

1986

# Kenneth Johnson v. Harsco and Heckett, and/or Insurance Company of North America/Aetna : Brief of Appellant

Utah Supreme Court

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Mary C. Corporon; attorney for plaintiff.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNETH JOHNSON,

Plaintiff on Appeal/Applicant,

Supreme Court No. 860086

-vs-

Industrial Commission No.  
85-000816

HARSCO/HECKETT and/or INSURANCE  
COMPANY OF NORTH AMERICA/AETNA,

Category No. 6

Defendants on Appeal/Respondents.

---

BRIEF OF PLAINTIFF ON APPEAL

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AN APPEAL FROM THE ORDER OF THE BOARD OF REVIEW OF THE  
UTAH STATE INDUSTRIAL COMMISSION

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**UTAH SUPREME COURT  
BRIEF**

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**FILED**

**MAY 16 1986**

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNETH JOHNSON,

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNETH JOHNSON,

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Supreme Court No. 860086

-vs-

Industrial Commission No.  
85-000816

HARSCO/HECKETT and/or INSURANCE  
COMPANY OF NORTH AMERICA/AETNA,

Category No. 6

Defendants on Appeal/Respondents.

---

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether plaintiff on appeal is entitled to receive additional benefits for temporary total disability and permanent partial disability other than those awarded by the Industrial Commission.

2. Whether plaintiff on appeal is entitled to receive benefits for temporary total disability up to a maximum of 312 weeks, and whether he is entitled to receive benefits for permanent partial disability for an additional maximum of 312 weeks for a total maximum of 624 weeks.

STATEMENT OF THE CASE

This is an appeal from the denial of plaintiff's motion for review filed with the board of review of the Industrial Commission of the State of Utah.

STATEMENT OF THE FACTS

On or about October 9, 1980, plaintiff was injured in an industrial accident arising out of the course of his employment with defendant, Harsco/Heckett (hereinafter "the employer"). The accident occurred when a truck rolled backwards on the hill above

him and rolled over the top of him. He sustained a crushed pelvis, denervated perineum, resulting in a patulous and uncontrolled anal sphincter. This necessitated a left colostomy. His residual injuries consist of total urinary incontinence, total neurological impotence and retrograde ejaculation, a partial sciatic nerve injury and deformities resulting from the pelvic fracture. (Findings of Fact number 1.)

The Insurance Company of North America/AETNA (hereinafter "the insurance carrier") is the worker's compensation carrier for the employer. The insurance carrier paid all medical bills arising out of the accident. It also paid temporary total disability compensation commencing with the date of the accident and continuing until January 16, 1984.

The plaintiff has been under the treatment of several physicians since the date of the accident, including a Dr. Douglas Schow. A medical report from Dr. Schow dated December 5, 1983 indicated that the plaintiff's combined injuries resulted in a 79% permanent partial disability rating. (Findings of Fact number 2.)

On January 16, 1984, the insurance carrier, on its own, assumed that the plaintiff had become permanently and totally disabled and began paying the applicant permanent total disability benefits on a weekly basis at the rate of \$196.00 per week, which represented 85% of the state average weekly wage at the time of the plaintiff's injury. (Findings of Fact number 4.)

The insurance carrier paid disability benefits from January 16, 1984 through and including March 10, 1986, at the rate of

\$196.00 per week. The total paid by the insurer to the plaintiff for his injury for combined temporary total impairment, total permanent impairment and permanent partial impairment is \$61,152.00. The insurance carrier and the employer have denied further liability for the accident in question. (Findings of Fact number 5.)

The plaintiff was off work from the date of the injury through and including May 15, 1985. On May 15, 1985, the plaintiff became employed and has been continuously employed from that date. (Findings of Fact number 3.) The plaintiff was temporarily totally disabled from October 9, 1980 until May 15, 1985. Since May 15, 1985, the applicant has suffered a permanent partial disability of 79% of the whole man.

The administrative law judge below required the insurance carrier to pay the plaintiff compensation at the rate of \$196.00 per week until such time as it had paid a total of \$61,152.00 representing 85% of the state average weekly wage at the time of the plaintiff's injury, payable over a period of 312 weeks. Further, the administrative law judge ordered the employer and the insurance carrier to pay all medical expenses incurred as a result of the accident, said expenses to be paid in accordance with the medical and surgical fee schedule of the Industrial Commission.

The plaintiff filed a timely motion for review with the Industrial Commission on December 31, 1985, and that motion for review was denied by the board of review of the Industrial Commission of Utah on January 21, 1986. From that denial of



plaintiff's motion for review, the applicant has filed a timely appeal to this court.

#### SUMMARY OF ARGUMENT

The plaintiff alleges that the Commission has erred as follows: first, that the Industrial Commission has erred in failing to allow him benefits and compensation for one 312-week maximum period of temporary total disability and for another 312-week maximum period of permanent partial disability; and, second, that the Industrial Commission has failed as a matter of law to calculate accurately the amount of benefits to which the plaintiff is entitled.

Utah Code Annotated, Section 35-1-65 (1953, as amended) provides that a person entitled to worker's compensation benefits may receive benefits for temporary total disability up to a maximum of 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury. In addition, Utah Code Annotated, Section 35-1-66 (1953, as amended) provides that a person entitled to receive worker's compensation benefits may receive permanent partial disability benefits not exceeding in any case 312 weeks. These statutes should be construed such that the plaintiff in this case is entitled to receive benefits for temporary total disability benefits up to a maximum of 312 weeks at the state average weekly wage at the time of the accident and, in addition, is entitled to receive permanent partial disability benefits up to a maximum of 66-2/3% of the state average weekly wage for a period of 312 weeks.

## ARGUMENT

### POINT I

#### STANDARD OF REVIEW

The plaintiff accepts the Findings of Fact as enunciated by the administrative law judge. Since the Commission did not enter its own Findings of Fact and Conclusions of Law, it must be assumed that the Commission has adopted the Findings of Fact and Conclusions of Law of the administrative law judge. Giles v. Industrial Commission of Utah, 692 P.2d 743, 745 (Utah 1984). The employer and the insurance carrier have not appealed the decision of the Commission and, therefore, it should be assumed that they also accept the Findings of Fact of the administrative law judge, as adopted by the Commission.

Hence, there is no factual issue before this Court. The only issue before this Court is an issue of law, namely the interpretation of apparently conflicting statutes, and/or an award of benefits as authorized by law based upon the facts as found by the administrative law judge and adopted by the Commission.

Since this Court is reviewing a question of law, the decision of the Commission below is entitled to no deference whatsoever in this Court. Board of Education of Alpine v. Olsen, 684 P.2d 49 (Utah 1984); Giles v. Industrial Commission of Utah, 692 P.2d 743 (Utah 1984). The court in Olsen stated:

In reviewing interpretations of general law, . . . we apply a correction-of-error standard with no deference to the expertise of the Commission. (At page 51.)

The Court is wholly free to consider the issues now raised

on appeal by the plaintiff and is wholly free to correct any error it may find in the decision of the Commission.

## POINT II

THE APPLICANT IS ENTITLED, AS A MATTER OF LAW, TO RECEIVE BENEFITS UP TO A MAXIMUM OF 312 WEEKS AT 100% OF THE STATE AVERAGE WEEKLY WAGE AT THE TIME OF HIS ACCIDENT AND, IN ADDITION, IS ENTITLED TO RECEIVE BENEFITS FOR PERMANENT PARTIAL DISABILITY AT THE APPROPRIATE LEVEL OF COMPENSATION UP TO A MAXIMUM OF 312 WEEKS.

Utah Code Annotated, Section 35-1-65 (1953, as amended) reads as follows:

35-1-65. TEMPORARY DISABILITY--AMOUNT OF PAYMENTS--STATE AVERAGE WEEKLY WAGE DEFINED. (1) In case of temporary disability, the employee shall receive 66-2/3% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of injury. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury. (Emphasis added.)

In addition, Utah Code Annotated, Section 35-1-66 (1953, as amended), in pertinent part, states as follows:

The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight-year period.

. . . .

In the case of the following injuries the compensation shall be 66-2/3% of that employee's

average weekly wages at the time of the injury, but not more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45.00 per week plus \$5.00 for a dependent spouse and \$5.00 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed 66-2/3% of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated for such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, . . . .

. . . .

For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid. (Emphasis added.)

The above-cited statutory provisions make clear that an injured employee entitled to receive worker's compensation benefits is entitled to receive both of the following:

(1) temporary total disability benefits not to exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury; and, (2) permanent partial disability benefits up to a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks.

Utah Code Annotated, Section 35-1-67 (1953, as amended) is

in direct contradiction with the provisions of Sections 35-1-65 and 35-1-66. The last paragraph of Section 35-1-67 reads as follows:

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

The Commission, in reliance upon the quoted portion of Section 35-1-67, ruled that the employer and the insurance carrier herein are obligated to pay to plaintiff only 85% of the state average weekly wage for 312 weeks, and denied the plaintiff's claim for additional benefits. This decision of the Commission was improper as a matter of law, and the conflict between the provisions of Sections 35-1-65 and 35-1-66 on the one hand and Section 35-1-67 on the other should be resolved in favor of allowing the plaintiff all the benefits guaranteed to him under Sections 35-1-65 and 35-1-66.

To resolve the apparent contradiction between the statutory provisions of 35-1-65, 35-1-66 and 35-1-67, it is necessary to turn to the rules promulgated by this Court in interpreting statutes and resolving apparent contradictions between statutes.

One principle enunciated by this Court in resolving contradictions between statutory provisions can be found in the case of Madsen v. Brown, 701 P.2d 1086 (Utah 1985). The Madsen decision stated:

[I]n cases of apparent conflict between provisions of the same statute, it is the Court's duty to harmonize and reconcile statutory provisions, since the Court cannot presume that the legislature intended to create

a conflict. Where contradictory provisions are passed, the provision susceptible of but one meaning will control those susceptible of two if the statute can thereby be rendered harmonious. 73 Am.Jur.2d Statutes, Sections 254 and 255 (1974).

In the instant case, as in the Madsen case, we are confronted with an apparent conflict between provisions of the same statute. Unfortunately, however, unlike the Madsen situation, all statutory provisions in issue here are susceptible of but one meaning. Section 35-1-65 is susceptible only of the meaning that the plaintiff is entitled to temporary total disability benefits up to a maximum of 100% of the state average weekly wage for 312 weeks. Section 35-1-66 is susceptible only of one meaning, that the plaintiff is entitled to receive permanent partial disability benefits for any permanent partial disability he may suffer up to a maximum of 66-2/3% of the state average weekly wage for 312 weeks. Section 35-1-67 is susceptible of only one meaning, that the insurance carrier and employer are obligated for a combination of temporary total disability benefits, permanent partial disability benefits and permanent total disability benefits up to a maximum total of 85% the state average weekly wage for a period of 312 weeks.

Another rule of statutory construction adopted by this Court is that specific statutory provisions prevail over more general expressions. Osuala v. AETNA Life and Casualty, 608 P.2d 242 (Utah 1980). In the case now before the Court, the more specific provisions are the provisions which would grant the plaintiff the relief he is seeking. Section 35-1-65 is very specific that the

plaintiff is entitled to receive benefits up to a maximum of 100% of the state average weekly wage for 312 weeks for his temporary total disability. Section 35-1-66 is very specific that the plaintiff is entitled to receive benefits for his permanent partial disability up to a maximum of 66-2/3% of the state average weekly wage for a period of 312 weeks. The contradictory provision contained in Section 35-1-67 is a more general statutory expression which attempts to limit on a broader scope the provisions of a number of more specific statutes. Pursuant to the Osuola decision, the specific provisions of Sections 35-1-65 and 35-1-66 should govern over the more general statute, Section 35-1-67.

Further, Section 35-1-67 is a provision dealing solely with permanent total disability benefits. The portion of the statute relied on below to deny the plaintiff the relief sought is the last paragraph of the section of the Utah Code establishing permanent total disability benefits. That last paragraph should, therefore, be read narrowly to apply only in cases of permanent total disability. Since the plaintiff is not permanently and totally disabled, Section 35-1-67 would not apply here.

The most important principle enunciated by this Court in construing statutes is that the Court will look to the broader reason and purpose of the legislation to determine how conflicts should be resolved. In the case of Reagan Outdoor Advertising, Inc. v. Utah Department of Transportation, 589 P.2d 782 (Utah 1979), this Court stated:

One of the cardinal principles of statutory

construction is that the courts will look to the reason, spirit and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject. (At page 783.)

The Osuala court, supra, stated:

There are some cardinal rules of statutory construction to be considered in relation to this controversy. If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in the light of its objective, and to harmonize its provisions in accordance with the legislative intent and purpose.

It is proper for the Court to consider the broad general legislative purpose and intent in adopting the worker's compensation statutes in order to resolve the statutory conflict now in issue. The clear purpose of the worker's compensation statutes in the State of Utah can be found in Utah Code Annotated, Section 35-1-45, which provides that every employee who is injured and the dependents of every such employee who is killed by accident arising out of or in the course of his employment shall be entitled to receive compensation for the loss. The purpose of the worker's compensation act was set forth in the case of Henrie v. Rocky Mountain Packing Corp., 197 P.2d 487 (Utah 1948). The court there held that the intention of the worker's compensation act was to secure workers and their dependents against becoming objects of charity, by making reasonable compensation for calamities incidental to employment, and to make human wastage in industry part of the cost of production for the employers and their insurance carriers.

In the present case, the Court should resolve the statutory conflict in question in favor of furthering the broad remedial



purposes of the worker's compensation act and the purpose of providing reasonable compensation for calamities incidental to employment. This Court should resolve the statutory conflict by finding that the plaintiff herein is entitled to receive temporary total disability benefits for the period of his temporary total disability, October 9, 1980 through May 15, 1985, at 100% the state average weekly wage at the time of his injury. This award would be pursuant to Section 35-1-65. In addition, this Court should find that the plaintiff is entitled to receive compensation for his permanent partial disability as authorized by Section 35-1-66, at 66-2/3% the state average weekly wage at the time of his accident, payable for 79% of the 312 week maximum. (This is based on the plaintiff's 79% permanent partial disability rating.)

Such an interpretation would promote the purposes of the worker's compensation statutes in two respects. First, it would award the plaintiff a more appropriate level of compensation for the horrible and debilitating injuries which he has suffered. It would award the plaintiff the "reasonable compensation" contemplated in Section 35-1-45. Second, it should be noted that the maximum award level set forth in Section 35-1-67 (85% of the state average weekly wage for a maximum of 312 weeks) assumes that those individuals who have been 100% disabled such that they are entitled to the maximum level of benefits will, at the conclusion of the 312-week period of compensation be entitled to receive lifelong benefits from the Second Injury Fund. Utah Code Annotated, Section 35-1-67, 68 and 69 (1953, as amended). In the

case now at bar, the plaintiff has sustained injuries which are permanently and grossly debilitating, but, because of his re-employment on May 15, 1985, he cannot be said to be permanently and totally disabled. It would be a serious injustice and in contradiction to the broad remedial purposes of the worker's compensation laws to grant him only compensation at 85% the state average weekly wage for a maximum of 312 weeks, since this level of compensation is based on the erroneous assumption that he will have lifelong financial assistance from the Second Injury Fund.

The Court should order that the plaintiff is entitled to receive benefits as follows:

(1)	temporary total disability benefits for October 9, 1980 through May 15, 1985 (239.15 weeks) at the state average weekly wage effective October 9, 1980 (\$230.00)	\$55,004.50
(2)	permanent partial disability benefits of 79% of the 312 week maximum (246.48) at the rate of 66-2/3% of the state average weekly wage on October 9, 1980 (\$153.00)	<u>\$37,711.44</u>
	TOTAL BENEFITS DUE TO PLAINTIFF	\$92,715.94
	AMOUNT PAID TO PLAINTIFF TO DATE	\$61,152.00
	BALANCE DUE TO PLAINTIFF	\$31,563.94

The balance due the plaintiff should be made payable to the plaintiff at the appropriate weekly rate of \$153.00 per week. He should be granted a lump sum for arrearages accrued from March 10, 1986 (the date the insurance carrier last paid weekly benefits) through the present, and the balance should be payable at the weekly rate.

POINT III

ATTORNEY'S FEES

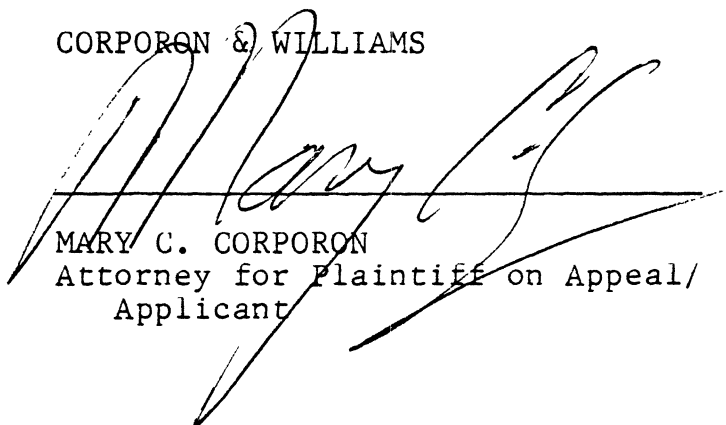
The plaintiff is entitled to the costs of this appeal and to receive an appropriate award of attorney's fees herein.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that this Court award him additional worker's compensation benefits as set forth in Point of Argument II.

RESPECTFULLY SUBMITTED this 15th day of May, 1986.

CORPORON & WILLIAMS



MARY C. CORPORON  
Attorney for Plaintiff on Appeal/  
Applicant

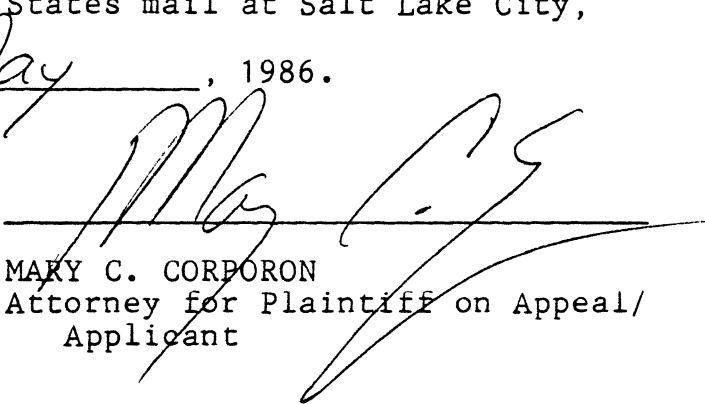
CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for plaintiff on appeal/applicant herein; that I caused the attached Brief of Plaintiff on Appeal/Applicant to be served upon each of the defendants on appeal/respondents by placing four true and correct copies of the same in an envelope addressed to each of the following:

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and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah, on the 15 day of May, 1986.

  
\_\_\_\_\_  
MARY C. CORPORON  
Attorney for Plaintiff on Appeal/  
Applicant

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000816

KENNETH JOHNSON,

Applicant,

vs.

HARSCO/HECKETT and INSURANCE COMPANY OF  
NORTH AMERICA/AETNA,

Defendants.

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FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

APPEARANCES: The Applicant is represented by Mary C. Corporon,  
Attorney at Law.

The Defendant is represented by Robert J. Shaughnessy,  
Attorney at Law and Colleen Richardson.

A Hearing was deemed unnecessary in this matter, there being no  
factual dispute. The legal issues were submitted for decision.

FINDINGS OF FACT:

1. The Applicant filed a claim with the Commission on September 19, 1985 alleging that he had sustained an injury by accident arising out of or in the course of his employment with Harsco/Heckett on the 9th day of October, 1980 at Provo, Utah. He alleged the accident occurred when a truck rolled backwards on a hill above him and accidentally rolled over him. He sustained a crushed pelvis, denervated periream resulting in a patulous and uncontrolled anal sphincter. This necessitated a left colostomy. His residual injuries consist of total urinary incontinence, total neurological impotence and retrograde ejaculation, a partial sciatic nerve injury and deformities resulting from the pelvic fracture.

2. The Applicant has been under the treatment of several physicians. A letter from Dr. Douglas Schow dated December 5, 1983 indicates the Applicant's combined injuries have resulted in a 79% permanent partial impairment.

3. The Applicant was off work from the date of injury to May 15, 1985. Temporary total disability benefits were paid until January 16, 1984 at the rate of \$230.00 per week for a total of \$39,198.57.

4. On January 16, 1984, the insurance carrier began paying Mr. Johnson permanent total benefits on a weekly basis at the rate of \$196.00 and

KENNETH JOHNSON  
ORDER  
PAGE TWO

have continued to make payments on this basis. The payments were made at the permanent total disability rate on the assumption the Applicant would be permanently and totally disabled but in fact he is not. To his credit, the Applicant has returned to work and under these circumstances the statute mandates that he be paid permanent partial disability benefits subject to the limitations set forth in Section 35-1-67 U.C.A. The last paragraph of that Section provides

"In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Section 35-1-65, 35-1-66 and this Section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks".

Eighty Five percent of the state average weekly wage at the time of the Applicant's injury was \$196.00. The Administrative Law Judge finds that the foregoing Section provides a maximum liability on the part of the employer of \$61,152.00. Counsel for the Applicant challenges this Finding and the Conclusion of Law based thereon and contends that the Applicant is entitled to temporary total disability compensation for the full period of time and, in addition thereto, to the full compensation that would otherwise be due him on the basis of the 79% permanent partial impairment rating.

In addition to the foregoing limitation, the third paragraph of Section 35-1-66 provides that

"In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation."

5. The insurance carrier has acknowledged its liability for payment of the statutory maximum of \$61,152.00.

6. The Applicant's injuries are sufficiently significant that he may at some point in time prior to normal retirement years become permanently and totally disabled. Should such occur, there is no specific period of time during which the Applicant can file his petition for permanent total disability benefits. For now, he is limited to the maximum benefits provided under Section 35-1-67. The insurance carrier will continue to make payments to the Applicant until such time as the total sum of \$61,152.00 has been paid out. There remains to be paid the approximate sum of \$2500.00.

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CONCLUSIONS OF LAW:

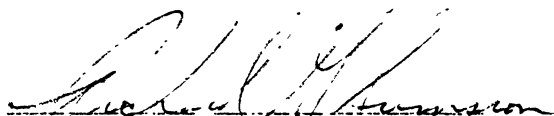
The Applicant is entitled to Worker's Compensation benefits as a result of his industrial accident of October 9, 1980 in accordance with the foregoing Findings of Fact.

ORDER:

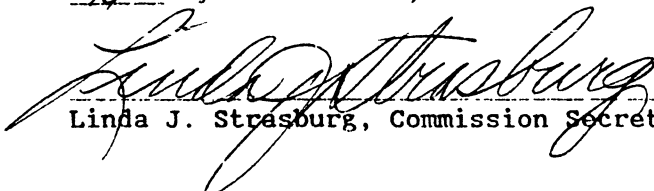
IT IS THEREFORE ORDERED that the Defendants, Harsco/Heckett and/or INA/Aetna pay Applicant compensation at the rate of \$196.00 per week until such time as it has paid the total sum of \$61,152.00 representing 85% of the state average weekly wage at the time of the Applicant's injury payable over a period of 312 weeks.

IT IS FURTHER ORDERED that Defendants pay all medical expenses incurred as the result of this accident; said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal.

  
Richard G. Sumsion  
Administrative Law Judge

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this  
19th day of December, 1985.

  
Linda J. Strasburg, Commission Secretary

**CERTIFICATE OF MAILING**

I certify that on December 18, 1985, a copy of the attached Findings of Fact, Conclusions of Law and Order in the case of Kenneth Johnson issued December 18, 1985, was mailed to the following persons at the following addresses, postage paid:

Kenneth Johnson, 1709 West 120 South, Provo, UT 84601

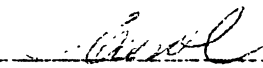
Harsco/Heckett, P.O. Box 5, Provo, UT 84601

Colleen Richardson, INA/Aetna, 455 East South Temple, SLC, UT 84110

Mary C. Corporon, Atty., 1100 Boston Bldg., 9 Exchange Place  
Salt Lake City, Utah 84111

Robert J. Shaughnessy, Atty., 543 East 500 South, #3, SLC, UT 84102

**THE INDUSTRIAL COMMISSION OF UTAH**

By   
Carol Olson



MARY C. CORPORON  
Attorney for Applicant  
CORPORON & WILLIAMS  
1100 Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111  
(801) 328-1162

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THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000816

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KENNETH JOHNSON,

Applicant,

MOTION FOR REVIEW

-vs-

HARSCO/HECKETT and INSURANCE COMPANY  
OF NORTH AMERICA/AETNA,

Defendants.

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APPLICANT TO THE ABOVE-ENTITLED ACTION, by and through his counsel of record, Mary C. Corporon, hereby requests that the decision before the Industrial Commission of Utah in the above-referenced matter entered on or about December 18, 1985, be reviewed. In support of this Motion for Review, applicant specifies the following particular errors and objections to the court's Findings, Conclusions and Order of December 18, 1985;

In its Order of December 18, 1985, the Industrial Commission of the State of Utah has determined that applicant is entitled to receive 85% of the state average weekly wage at the time of the applicant's injury, payable over a period of 312 weeks. Applicant asserts that he is entitled to receive benefits up to a maximum of two 312 week periods of disability, the first being for a period of temporary total disability, and the second being for a period of permanent partial disability.

Applicant does not dispute the Findings of Fact entered on December 18, 1985.

Utah Code Annotated, Section 35-1-65 (1981, as amended) provides that injured workers may receive compensation for temporary disability so long as such disability is total. The first paragraph of subsection (1) of this statute states: "In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury." (emphasis added)

Further, Utah Code Annotated, Section 35-1-66 (1983 as amended) provides that injured workers may receive compensation for permanent partial disability. The tenth full paragraph of this statute states that such benefits may be received but shall not exceed "...in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function."

The findings of the Industrial Commission indicate that the applicant has suffered a period of temporary total disability from the date of his injury on October 9, 1980, until May 15, 1985, the day applicant was able to return to work. Further, the medical records and medical evidence indicate that applicant has suffered permanent partial disability, and that his disability rating is a 79% permanent partial impairment. Clearly, applicant has suffered injury and losses in two categories, one being temporary total disability and the other being permanent partial disability.

The Utah Code distinguishes clearly between temporary total disability and permanent partial disability. Section 35-1-65 provides for a rate of compensation and a period of compensation for temporary total

disability. Utah Code Annotated Section 35-1-66 provides for a rate of compensation and a period of compensation for permanent partial disability. Section 35-1-65 provides that the maximum term of compensation for temporary disability is 312 weeks. Section 35-1-66 provides that the maximum term of compensation for temporary total disability is 312 weeks. These two statutory provisions should be read independently, and should be read as providing for separate periods of compensation for separate classifications of loss or injury. Hence, applicant would be entitled to receive temporary total disability benefits commencing September 19, 1985 and continuing through May 15, 1985. After May 15, 1985, he would be entitled to receive temporary total disability at the statutory rate, based upon his temporary total disability rating of 79% permanent partial impairment, and he would be entitled to receive such temporary total disability benefits for a maximum period of 312 weeks commencing May 15, 1985.

The Administrative Law Judge in entering the order of December 18, 1985 has relied on Utah Code Annotated Section 35-1-67 (1985 as amended) for the proposition that the maximum period of compensation to which applicant is entitled is 312 weeks. First, this section applies only to circumstances in which an injured worker is permanently and totally disabled. Clearly, this does not apply to applicant in the instant case. For this reason, applicant benefits should be computed under Sections 35-1-65 and 35-1-66, and not under the statutory provision dealing with permanent total disability. Further, to the extent that the last paragraph of Section 35-1-67 is applicable to claimant's case, it is in direct contradiction with the provisions of Section 35-1-65 and 35-1-66. Where such a conflict exists, the remedial purposes of the Worker's

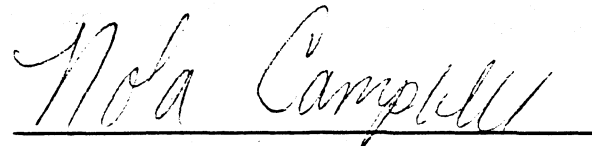
Compensations/ laws should govern, and an applicant who has suffered these severe injuries sustained by claimant herein should be deemed entitled to compensation as he has requested.

DATED this 30 day of December, 1985.

CORPORON & WILLIAMS

  
\_\_\_\_\_  
MARY C. CORPORON  
Attorney for Applicant

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY of the foregoing was mailed, postage pre-paid in the United States mail to: Harsco/Heckett, P.O. Box 5, Provo, Utah 84601; Colleen Richardson of INA Aetna, 455 East South Temple, Salt Lake City, Utah 84110; Robert J. Shaughnessy, Attorney at Law, 543 East 500 South #3, Salt Lake City, Utah 84102, this 30 day of December, 1985.

  
\_\_\_\_\_  
SECRETARY

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000816

KENNETH JOHNSON,

Applicant,

vs.

HARSCO/HECKETT and/or  
INSURANCE COMPANY OF  
NORTH AMERICA/AETNA,

Defendants.

DENIAL OF

MOTION FOR REVIEW

\* \* \* \* \*

On or about December 18, 1985, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about December 31, 1985, the Commission received a Motion for Review from the Applicant by and through his attorney.

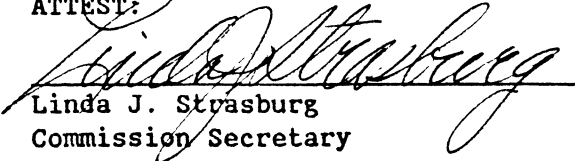
Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

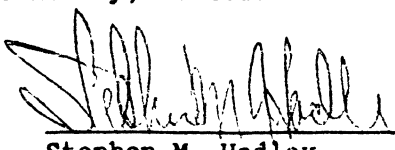
IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of December 18, 1985, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

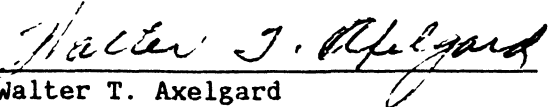
Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this


21<sup>st</sup> day of January, 1986.

ATTEST:

  
Linda J. Strasburg  
Commission Secretary

  
Stephen M. Hadley  
Chairman

  
Walter T. Axelgard  
Commissioner

  
Lenice L. Nielsen  
Commissioner

CERTIFICATE OF MAILING

I certify that on January 21<sup>st</sup>, 1986, a copy of the attached Denial of Motion for Review in the case of Kenneth Johnson, issued January 21<sup>st</sup> 1986, was mailed to the following persons at the following addresses, postage paid:

Kenneth Johnson, 1709 West 120 South, Provo, UT 84601


~~Mary~~ C. Corporon, Atty., 1100 Boston Bldg., 9 Exchange Place, SLC, UT 84111

Harsco/Heckett, P O. Box 5, Provo, UT 84601

INA/Aetna, Attn: Colleen Richardson, P. O. Box 390, SLC, UT 84110

Robert J. Shaughnessy, Atty., 543 East 500 South ~~4~~ #3, SLC, UT 84102

THE INDUSTRIAL COMMISSION OF UTAH

By   
Wilma