

1986

Lloyd L. Moore v. American Coal Company, aka Emery Mining Corporation, Utah State Insurance Fund and Second Injury Fund : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LLOYD L. MOORE,
Applicant/Appellant,

vs.

AMERICAN COAL COMPANY, aka
EMERY MINING CORPORATION,
UTAH STATE INSURANCE FUND
and SECOND INJURY FUND,

Defendants/Respondents.

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Supreme Court No. 20620

BRIEF OF RESPONDENT UTAH STATE INSURANCE FUND

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JAN 24 1986

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

There are two issues presented for review. The first is whether the provisions of Section 35-1-77, Utah Code Annotated, as amended in 1982, require an Administrative Law Judge of the Industrial Commission to set and hold a hearing to determine the facts and issues involved when an applicant for workers' compensation benefits files objections to the report of the medical panel in his case. The second is whether the amended statute or the law as it existed at the time the applicant initiated proceedings on his claims for workers' compensation benefits ought to be applied.

DETERMINATIVE STATUTE

The statute whose interpretation is determinative of the first issue presented for review is Section 35-1-77, Utah Code Annotated (1985 Supp.), which reads as follows:

out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in Section 35-2-56. The medical panel shall then make such study, take such X-rays and perform such tests, including post-mortem examinations where authorized by the commission, as it may determine and thereafter make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objections in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its finding and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order other members of the panel, with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68.

APPLICABLE RULES

In order to prevent an arbitrary use of the discretion granted the Commission in Section 35-1-77, the Commission promulgated rules and regulations to govern procedure under the statute. The relevant provision of the Commission's "Guidelines For Utilization of Medical Panel" reads as follows:

A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or an indication that all relevant medical evidence was not considered by the panel.

Workers' Compensation Rules and Regulations - Procedure, 1.2.33(c). The Rules and Regulations are reproduced in full in the addendum to this brief, as is Section 35-1-10, Utah Code Ann. (1953), pursuant to which the Commission adopts and publishes rules and regulations governing procedure before it.

STATEMENT OF THE CASE

This case arose upon appellant Lloyd L. Moore's claims for medical expenses and compensation for time off work from his employer, American Coal Company. The injury on which he bases his claims occurred on April 6, 1979. (R. 373.) An Administrative Law Judge of the Industrial Commission of Utah considered the matter in an evidentiary hearing June 28, 1984, and appointed a medical panel to review the medical issues involved. (R. 377 through 389.) The panel found no medical connection between Mr. Moore's industrial injury and the medical treatments or time off work for which he sought compensation. (R. 398 through 401.) Mr.

Moore objected to the panel's finding, stating that in the opinion of his treating physicians, the panel's conclusion was incorrect. (R. 404.) In the absence of a proffer of the physicians' opinion, the Administrative Law Judge admitted the panel report into evidence, adopted its findings as his own, and denied Mr. Moore's claims. (R. 405 through 407.) Mr. Moore sought the Industrial Commission's review of the judge's order on the ground that Section 35-1-77, Utah Code Annotated, requires a "medical panel hearing" to be held when requested by a party who objects to the findings of the medical panel. (R. 409 through 410.) The Commission denied the motion for review and affirmed the Administrative Law Judge's order. (R. 414.) Mr. Moore then petitioned this Court for review.

STATEMENT OF FACTS

The appellant, Lloyd L. Moore, slipped on a piece of coal and twisted his right leg (R. 16) while in the employ of the respondent American Coal Company on April 6, 1979. (R. 1.) Mr. Moore had injured his right knee while in the military in the 1950's and, in approximately 1965, doctors performed a medial meniscectomy on his right knee. (R. 398.) Following his industrial injury in 1979, he underwent posteromedial reconstruction of the knee in June of 1979, anterior cruciate ligament reconstruction in June of 1980, and arthroscopic debridement of the lateral joint compartment of the knee in September 1981. (R. 324, 325 and 362.) The respondent Utah State Insurance Fund, as American Coal Company's workers' compensation insurer, paid the

medical expenses of the 1979 and 1980 surgeries, and compensation for temporary total disability from April 6, 1979 through April 5, 1981. (R. 9.) When the State Insurance Fund denied liability for the September 1981 surgery, and terminated compensation, Mr. Moore filed a claim with the Industrial Commission and a hearing on the matter was held November 23, 1981. (R. 10-58.) Following the hearing, a medical panel was appointed to examine Mr. Moore and his medical records. (R. 319-320.) The medical panel found that the 1979 and 1981 surgeries were all required as a result of the industrial injury, but specifically stated that "no further medical therapy, physical therapy or surgery is indicated as a result of the industrial injury." (R. 326.) In January and September of 1984, Mr. Moore underwent further surgery on his right knee, a Coventry osteotomy in January and a total knee replacement in September. (R. 398-401.) When he presented his claim for the January surgery to the State Insurance Fund, he was denied. (R. 374-375.) He again requested a hearing. The hearing was held June 28, 1984, and Mr. Moore's medical records were introduced into evidence. (R. 377-389). The Administrative Law Judge referred him to a medical panel, which met January 10, 1985, and again examined Mr. Moore and once more reviewed his records. (R. 392-393.) The panel found that the surgeries which were performed subsequent to the initial hearing were not necessitated by the industrial injury and that Mr. Moore had not been temporarily totally disabled as a result of that injury since the date the panel had previously found his condition to have

stabilized, June 13, 1981. (R. 398-401.) Mr. Moore objected to the medical panel report "for the reason that the conclusion of the panel that the total knee replacement operation was unrelated to his April, 1979 industrial injury is, in the opinion of his treating physicians, clearly incorrect." (R. 404.)

The opinions of Mr. Moore's treating physicians were not proffered with his objection, and the Administrative Law Judge issued findings of fact, conclusions of law and an order in which he denied the objections and adopted the findings of the medical panel as his own. (R. 405-408.) Mr. Moore then made a motion for review of the matter by the Industrial Commission "for the reason that the order was entered despite the claimant having filed an objection to findings of the medical panel and requesting that a medical panel hearing be scheduled." (R. 409.) The Industrial Commission denied the motion. (R. 414.) This appeal followed, appellant arguing that "a medical panel hearing is mandatory under Section 35-1-77, Utah Code Annotated when objections are filed to a medical panel report." (Brief of Appellant, p. 3.)

SUMMARY OF ARGUMENTS

I

Section 35-1-77, Utah Code Annotated, as amended in 1982, provides that the Industrial Commission may set a case for hearing to determine the facts and issues involved when a party objects to the findings reported by a medical panel to whom the Commission has referred the medical aspects of the case. It is within the Commission's discretion to set a case for what is termed a

"medical panel hearing." Under the amended Section 35-1-77, the hearing is not mandatory. The decision to set a hearing on objections is governed by the "Guidelines for Utilization of Medical Panel" adopted by the Commission as part of its rules and regulations governing procedure. The Guidelines provide that a hearing be set "if there is a proffer of conflicting medical testimony or an indication that all relevant medical evidence was not considered by the panel." When neither the proffer nor the indication described in the Guidelines arise in a case, the Commission properly uses its discretion in determining the matter without setting a medical panel hearing.

II

Remedial statutes which do not create new rights or destroy existing rights are applied retrospectively to accrued or pending actions. Marshall v. Industrial Commission of State of Utah, 704 P.2d 581, 582 (Utah 1985). Section 35-1-77 does not enlarge, eliminate, or destroy existing rights. Therefore, the 1982 amended section, rather than the section which required the setting of a medical panel hearing, applied to Mr. Moore's case. The Administrative Law Judge and the Commission acted within their discretion and according to established rules of procedure in ruling on the case.

ARGUMENT

POINT I

SECTION 35-1-77, UTAH CODE ANN. (SUPP. 1985),
LEAVES THE DECISION TO SET OBJECTIONS TO

MEDICAL PANEL REPORTS FOR HEARING WITHIN THE COMMISSION'S DISCRETION; THEREFORE, THE FACT THAT THE COMMISSION AFFIRMED THE ADMINISTRATIVE LAW JUDGE'S DECISION WITHOUT FURTHER HEARING ON THE EVIDENCE DOES NOT ENTITLE THE APPELLANT TO REVERSAL OF THE COMMISSION'S DECISION.

Section 35-1-77, Utah Code Ann., sets forth the procedures to be followed by the Industrial Commission of Utah upon the filing by an employee of a claim for compensation when the employer or its insurance carrier denies liability for the employee's claim. It provides that a medical panel may be appointed to determine the medical aspects of the case; that the panel shall study the case and make a report in writing on its medical aspects; that the report shall be distributed to the parties, who are given fifteen days within which to object to the report; and, that if there are no objections, the report shall be deemed admitted in evidence. The sixth sentence of Section 35-1-77 contains the material which is pertinent to this appeal:

If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination.

(Emphasis added.) Prior to 1982, the sixth sentence of Section 35-1-77 read as it appears in appellant's brief:

If objections to such report are filed it shall be the duty of the commission to set the case for hearing within thirty days to determine the facts and issues involved . . .

In 1982, the legislature amended the sixth sentence of Section 35-1-77, substituting "the commission may" for "it shall be the

duty of the commission to." The Commission then adopted and published guidelines which it and its Administrative Law Judges follow to determine whether or not to set a hearing on objections in a given case. Therefore, at the time the Administrative Law Judge considered Mr. Moore's objections to the findings of the medical panel, in February and March of 1984, it was within his discretion to set the case for further hearing or make a decision based on the evidence before him. The Administrative Law Judge analyzed the case in accordance with the Commission's guidelines, and finding no proffer of conflicting medical testimony or indication that all relevant medical evidence was not considered by the panel, he did not set a hearing on Mr. Moore's objections.

Mr. Moore attempts to rely on the language of the unamended version of Section 35-1-77, making no reference to the change wrought by the 1982 amendment, and basing his argument that he is entitled to reversal of the Industrial Commission's decision on Johnson v. Moore Business Forms, 694 P.2d 597 (Utah 1984), Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980), and Lipman v. Industrial Commission, 592 P.2d 616 (Utah 1969). Each of these cases dealt with the issue whether convening a medical panel was mandatory under statutes which contained the language "shall refer" or "shall appoint" a medical panel. Both Lipman and Schmidt ruled medical panels mandatory under Section 35-1-77 of the Workers' Compensation Act. Johnson held medical panels mandatory under Section 35-2-56(2) of the Utah Occupational Disease Disability Law. Mr. Moore argues that just as the

appointment of a medical panel was found mandatory in these cases, setting a medical panel hearing when objection is made to the panel report is also mandatory. However, in Johnson, the Court noted that in 1982 the legislature amended Section 35-1-77 to make convening of a medical panel discretionary. 694 P.2d 597, 599 footnote 1. The legislature substituted "may" for "shall" in the first sentence of Section 35-1-77, which deals with referral to a medical panel. According to the Court in Johnson, this amendment "effectively reversed Schmidt" on the issue whether referral to a medical panel is mandatory under the section. Id.

The substitution of "may" for "shall" in the first sentence of Section 35-1-77 gave the Commission the discretion to convene a medical panel. So too, the substitution of "may" for "it shall be the duty of the commission to" in the sixth sentence of Section 35-1-77 leaves the decision whether to set a case for further hearing upon objections to the medical panel report within the Commission's discretion. The Commission's discretion is governed by the "Guidelines for Utilization of Medical Panel" adopted by the Commission. The "Guidelines" read, in pertinent part:

A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or an indication that all relevant medical evidence was not considered by the panel.

Workers' Compensation Rules and Regulations - Procedure, 1.2.33(c). Mr. Moore is not "entitled" to a hearing on objections, nor is he "entitled" to have the Commission's decision

reversed, as he argues in his brief. The Commission's decision complied fully with the law. There was not a proffer of conflicting medical testimony nor was there an indication that all relevant medical evidence was not considered by the panel in this case. The records of Mr. Moore's treating physicians were introduced as evidence at his hearing and forwarded to the panel.

In light of these facts, the Commission's decision cannot be said to be arbitrary, capricious, wholly without cause, or contrary to the one inevitable conclusion from the evidence. Rather, it is supported by the evidence and the reports of two qualified medical panels. It was made in accordance with the statute, and in accordance with the rules adopted by the Commission to prevent any abuse of the discretion Section 35-1-77 allows. It should not be displaced on review.

POINT II

THE 1982 AMENDMENT TO THE PROVISIONS OF SECTION 35-1-77 PERTINENT TO THIS CASE IS PROCEDURAL IN NATURE AND APPLIES RETROSPECTIVELY TO CLAIMS SUCH AS APPELLANT'S WHICH ACCRUED OR WERE PENDING PRIOR TO THE TIME OF THE AMENDMENT.

Mr. Moore's brief does not mention the 1982 amendments to Section 35-1-77, which fact leads to the assumption that he thinks the unamended Section, found in the bound 1953 volume of Utah Code Annotated, controls his case. The injury to which he ascribes the need for his 1984 medical treatment occurred in 1979 and the Industrial Commission first reviewed claims stemming from it in 1981. The argument that the law in effect at the initiation

of proceedings is the law that controls throughout a case is one the State and the Department of Social Services likewise made in State, Dept. of Social Services v. Higgs, 656 P.2d 998 (Utah 1982)). There, the State contested the district court's dismissal of its complaint for review of an administrative order sustaining certain employee grievances filed by the defendants. The statutory grievance procedures in effect at the time the defendants initiated their action had provided for a five-step administrative review of employees' grievances and authorized either the State or employee(s) to seek judicial review of the administrative decision following the fifth step which was a hearing before a state hearing officer. During the administrative proceedings, however, the grievance statute was amended to establish a sixth level of administrative review before a personnel review board. The district court applied the amended statute and dismissed the State's complaint, ruling the State had failed to exhaust its administrative remedies. The State appealed, and this Court analyzed its arguments on appeal as follows:

The State argues that the law in effect at the time the legal proceedings are initiated controls all the proceedings from that point forward. It relies for that proposition on Union Pacific Railroad Co. v. Trustees, Inc., 8 Utah 2d 101, 329 P.2d 398 (1958); McCarrey v. Utah State Teachers' Retirement Bd., 111 Utah 251, 177 P.2d 725 (1947); and In re Ingraham's Estate, 106 Utah 337, 148 P.2d 340 (1944). These authorities state the well-established rule that statutory enactments which affect substantive or vested rights generally operate only prospectively. Under the cases cited, the substantive law to be applied throughout an action is the law in effect at the date the action was initiated.

State v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955). Since the State had the right of judicial review upon completion of Step 5 under the law in effect at the initiation of the administrative proceedings, the State asserts that it may not be deprived of that right by a subsequent change in the law.

656 P.2d 998, 1000. The Court's response to this argument was:

However, procedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well Generally, new procedural rules do not affect proceedings completed prior to enactment Further proceedings in a pending case are governed by the new law

656 P.2d, 998, 1001 (citations omitted.) As in Higgs, in this case the statute outlining the procedures to be followed in resolving Mr. Moore's claims was amended during the pendency of and proceedings on his claims. The amendments to Section 35-1-77 did not enlarge, eliminate or destroy any vested right or change the substantive law of the Workers' Compensation Act. Mr. Moore's rights to potential recovery of medical expenses and payment for time off work have not been diminished or altered. The proceedings before the Industrial Commission on his claims were governed by the new law and neither the Administrative Law Judge nor the Commission was required to set or hold a hearing on his objections to the medical panel report.

CONCLUSION

Section 35-1-77 of the Workers' Compensation Act, Utah Code Annotated (1985 Supp.), was amended in 1982 to make the setting of

a medical panel hearing discretionary. The amendment, varying only the established procedure for review of workers' claims, operated in furtherance of a remedy which already existed. It did not create new rights or destroy the existing rights of the appellant herein. As the Court stated in Marshall v. Industrial Commission of State of Utah, 704 P.2d 581 (Utah 1985),

This Court has consistently held that in worker's compensation cases the benefits to be awarded to an injured worker are to be determined on the basis of the law as it existed at the time of the injury. As the Court said in Oakland Construction Co. v. Industrial Commission: "[A] later statute or amendment should not be applied in a retro-active manner to deprive a party of his rights or impose greater liability upon him."

We recognize that this rule differs from the general rule followed in this jurisdiction which is that "the substantive law to be applied throughout an action is the law in effect at the date the action was initiated." (Emphasis added.)

A contrary rule to both of the above applies, however, to statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights. Those remedial statutes are applied retrospectively to accrued or pending actions to further the legislature's remedial purpose unless a contrary legislative intent is manifested.

704 P.2d 581, 582 (emphasis added.)

Therefore, on February 6, 1985, when the appellant herein objected to the report of the medical panel to which his claims had been referred, the Administrative Law Judge presiding over his case did not have a duty to set his objections for hearing. It was within his discretion, as controlled by established

guidelines, to set a hearing on objections. Absent a proffer of conflicting medical testimony or an indication that all relevant medical evidence had not been considered by the panel, he adopted the findings of the medical panel report as his own and denied Mr. Moore's claims. On review of his decision, the Industrial Commission adopted his findings of fact and conclusions of law in affirming his denial. On review, it was also within the Commission's discretion, pursuant to amended Section 35-1-77, to set the matter for further hearing.

On review by this Court, the Commission's findings should be displaced only if they are arbitrary, capricious, wholly without cause, contrary to the one inevitable conclusion from the evidence, or without any substantial evidence to support them. Kaiser Steel Corp. v. Monfredi, 631 P.2d 888, 890 (Utah 1981). In this case, the Commission's findings were not arbitrary or capricious but within its discretion under Section 35-1-77, and were based on the evidence accumulated during two hearings, the findings of two qualified, duly appointed medical panels, together with records from all of the appellant's treating physicians. Given these facts and the controlling authorities cited above, the Commission's findings should be affirmed.

DATED this 24th day of January, 1986.

BLACK & MOORE

JS/
James R. Black

JS/
Wendy B. Moseley

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondent Utah State Insurance Fund, was mailed, postage paid, on the 24th day of January, 1986, to the following:

Ralph Finlayson
Attorney General's Office
State Capitol Building
Salt Lake City, UT 84114

Four of the said copies were mailed on this date to:

James R. Hasenayger
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James R. Black

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Wendy B. Moseley

ADDENDUM

WORKERS' COMPENSATION
RULES AND REGULATIONS - PROCEDURE

Adopted in Accordance with the Provisions of 35-1-10 and 35-2-5.
All changes herein effective 8/17/84.

1.1.1. DEFINITIONS:

- (a) "Commission" - means the Industrial Commission of Utah.
- (b) "Applicant/Plaintiff" - means an injured employee or his/her dependents or any person seeking relief or claiming benefits under the Workers' Compensation and/or Occupational Disease and Disability Laws.
- (c) "Defendant" - means employers and includes insurance carriers and self insured, and the Second Injury Fund.
- (d) "Administrative Law Judge" - means a person duly designated by the Industrial Commission to hear and determine disputed or other cases under the provisions of Title 35, Chapters 1 and 2.
- (e) "Insurance Carrier" - includes all insurance companies writing Workers' Compensation and Occupational Disease and Disability Insurance, the State Insurance Fund and Self Insurers who are granted self-insuring privileges by the Industrial Commission. In all cases involving no insurance coverage by the employer, the term "Insurance Carrier" includes the employer.

1.2.33. GUIDELINES FOR UTILIZATION OF MEDICAL PANEL - Pursuant to Section 35-1-77, U.C.A. the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

- (a) A panel will be utilized where:
 - 1. One or more significant medical issues are involved.

Generally a significant medical issue must be shown by conflicting medical reports. The issues of permanent partial impairment will be considered significant

if conflicting medical reports vary with a rating more than 5% of the whole person; or if the temporary total cut off date varies more than 90 days; or if the amount of medical expense in controversy is more than \$2,000.

2. In the opinion of the Commission the medical issues are so intertwined with the events that a determination of whether an accident has occurred cannot be made without first resolving medical consideration.

(b) Where in the opinion of the Commission, the evidence is insufficient for the Commission to make a final determination, the Commission may require an independent medical evaluation. Costs to be assessed against the employer and/or Second Injury Fund.

(c) A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or an indication that all relevant medical evidence was not considered by the panel.

(d) The Commission may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating.
2. The employer or doctor considers the claim to be non-industrial.
3. A substantial injustice may occur without such further evaluation.

35-1-10. RULES FOR PROCEDURE:

Subject to the provisions of this title, the Commission shall adopt and publish rules and regulations governing procedure before it, and shall prescribe forms of notices and manner of serving the same in all claims for compensation, and may change the same from time to time in its

35-1-10 discretion. Such rules and regulations shall
(cont.) include provisions for procedures in the
nature of conferences in order to dispose of
cases informally, or to expedite claims
adjudication, narrow issues and simplify the
methods of proof at hearings.

amount necessary to accomplish that objective as specifically directed by the judgment. The plaintiffs themselves had the work done after the entry of the trial court's decree. The defendant objected to plaintiffs' actions when he filed the motion to amend the judgment. No relief was granted.

The trial court's order was clear and unequivocal; the defendant was entitled to a money payment from the plaintiff so that the grading could be accomplished in a reasonable manner according to the directions of the defendant and not as the plaintiffs saw fit to do. Since the work was done after the conclusion of the trial, the record is devoid of the nature and extent of the work performed by the plaintiffs. Accordingly, we remand this case to the trial court for a determination of what amount, if any, is owed by plaintiffs to the defendant for the purpose of having the defendant's parcel graded in a manner that is in reasonable conformity with the intent and purpose of the decree if it is not now.

The decree of partition is affirmed; the case is remanded for further proceedings in accordance with this opinion. No costs.

HALL, C.J., and HOWE, DURHAM and ZIMMERMAN, JJ., concur.



Linda B. JOHNSON, Plaintiff
and Appellant,

v.

MOORE BUSINESS FORMS, INA/Aetna
and the Industrial Commission of Utah,
Defendants and Respondents.

No. 19630.

Supreme Court of Utah.

Dec. 3, 1984.

Employee brought partial disability claim under occupational disease disability

law. The administrative law judge dismissed claim, and the Industrial Commission affirmed. The Supreme Court, Zimmerman, J., held that administrative law judge was required to call medical panel to decide extent and causation of any disability upon claimant's assertion that repeated trauma on job caused tenosynovitis.

Reversed and remanded.

1. Workers' Compensation \approx 1730

Employee's claim, under the occupational disease disability law, of permanent partial disability caused by tenosynovitis of the wrist required that medical panel be called by administrative law judge to determine extent and causation of any disability, where employee asserted, through her testimony and letter from her doctor, that repeated trauma of twisting motion required by her job caused tenosynovitis. U.C.A.1953, 35-2-1 to 35-2-65, 35-2-27(25).

2. Workers' Compensation \approx 547

Employee claiming partial disability under occupational disease disability law was not required to show identifiable accident as prerequisite to recovery; such showing is only required for claims under Workers' Compensation Act. U.C.A.1953, 35-1-1 et seq., 35-2-1 et seq.

Arthur F. Sandack, Salt Lake City, for plaintiff and appellant.

Gilbert Martinez, Shaun Howell, Robert Shaughnessy, Frank V. Nelson, Asst. Attys. Gen., Salt Lake City, for defendants and respondents.

ZIMMERMAN, Justice.

The issue in this review from the Industrial Commission is whether an administrative law judge can dispose of a claim of permanent partial disability under the Utah Occupational Disease Disability Law without calling a medical panel.

Mrs. Johnson, an employee of Moore Business Forms in Logan, Utah, brought this partial disability claim under the Utah Occupational Disease Disability Law (the "Act"). Utah Code Ann., 1953, § 35-2-1 to -2-65 (1974 ed. & Supp.1983). She alleged that her assembly line job caused her to suffer tenosynovitis of the left wrist, resulting in permanent partial disability. Her job consisted of wrapping and packing paper forms and involved repetitive twisting motions with both her hands. The administrative law judge heard evidence of the work she did and the motions and stresses to which her hands and wrists were subjected. The judge rejected her claim, finding that Mrs. Johnson had not shown that her tenosynovitis was "due to continual pressure or friction or to repeated trauma or vibration of tools," as required by section 35-2-27(25) of the Act. The Commission affirmed. Because that finding was made without first convening a medical panel as required by section 35-2-56(2) of the Act, we reverse.

Sections 35-2-27(25) and 35-2-56(1) of the Act provide that one suffering from tenosynovitis of the wrist "due to continual pressure or friction or repeated trauma or vibration of tools" resulting in permanent partial disability is entitled to compensation if that condition is "caused or contributed to" by an occupational disease or injury to health. Mrs. Johnson made exactly this claim. The Act requires that when such a claim is filed with the Commission, "the commission shall appoint an impartial medical panel . . . , and such medical panel shall make such study, take such X-rays and perform such tests as the panel may determine. . . ." Utah Code Ann., 1953, § 35-2-56(2) (Supp.1983) (emphasis added). Following such study, the panel must report to the Commission both (i) the extent of any permanent partial disability and (ii) whether the disability, in whole or in part, resulted from an occupational disease. *Id.*

Despite the clear requirement of the statute that upon the mere filing of such a claim a medical panel "shall" be convened, the administrative law judge took it upon

himself to hold a hearing, consider the evidence, including the supportive medical opinion of Mrs. Johnson's doctor, and make findings of fact and conclusions of law that Mrs. Johnson's tenosynovitis did not result from any of the causes enumerated in section 35-2-27(25), including "friction" or "repeated trauma." He then dismissed her claim.

[1] The administrative law judge seemed to be operating under the unspoken premise that not every claim filed that alleges the statutory elements requires convening a medical panel; only those cases that pass some threshold test of meritousness established by the administrative law judge may go forward. That interpretation of the statute is contrary to the plain language of section 35-2-56(2) and, furthermore, is flatly contrary to this Court's holdings in *Schmidt v. Industrial Commission*, Utah, 617 P.2d 693, 695-96 (1980), and *Lipman v. Industrial Commission*, Utah, 592 P.2d 616, 618 (1979). In those cases, we ruled that similar language in the Workers' Compensation Act required the convening of a medical panel in all cases. Utah Code Ann., 1953, § 35-1-77 (1974 ed.).

The instant case presents an even more compelling reason than existed in *Schmidt* for applying the statute literally. Section 35-2-56(2) of the Utah Occupational Disease Disability Law includes language describing the legislature's purpose in requiring that all questions of causation and disability raised by a claim be referred to a medical panel, language that was absent from the parallel section of the Workers' Compensation Act construed in *Schmidt*. In section 35-2-56(2) the legislature specifically found that these questions present "highly technical" issues and that the "difficult task" of dealing with these issues "should be placed in the hands of physicians specially trained for the care and treatment of the occupational disease involved." Given this legislative finding, we are not free to depart from the interpretation placed upon the similar language in

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Schmidt, despite the fact that the legislature later amended the Workers' Compensation Act to delete the requirement that a medical panel be convened in every case.¹

In the present case, Mrs. Johnson's claim met the required statutory minimum to trigger the convening of a medical panel. Section 35-2-27(25) of the Act requires that to be compensable tenosynovitis of the wrist must be caused, *inter alia*, by job-related continual "friction" or "repeated trauma." Mrs. Johnson claimed that job-related repeated trauma caused tenosynovitis of her wrist. She testified about the repetitive twisting wrist movements required by her job and produced a letter from her doctor, Dr. Hyde, opining that the requirements of her job played a causative role in her wrist problems. Once she made this showing, a medical panel had to be called to report on whether the continual twisting motions required by Mrs. Johnson's job constituted "friction" or "repeated trauma" and whether this trauma eventually resulted in her tenosynovitis.

[2] The administrative law judge invaded the province of the medical panel when, without input from a panel, he found that Mrs. Johnson's job did not involve the statutorily required pressure, friction, trauma, or vibration.²

We reverse the administrative law judge's holding and remand for further proceedings before a properly called medical panel.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

1. In 1982, the legislature amended section 35-1-77 to make convening of a medical panel discretionary under the Workers' Compensation Act. 1982 Utah Laws ch. 41 § 1. This amendment effectively reversed *Schmidt* on this issue. However, it is worth noting that no such change was made in the similar language used in section 35-2-52(2) of the Utah Occupational Disease Disability Law, perhaps because the legislature thought the latter act required more sophisticated determinations, best made only with expert assistance.

STATE of Utah, Plaintiff and
Respondent,

v.

Stanley LeRoy GEHRING, Defendant
and Appellant.

No. 19790.

Supreme Court of Utah.

Dec. 3, 1984.

Defendant was convicted of rape in the Second District Court, Davis County, Douglas L. Cornaby, J., and defendant appealed. The Supreme Court, Howe, J., held that: (1) evidence was sufficient to support conviction; (2) trial court's failure to order production of bed on which rape allegedly occurred did not prejudice defendant; and (3) unavailability of witness did not entitle defendant to new trial.

Affirmed.

1. Criminal Law ⇨1159.2(6)

Supreme Court will sustain criminal conviction when there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all requisite elements of crime can be reasonably made.

2. Rape ⇨1

Emission of semen is not necessary to the crime of rape. U.C.A.1953, 76-5-407(3).

2. In his findings, the administrative law judge also stressed the fact that nothing unusual or accidental in nature had occurred on the day Mrs. Johnson first reported pain. That fact is irrelevant. It is only when the injury complained of does not fit under the Utah Occupational Disease Disability Law and is dealt with under the Workers' Compensation Act that the claimant must show an identifiable accident as a prerequisite to recovery. See *Pintar v. Industrial Commission*, 14 Utah 2d 276, 277, 382 P.2d 414 (1963).

Douglas L. SCHMIDT, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF
UTAH, Kenway Engineering, Inc., and
Industrial Indemnity, Defendants.

No. 16097.

Supreme Court of Utah.

Aug. 8, 1980.

Injured worker appealed from an order of the Industrial Commission which denied his application for disability compensation. The Supreme Court, Maughan, J., held that: (1) administrative law judge erred in concluding that no "accident" occurred for which claimant could be granted compensation; (2) referral of medical aspects of the case to medical panel was mandatory; and (3) evidence was erroneously excluded on basis of hearsay rule.

Reversed and remanded.

Stewart, J., concurred in the result.

Wilkins, J., filed concurring opinion.

Crockett, C. J., filed dissenting opinion in which Hall, J., joined.

1. Workers' Compensation ⇐517

Claimant's internal failure brought about by exertion in the course of employment could be "accident" within meaning of workmen's compensation statute, without requirement that the injury result from some incident which happened suddenly and was identifiable at definite time and place. U.C.A.1953, 35-1-45.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation ⇐568

Injury received by employee may be accidental even though exertion is that required in ordinary course of employment. U.C.A.1953, 35-1-45.

3. Workers' Compensation ⇐568

If employee incurs unexpected injuries, including internal failures, caused by ordi-

nary duties of his employment, he is eligible for compensation. U.C.A.1953, 35-1-45.

4. Workers' Compensation ⇐597

Workmen's compensation statute requires existence of causal connection between injury and employment. U.C.A.1953, 35-1-45.

5. Workers' Compensation ⇐1730

When accidental injury has occurred, submission to medical panel of medical aspects of the case, including those involving causation, is mandatory. U.C.A.1953, 35-1-77.

6. Workers' Compensation ⇐1385

Hearsay rule has no application in proceeding before Industrial Commission; Commission and its hearing officers may receive and consider any hearsay evidence presented to it. U.C.A.1953, 35-1-88.

7. Workers' Compensation ⇐1385

Administrative law judge erred in excluding certain evidence presented in workmen's compensation proceeding on basis of hearsay rule. U.C.A.1953, 35-1-88.

Jay A. Meservy of Verhaaren & Meservy, Salt Lake City, for plaintiff.

Robert B. Hansen, Atty. Gen. and Floyd G. Astin, Asst. Atty. Gen., K. Allan Zabel, Stewart L. Poelman, Salt Lake City, for defendants.

MAUGHAN, Justice:

The plaintiff, Douglas L. Schmidt, appeals from an order of the Industrial Commission denying his application for disability compensation. We reverse the order and remand the matter to the Commission for further proceedings. All statutory references are to Utah Code Annotated, 1953, as amended.

Douglas L. Schmidt began working for the defendant, Kenway Engineering, Inc., October 25, 1976, as a rough-cut sawman. His principal employment duty was the cutting of steel to various sizes for use in the shop. The steel pieces he was required to

handle varied in weight from a few ounces to as much as 200 pounds. While an overhead crane was present in the shop its use by other employees rendered it unavailable to the plaintiff at various times. When the crane was unavailable the demands of the position required the plaintiff to move the heavy pieces alone or with the aid of fellow employees. The plaintiff testified at the Commission Hearing it was a common occurrence in carrying the larger pieces for one of the individuals involved to suddenly drop the piece. This would result in the other person absorbing the shock of the metal hitting the floor.

The plaintiff, a 21 year old male, had a prior history of back disorders. As an adolescent he had contracted Scheurmann's disease, which resulted in severe pain in his back involving the T11, T12 and L1 vertebrae. This osteochondrosis was juvenile in nature and the plaintiff testified that from a year to a year and a half prior to his accepting employment at Kenway Engineering he experienced no difficulties or problems with his back.

However, by February 1977, the plaintiff was having significant problems with his back. He testified initial soreness began in December of 1976, increased gradually in intensity and duration through January and into February. He then went to a doctor for care. X-rays taken at that time showed a spondylolysis in the lower lumbar region and a possible appendicolith. Following additional x-rays confirming the existence of the appendicolith the plaintiff underwent an appendectomy. After recovery from the appendectomy the plaintiff returned to work. By June of 1977, he was again experiencing significant pain in his back. He was seen by three different medical doctors, these consultations culminated in a laminectomy and fusion of L5 S1 level vertebrae on July 19, 1977.

The plaintiff's application for workmen's compensation benefits was denied. Following a hearing the administrative law judge entered findings of fact, conclusions of law and an order denying the benefits requested. After the plaintiff's submission of a

memorandum in support of his motion for review, the Industrial Commission denied the plaintiff's motion and affirmed the actions of the administrative law judge.

The issues presented on appeal concern the administrative law judge's conclusion no "accident" occurred for which the plaintiff could be granted compensation, failure of the administrative law judge to refer the medical aspects of the case to a medical panel and the exclusion of certain evidence presented by the plaintiff at the hearing.

Concerning the first issue, the plaintiff candidly explained prior to and at the hearing he could not pinpoint any specific time or occurrence as the origin of his present back problems. The judge explained in his findings of fact:

"The application did not specify a date on which an accident occurred but referred only to February, 1977, and the applicant described the accident by stating: 'Under the stress of lifting steel daily I developed accute low back pain.'"

However, at the hearing the plaintiff recounted an incident occurring in mid-December, in which he slipped while handling a piece of steel and struck his knee on the saw table. Although the blow was allegedly very painful, the plaintiff testified, because he did not want to create a negative impression on his employer, he did not report it. A short time later he hit the same knee on a piece of scrap metal protruding from a waste can and reported that incident to his supervisor.

The plaintiff also stated generally the above-mentioned problem with the handling of the steel but could not identify a specific instance as adversely affecting his back. While the back pains the plaintiff complained of in February, 1977, allegedly originated contemporaneously with the slipping incident the plaintiff introduced no direct proof he experienced or realized any specific damage to his back because of that incident.

Section 35-1-45 provides compensation for industrial accidents when the employee: "is injured . . . by accident arising

out or or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted." The administrative law judge concluded the plaintiff was not entitled to compensation, because he failed to establish he sustained an injury as a result of an identifiable accident or accidents. Quoting from *Pintar v. Industrial Commission*,¹ the judge explained:

"It is therefore, a prerequisite for compensation that his disability be shown to result, not as a gradual development because of the nature or condition of his work, but from an identifiable accident or accidents in the course of the employment."

[1] In this jurisdiction, it is settled beyond question an internal failure brought about by exertion in the course of employment may be an accident within the meaning of 35-1-45, without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place.² As this Court explained in *Purity Biscuit Co. v. Industrial Commission*:³

"In *Cherdron Construction Co. v. Simpkins*, 61 Utah 493, 214 P. 593, 596, this court held that '[t]he underlying principle seems to be that the injury must happen suddenly, undesigned and unexpected, and at a definite time and place.' In the *Dee Hospital [v. Ind. Comm.]*, 109 Utah 25, 163 P.2d 331 case we have relaxed the requirement that it be sudden and at a definite time and place so that the essential requirement now seems to be that it be unexpected and not designed."

1. *Pintar v. Industrial Commission*, 14 Utah 2d 276, 382 P.2d 414 (1963).

2. *Jones v. California Packing Co.*, 121 Utah 612, 616, 244 P.2d 640, 642 (1952); see also *Robertson v. Industrial Comm.*, 109 Utah 25, 163 P.2d 331 (1945); *Thomas D. Dee Memorial Hospital Assoc. v. Industrial Comm.*, 104 Utah 61, 138 P.2d 233 (1943); *Hammond v. Industrial Comm.*, 84 Utah 67, 34 P.2d 687 (1934).

3. *Purity Biscuit Co. v. Industrial Commission*, 115 Utah 1, 17, 201 P.2d 961, 969 (1949).

4. *Id.*, 201 P.2d at 969.

[2, 3] It is equally well settled the injury received may be accidental even though the exertion is that required in the ordinary course of employment.⁴ If an employee incurs unexpected injuries, including internal failures, caused by the ordinary duties of his employment he is eligible for compensation under 35-1-45.⁵ Therefore, the administrative law judges conclusion of law was erroneous and did not reflect our contemporary standard.

[4] The existence of an unexpected injury, however, is the beginning rather than the end of the Commission's inquiry. This Court's interpretation of 35-1-45 requires the existence of a causal connection between the injury and the employment. Justice Wade explained this requirement in *Purity Biscuit*:⁶

"... in a case of this kind where the employee suffers an internal bodily failure or breakdown the burden is on the applicant to show that the exertion was at least a contributing cause thereof. In other words, ... in cases where disease or internal failure causes or is the injury there must be a causal connection between the employment and the injury."

Many times the determination of the existence of a causal connection between the injury and the employment will depend on the production and interpretation of medical evidence. To establish agency expertise in this area the legislature enacted 35-1-77. This section provides:

"Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of

5. Justice Wolfe explained in his dissenting opinion in *Robertson*, supra note 2, 163 P.2d at 338: "Thus where exertion or overexertion in the course of the employment causes disability or death, I agree that compensation should be allowed."

6. *Purity Biscuit*, supra note 3, 201 P.2d at 969; see also *M & K Corp. v. Industrial Comm.*, 112 Utah 488, 189 P.2d 132 (1948); *Robertson v. Industrial Comm.*, supra note 2; *Andreason v. Industrial Comm.*, 98 Utah 551, 100 P.2d 202 (1940).

employment, and where the employer or insurance carrier denies liability, the commission shall refer the medical aspects of the case to a medical panel"

[5] This statute mandates the submission of the medical aspects of the case to the medical panel.⁷ In the present case, as in most cases involving internal injury, the determination of the existence of the requisite causal connection depends in part on the accumulation and interpretation of medical evidence. The language of the statute is clear. When an accidental injury, such as in the present case, has occurred the submission of the medical aspects of the case, including those involving causation, is mandatory.

At the hearing, the administrative law judge excluded certain evidence presented by the plaintiff because it was hearsay and thus inadmissible. Section 35-1-88 states:

"Neither the commission nor its hearing officers shall be bound by the usual common-law or statutory rules of evidence."

[6, 7] The hearsay rule has no application in a commission proceeding and the commission and its hearing officers may receive and consider any hearsay evidence presented to it.⁸ Therefore the administrative law judge erred in excluding this evidence on the basis of the hearsay rule.

Because the present injury is of a type held by this Court to fall within the purview of Section 35-1-45, the administrative law judge's conclusion that no accident occurred should not be reached from the facts presented, without submission of the matter to the medical panel. The case is remanded to the Commission for further proceedings. Those proceedings shall include the submission of the medical aspects of this problem to a medical panel.

WILKINS, Justice (concurring):

I concur that this matter should be remanded and the medical aspects referred to a medical panel. Because, however, of conflicting case law in this State interpreting the statutory requirement that to support an award of compensation a worker must be injured "by accident," I deem it appropriate to enlarge on the analysis of this point found in the main opinion with a view to providing the Industrial Commission with a consistent standard to apply.

The dissenting opinion of Mr. Chief Justice Crockett centers on the necessity of identifying "an accident" which causes injury. As Professor Arthur Larson (hereafter "Larson") points out in his treatise, *The Law of Workmen's Compensation* (1980), "[t]he basic and indispensable ingredient of 'accident' is unexpectedness".¹ This Court has recognized as much in past cases.² Larson continues:

A second ingredient, however, has been added in most jurisdictions: The injury must be traceable, within reasonable limits, to a definite time, place, and occasion or cause. Justification of this widespread addition is not entirely clear. When the phrase "accidental injury" is used, or the equivalent phrase "injury by accident," there is no occasion, as a matter of grammar, to read the phrase as if it referred "an accident," and then proceed to conduct a search for "the accident".³ (emphasis in original)

The main opinion makes it clear that in Utah "accident" connotes an unlooked for mishap which is not expected or designed.⁴

Residential & Commercial Construction Company v. Industrial Commission, supra.

7. *Lipman v. Industrial Comm.*, Utah, 592 P.2d 616, 618 (1979).

8. See *Ogden Iron Works v. Industrial Comm.*, 102 Utah 492, 132 P.2d 376 (1942).

1. 1B Larson at 7-4, citing *inter alia*, *Residential & Commercial Construction Company v. Industrial Commission*, Utah, 529 P.2d 427 (1974).

2. See, e. g., *Purity Biscuit Co. v. Industrial Commission*, 115 Utah 1, 201 P.2d 961 (1949);

3. 1B Larson at 7-5.

4. This is the language of the first English case interpreting the English workmen's compensation act which was adopted in 1897, *Fenton v. Thorley & Co.*, [1903] A.C. 443. *Fenton* has often been cited in Utah cases including *Purity Biscuit*.

Mr. Chief Justice Crockett also expresses concern that without the requirement of identifying an accident in compensation cases, "[t]he practical effect would be to make the employer a general insurer of the health and well-being of his employees". In my view, protection against unwarranted awards for internal failure is not to be found in requiring identification of an accident. Rather protection against such awards is found in requiring a medically demonstrated causal connection between the injury and the employment. With the issue being one primarily of causation, the importance of the statutorily mandated medical panel becomes manifest. It is through the expertise of the medical panel that the Commission should be able to make the determination of whether the injury sustained by a claimant is causally connected or contributed to by the claimant's employment.

There is no reason to expect that application of the standards laid down in this case will render employers the insurers of the health of their employees. Rather there is every reason to expect that the beneficent and humanitarian purposes of the worker's compensation act will be effectuated.

STEWART, J., concurs in result.

CROCKETT, Chief Justice (dissenting):

The foundational rules upon which this Court should review the Commission's ruling are: that it is the Commission's prerogative to judge the evidence, and if there is any reasonable basis therein to justify the Commission's finding, this Court should not disturb it.¹ Conversely stated and specifically applicable here: when the Commission has refused to find a work-connected accident, this Court should not reverse and direct such a finding unless the evidence is so clear and persuasive that all reasonable minds acting fairly thereon must necessarily so find.²

1. *Kent v. Ind. Comm.*, 89 Utah 381, 57 P.2d 724.

2. *Id.*; and see *Vause v. Ind. Comm.*, 17 Utah 2d 217, 407 P.2d 1006.

Bearing in mind those rules, the salient and what should be the controlling proposition here is that the Commission was not persuaded that the plaintiff had met his burden of proving that he suffered an accident arising out of or in the course of his employment.

The position taken in this dissent does not disagree with the proposition that even though an employee has a preexisting abnormal condition, if it is aggravated into a compensable injury or disability by an accident which arises out of or occurs in the course of his employment, as required by the statute, it is compensable. Nor do I question that if there is some extraordinary exertion or stress which produces an occurrence which the Commission finds to come within the definition of accident, it can be found compensable.³

The point of disagreement with the main opinion is its statement that "... it is settled beyond question that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of Sec. 35-1-45, without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place."

It is submitted that that statement is not justified by the cases cited in support thereof; and I doubt that any such case can be found. On the contrary, the statement is squarely inconsistent with the applicable statute, and with all of the case law on the subject with which I am acquainted.

The first place to test the soundness of the proposition just stated is the applicable statute. In my judgment, Sec. 35-1-45, U.C.A.1953, leaves no room for doubt or misunderstanding. It states plainly and simply that compensation is to be paid when the employee "is injured . . . by accident arising out of or in the course of his employment." There similarly should be no misunderstanding or confusion on the proposition that the term "accident" im-

3. *Graybar Electric Co. v. Ind. Comm.*, 73 Utah 568, 276 P. 161.

ports that there must be some unanticipated event or occurrence, different from what would normally be expected to occur in the usual course of events.⁴ It is submitted that a study of the numerous cases decided by this Court on the subject, and other authorities as well, will reveal that without exception, they have been concerned with whether there was in fact some incident or occurrence which would come within the definition of accident, as is expressly required by the statute.⁵

Controversies of this character are so common that such cases are found in practically every volume of the Utah Reporter; and it would serve no useful purpose to burden this page with excessive citations. In the interest of brevity, it is sufficient to say that on the point of controversy herein, the cases are all of generally similar import. It seems fair to assume that the plaintiff (and the main opinion) would select those cases which would best give support for its thesis quoted above, and upon which its reversal of the Commission's order necessarily must rest.

The case of *Robertson v. Ind. Comm.*,⁶ on which the main opinion places reliance is as good an example as any. In that case, the burden of the main opinion was to demonstrate that there was an extraordinary exertion in manipulating and skinning an extra large horse, so that the heart seizure would come within the definition of such an unexpected occurrence and thus could be found to be an accident. I join in the main opinion's approval of Justice Wolfe's reasoning and statement of the law in his dissent in that case. He stated the standard rule of review, which if applied to this case would affirm the Commission, that: "Unless the evidence is such as to compel the conclusion that the Commission was ar-

bitrary in failing to find that the internal failure was service-connected, we should not set aside its decision."⁷ And upon the basis of his previously made explanation that it was the prerogative of the Commission to find the facts, he dissented from the reversal of the Commission's decision.

Another good example of the principle involved is our recent case of *IGA Food Fair v. Martin*.⁸ There, the applicant was undergoing unusual exertion in unloading a shipment of heavy boxes of meat and, because of the extraordinary stress, suffered a heart attack. The same comment is to be made about *Jones v. Ind. Comm.*,⁹ in which the extraordinary stress was from being required to repeatedly crank a balky motor over a long 16-hour double shift.

It is important to realize that the removal of the requirement that there be some event which can be regarded as an accident arising out of or occurring in the course of employment, so that it need only appear that some injury or disability developed which could be related to the employee's work, would be a dramatic change in our law. The practical effect would be to make the employer a general insurer of that aspect of the health and well-being of his employees. This might be of temporary benefit to a few individuals in the labor force who may have some infirmity. But I think if we take a second look, such a rule would do them more harm than good in the long run.

The forcing of employers to become, in practical effect, such general insurers of employees would add to the already plentiful burdens of going into or carrying on enterprises, which furnish jobs for others, and would thus reduce opportunities for employment. More especially, with respect

held to be an occupational disease, and not an injury resulting from accident.

4. *Tintic Milling Co. v. Ind. Comm.*, 60 Utah 14, 206 P. 278; *Carling v. Ind. Comm.*, 10 Utah 2d 260, 399 P.2d 202.

5. *Tintic Milling and Mining Co. v. Ind. Comm.*, 60 Utah at 22, 206 P. at 281 states:

If the injury is incurred gradually in the course of the employment, and because thereof, and there is no specific event or occurrence known as the starting point, it is

6. 109 Utah 25, 163 P.2d 331.

7. *Id.* at 47, 163 P.2d at 341.

8. Utah, 584 P.2d 828.

9. 121 Utah 612, 244 P.2d 640.

to persons who already have some infirmity, there would be even more adverse effect because economic necessity would force employers to give more searching examinations, and refuse to hire anyone with any history or indication of physical disability or handicap. I acknowledge that the proposition just stated should be considered by this Court only if it thinks it has the prerogative of making a dramatic change in policy and the law. It is my view that the Court has no such prerogative; and that the proper procedure for the long term benefit of employers, employees and the public generally is to follow the statute as it is written, and the adjudications thereon; and if there is to be any such dramatic change in the law, it should be done by the legislature. Then, everyone will know of that change in the law, when it takes effect, and how to govern themselves in accord therewith.

There is no question here, but that the plaintiff suffered from a pre-existing difficulty with his back, for which he had previously received medical treatment and which had existed at least since he was in junior high school, eight or nine years prior to this claim. As the main opinion itself fairly and properly points out, the plaintiff himself stated unequivocally that he could not identify any specific time or occurrence in his work as the origin of the disability in his back.

In response to various questions concerning whether there was any incident or occurrence from which the applicant's back problem resulted, he repeatedly stated that there was not. Typical of these answers is:

Q. Mr. Schmidt, isn't it true that you really cannot relate the onset on your back pain to any particular event that occurred while you were working for Kenway?

A. That's true. (R., p. 37)

On the basis of the whole evidence, the findings of the administrative law judge, adopted by the Commission, states:

... that the applicant has simply not met his burden of proving that an accident occurred which caused the injury complained of. We further note that

there are no witnesses, no timely reporting and no showing of a relationship between the injury and the work of the applicant.

In regard to the question of reference to a medical panel: Plaintiff cites Sec. 35-1-77, which requires the Commission to refer "the medical aspects of the case to a medical panel" As is true of all statutes, this one should be given a sensible and practical application. First, assume a hypothetical case in which the evidence was so absolutely clear that no one could disagree that the applicant had suffered no accident in the course of his employment. Would it yet be maintained that merely because he had filed an application for benefits and the employer had denied liability, the Commission was nevertheless compelled to refer the case to a medical panel. It seems idle to have to answer such a question, but the answer, of course, is no. The same reasoning applies here. Inasmuch as the findings and order of the Commission rest upon the proposition that considering the whole evidence, and particularly the plaintiff's own testimony, there was no basis upon which to find that there was a work-caused or connected accident, there would be no useful purpose to be served by referring the non-existent medical aspects of the case to a medical panel.

Because there is no basis upon which it can be concluded that the action of the Commission was capricious, arbitrary or unreasonable, I would affirm its decision.

HALL, Justice (dissenting):

I join in the dissent of Mr. Chief Justice Crockett which I deem reflects the accurate state of the law in Utah. Particularly is this so in light of the most recent pronouncement of this Court in *Farmers Grain v. Mason*, Utah, 606 P.2d 237 (1980).



that the court should have granted a mistrial?

[1-4] In the first place it appears that the matter was not properly and timely brought to the attention of the trial court. The objection made was that it called for a legal conclusion. Then defendant's counsel suggested that Mr. Whiteley be handed a copy of the decision. After the matter had been thoroughly discussed, counsel for defendant then indicated a desire to make a motion out of the presence of the jury. The court suggested that he make it at recess and he agreed to do so.

During the next recess defense counsel did move for a mistrial and during the argument following the motion he stated:

MR. LIVINGSTON: Your Honor, maybe so that we could work this out I would be amenable if the Court rather than ruling on the motion for a mistrial, if the Court would give a Jury instruction to the effect that that was a misstatement of law as to whether Mr. Whiteley was convicted of fraud, and that that is not relevant in this case and not to be considered in this case by the Jury in their deliberations as to what the agreement was between the parties and who is going to pay for the attorney's fees.

The court denied the motion for a mistrial and gave the following instruction to the jury:

Any evidence or inference which may have been made in this courtroom that Mr. Whiteley was named personally in the case of *Roberston v. Geis*, et al, is incorrect as Mr. Whiteley was not a party to that lawsuit and you should disregard any such inferences or evidence.

The granting of a motion for a mistrial lies in the sound discretion of the trial judge and his ruling should be overturned only when it clearly appears that he has abused his discretion. A mistrial should be

granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.²

The trial court did not abuse its discretion in refusing to grant a mistrial under the circumstances of this case.

[5, 6] However, the court in calculating the amount of the judgment, compounded the interest annually on the unpaid amounts due. This is not proper. Compound interest is not favored by the law.³

The plaintiff relies upon the case of *Jensen v. Lichtenstein*⁴ as authority for permitting compound interest. That case is not in point. There the defendant promised to pay interest at specified times and this Court held that when the specified date arrived there was a new debt, to wit, the promised interest, in addition to the original debt. In the instant matter there was no promise to pay interest at a particular time.

The judgment is affirmed except as to the interest and as to that matter the case is remanded to the trial court with directions to recalculate the interest at simple interest rate.



L. Virginia LIPMAN, widow of Paul
Lipman, Deceased, Plaintiff,

v.

INDUSTRIAL COMMISSION of Utah,
Utah State Prison, and State
Insurance Fund, Defendants.

No. 15821.

Supreme Court of Utah.

March 12, 1979.

Workmen's compensation benefits were denied by the Industrial Commission, and

2. *Curley v. Boston Herald-Traveler Corporation*, 314 Mass. 31, 49 N.E.2d 445 (1943).

3. *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391, 83 P.2d 231 (1938); *Musser v. Murphy*, 49 Idaho 141, 286 P. 618 (1930).

4. 45 Utah 320, 145 P. 1036 (1915).

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claimant sought review. The Supreme Court, Hall, J., held that: (1) Commission's refusal to refer to medical panel question whether death from myocardial infarction was causally related to circumstances occurring on job was prejudicial and required reversal, and (2) Commission erred in stating that applicant had burden of proving causal relationship by clear and convincing evidence; proper standard was usual standard of proof used in most civil actions.

Order of Commission vacated and set aside, and matter remanded.

1. Workers' Compensation \approx 1730

When liability is denied, applicant for workmen's compensation has clear right to have case referred to medical panel appointed by Industrial Commission, and statute so providing is mandatory. U.C.A. 1953, 35-1-77.

2. Workers' Compensation \approx 1730, 1937

Industrial Commission's refusal to refer to medical panel question whether death from myocardial infarction was causally related to circumstances occurring on job was prejudicial and required reversal. U.C.A. 1953, 35-1-77.

3. Workers' Compensation \approx 1413

Industrial Commission erred in stating that applicant for workmen's compensation had burden of proving causal relationship by clear and convincing evidence; proper standard was usual standard of proof used in most civil actions. U.C.A. 1953, 35-1-45, 35-1-77, 35-1-83.

Scott W. Cameron, of Backman, Clark & Marsh, Salt Lake City, for plaintiff.

Robert B. Hansen, Atty. Gen., Robert D. Moore, Salt Lake City, for defendant.

HALL, Justice:

Paul Lipman, husband of petitioner, died May 23, 1977, as a result of an acute myo-

cardial infarction while on duty as the control room sergeant at the Utah State Prison. The Industrial Commission denied benefits to the petitioner because it found that her husband did not die as a result of an accident arising out of or in the course of his employment.¹ This matter was then brought before this Court for review.²

The evidence before the Commission showed that the deceased had suffered one (and possibly two) heart attacks prior to his death. He suffered from an arteriosclerotic heart condition and had undergone corrective surgery the previous autumn for a perforal heart condition. In November 1976 he suffered an almost fatal episode of pulmonary edema while on vacation. As a result of his condition he was permitted to work only part time until approximately two months before his death. He was diabetic and had been a lifelong smoker of tobacco. His treating physician testified that a person with the medical and social history of the deceased had a high probability of being subject to a myocardial infarction and that this probability was not conditioned upon any unusual stress or exertion.

The petitioner claims that decedent's death was caused by the extra work and stress brought on by the "escape" of a female inmate. The woman was housed at the Y.W.C.A. in Salt Lake City which functioned as a half-way house for the prison where low-risk inmates were given certain community privileges as a step toward ultimate release. The woman was discovered to be missing at 11:55 p. m. on May 22, 1977, which has reported to one Connie Buck, a supervisory counselor at the facility, some 25 minutes later. Ms. Buck contacted Mr. Lipman at the prison and the Y.W.C.A. director, whereupon the inmate was designated an escapee. Mr. Lipman was responsible for coordinating all information regarding the escape. He learned of the escape at about 12:40 a. m. on May 23, 1977,³ and until his death, some two

1. U.C.A., 1953, 35-1-45.

2. U.C.A., 1953, 35-1-83.

3. The testimony is conflicting as to precisely when the escape occurred. The Commission's finding that the escape occurred at 11:55 a. m.

hours later, he had more phone calls than he otherwise would have handled.

We do not reach the ultimate issue as to whether or not the death was job related because the resolution of two procedural points raised by petitioner are dispositive of this review. The two points are: (1) that the Commission refused to refer this matter to a medical panel as provided by law, and (2) that the Commission applied an improper standard as to the burden of persuasion.

[1] When liability is denied, an applicant for Workmen's Compensation is afforded a clear right to have the case referred to a medical panel appointed by the Commission. The applicable statute reads in pertinent part as follows:

Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission shall refer the medical aspects of the case to a medical panel appointed by the commission The medical panel shall make such study, take such X-rays and perform such tests, including post mortem examinations where authorized by the commission, as it may determine and thereafter shall make a report in writing to the commission⁴

The foregoing statute is clearly mandatory and requires that a medical panel "shall" be convened "upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment," when the employer or insurance carrier denies liability.

[2] In difficult or doubtful cases, the findings of a medical panel may assist in determining whether the death was caused by accident. In this case, it is known that

(some twelve hours before Lipman learned of it) appears to be erroneous.

4. U.C.A., 1953, 35-1-77.

5. *M & K Corporation v. Industrial Comm.*, 112 Utah 488, 189 P.2d 132 (1948).

6. *Grasteit v. Industrial Commission*, 76 Utah 487, 290 P. 764 (1930); *Higley v. Industrial Commission*, 75 Utah 361, 285 P. 306 (1930);

death was caused by a myocardial infarction, but the ultimate question is whether or not it can be said that the myocardial infarction was causally related to circumstances occurring on the job.⁵

Findings of a medical panel may well be important in assisting the Commission to determine whether job-caused stress induced injury or death in such a manner as to be compensable. The petitioner in this case should not be deprived of an important procedural provision in the Workmen's Compensation Act. This is particularly so here since petitioner's procedural rights are closely akin to her substantive rights.

[3] Turning now to the issue raised as to the quantum of evidence necessary to prove compensability, the Commission stated that the petitioner had the burden of proving by clear and convincing evidence that the death of the deceased was caused by tension and stress of his employment. This Court has consistently held that the burden of proof in Workmen's Compensation cases is proof by a preponderance of the evidence.⁶ It appears that the only Utah case which makes reference to any other standard of proof is *Thomas D. Dee Memorial v. Industrial Commission*,⁷ and that reference was clearly dictum. The standard of "clear and convincing" evidence has not been adopted by this Court. To adopt such a standard in a case of this nature would make recovery for death caused by internal failure exceptionally difficult especially where the deceased had a pre-existing condition that may have contributed to the death. Application of the usual standard of proof which is used in most civil actions better accommodates the liberal purposes of the act and the type of proof that is likely to be available in most cases of this type.⁸ Utilization

Henderson v. Industrial Commission, 80 Utah 316, 15 P.2d 302 (1932); *Wilson v. Industrial Commission*, 99 Utah 524, 108 P.2d 519 (1940).

7. 104 Utah 61, 138 P.2d 233 (1943).

8. See *Askren v. Industrial Commission*, 15 Utah 2d 275, 391 P.2d 302 (1964).

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of that standard by the Commission in this case, combined with the refusal to make a referral to a medical panel, denied the plaintiff's right to have the claim evaluated in the manner contemplated by the statute.

The order of the Commission is vacated and set aside and the matter is remanded for further proceedings consistent with this opinion. Costs awarded to petitioner.

CROCKETT, C. J., and MAUGHAN, WILKINS and STEWART, JJ., concur.



Sandra D. FUNK and Robert A. Young,
Plaintiffs and Appellants,

v.

William R. YOUNG, Defendant
and Respondent.

No. 15937.

Supreme Court of Utah.

March 12, 1979.

Life tenant and vested remainderman appealed from order of the Third District Court, Salt Lake County, David K. Winder, J., dismissing petition for sale in lieu of partition. The Supreme Court, Stewart, J., held that petition failed to state claim under statute permitting one or more of several cotenants who hold interest in and are in possession of real property to bring action for sale in lieu of partition, where the life tenant was sole life tenant and remainderman was not in possession.

Affirmed.

1. Partition \Rightarrow 14

Under statute permitting one or more of several cotenants who hold interest in

and are in possession of real property to bring action for sale in lieu of partition, sole life tenant, by himself, does not have right to force sale in lieu of partition. U.C.A. 1953, 78-39-1.

2. Partition \Rightarrow 19

One vested remainderman cannot compel sale in lieu of partition under statute permitting one or more of several cotenants who hold interest in and are in possession of real property to bring action for sale in lieu of partition, where there is no possessory interest in the vested remainderman. U.C.A. 1953, 78-39-1.

3. Partition \Rightarrow 14, 19

Petition of life tenant and one vested remainderman failed to state claim under statute permitting one or more of several cotenants who hold interest in and are in possession of real property to bring action for sale in lieu of partition, where the life tenant was sole life tenant and remainderman was not in possession. U.C.A. 1953, 78-39-1.

David Lloyd of Watkins & Faber, Salt Lake City, for plaintiffs and appellants.

Franklin D. Anderson, Salt Lake City, for defendant and respondent.

STEWART, Justice:

The parties in this case are two brothers and a sister who inherited a house from their mother. Robert A. Young, a plaintiff, inherited a life estate interest in the house subject to his personally residing there and subject to an obligation to repair and maintain the premises and to pay the utilities, taxes and special assessments. The other plaintiff, Sandra D. Funk, and the defendant, William R. Young, were devised the remainder fee estate as co-tenants. Sandra D. Funk and Robert A. Young brought an action in the District Court seeking an order directing the sale of the property and an apportionment of the proceeds under our partition statute, Section 78-39-1, U.C.A.¹ The District Court dismissed the action for

1. U.C.A. refers to Utah Code Annotated, 1953, as amended.

ment of Employment Security ("department") for unemployment benefits. The department found that plaintiff was entitled to weekly benefits for a period of ten weeks, but reduced his benefits by 100% of the amounts which he was then receiving as retirement benefits, pursuant to U.C.A., 1953, § 35-4-3(b). This reduced plaintiff's unemployment benefits to zero.

Plaintiff began receiving payments from the Federal Civil Service Retirement System on or about January 27, 1980. The payments received by plaintiff from said Retirement System are not subject to federal income tax to the extent they are considered a return of plaintiff's contribution to his retirement fund, under applicable provisions of the Internal Revenue Code. At the department, plaintiff submitted proof that his receipts from the Civil Service Retirement System would not be taxable until July 15, 1981. U.C.A., 1953, § 35-4-3(b) provides, in part:

[T]he "weekly benefit amount" of an individual who is receiving, or who is eligible to receive, retirement benefits by reason of his past performance of personal services shall be the "weekly benefit amount" which is computed pursuant to this section less 50% until April 1, 1980, at which time the deduction for retirement income shall be 100% (disregarding any fraction of \$1) of his primary benefits which are attributable to a week.

In seeking a reversal of the decision of the department, plaintiff argues that his retirement benefits did not begin until July 15, 1981, and that until that time, plaintiff received only a return of his capital, which was neither "wages" nor new income.

On this basis, he contends that until July 15, 1981, he received only those amounts which he had been forced to save. He points out that other savings accounts are not deductible from unemployment benefits, and the statute requiring reduction of his unemployment benefits by the amounts received monthly from these savings, while disregarding other savings, constitutes discrimination and a denial of equal protection in violation of the Utah and U.S. Constitutions.

This Court has previously considered plaintiff's arguments and has found them to be without merit. *Coleman v. Department of Employment Security*, 29 Utah 2d 326, 509 P.2d 355 (1973). Unemployment compensation is designed to alleviate hardship to an employee and his family due to involuntary layoffs where the employee has no other means of meeting his expenses of living. In the same manner, retirement benefits enable the employee to meet these expenses.

Plaintiff's argument that his receipts are not income or wages is not persuasive. The statute does not speak in terms of wage or income receipts; rather, "retirement benefits" which are "received by reason of his past performance of personal services" are deductible under Section 35-4-3(b). The monthly payments payable to plaintiff from the Civil Service Retirement System meet this description, and are thus deductible from unemployment compensation under our statute.

Affirmed.



The STATE of Utah, DEPARTMENT OF
SOCIAL SERVICES, Plaintiff
and Appellant,

v.

Roger C. HIGGS, Kurt Mathia, and
George C. Melis, Defendants and
Respondents.

No. 17607.

Supreme Court of Utah.

Nov. 26, 1982.

Appeal was taken from order of the Third District Court, Salt Lake County, Kenneth Rigtrup, J., which dismissed

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State's petition for review of Step 5 grievance ruling. The Supreme Court, Stewart, J., held that: (1) where Personnel Management Act which removed right of State to seek judicial review of Step 5 proceeding had been adopted while the grievance was pending, District Court did not have jurisdiction, but (2) order dismissing should allow State to pursue its new right to a Step 6 proceeding.

Affirmed as modified.

1. Statutes ⇌ 267(2)

Procedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions but also to accrued and pending actions as well; new procedural rules do not affect proceedings completed prior to enactment.

2. Statutes ⇌ 270

When the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending actions.

3. Labor Relations ⇌ 477

Where statute providing State with a right to judicial review of grievance proceeding after a Step 5 determination was repealed prior to completion of those procedures, State's complaint in the district court did not validly invoke the jurisdiction of the district court.

4. Administrative Law and Procedure ⇌ 229

Administrative remedies must first be exhausted before resort may be had to judicial review.

5. Courts ⇌ 23

Parties may not by stipulation enlarge the jurisdiction of a court beyond the boundaries delimited by statutory or constitutional law.

6. Labor Relations ⇌ 412

Personnel Management Act did not affect any common-law or vested rights of State or employee who had filed grievance

and would be applied in case which was pending in the grievance procedure at the time of the adoption of the Act. U.C.A. 1953, 67-19-20 to 67-19-25.

7. Labor Relations ⇌ 486

Where State had improperly attempted to obtain judicial review of Step 5 grievance ruling even though the Personnel Management Act had been adopted which created a Step 6 procedure for the State to use, order dismissing State's petition for review in the court would allow for State to file a Step 6 proceeding.

Don R. Petersen, Provo, for plaintiff and appellant.

Kathryn Collard, Salt Lake City, for defendants and respondents.

STEWART, Justice:

The State of Utah, on behalf of the Department of Social Services, filed a complaint in the district court June 7, 1980, seeking judicial review of an administrative order sustaining in part employee grievances filed by the defendants against the Department. On July 22, 1980, the district court dismissed the complaint because the State had failed to exhaust its administrative remedies. The State appeals that order, contending that the trial court erred in not applying the procedural provisions of the statute in effect at the time defendants first initiated their grievance procedures rather than different procedural provisions enacted subsequent to the initiation of the administrative proceedings.

The Department's objection to various conduct by the defendants led to the defendants' initiation of employee grievance proceedings under the State Employees' Grievance Procedure Act, U.C.A., 1953, §§ 67-17-1 to -6 (repealed by 1979 Utah Laws, ch. 139, § 36). That Act provided state employees with a five-step grievance procedure which consisted of: (1) an oral discussion with the grievant's immediate supervisor; (2) a written appeal to the grievant's immediate supervisor; (3) a written

appeal to the grievant's second level supervisor; (4) a written appeal to and hearing before the grievant's department head; and (5) a written appeal to and hearing before a state hearing officer. The Act authorized judicial review of the administrative decision by the district court upon petition by either the employee or the State at the conclusion of the Step 5 procedure. § 67-17-6(5).

After the first four steps had been completed and a Step 5 hearing had been scheduled but not yet held, the Grievance Procedure Act was repealed, 1979 Utah Laws, ch. 139, § 36, and replaced by the Utah State Personnel Management Act, U.C.A., 1953, §§ 67-19-20 to -25 (1981 Supp.), which established a sixth level of administrative review before a personnel review board. Under the Personnel Management Act as originally enacted, only an employee, not the State, was accorded the right to appeal to the personnel review board from the Step 5 proceeding; either the employee or the state agency could seek judicial review of the new Step 6 proceeding. 1979 Utah Laws, ch. 139, § 31.

Upon completion of the Step 5 procedure in this case, the hearing officer denied four and sustained five of the nine employee grievances. The Department sought judicial review of that decision in the district court pursuant to the repealed Grievance Procedure Act, which was in effect at the commencement of the administrative proceedings. At the same time, the employees petitioned for a Step 6 administrative review pursuant to § 67-19-25(6) of the new Personnel Management Act on those issues on which they had lost.

The district court, on the employees' motion to dismiss, ruled that the State had not exhausted its remedies and that no substantive right of the Department would be prejudiced by completion of the administrative process. The court therefore remanded the matter for further administrative proceedings, and the State filed an appeal from that order to this Court. While the appeal was pending, but before the case was briefed and argued, the Legislature again

changed the grievance procedures, amending the Personnel Management Act to allow either the agency or aggrieved employees to obtain a Step 6 review, and to allow judicial review of a Step 6 order only to the aggrieved employee and not to the state agency.

The central issue in this case is what law governs the procedural rights of the parties: the Grievance Procedure Act which was in effect at the commencement of the action; the Personnel Management Act which was enacted after the action was commenced but before the petition for judicial review was filed; or the amendment to that act which was passed while the case was pending before this Court.

The State argues that the law in effect at the time the legal proceedings are initiated controls all the proceedings from that point forward. It relies for that proposition on *Union Pacific Railroad Co. v. Trustees, Inc.*, 8 Utah 2d 101, 329 P.2d 398 (1958); *McCarrey v. Utah State Teachers' Retirement Bd.*, 111 Utah 251, 177 P.2d 725 (1947); and *In re Ingraham's Estate*, 106 Utah 337, 148 P.2d 340 (1944). These authorities state the well-established rule that statutory enactments which affect substantive or vested rights generally operate only prospectively. Under the cases cited, the substantive law to be applied throughout an action is the law in effect at the date the action was initiated. *State v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955). Since the State had the right of judicial review upon completion of Step 5 under the law in effect at the initiation of the administrative proceedings, the State asserts that it may not be deprived of that right by a subsequent change in the law.

[1, 2] However, procedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well. *Petty v. Clark*, 113 Utah 205, 192 P.2d 589 (1948); *Boucofski v. Jacobsen*, 36 Utah 165, 104 P. 117 (1909); 82 C.J.S., *Statutes*, § 416 (1953). Generally, new procedural rules do not affect proceed-

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ings completed prior to enactment. *Drainage District No. 7 of Washington County v. Bernards*, 89 Or. 531, 174 P. 1167 (1918). Further proceedings in a pending case are governed by the new law. *St. Louis Southwestern Railway Co. v. Robinson*, 228 Ark. 418, 308 S.W.2d 282 (1957); *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 256 N.E.2d 198 (1970); *Drainage District No. 7 of Washington County v. Bernards*, *supra*. However, when the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending actions. *McGuire v. University of Utah Medical Center*, Utah, 603 P.2d 786 (1979); *Foil v. Ballinger*, Utah, 601 P.2d 144 (1979); *Okland Construction Co. v. Industrial Commission*, Utah, 520 P.2d 208 (1974).

The State contends that *Archer v. Utah State Land Board*, 15 Utah 2d 321, 392 P.2d 622 (1964), is squarely on point and controls this case. In *Archer* the Court held that once jurisdiction of the district court had attached in a proceeding for review of an administrative order, an amendment providing for additional administrative proceedings prior to judicial review did not divest the court of jurisdiction. The original law continued to govern and the amendment had no effect. In *Archer* the Court did not distinguish between substantive law changes and procedural law changes. In any event, a vital factual distinction exists between *Archer* and the present case. Although we stated in *Archer* "that ordinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint," 15 Utah 2d at 324, 392 P.2d at 624, the effective date of the amendment in that case was after the filing of the complaint in the district court. In the instant case, the law providing for judicial review after Step 5 was repealed prior to the filing of the complaint.

Industrial Commission v. Agee, 56 Utah 63, 189 P. 414 (1920), also held that once a reviewing court's jurisdiction had attached in a case, an act repealing the jurisdiction of the court in question was not intended to divest that court of jurisdiction. In *Agee* an appeal was taken to the district court for

judicial review of an Industrial Commission order. The district court's affirmance of the Commission's order was reversed on appeal to this Court and remanded to the district court. The defendants moved to dismiss, asserting that the district court lacked jurisdiction because of an amendment, which became effective prior to the remand, transferring jurisdiction for judicial review of Commission orders from the district court to the Supreme Court. The district court denied the motion to dismiss, holding that the change in the law had not deprived it of jurisdiction. The defendants appealed to this Court, and we affirmed the district court's exercise of jurisdiction, and held that the former law governed the pending dispute on the ground that the Legislature had not intended to disrupt the appeal proceedings then in process in the courts and thereby leave some employees with no right of judicial review.

[3,4] In the instant case, the statute providing the Department with a right to judicial review of a Step 5 determination was repealed prior to the completion of Step 5 procedures. The complaint filed in the district court did not validly invoke the jurisdiction of the district court because there was no then existing statute authorizing the exercise of such jurisdiction. Therefore, *Archer* and *Agee* are not dispositive. The statute in effect when the State filed its complaint in the district court required defendants to complete all available administrative procedures prior to filing a petition for judicial review in the district court, and this the State failed to do. It is elementary that administrative remedies, except in rare instances, must first be exhausted before resort may be had to judicial review. *Johnson v. Utah State Retirement Bd.*, Utah, 621 P.2d 1234 (1980); *Am.Jur.2d, Administrative Law* § 595 (1962). Thus, under the law in effect at the time of filing the complaint, the Personnel Management Act, the district court correctly held that the administrative procedures had not been exhausted and properly dismissed the complaint.

The additional administrative proceedings provided for by the Personnel Management Act, § 67-19-1 et seq., must be completed in accordance with the terms of that act before any right of judicial review accrues. As stated in *Boucofski v. Jacobsen*, 36 Utah 165, 104 P. 117 (1909):

While it is true that a party's rights in a judgment, as a general rule, may not be affected by legislative acts passed or which become effective after the entry of judgment, the rule does not apply to laws which are merely remedial, and which only affect matters of procedure or practice. . . . [T]he amendment related to a matter of procedure merely, and this would apply to all pending actions unless limited to future actions. In 1 Lewis' *Suth. Stat. Const.* § 674, the author says: "Where a new statute deals with procedure only, prima facie, it applies to all actions—those which have accrued or are pending, and to future actions." Further on in the same section it is said: "A remedy may be provided for existing rights, a new remedy added to or substituted for those which exist. Every case must, to a considerable extent, depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice." In section 686 of the same volume it is said: "Statutes enacted to promote and facilitate the administration of justice are prominent in the category of remedial statutes." Section 3490, *Comp. Laws* 1907, provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

Id. at 171-72, 104 P. at 119-20. See also *United States v. National City Lines*, 80 F.Supp. 734 (S.D.Cal.1948); *Tennessee River Nav. Co. v. Grantland*, 199 Ala. 674, 75 So. 283 (1917); *Boyda Dairy Co. v. Continental Casualty Co.*, 299 Ill.App. 469, 20 N.E.2d 339 (1939).

Section 67-19-25 of the Personnel Management Act now provides that both a state agency and an aggrieved employee may take a Step 6 appeal to the personnel review board from an adverse decision at Step 5. The agency's right of judicial review under the old Grievance Procedure Act and under the Personnel Management Act prior to its amendment, however, is abolished.

[5] Finally, we note the State's contention that the parties had stipulated prior to the Step 5 proceeding that the Grievance Procedure Act would govern the proceedings in this case. The stipulation, however, is not effective to confer jurisdiction on a court. Parties may not by stipulation enlarge the jurisdiction of a court beyond the boundaries delimited by statutory or constitutional law. *Landes & Co. v. Fellows*, 81 Utah 432, 19 P.2d 389 (1933); *Winn v. Winn*, Mont., 651 P.2d 51 (1982); *Sholty v. Carruth*, 126 Ariz. 458, 616 P.2d 918 (1980).

[6] On remand of this case, the Personnel Management Act will control the administrative proceeding since it does not affect any common law or vested rights, and since jurisdiction of the district court had not yet attached at the time the Employees' Grievance Procedure Act was repealed. *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); *Thorpe v. Housing Authority*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); *Carpenter v. Wabash Railway Co.*, 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); *Concerned Parents v. Mitchell*, Utah, 645 P.2d 629 (1982).

[7] Because of the unusual procedural complications in this case, we think it appropriate that the Department of Social Services be accorded on remand the right of filing for a Step 6 proceeding, and the order of the district court remanding this case should be amended to so provide.

Affirmed as modified.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.

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Nolan W. MARSHALL, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF the
STATE OF UTAH, Emery Mining Cor-
poration (Employer), and/or the State
Insurance Fund of the State of Utah,
and the Second Injury Fund of the
State of Utah, Defendants.

No. 20141.

Supreme Court of Utah.

Aug. 7, 1985.

Plaintiff, who was injured in an industrial accident in an underground coal mine, filed a claim for permanent partial disability benefits. The administrative law judge denied plaintiff's request and the Industrial Commission affirmed, and plaintiff appealed. The Supreme Court, 681 P.2d 208, reversed and remanded. On remand, the administrative law judge entered an order awarding plaintiff permanent total disability benefits. Plaintiff then made a motion for reconsideration requesting inclusion of interest on the award for past-due benefits. The administrative law judge denied the motion, and plaintiff appealed. The Supreme Court, Hall, C.J., held that statute providing for interest payments on past-due workers' compensation benefits applied to action seeking benefits for injury sustained before passage of the statute.

Reversed.

Stewart, J., concurred in the result.

1. Workers' Compensation §60

In worker's compensation cases benefits to be awarded to an injured worker are to be determined on basis of the suit as it existed at time of the injury.

2. Statutes §265, 266

A later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him.

3. Statutes §267(2)

Statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights are applied retrospectively to accrued or pending actions to further legislature's remedial purpose unless a contrary legislative intent is manifested.

4. Statutes §265, 267(2)

Statutes enacted subsequent to initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well.

5. Workers' Compensation §63

Statute providing for interest payments on past-due workers' compensation benefits applied to action seeking benefits for injury sustained before passage of the statute. U.C.A. 1953, 35-1-78.

Virginus Dabney, Salt Lake City, for plaintiff.

David L. Wilkinson, Atty. Gen., Salt Lake City, for Industrial Com'n.

James R. Black, Salt Lake City, for State Ins. Fund.

Gilbert A. Martinez, Salt Lake City, for Second Injury Fund.

HALL, Chief Justice:

Plaintiff appeals a decision of the Industrial Commission denying him interest on past due benefits. Interest was denied on the ground that plaintiff's injury occurred before passage of the statute providing for interest payments. U.C.A., 1953, § 35-1-78 (Supp.1983). We reverse.

On January 25, 1980, plaintiff was injured in an industrial accident in an underground coal mine. He was paid temporary total disability benefits from March 1, 1980, to November 14, 1980. On July 1, 1981, plaintiff filed a claim for permanent partial disability benefits and an application for hearing with the Industrial Commission. A hearing was held on July 12, 1982. On February 4, 1983, the administrative law judge (ALJ) denied plaintiff's request for a

finding of entitlement to permanent total disability benefits. The Industrial Commission affirmed the ALJ's order. Plaintiff then appealed to this Court. The Court reversed, finding that plaintiff was entitled to permanent disability benefits.¹ On remand, the ALJ entered an order awarding plaintiff permanent total disability benefits.

Plaintiff then made a motion for reconsideration requesting the ALJ to include interest of 8% per annum on the award for past due benefits. The ALJ denied the motion, reasoning that since the interest provision was added to the statute effective May 12, 1981,² and plaintiff's injury occurred in 1980, the law in effect at the time of the injury governed the case. The ALJ relied on the following language from *Kincheloe v. Coca-Cola Bottling Co.*³ "Inasmuch as the incident here concerned occurred in 1980, we are bound to apply the law as of that date."

U.C.A., 1953, § 35-1-78 (Supp.1983) provides in pertinent part: "Awards made by the industrial commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable."

Plaintiff argues that the statutory wording is unambiguous: inclusion of 8% interest must be made on awards from the date when the payment was due regardless of when the injury occurred.

[1,2] This Court has consistently held that in worker's compensation cases the benefits to be awarded to an injured worker are to be determined on the basis of the

law as it existed at the time of the injury.⁴ As the Court said in *Okland Construction Co. v. Industrial Commission*:⁵ "[A] later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him."

We recognize that this rule differs from the general rule followed in this jurisdiction which is that "the substantive law to be applied throughout an action is the law in effect at the date the action was initiated." (Emphasis added.)⁶

[3,4] A contrary rule to both of the above applies, however, to statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights. Those remedial statutes are applied retrospectively to accrued or pending actions to further the legislature's remedial purpose unless a contrary legislative intent is manifested.⁷ As the Court said in *State v. Higgs*:⁸

[S]tatutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well.

(Emphasis added.) By implication, such statutes enacted before the initiation of a suit or claim automatically apply to suits or claims initiated subsequent to passage of a procedural or remedial statute.

[5] The purpose of the worker's compensation act is "to secure workmen ...

1. *Marshall v. Industrial Comm'n*, Utah, 681 P.2d 208 (1984).

2. The amendment to the statute was passed in the legislative session which adjourned on March 12, 1981, with no specific effective date. Therefore, the statute became effective sixty days after the adjournment. Utah Const. art. VI, § 25.

3. Utah, 656 P.2d 440, 442 n.5 (1982).

4. *Smith v. Industrial Comm'n*, Utah, 549 P.2d 448, 449 (1976); *Utah Constr. Co. v. Matheson*, Utah, 534 P.2d 1238, 1239 (1975); *Okland Constr. Co. v. Industrial Comm'n*, Utah, 520 P.2d 208, 210 (1974).

5. *Supra*, note 4 at 210.

6. *Department of Social Servs. v. Higgs*, Utah, 656 P.2d 998, 1000 (1982). See also *Archer v. Utah State Land Bd.*, 15 Utah 2d 321, 324, 392 P.2d 622, 624 (1964) ("[O]rdinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint.").

7. *Pilcher v. Department of Social Servs.*, Utah, 663 P.2d 450, 455 (1983); *Foil v. Ballinger*, Utah, 601 P.2d 144, 151 (1979). See also *Selk v. Detroit Plastic Prod.*, 419 Mich. 1, 10, 345 N.W.2d 184, 188 (1984).

8. *Supra* note 6.

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against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment⁹ This payment is intended to compensate the injured individual for the loss of employability resulting from the injury and is keyed to a percentage of the worker's average weekly wages.¹⁰ Thus, it is clear that compensation for worker disability is legislation for the public welfare. It is also clear that the statute providing for interest on unpaid benefits was a legislative attempt to remedy a serious social problem: the depreciation of the value of benefits as a result of non-receipt of the weekly benefit for months, or perhaps years, until a final determination of eligibility and an award are made.¹¹ To effect this purpose, the legislature could only have intended this remedy to apply to as broad a range of awards as possible.

The ALJ in this case apparently assumed that payment of interest on a worker's compensation award was analagous to a new benefit since, in denying interest on the instant award, the ALJ relied on a footnote in *Kincheloe*¹² which noted that the law in effect at the time of the injury governed.

In *Kincheloe*, the Court was considering whether the Second Injury Fund was liable to the plaintiff there for benefits under U.C.A., 1953, § 35-1-69. Since, as noted previously, the benefits to be awarded to

9. *Marshall*, *supra* note 1 681 P.2d at 210-11 (quoting *Henrie v. Rocky Mountain Packing Corp.*, 113 Utah 415, 427, 196 P.2d 487, 493 (1948)).

10. *Marshall*, *supra* note 1, 681 P.2d at 211.

11. *Selk*, 419 Mich. at 12, 345 N.W.2d, at 189.

12. *Supra*, note 3.

13. "[T]he [interest] rate applied is usually the rate in effect at the time interest is assessed, rather than the rate in effect at the time of injury." 3 Larson, *The Law of Workmen's Compensation* § 83.42(a) at 15-764 (1983) (footnotes omitted).

14. *Selk*, *supra* note 7. Cf. *Myers v. Carr Constr. Co.*, Fla.App., 387 So.2d 417 (1980); *Jeannette Foods, Inc. v. Workmen's Compensation Appeal Bd.*, 39 Pa.Comm. 107, 394 A.2d 1309 (1978).

an injured worker must be determined on the basis of the law as it existed at the time of the injury, the Court noted that it was bound to apply the law as of that date, even though the legislature had amended the law subsequent to *Kincheloe*'s injury. Thus, the issue involved in *Kincheloe* concerned substantive law.

This line of case law is inapposite to interest payments on worker's compensation awards.¹³ Interest on a compensation award is incident to a right and a remedy that already exists.¹⁴ Retroactive application of the statute does not alter the substance of the compensation award.¹⁵ Payment of interest on an unpaid benefit neither creates a new right nor destroys an existing right. Therefore, interest payments should be made on any benefits awarded after the effective date of the statute even though the injury had occurred before. According to the terms of the statute, interest must be paid on each benefit payment which comprises the award from the date that payment would have been due and payable.¹⁶

The decision of the Industrial Commission is reversed.

HOWE, DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., concurs in the result.

15. *Selk*, 419 Mich. at 12, 345 N.W.2d at 189. See also *First Nat'l Bank v. Paul Hughes Trucking Co.*, Okla.App., 645 P.2d 1054 (1982) (interest is not a benefit but a charge assessed for use of the claimant's money pending appeal). Cf. *Ballog v. Knight Newspapers, Inc.*, 381 Mich. 527, 535, 164 N.W.2d 19, 22 (1969) (interest is incident to a right that already exists and is analagous to the costs and court fees of an action).

16. We note that in cases not involving worker's compensation awards (e.g. prejudgment interest) case law is split as to whether a statute increasing the interest rate requires payment of the new interest rate from the date of injury or from the effective date of the amendatory act. See e.g., Annot., 4 ALR 2d 932 (1949); Annot., 4 ALR 2d 932, Later Case Service (1985).

would not eliminate the gap but only shift its impact. Under plaintiffs' proposed construction, we would prevent a referendum from being aborted due to official neglect but do so at the risk of permitting legislation to be aborted due to unofficial manipulation. Until instructed otherwise by the Legislature, we prefer to construe this gap so as to eliminate the risk of improper manipulation of the referendum petition by private persons and to assume what we deem the lesser risk of improper conduct by duly elected officials.⁴

The summary judgment for defendant is affirmed. No costs awarded.

MAUGHAN, C. J., and HALL, STEWART and HOWE, JJ., concur.



KAISER STEEL CORPORATION,

Plaintiff,

v.

Lawrence F. MONFREDI and The
Industrial Commission of Utah,
Defendants.

No. 17152.

Supreme Court of Utah.

June 1, 1981.

Employer sought review of an order of the Industrial Commission awarding an employee benefits for temporary total disability on account of a back injury. The Supreme Court, Oaks, J., held that the Commissioner's finding that the employee's injury and disability resulted from an "accident" was not arbitrary or capricious, wholly without cause, or without any substantial evidence to support it.

Affirmed.

1. Workers' Compensation — 1939.4(4)

The Supreme Court's function in reviewing findings of fact of Industrial Commission is a strictly limited one in which

4. We express no opinion on whether the mandamus remedy currently available under U.R.C.P., Rule 65B(b)(3) or any other remedy would be available to compel action by a clerk who declined to perform his or her statutory func-

tion in time for the proponents of a petition to meet the deadline under § 20-11-24.

2. Workers' Compensation — 1716

Meaning of "accident" for workmen's compensation purposes is question of law; whether evidence conforms to that meaning is question of fact. U.C.A.1953, 35-1-45.

3. Workers' Compensation — 1533, 1653

Industrial Commission's finding that employee's back injury and temporary total disability resulted from "accident" was not arbitrary or capricious, wholly without cause, or without any substantial evidence to support it. U.C.A.1953, 35-1-45.

Steven E. Clyde, Salt Lake City, for plaintiff.

David L. Wilkinson, Salt Lake City, Marlynn B. Lema, Price, for defendants.

OAKS, Justice:

This is a writ of review to set aside an order of the Industrial Commission in a claim for workmen's compensation. The order directed the employer to pay \$2,532.94 plus medical expenses to an employee who was totally disabled for three months with a back injury. The employer seeks reversal of that order.

The administrative law judge, whose findings and conclusions were affirmed by the Industrial Commission, found (1) that "there was a definite identifiable injury to the Applicant's low back on January 5, 1979"; (2) that "the Applicant was temporarily totally disabled" from that date until April 4, 1979; and (3) that "Applicant is entitled to workmen's compensation benefits as a result of his industrial accident of January 5, 1979" The employer ar-

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1. The administrative law judge also found that applicant had a 15 percent permanent physical impairment "based on moderate rigidity of the

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peal—whether an "accident" turns on the and the evide
The govern Commission t fact, and (2) p conclusions of of fact shall shall not be s except where support the meaning of t the leading Comm'n, 67 698, 700, 701

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gues that the applicant's disability resulted from a preexisting physical condition rather than an identifiable "accident . . . in the course of his employment" as required by U.C.A., 1953, § 35-1-45.² The issue on appeal—whether the applicant was injured by an "accident"—is a question of fact which turns on the findings of the Commission and the evidence before it.

The governing statutes (1) require the Commission to make written findings of fact, and (2) provide that the "findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review," § 35-1-85, except where "the findings of fact do not support the award." § 35-1-84(2). The meaning of that exception was defined in the leading case of *Kavalinakis v. Indus. Comm'n*, 67 Utah 174, 181-82, 184, 246 P. 698, 700, 701 (1926), as follows:

What we hold is that in case . . . we are asked to overturn the findings and conclusions of the commission which appear to be in conflict with or contrary to the evidence, it must be clearly made to appear to us that the commission acted arbitrarily or capriciously and wholly without cause in rejecting or in refusing to give effect to the evidence. . . . Any other conclusion would make this court merely a reviewing court with power to weigh the probative effect of the evidence. . . .

lumbar spine accompanied by associated progressive degenerative disease of the lumbar spine" due to accidental injury, disease or congenital causes existing prior to the January 5, 1979, injury.

2. "Every employee . . . who is injured . . . by accident arising out of or in the course of his employment . . . shall be entitled to [compensation and medical expenses]." U.C.A., 1953, § 35-1-45.

3. E. g., *McPhie v. Indus. Comm'n*, Utah, 567 P.2d 153 (1977); *McWilliams v. Indus. Comm'n*, 21 Utah 2d 266, 444 P.2d 513 (1968); *Garner v. Hecla Mining Company*, 19 Utah 2d 367, 431 P.2d 794 (1967); *Baker v. Indus. Comm'n*, 17 Utah 2d 141, 405 P.2d 613 (1965); *Western Contracting Corp. v. Indus. Comm'n*, 15 Utah 2d 208, 390 P.2d 125 (1964); *Dalton v. Indus. Comm'n*, 8 Utah 2d 353, 334 P.2d 763 (1959); *Lorange v. Indus. Comm'n*, 107 Utah

Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. Such is the manifest purpose and intent of the Workmen's Compensation Act. . . . It was not intended, . . . that this Court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission.

The *Kavalinakis* declaration that the Commission will be sustained in its findings of fact unless its action was "arbitrary or capricious" has been cited repeatedly as the appropriate standard by which this Court reviews the Commission's findings of fact.³

In many subsequent cases, this Court has also reaffirmed that the reviewing court does not weigh the probative effect of conflicting evidence before the Commission.⁴ Similarly, the reviewing court will survey the evidence in the light most favorable to the Commission's findings and order.⁵ Subsequent courts have also reaffirmed the *Kavalinakis* statement that under the Workmen's Compensation Act this Court should not "to any extent substitute the judgment of the court upon factual matters for the judgment of the commission."⁶ Thus, for example, this Court has repeatedly held that it cannot substitute its judgment for the Commission's on which of two possible

261, 153 P.2d 272 (1944); *Kelly v. Indus. Comm'n*, 80 Utah 73, 12 P.2d 1112 (1932).

4. E. g., *Wiseman v. Village Partners*, Utah, 589 P.2d 754 (1978); *Clinger v. Indus. Comm'n*, Utah, 571 P.2d 1328 (1977); *Russell v. Indus. Comm'n*, 86 Utah 306, 43 P.2d 1069 (1935); *Ogden Union Ry. v. Indus. Comm'n*, 85 Utah 124, 38 P.2d 766 (1934); *Parker v. Indus. Comm'n*, 78 Utah 509, 5 P.2d 573 (1931).

5. E. g., *Chadwick v. Indus. Comm'n*, Utah, 572 P.2d 400, 402 (1977); *Savage v. Indus. Comm'n*, Utah, 565 P.2d 782, 783 (1977); *Shipley v. C. & W Contracting Co.*, Utah, 528 P.2d 153, 155 (1974), and cases cited therein.

6. E. g., *Kent v. Indus. Comm'n*, 89 Utah 381, 386, 57 P.2d 724 (1936).

inferences should be drawn from the evidence.⁷

There are at least two other much-cited descriptions of this Court's scope of review of Commission findings of fact. In *Kent v. Indus. Comm'n*, 89 Utah 381, 385, 57 P.2d 724, 725 (1936), a unanimous Court declared:

In case of an award of compensation, all the record is required to disclose is that there is sufficient, competent, material evidence in the record to support the award. That there is a conflict in the evidence, or that this court might or would have found differently had the evidence been submitted to it as a trier of the facts, is of no consequence. The Industrial Commission is a fact-finding body, and in case there is any substantial evidence to support its findings, its findings are conclusive upon this court and may not be disturbed.

In *Norris v. Indus. Comm'n*, 90 Utah 256, 260-61, 61 P.2d 413, 415 (1936), the Court defined its function as follows:

Where the matter presented on appeal is the question of whether the commission should have in law arrived at a conclusion of fact different from that at which it did arrive from the evidence, a question of law is presented only when it is claimed that the commission could only arrive at one conclusion from the evidence, and that it found contrary to that inevitable conclusion.

Writing for the Court, Justice Wolfe outlined six criteria which had to combine in order to justify reversing the Commission, such as uncontradicted evidence in opposition to its position, and then continued:

If the commission should decide against the uncontradicted evidence under those conditions, its decision would as a matter of law be arbitrary and capricious, which is another way of saying that it would be unreasonable.

[1] Under any of these standards—*Kavalinakis*, *Kent*, or *Norris*—it is apparent that

7. *Pace v. Indus. Comm'n*, 87 Utah 6, 47 P.2d 1050 (1935); *Park Utah Consol. Mines Co. v. Indus. Comm'n*, 84 Utah 481, 36 P.2d 979

this Court's function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the Court agrees with the Commission's findings or whether they are supported by the preponderance of evidence. Instead, the reviewing court's inquiry 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.

[2] Applying those standards, we turn to the record to see whether there is the requisite support for the Commission's finding that the applicant sustained a "definite identifiable injury" (or "accident"—the terms are used interchangeably in the findings—) on the job on January 5, 1979. This requires a preliminary inquiry into the meaning of the word *accident* in § 35-1-45. The meaning of this word is a question of law; whether the evidence conforms to that meaning is a question of fact.

The leading case on the meaning of "accident" is *Carling v. Industrial Commission*, 16 Utah 2d 260, 261-62, 399 P.2d 202, 203 (1965), a unanimous opinion in which this Court declared:

[T]his court has held that for the purpose of the Act [the term "accident"] should be given a broad meaning. It connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. We recognize the correctness of plaintiff's contention that even though there must be some such "accident" within the meaning of that statute, this is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly

(1934); *Parker v. Indus. Comm'n*, 78 Utah 509, 5 P.2d 573 (1931); and cases cited therein.

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fall within the definition of an accident as just stated above. However, such an occurrence must be distinguished from gradually developing conditions which are classified as occupational diseases and which are not compensable except as provided in [§ 35-2-1, et seq.].

This Court has held that the aggravation of a preexisting disability of the back by the performance of an employee's usual and customary work is not compensable as an "accident" where there was no "intervention of any unusual event or trauma."⁸ On the other hand, this Court has also applied the *Carling* definition by declaring that even though a back injury is related to a preexisting deficiency or disease, "if there is an incident, properly regarded as an accident in the course of work which adds to or aggravates that condition, any resulting injury is compensable."⁹

As suggested by the contrast between those two cases, the application of the "accident" requirement to back injuries has been particularly vexing to this Court and to the Commission. In fact, this is at least the ninth back injury case that has come to this Court from the Commission in less than 30 months,¹⁰ and in most of these cases the Court has been sharply divided, often on whether or not the disability was the result of an "accident" or merely the consequence of a preexisting condition.

The facts of one of these back cases, *U.S. Steel Corp. v. Indus. Comm'n*, Utah, 607 P.2d 807 (1980), are remarkably similar to the facts in the case now before the Court. In *U.S. Steel*, the employee "felt a pop in his back" as he was reaching under a conveyor belt in the course of shoveling ore from under the belt. His injury was diagnosed as a herniated disk. The Commission found that the employee's temporary dis-

ability had resulted from an industrial accident, and this Court unanimously affirmed an award for temporary total disability.

[3] The record evidence in this case showed that at the start of his shift in the mine on January 5, 1979, the applicant, Monfredi, was scaling rock from the roof of the mine and shoveling it onto a conveyor belt. In the hearing before the Commission, he was questioned about whether there was any particular or unusual incident or act that he could specify as causing his injury, such as breaking a shovel or slipping on a rock. He gave this answer:

No. I was just shoveling onto the belt. Shoveling that rock. I was scaling down the rock by the beltline, and I was shoveling it onto the belt. Cleaning it up. . . . Well, I was right by the belt. You know. I got my shovel, and was scaling down some rock. Then, when I went to shovel like this, there was a catch in my back. Right here in the lower back. (Indicating) . . .

It went about halfway. If it had went out entirely, they would have had to carry me out. But it was just half out.

The company doctor who examined the applicant reported "Lumbar Syndrome . . . general spinal arthritis and possible degenerative disease," predicting a one-week return to work. When the lower back pain prevented the applicant's return in that period, he was examined by a specialist and hospitalized for about a week. A myelogram was performed "with findings of shallow but consistent extradural defect at the L4-5 interspace level consistent with disk protrusion without other demonstrated abnormality." The final discharge diagnosis was "herniated lumbar disk."

8. *Farmers Grain Co-op v. Mason*, Utah, 606 P.2d 237, 239 (1980).

9. *United States Steel Corp. v. Draper*, Utah, 613 P.2d 508, 509 (1980). Accord, *Nuzum v. Roosendahl Const. & Min. Corp.*, Utah, 565 P.2d 1144, 1146 (1977).

10. *Entwhistle v. Indus. Comm'n*, Utah, 626 P.2d 495 (1981); *Painter Motor Co. v. Ostler*, Utah,

617 P.2d 975 (1980); *Schmidt v. Indus. Comm'n*, Utah, 617 P.2d 693 (1980); *U.S. Steel v. Indus. Comm'n*, Utah, 607 P.2d 807 (1980); *Farmer's Grain Co-op v. Mason*, Utah, 606 P.2d 237 (1980); *Church of Jesus Christ of Latter-Day Saints v. Indus. Comm'n*, Utah, 590 P.2d 328 (1979); *Wiseman v. Village Partners*, Utah, 589 P.2d 754 (1978); *Buxton v. Indus. Comm'n*, Utah, 587 P.2d 121 (1978).

The applicant had worked as a miner for this employer for about 27 years. Until 1978, he had been a roof bolter. He had a history of back problems associated with his work. In 1965, he was examined by the company doctor for pain in the lumber region after lifting a duke. In 1968, he was examined twice, once after feeling a pinch in his lower back as he was lifting a big rock from under the conveyor belt, and once for lower back pain after he grabbed for a rock on the conveyor belt. Company medical reports also showed that in 1969 he twisted his back as he was shoveling rock along the face of the coal seam, in 1970 he sustained a strain to his lower back as he was pulling a grease bucket from under a conveyor belt, and in 1971 he felt a pinch in his lower back while he was lifting a sack of rock dust. Again that same year, he injured his back (which "went out" as he described it) while lifting steel beams. According to the applicant's statement, all of these injuries were covered by workmen's compensation.

The applicant's history of work-related accidents and his medical condition showed a job-induced preexisting condition which could have been added to or aggravated, *United States Steel Corp. v. Draper*, Utah, 613 P.2d 508, 509 (1980), by the work-related incident that occurred on January 5, 1979, or which could have reached what this Court has referred to as a "climax" due to "exertion, stress, or other repetitive cause . . . in such manner as to properly fall within the definition of an accident . . ." *Carling v. Indus. Comm'n*, quoted *supra*. In the almost identical circumstance in *U.S. Steel Corp. v. Indus. Comm'n*, *supra*,—a pop in the back suffered while reaching to shovel under a conveyor belt—this Court unanimously affirmed an award for temporary total disability.

Mindful of the "recognized rule of construction [that] resolves any doubt respecting the right of compensation in favor of the injured employee or his dependents," and the principle that "the compensation statutes should be liberally construed in favor of recovery," *McPhie v. Indus. Comm'n*, Utah, 567 P.2d 153, 155 (1977), we cannot

conclude that the Commission's finding that applicant's injury and disability resulted from an "accident" was "arbitrary or capricious" or "wholly without cause" or without "any substantial evidence" to support it. The Commission's order is therefore affirmed.

MAUGHAN, C. J., and HALL, STEWART and HOWE, JJ., concur.



Chester V. BUTTARS, Plaintiff
and Appellant,

v.

Asael M. BUTTARS, Defendant
and Respondent.

No. 17136.

Supreme Court of Utah.

June 2, 1981.

In an action to quiet title, the First District Court, Cache County, VeNoy Christoffersen, J., found for defendant. On appeal by the plaintiff, the Supreme Court, Oaks, J., held that where son held land in fee simple determinable, with his estate to terminate by special limitation if he should fail to pay and perform his \$500 per year obligation to his mother, and he admittedly paid only seven of 14 annual payments, district court, citing "special relationship" existing between son and his mother and fact that he performed many personal and business services for her each year could find for son on basis of waiver and satisfaction and could therefore find that son's estate did not terminate.

Affirmed.

Stewart, J., concurred in result.

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