unless it - - Well, I can vaguely remember Dr. McNaught saying after he released me that he wanted to see me in a couple of months. Just to do a follow-up. So it could be Valley View. Is just - - .
[Emphasis added]

It is apparent by this entry that even the Applicant-Appellant was aware that he had been released from Dr. McNaught's treatment.

The Applicant-Appellant refers to the case of Booms v. Rapp Construction Company, 720 P.2d 1363 (Utah 1986) for the proposition that "stabilization is strictly a medical question that is appropriately decided on the basis of medical evidence." (Applicant-Appellant's brief at page 10-11) As indicated above, the Judge had substantial medical evidence to support her position. The Booms case, however, also indicates that subsequent to the review of medical evidence, the Judge is the finder of fact and, as such, can make the decision as to disability. In Booms, there was a conflict between the medical evidence presented. The Court in that case concluded:

The administrative law judge is the finder of fact. The discrepancy between Dr. Tedrow's rating of 10 percent psychological impairment and Dr. Egan's rating of 20 percent impairment was simply a conflict between expert witnesses. In such a case, the administrative law judge properly exercised his authority to decide the question after reviewing the evidence from both sides.

Id. at 1367.

It is the duty of the Administrative Law Judge to review the evidence submitted and draw a reasonable conclusion from said evidence. As referenced above, Section 35-1-88, U.C.A. 1953, directs the Commission to receive as evidence and use as proof on any fact in dispute, " . . . all evidence deemed material and relevant"

The Applicant-Appellant points out that the Applicant-Appellant did not work during the period from May 3, 1985 to December 30, 1985. However, the record shows that the Applicant-Appellant lost his job some time in May of 1985. (R.111, 118, Addendum p. 2) Referring again to the Booms case, the Court held:

Once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits. Thus, the statutes imply that at some point a claimant's disability ceases to be temporary and should be recognized as permanent. To accept the claimant's argument would require that all claimants who are unable to return to their prior employment would receive temporary total benefits for the entire 312-week statutory period. That result is inconsistent with a statutory structure which provides for both temporary and permanent benefits.

Id. at 1366, 1367.

As the Booms court indicates, the mere fact that an injured employee has not returned to his prior employment does not and cannot stand for the proposition that he is not yet medically stable.

In the case at hand, the Administrative Law Judge, after a thorough review of all of the evidence submitted, concluded that the Applicant-Appellant was not entitled to temporary total disability compensation from May 3, 1985 to December 29, 1985. This was a direct ruling on an issue of fact based upon substantial evidence. Therefore, this decision should not be overturned.

ARGUMENT

V

THE BURDEN OF PROOF IS ON THE APPLICANT TO ESTABLISH DISABILITY. THIS BURDEN HAS NOT BEEN MET BY THE APPLICANT-APPELLANT HEREIN.

The Applicant-Appellant's Argument II alleges that, "There is no medical evidence to support the claim that the Applicant-Appellant was not totally disabled from May 3, 1985 through December 29, 1985." (Applicant-Appellant's Brief p. 10) It is the Applicant-Appellant's burden to establish disability. It is not the Defendants-Respondents' burden to prove that he was not totally disabled. The Utah State Supreme Court has directly addressed this issue. The Shipley decision

involved a situation wherein the plaintiff was claiming that he should be declared permanently and totally disabled based on his lack of employment in a gainful occupation. The Court in that case held:

To be considered in connection with the foregoing is the fact that the burden rests upon the plaintiff to prove the extent of his disability by evidence which persuades the Commission in accordance with his contention. In that connection, it is to be had in mind that there was not only the evidence upon which the plaintiff relies concerning his unemployability, but also the evidence, which he seems to ignore, of the medical panel which rated his disability at 50 percent, which the Commission elected to believe and adopt as its finding. It is not open to question that if the Commission had chosen to make its findings in accordance with the plaintiff's evidence, that award would be sustained. But upon this review, it is our duty to survey the total evidence in the light most favorable to the Commission's determination; and to assume that it believes those aspects of the evidence which support its award; and we cannot properly reverse when there is a reasonable basis therein to support the findings and award as made. [Footnotes omitted]

Id. at 155.

To allege that it is not the Applicant-Appellant's burden to prove his case, but rather the Defendants-Respondents' duty to prove that he does not have a case, is unreasonable.

The Applicant-Appellant concludes Argument II with the statement that, "The medical panel did not contradict Dr. McNaught in its report of December 8, 1986, (R.219)."

(Applicant-Appellant's Brief, page 11) The original Medical Panel Report contained in the record at pages 203 and 204, indicates,

In answer to question #2 I find very little evidence in either Dr. McNaught's or any of the other records that would indicate a causal connection between the applicant's need for surgery on December 30, 1985 and the industrial accident on December 31, 1983 or of April 16, 1985. I think that his right ankle had several other injuries that were non-industrially related and I can find no evidence that this was industrial in nature.

Therefore, for answer #3, there would be no temporary total disability after May 3rd of 1986.

The Applicant-Appellant then filed an objection to the Medical Panel Report containing a letter from Dr. McNaught indicating that the claims adjuster for the State Insurance Fund (Workers Compensation Fund) had indicated that if surgery was the only alternative, the Fund would accept liability for the same. Subsequent to the Panel's review of the objections, the single member Medical Panel issued a one-sentence reply. The reply, found in the record at page 219, indicates, "After review of James L. Shumate's objections and the letter from Dr. McNaught I would agree that his right ankle is industrially related and should be covered according to the industrial injury to his right ankle." There was no further directive from the medical panel regarding temporary total disability. On February 3, 1987, the Applicant-Appellant wrote to the

Defendant-Respondent, Workers Compensation Fund, indicating that it would be necessary to submit the issue of temporary total disability to the Administrative Law Judge for her determination. The Applicant-Appellant was aware that the medical panel did not make a finding as to temporary total disability. The Applicant-Appellant asked the Administrative Law Judge to make a determination on the issue of temporary total disability. (R.220 and 221) When the Administrative Law Judge found against temporary total disability for the period of May 3, 1985 to December 29, 1985, the Applicant-Appellant filed a Motion For Review, which was denied by the entire Industrial Commission. (R.271 through 274)

The Applicant-Appellant in this case failed to meet his burden of proof of convincing the Administrative Law Judge and the Industrial Commission that the Applicant-Appellant was temporarily and totally disabled from May 3, 1985 through December 29, 1985.

ARGUMENT

VI

IN CASES WHERE DISABILITY IS BEING CLAIMED, THE APPLICANT MUST PROVE THAT THE INDUSTRIAL INJURY IS THE DIRECT AND PROXIMATE CAUSE OF THE CLAIMED DISABILITY.

On August 14, 1985, Dr. McNaught recommended that surgery be performed for the repair of Mr. Griffith's right ankle. (R.116) On August 29, 1985, surgery was approved by

the claims adjuster for the State Insurance Fund (Workers Compensation Fund). (R.217) Before the Applicant-Appellant could undergo surgery, however, he had numerous non-industrial medical problems which had to be stabilized prior to surgery. Among these serious, non-related, medical conditions were: high blood pressure, hypertension, asthma, alcoholism, and obesity. (R.110, 111, 112, 113, 129, 131, 132, 133, 138, 152, 153, and 252) Additionally, the records would tend to indicate that the majority of these medical problems were attributable to the actions of the Applicant-Appellant. Regarding the Applicant-Appellant's asthmatic condition, the opinion of Dr. Enrique Alfaro is evidenced at page 113 of the record. Dr. Alfaro indicates, "He does have some shortness of breath and this is usually related to the asthma as well as some pressure and tightness on his chest, but it usually is associated with him not taking his Marax on a regular basis." (Emphasis added) Dr. Alfaro also suggests that some of the problems that the Applicant-Appellant had during the prior surgery on the left ankle may have been due in part to alcoholic cardiomyopathy. (R.113)

Dr. Kent B. McDonald indicates at p. 131 of the record that the Applicant-Appellant's hypertension was "possibly alcohol related." Additionally, the doctor notes alcoholic liver disease, hyperuricemia, obesity, and chronic alcohol use and abuse. All of the conditions which prohibited the surgery

as recommended in August were totally unrelated to the claimed industrial injury.

The Industrial Commission has held that an industrial injury must be the direct and proximate cause of a claimed disability. In the recent case of Robert C. Large v. Howard Trucking of Utah, Inc., Case No. 85000759, (Addendum p. 3-6), the Commission reviewed an administrative law judge's order holding that the applicant's industrial injury was not the direct and proximate cause of his claimed permanent total disability. In affirming the Administrative Law Judge's Order, the Industrial Commission of Utah ruled:

The Administrative Law Judge acknowledges that the applicant most likely is unemployable due to a combination of factors including his age (64), obesity, lack of transferable skills, prior back surgery and the aggravation caused by the March 25, 1985 incident. However, the Administrative Law Judge states that the statute dealing with permanent total disability benefits, U.C.A. 35-1-67, contains language that implies that the industrial injury giving rise to the permanent total disability must be the proximate or dominant cause of the permanent total disability.

The Administrative Law Judge notes that U.C.A. 35-1-67 begins with the phrase 'in cases of permanent total disability.' He states this phrase is best interpreted to mean 'in cases of industrial injury resulting in, or causing, permanent total disability.' Therefore, according to this line of reasoning, the Administrative Law Judge states it is implied that the industrial injury must be the proximate or dominate (sic) cause of the permanent total disability. (Addendum p. 3-4)

The Commission concludes:


The Commission must agree with the Administrative Law Judge that U.C.A. 35-1-67 implies there must be a causal connection between the injury and the permanent total disability. The Commission finds it is logical to presume that the Legislature intended permanent total disability benefits for those employees whose disabilities result due to an industrial injury and not due to a long list of other factors. The concept of proximate cause serves the purpose of allowing those whose disabilities are truly the result of the industrial injury to be properly compensation (sic). That concept may also eliminate some industrially injured individuals from permanent total disability compensation, but will not eliminate those individuals for other kinds of workers' compensation benefits. This result seems both logical and fair to the Commission and therefore the Commission must affirm the Administrative Law Judge's adoption of the proximate cause theory as it applies to U.C.A. 35-1-67. (Addendum p. 4)

While the Defendants-Respondents acknowledge that this particular case was relating to a permanent total disability claim and the present claim is for temporary total disability, the basis for the theory is the same. An industrial insurance carrier should not be required to compensate claimants whose claimed disability is not caused by the industrial injury. It is obvious in the record, that the delay from the time that surgery was actually recommended to the time surgery was performed, was not caused by the industrial injury. As such, the Administrative Law Judge was correct in disallowing temporary total disability compensation as claimed by the Applicant-Appellant.

CONCLUSION

In the case of Entwistle Co. v. Wilkins, 626 P.2d 495, 498 (Utah 1981), the Supreme Court held, "The extent and the duration of an employee's disability are questions of fact to be determined by the Commission. We review the evidence in the light most favorable to the Commission's findings, and when there is substantial evidence to support the facts as found by the Commission, its order will not be disturbed." [Footnote omitted] The Defendants-Respondents respectfully request that the Order of the Administrative Law Judge, as affirmed by the Industrial Commission, which was based on substantial medical evidence and other evidence including the testimony of the Applicant-Appellant, be affirmed by the Court of Appeals. We would request that the Applicant-Appellant's claim for benefits in addition to those awarded, be denied.

Respectfully submitted, this 21st day of September, 1987.


SHAUN HOWELL
Attorney for Defendants-Respondents,
Workers Compensation Fund of Utah
and/or Cedar City Coca Cola Bottling Co.
560 South Third East
P.O. Box 45420
Salt Lake City, UT 84145-0420
Telephone: (801) 533-7842

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF DEFENDANT-RESPONDENTS, to James L. Shumate, 110 No. Main, Suite H, P.O. Box 623, Cedar City, Utah 84720, Erie Boorman, Administrator, Second Injury Fund, P.O. Box 45580, Salt Lake City, Utah 84111, and Earl Dorius, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 8415, this 21st of September, 1987, first class postage prepaid.


SHAUN HOWELL

ADDENDUM

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1. April 16, 1985 Office Consultation, Dr. D.R. McNaught	1
2. McNaught letter of May 2, 1985	2
3. Industrial Commission's Order Denying Motion For Review - Robert C. Large v. Howard Trucking Case No. 85000759	3-6

OFFICE CONSULTATION

Dr. D. R. McNaught

NAME: James T. Griffith

DATE: 4-16-85

History: This man has had recurrent ankle sprains secondary to work injuries at Coca Cola Bottling Company. The left ankle became so severe that it was treated surgically with a ligament repair. He has been back to work without any difficulty to the left ankle. Yesterday he turned over the right ankle while at work. He has had increased pain and swelling in the region of the right ankle overnight and today is unable to weight bear and is on crutches. Examination shows mild swelling of the ankle, both laterally and medially with associated tenderness and a limited range of motion, but is clinically stable. X-rays at Valley View Medical Center showed no evidence of fracture. The ankle has been braced and he will be off work for at least one week and will be checked in the office at that time.

4-16-85

4-18-85

DRM:jdh

Dictated - not edited

cc: State Industrial Commission
160 East 300 South
Salt Lake City, Utah 84110

State Insurance Fund
P.O. Box 45420
Salt Lake City, Utah 84145-0420
33-25457-B6

See Wilky

Orthopedic Surgery
VALLEY VIEW MEDICAL CENTER
595 SOUTH 75 EAST
CEDAR CITY, UTAH 84780

Phone 586-6962

May 2, 1985

Lee Willis, Claims Adjuster
State Insurance Fund
P.O. Box 45420
Salt Lake City, Utah 84145-0420

RE: James Griffith
State Industrial #83-25457-B6

Dear Mr. Willis:

This is a letter in follow-up to our conversation that we had on May 2, 1985 with regards to James Griffith.

This man, who has been employed by Coca Cola Company in Cedar City, gives a history of having rather severe sprains of both ankles. He was unable to continue working so we elected to carry out a surgical repair of the left ankle.

This was complicated initially by a cardiac arrest at the time of surgery, presumably complicated by his marked hypertension despite his age of 27. He has also sprained his right ankle. He has made a good recovery from the left ankle and was able to return to work without difficulty. He presented in the office April 16, 1985; and again injured his right ankle with pain and swelling. X-ray showed no evidence of fracture.

The ankle was brace and he was off physical therapy. When examined today, the symptoms have settled down nicely with a good range of motion and no pain or swelling and the ankle has been immobilized in a brace. He informed me at this time that they have given away his job at the Coca Cola Company and have advised retraining.

After our conversation today, I think that retraining would be indicated in this individual to try to get him into some type of lighter work that he will be able to continue at for an extended period of time. Thank you for your assistance.

Sincerely,

Dr. D. R. McNaught

DRM/gd
Dictated - not edited

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 85000759

ROBERT C. LARGE,

Applicant,

vs.

HOWARD TRUCKING OF UTAH, INC. and/or
WORKERS COMPENSATION FUND OF UTAH and
SECOND INJURY FUND,

Defendants.

ORDER DENYING

MOTION FOR REVIEW

On September 3, 1986, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order awarding the applicant in the above-captioned case temporary total compensation, permanent partial impairment and medical expenses related to an incident occurring on March 25, 1985. The incident involved the applicant's fall from a ladder affixed to a semi-truck. At the time of the fall, the applicant was in the process of completing a driving test which he was required to pass before being hired by the defendant. As such, he had not been officially hired by the defendant/employer at the time of the injury. The Administrative Law Judge found that the purposes of workers' compensation were served by extending coverage to the applicant even though he was technically a non-employee.

On April 17, 1987, counsel for the applicant filed a Request for Hearing for determination of the applicant's permanent total disability. No hearing was scheduled and the Administrative Law Judge issued Supplemental Findings of Fact, Conclusions of Law and Order on July 28, 1987. In that Order, the Administrative Law Judge denies permanent total disability benefits. The Administrative Law Judge acknowledges that the applicant most likely is unemployable due to a combination of factors including his age (64), obesity, lack of transferable skills, prior back surgery and the aggravation caused by the March 25, 1985 incident. However, the Administrative Law Judge states that the statute dealing with permanent total disability benefits, U.C.A. 35-1-67, contains language that implies that the industrial injury giving rise to the permanent total disability must be the proximate or dominant cause of the permanent total disability.

The Administrative Law Judge notes that U.C.A. 35-1-67 begins with the phrase "in cases of permanent total disability." He states this phrase is best interpreted to mean "in cases of industrial injury resulting in, or causing, permanent total disability." Therefore, according to this line of

ROBERT C. LARGE
ORDER DENYING MOTION
PAGE TWO

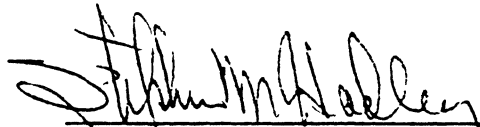
reasoning, the Administrative Law Judge states it is implied that the industrial injury must be the proximate or dominate cause of the permanent total disability. In the instant case, the Administrative Law Judge finds the industrial injury is the immediate cause of the permanent total disability or the cause closest in time to the result. However, the Administrative Law Judge finds the industrial injury is not the proximate or dominant cause of the applicant's permanent total disability. The Administrative Law Judge finds the industrial injury adds little to the applicant's overall non-employability. Because the injury was the proximate cause of temporary total disability, medical expenses and some permanent partial impairment, the Administrative Law Judge found those benefits payable but denied an award of permanent total disability. On August 12, 1987, pursuant to U.C.A. 35-1-82.53, counsel for the applicant filed a 1 line Motion for Review. That Motion for Review simply states that the definition of employee is the same for permanent total disability as it is for other workers compensation benefits. The Commission takes this to mean that counsel for the applicant feels that if temporary benefits are awarded because the applicant is deemed to have been an employee even though the facts technically show him to have been a non-employee, then permanent total benefits should be awarded on that same theory if the applicant qualifies for those benefits.

The Commission finds the only issue on review is whether the applicant is entitled to permanent total disability benefits. The issue regarding what kind of causal connection there must be between the industrial injury and the permanent total disability has not been addressed to date by the Commission. What causes impairment is a question that is easier to answer by reference to a medical opinion. What causes disability on a permanent basis is not so easily pinpointed. The Commission must agree with the Administrative Law Judge that U.C.A. 35-1-67 implies there must be a causal connection between the injury and the permanent total disability. The Commission finds it is logical to presume that the Legislature intended permanent total disability benefits for those employees whose disabilities result due to an industrial injury and not due to a long list of other factors. The concept of proximate cause serves the purpose of allowing those whose disabilities are truly the result of the industrial injury to be properly compensation. That concept may also eliminate some industrially injured individuals from permanent total disability compensation, but will not eliminate those individuals for other kinds of workers compensation benefits. This result seems both logical and fair to the Commission and therefore the Commission must affirm the Administrative Law Judge's adoption of the proximate cause theory as it applies to U.C.A. 35-1-67. As result, the Commission must deny the applicant's Motion for Review.

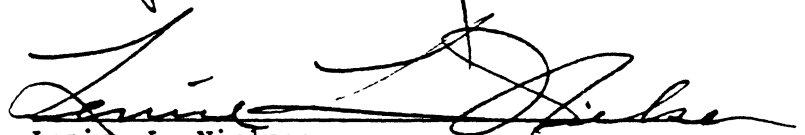
ROBERT C. LARGE
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PAGE THREE

ORDER:

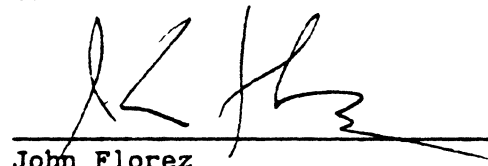
IT IS THEREFORE ORDERED that the applicant's August 12, 1987 Motion for Review is denied and the Administrative Law Judge's July 28, 1987 Supplemental Order is hereby affirmed and final with further appeal to the Court of Appeals only pursuant to U.C.A. 35-1-83.



Stephen M. Hadley
Chairman

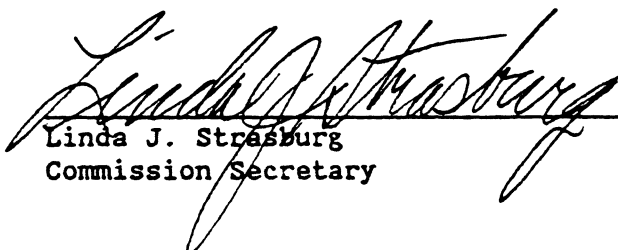


Lenice L. Nielsen
Commissioner



John Florez
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
9th day of September, 1987.
ATTEST:



Linda J. Strassburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on September 9th, 1987, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of ROBERT C. LARGE was mailed to the following persons at the following addresses, postage paid:

Robert C. Large
2605 West Van Buren, Space C-42
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Erie V. Boorman, Administrator, Second Injury Fund

Richard G. Sumsion, Administrative Law Judge

Janet L. Moffitt, Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH

By Pamela Hayes
Pamela Hayes