1988

Douglas Youngfield and Industrial Commission of Utah v. Smith and Edwards Co and/or Workers' Compensation Fund of Utah: Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SMITH & EDWARDS COMPANY, and/or WORKERS' COMPENSATION FUND OF UTAH,	:	Case No. 880114-CA
Defendants/Appellants,	:	
v.	:	
DOUGLAS YOUNGFIELD, and INDUSTRIAL COMMISSION OF UTAH,	:	
	:	Category No. 6
Respondents.	:	

BRIEF OF RESPONDENT

AN APPEAL FROM AN ORDER OF THE INDUSTRIAL COMMISSION OF UTAH AWARDING WORKERS' COMPENSATION TO THE APPLICANT, DOUGLAS YOUNGFIELD, FOR INJURIES RECEIVED DURING THE COURSE OF HIS EMPLOYMENT IN ACCORDANCE WITH UTAH CODE ANN. § 35-1-45 (1988).

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from an order of the Industrial Commission of Utah awarding workers' compensation to the applicant, Douglas Youngfield, for injuries received during the course of his employment in accordance with Utah Code Ann. § 35-1-45 (1988). This Court has jurisdiction to hear the appeal under Utah Code Ann. §§ 35-1-86 (1988), 63-46b-16 (Supp. 1987) and 78-2a-3(a) (1987).

STATEMENT OF THE ISSUES

1. Whether the Industrial Commission properly found Mr. Youngfield's injury to be the result of an accident.

2. Whether the Industrial Commission properly found a legal causal connection between Mr. Youngfield's injury and his employment.

3. Whether not referring the issue of medical causation to a medical panel can represent an abuse of discretion where the ALJ followed the Industrial Commission's rules and regulations.

4. Whether evidence of medical causation is sufficiently established in the record.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Utah Code Ann. § 35-1-45 (1988).

2. Utah Code Ann. § 35-1-77 (1988).

3. Utah Admin. Code R490-2-18 (1987).

(The above provisions are reproduced verbatim in the addendum).

STATEMENT OF THE CASE

On February 5, 1987, applicant, Douglas Youngfield was injured in an industrial accident while employed by the Smith & Edwards Company (R. 3, 14). Applicant filed for a hearing before the Industrial Commission of Utah because his employer's insurance carrier refused to accept his claim (R. 3, 51).

On July 21, 1987 a hearing before Administrative Law Judge, Gilbert A. Martinez was conducted. During the course of the hearing, Mr. Youngfield testified and exhibits were entered into the record on his behalf. Defendants called no witnesses, offered no exhibits and did not attempt to produce any evidence. At the conclusion of the hearing, a motion was granted allowing defendants to supplement the record based on subsequent investigations (R. 49). The case was diaried for 30 days (R.

54). On August 5, 1987 defendants supplemented the record with i) the dates of Mr. Youngfield's employment and his earnings and ii) an affidavit concerning the weight of the box which Mr. Youngfield had lifted causing his injury.

On October 26, 1987 interim findings of fact, conclusions of law and an order were issued; Mr. Youngfield was awarded temporary total disability compensation, medical costs and attorney fees (R. 137-138). Claims for potential permanent partial disability were reserved until Mr. Youngfield had been rated by a qualified physician or orthopedic surgeon (R. 138).

On November 12, 1987, the defendants moved for a review of the findings of fact, conclusions of law and order previously issued or alternatively for an additional hearing to present further evidence with respect to the issue of legal causation (R. 140-141). The motion was referred to the entire Industrial Commission (R. 142). The Industrial Commission denied the motion for review and affirmed the Administrative Law Judge's Interim Order (R. 143-144).

STATEMENT OF THE FACTS

Douglas Youngfield was born on December 17, 1954 and is 33 years old (R. 36). On the date of the industrial accident Mr. Youngfield was employed by the Smith and Edwards Company and was earning a wage of $ 219.48 per week (R. 14, 27, 128). Although not married at the time, Mr. Youngfield had one dependant child under the age of eighteen (R. 13-14).

On February 5, 1987, applicant, Mr. Youngfield, during the course of his employment, performing his regular duties as a

stock clerk, was lifting cases of shotgun shells from a cart and loading them on a pallet (R. 14, 27). Mr. Youngfield testified as he lifted one of the boxes of shotgun shells, he turned to his left to put the box on the pallet and felt a sharp pain shoot from the center of his back down his right leg (R. 15). He dropped the box of shells and fell to the floor (R. 15). Mr. Youngfield estimated the weight of the individual boxes to be "in the neighborhood of 75 to a hundred pounds." (R. 33). The actual weight, after an exact weighing, was found to be 47½ pounds (R. 126, 132).

Mr. Youngfield approached his supervisor telling him he was unsure whether he would be able to work the rest of the day and sought lighter work (R. 15). Although told he could "go ahead and go home," Mr. Youngfield finished his shift though still experiencing pain (R. 15-16).

That night Mr. Youngfield had difficulty sleeping due to sharp pains in his back, right buttocks and down his right leg (R. 16). The pain continued the next day when he returned to work. Mr. Youngfield testified, "It was painful for [him] to even stand." (R. 16).

Following the accident, sometime between February 7-12, 1987, Mr. Youngfield sought chiropractic care from Dr. Richard Barton (See, R. 17, 62). Mr. Youngfield continued seeing Dr. Barton into May, approximately 15 visits (R. 17, 48).

On February 16, Mr. Youngfield visited Craig Julien, M.D.. After observing Mr. Youngfield's condition for two weeks, Dr. Julien recommended a magnetic resonance imaging (MRI) test

(R. 17-19, 65). The MRI test revealed a herniated disk and Dr. Julien referred Mr. Youngfield to a orthopedic surgeon (R. 31, 65).

Mr. Youngfield then had a one time visit Dr. Allison, an orthopedic physician and surgeon, who advised Mr. Youngfield on surgical possibilities (R. 23, 48). Dr. Allison diagnosed Mr. Youngfield as having a low grade S-1 radiculopathy on the right, and recommended conservative treatment, but stated that, should Mr. Youngfield develop intolerable back and leg pain, he could be a candidate for myelography and possible surgical intervention (R. 31, 73).

Mr. Youngfield has a history of related and unrelated medical conditions.

In July of 1985, Mr. Youngfield was involved in an automobile accident in which he was rear ended (R. 37). After the accident Mr. Youngfield complained of mid-back and neck pain and received chiropractic treatments from Dr. Margolies for three to four months (R. 37, 42, 44).

In April of 1983, while serving in the Military at Fort Carson, Mr. Youngfield was diagnosed as having a potentially fatal skin disease known as scleroderma morphea (R. 20, 22). The Veterans Administration pays Mr. Youngfield $ 69.00 per month based on a 10% disability rating (R. 12).

In November of 1983, Youngfield received 10 to 12 chiropractic treatments from Dr. Rick Weum in Colorado Springs (R. 45). Dr. Weum's report listed the treatments in response to

chronic low back pain and upper back pain radiating into the neck and shoulders (R. 46, 64).

And in March of 1977, Mr. Youngfield was X-rayed at St. Benedicts' Hospital for a strained lower back (R. 36, 40-41, 86-90).

On February 11, 1987 Mr. Youngfield's employment was terminated due to a reduction in force (R. 5, 47, 127). Mr. Youngfield returned to work for a different employer, The Gift House, on May 5, 1987 although still suffering some back pain (R. 32). His new duties were that of a salesman and pawn loan clerk (R. 33).

To date, Mr. Youngfield has not been paid any compensation or received any medical benefits (R. 24, 26).

SUMMARY OF ARGUMENT

In Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986), the Utah Supreme Court interpreted Utah Code Ann. § 35-1-45 (1988), the statute which creates a right to workers' compensation for persons suffering industrial accidents. In Allen, the court stated that the statute creates two prerequisites to finding a compensable injury; i) that the injury occurred by accident and ii) that a causal connection between the injury and worker's duties exist. The second requirement, a causal connection, includes both legal and medical causation.

In the present case, a review of the record and relevant case law establish that the ALJ made a proper finding of an accident as defined by Allen, in that the accident was "an

unexpected or unintended occurrence that may be either the cause or the result of an injury." Allen, 729 P.2d at 22.

The ALJ also properly found that a legal causal connection existed. Applying an objective standard, the ALJ properly determined that Mr. Youngfield's employment duties, which included lifting boxes which weighed 47½ lbs., required an exertion which was greater that of nonemployment life.

The record contains sufficient evidence from which to conclude that medical causation exits. Because Mr. Youngfield was the only party to offer evidence at the hearing, the evidence is unrebutted that a connection between Mr. Youngfield's exertion in lifting the box of shotgun shells and his injury exits. Furthermore, the ALJ did not abuse his discretion in not referring the issue of medical causation to a medical panel. Utah Code Ann. § 35-1-77 (1988) establishes that referrals to medical panels to determine medical causation is permissive and not required in every case. In the present case there can not be an abuse of discretion where i) none of the circumstances described in Utah Admin. Code R490-2-18 (1987), Guidelines for Utilization of Medical Panel, were present and ii) there was no "uncertain or highly technical" evidence respecting he issue of medical causation.

ARGUMENT

I. THE INDUSTRIAL COMMISSION PROPERLY FOUND MR. YOUNGFIELD'S INJURY TO BE THE RESULT OF AN ACCIDENT.

The Workers' Compensation Act, Utah Code Ann. § 35-1-45 (1988) states, "Every employee . . . who is injured . . . by

accident arising out of or in the course of his employment . . . shall be paid compensation for loss sustained on account of the injury . . . ." In Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986), the Utah Supreme Court interpreted § 35-1-45 as creating two prerequisites to finding a compensable injury. First the claimant must prove the injury occurred "by accident." An accident, as defined in Allen is "an unexpected or unintended occurrence that may be either the cause or the result of an injury." Allen, 729 P.2d at 22 (emphasis in original).

In the present case, defendants contend that the Industrial Commission confused the first prerequisite, a necessary finding of an "accident," with the second prerequisite, a causal connection between the injury and the employment (Br. App. 12). See, Allen, 729 P.2d at 18. Defendants argue:

> Given the respondent's preexisting condition and the fact that his chiropractor had warned in 1984 that "bending" and "lifting heavy objects" . . . would lead to the result which occurred on February 5, 1987, it is arguable whether the first prerequisite, accident, was established.

(Br. App. 12). A review of the Administrative Law Judge's (ALJ) interim order and relevant case law clearly demonstrate that such contention is without merit.

In Hone v. J.F. Shea Co., 728 P.2d 1008, 1011 (Utah 1986), the Utah Supreme Court stated:

> Whether the claimant had a preexisting condition is relevant to the issue of causation, but is not determinative of whether the injury occurred "by accident." The key question here is whether the occurrence was the unexpected cause or the injury or the unexpected result of an exertion. The evidence in this case reveals

> that the claimant unexpectedly and without any forewarning or anticipation injured his back while putting on his coveralls. None of the evidence indicated that the claimant had experienced repeated pain or injury as with an occupational disease or other foreseeable injury. Under these circumstances, the injury in the case at bar was "by accident."

(emphasis added).

In American Roofing Co. v. Industrial Comm'n, 752 P.2d 912, 914 (Utah App. 1988), this Court heard the argument that because the applicant had experienced bolts of pain his lower back and legs since a 1983 accident, a subsequent 1985 injury occurring when the applicant lifted a bucket of debris was not unexpected and therefore not "by accident". This Court held that such an injury was not expected or intended, and therefore a finding of "by accident" was not arbitrary and capricious but supported by the evidence. Id. at 915.

And in Lancaster v. Gilbert Dev., 736 P.2d 237 (Utah 1987), the Utah Supreme Court reversed the decision of an ALJ that a heart attack was not "by accident" where the claimant had experienced similar pains four days earlier. The court stated,

> there is nothing in the claimant's job duties to suggest that he would suffer a heart attack. There is overwhelming evidence that the claimant did not intend to have a heart attack, nor did he anticipate one. These factors . . . require the conclusion that the heart attack was by accident.

Id. at 239.

In the present case the ALJ took note of the definition of accident provided in Allen specifically citing it in his interim order, and then stated:

> Applying this standard to the case at bar, the Administrative Law Judge finds no difficulty in determining that the low back injury sustained by Youngfield occurred by accident. Certainly, Mr. Youngfield did not intend that he should develop low back problems in the course of performing his regular job duties, which included stocking and lifting boxes of shotgun shells. Under the standard of Allen, his injuries were the unexpected result of exertions which occurred at work and in the course of employment.

(R. 133-134).

This approach is in perfect harmony with the standard set forth in Allen and elaborated on in Hone, American Roofing Co. and Lancaster. Clearly, the ALJ's finding the injury in the present case was "by accident" is supported by the record and is not arbitrary and capricious.

Moreover, the ALJ, demonstrated proper understanding and application of the Allen test when he stated,

> This conclusion [injury "by accident"], however, does not completely answer the question of whether Mr. Youngfield is entitled to benefits under Section 35-1-45. As the Utah Supreme Court explained in Allen, the second element of a compensable accident requires proof of a causal connection between the injury and the worker's employment duties. . . . The majority then defines the term "arising out of or in the course of employment" to impose legal and medical causation requirements.

(R. 134).

Defendants' contention that the ALJ confused the two prerequisites of the Allen test and did not make a proper finding that Mr. Youngfield's injury occurred "by accident" is wholly without merit.

II. THE INDUSTRIAL COMMISSION PROPERLY FOUND A LEGAL CAUSAL CONNECTION BETWEEN MR. YOUNGFIELD'S INJURY AND HIS EMPLOYMENT.

The second element of a compensable accident requires proof of a causal connection between the injury and the worker's employment duties. Allen, 729 P.2d at 22 (citation omitted). In order to establish the causal connection, the court adopted a two-prong test which dictates that both legal and medical causation be established. Id. at 25.

To establish legal causation the court adopted the approach advanced by Professor Larson in Workmen's Compensation (1986).

> To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition.

Allen, 729 P.2d at 25. Larson describes the application of the rule as follows:

> If there is some personal causal contribution in the form of a [preexisting condition], the employment contribution must take the form of an exertion greater than that of nonemployment life. . . .
>
> If there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the employment and causally connected with the [injury] as matter of medical fact is adequate to satisfy the legal test of causation.

Allen, 729 P.2d at 26.

In the present case, because Mr. Youngfield suffered from preexisting conditions, the proper focus rests on whether the exertion necessary to lift the box of shotgun shells weighing 47½

lbs. is greater than that of nonemployment life. In making such a determination the court emphasized that an objective standard must be utilized. Id.

> In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected of people in today's society, not what this particular claimant is accustomed to doing. Typical activities and exertions expected of men and women in the latter part of the 20th century, for example include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height and climbing the stairs in buildings. By using an objective standard, the case law will eventually define a standard for typical "nonemployment activity" in much the way case law has developed the standard of care for the reasonable man in tort law.

Id. at 26-27.

In the case at hand the ALJ took judicial notice that lifting objects weighing 20 lbs. or less would not satisfy the unusual exertion test for a person with a preexisting condition mandated by Allen (R. 135, See, Allen, 729 P.2d at 26 footnote 8). The ALJ also took judicial notice that lifting objects weighing 80 lbs. or more would satisfy an "unusual or extraordinary exertion" for a Twentieth Century person in non-employment life (R. 135). The issue of legal causation ultimately turned on the ALJ's resolution of whether 47½ lbs., an intermediate weight, satisfied the threshold for legal causation.

The record indicates that the ALJ applied the proper standard of preponderance of the evidence in making his determination (R. 135, Allen, 729 P.2d at 23). The record is also clear that the ALJ applied an objective standard in trying to

determine what qualifies as an "unusual exertion" for the typical Twentieth Century individual and never attempted to determine to what Mr. Youngfield was personally accustomed (R. 135-136). The question proved difficult because the objective standard for nonemployment activity dictated by Allen remains relatively new and case law has not elaborated on the standard beyond the minimal guidelines suggested by Allen, i.e. taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height and climbing the stairs in buildings. See, Allen, 729 P.2d at 26.

The court in Allen noted, "There is no fixed formula by which the causation issue may be resolved, and the issue must be determined on the facts of each case." Allen, 729 P.2d at 25. Defendants, in order to upset the finding that legal causation existed in the present case, are required to demonstrate that the decision of the ALJ was arbitrary and capricious. American Roofing Co., 752 P.2d at 915; See, Lancaster v. Gilbert Dev., 736 237 at 241 (Utah 1987). Defendants' assertions that the record contains no evidence to support the ALJ's finding of legal causation or that the ALJ failed to apply an objective standard are not supported by a proper reading of the record. On the contrary, the record confirms that the ALJ followed the proper steps for determining whether legal causation exits.

> The question of whether the employment activities of a given employee are sufficient to satisfy the legal standard of unusual or extraordinary effort involves two steps. First, the agency must determine as a matter of fact exactly what were the employment-related activities of the injured employee. Second, the agency must decide whether those

> activities amounted to unusual or extraordinary exertion.

Price River Coal Co. v. Industrial Comm'n, 731 P.2d 1079, 1082 (Utah 1986). The ALJ determined as a matter of fact that Mr. Youngfield's employment related duties included lifting boxes of shot gun shells (R. 134), and that the exertion required to perform that activity was unusual and extraordinary (R. 137). Accordingly, the ALJ's finding that legal causation existed could not conceivably be held to be arbitrary and capricious and should, therefore, be affirmed.

III. REFERRING THE ISSUE OF MEDICAL CAUSATION TO A MEDICAL PANEL CANNOT REPRESENT AN ABUSE OF DISCRETION WHERE THE ALJ FOLLOWED THE INDUSTRIAL COMMISSION'S RULES AND REGULATIONS.

The second prong of the casual connection places the burden of showing medical causation on the claimant. However, proof of medical causation is not restricted to any one method and an applicant is given broad discretion in the type of evidence which may be proffered.

> Under the medical cause test, the claimant must show by evidence, opinion or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability.

Allen, 729 P.2d at 27 (emphasis added).

In Hone v. J.F. Shea Co., 728 P.2d 1008 (Utah 1986), the claimant argued the ALJ erred in not referring his case to a medical panel. The court noted the reference to a medical panel is controlled by statute.

> In 1982, the legislature amended U.C.A. 1953, § 35-1-77 and changed the requirement of a

mandatory referral to the medical panel to a permissive referral. Under the statute as now written, "the commission may refer the medical aspects of the case to a medical panel appointed by the commission."

Id. at 1012 (Emphasis added).

Utah Admin. Code R490-2-18 provides as follows:

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. Significant medical issues are involved when there are:

(a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person; or

(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than ninety (90) days; or

(c) Medical expenses in controversy amounting to more than $ 2,000.

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

3. 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.

4. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or evidence showing a need to clarify the medical panel report.

5. 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:

(a) The treating physician has failed or

refused to given an impairment rating;
(b) The employer or doctor considers the claim to be non-industrial;
(c) A substantial injustice may occur without such further evaluation.

In the present case none of the above conditions existed which necessitated the need to refer the case to a medical panel. In fact, not only was there a lack of significant medical issues, a conflict in medical opinions or reports or disputed expenses, defendants never challenged the issue of medical causation at the evidentiary hearing or in their request for review before the entire Industrial Commission. Instead, defendants have, until the present appeal, focused all of their arguments exclusively on the issue of legal causation.

Under the circumstances, where the issue of medical causation was never challenged and the ALJ properly followed the guidelines set forth by the Utah Administrative Rules governing referral of a case to a medical panel, the ALJ could not have abused his discretion by not referring the case to a medical panel.

Defendants' reliance on Champion Home Builders v. Industrial Comm'n, 703 P.2d 306, 308 (Utah 1985), for the proposition that referral to a medical panel is necessary in order to determine medical causation is unfounded. In the present case, evidence of the causal connection was not "uncertain or highly technical" as required by Champion Home Builders. As previously mentioned, during the evidentiary hearing Mr. Youngfield offered the only testimony. Defendants arguments at the hearing, when supplementing the record, and on motion for review, focused

exclusively on the issue of legal causation. As a result there was no "uncertain or highly technical" evidence respecting the issue of medical causation.

IV. EVIDENCE OF MEDICAL CAUSATION IS SUFFICIENTLY ESTABLISHED AND UNREBUTTED IN THE RECORD.

A proper analysis of medical causation differs significantly from legal causation. In medical causation the focus is whether "there was a physiological causal linkage between the injury and the job activity." Holloway v. Industrial Comm'n, 729 P.2d 31, 32 (Utah 1986) (J. Zimmerman concurring). Stated in other words, the key question in medical causation is whether, given the worker's body and worker's exertion, the exertion in fact contributed to the injury. Allen, 729 P.2d at 24. Legal causation on the other hand, focuses solely on the issue of whether the nature of the exertion is sufficient to hold the employer legally liable for the resulting injury. Id. at 25.

Based on the evidence in the record, as Mr. Youngfield lifted a box of shotgun shells, he turned to his left to put the box on the pallet and felt a sharp pain shoot from the center of his back down his right leg (R. 15). No attempt was ever made to rebut this evidence. Given this evidence, the only evidence, the record establishes sufficient evidence to conclude that Mr. Youngfield's exertion, lifting the box, contributed to his injury.

Upon review of cases in which the standards established in Allen are applied without a previous finding respecting medical causation, the Utah Supreme Court has concluded where appropriate that medical causation has been established from the record. Utah

Transit Authority v. Booth, 728 P.2d 1012, 1014 (Utah 1986); Miera v. Industrial Comm'n, 728 P.2d 1023, 1025 (Utah 1986); and Richfield Care Center v. Torgerson, 733 P.2d 178, 180 (Utah 1987). In the present case, although the ALJ did not make a specific finding of medical causation, it is amply established by the evidence.

If however, this Court should require a specific finding of medical causation before affirming the decision of the Industrial Commission, this Court should consider remanding the case back to Industrial Commission in order to afford it an opportunity to enter its finding which would then become reviewable. If this Court does not conclude that medical causation is established by the record, such a procedure would be most appropriate since the issue of medical causation was never contested during the hearing or on defendants' motion for review. To allow defendants to overturn the order of Industrial Commission on the basis of an argument never presented to the Commission would not serve the purposes of appellate review in overseeing the correctness of lower court decisions based on the evidence and arguments presented to it.

CONCLUSION

Based on the forgoing arguments, respondent respectfully request this Court to affirm the order of the Industrial Commission of Utah in awarding applicant, Douglas Youngfield workers' compensation benefits, or in the alternative to remand the case back to the Industrial Commission allowing it

an opportunity to enter findings relevant to medical causation, which would then make the case ripe for appellate review.

Dated this 11th day of August, 1988.

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CERTIFICATE OF MAILING

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ADDENDUM

Injury arising out of or in course of employment.

"Act of God" is not by implication excluded in Subdivision (5) of this section. State Rd. Comm'n v. Industrial Comm'n, 56 Utah 252, 190 P. 544 (1920).

Where mine superintendent was killed by holdup bandits as he entered store to purchase cigar for his own use, his death was not compensable as "accidental" injury within this section since in order to recover for accidental injury there must be some causal connection or relation between act causing injury and employment or duties of injured employee. Westerdahl v. State Ins. Fund, 60 Utah 325, 208 P. 494 (1922).

Where state road employee while working on road sought shelter from storm and was struck by lightning, the accident arose out of and in course of employment. State Rd. Comm'n v. Industrial Comm'n, 56 Utah 252, 190 P. 544 (1920).

Under Subdivision (5) although an employee is employed on the day of an accident, it cannot be said he is in the course of his employment where he steps aside to engage in an altercation with some third person concerning a personal grievance wholly unrelated to matters connected with his employment. Wilkerson v. Industrial Comm'n, 71 Utah 355, 266 P. 270 (1928).

Wife of deceased drugstore employee was not entitled to compensation where she did not sustain burden of proving that typhoid fever was result of injury received in course of his employment. Chase v. Industrial Comm'n, 81 Utah 141, 17 P.2d 205 (1932).

Death of beer truck driver after being taken to the hospital when he had a severe pain in his chest after making his second morning delivery, did not result from an accident arising out of or in the course of his employment, where substance of opinions of medical panel was that death from coronary thrombosis with myocardial infarction was not caused from the exertion of deceased's work on that morning. Burton v. Industrial Comm'n, 13 Utah 2d 353, 374 P.2d 439 (1962).

Regular course of employment.

Bricklayer killed in automobile accident while returning home from work was not killed in an accident arising out of or in the course of employment despite fact that decedent's hourly wage had been increased due to location of construction site; increased hourly wage did not constitute pay for travel time. Barney v. Industrial Comm'n, 29 Utah 2d 179, 506 P.2d 1271 (1973).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 1.

A.L.R. — Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.

Workmen's compensation: injury or death due to storms, 42 A.L.R.3d 385.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A.L.R.3d 566.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A.L.R.3d 505.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Workers' compensation: sexual assaults as compensable, 52 A.L.R.4th 731.

Key Numbers. — Workers' Compensation ⇐ 47.

35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

35-1-77. Medical panel — Medical director or medical consultants — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses.

(1) (a) 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 if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission. The panel shall have the qualifications generally applicable to the medical panel under Section 35-2-56.

(b) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the commission in its sole discretion may employ a medical director or medical consultants on a full-time or part-time basis for the purpose of evaluating the medical evidence and advising the commission with respect to its ultimate fact-finding responsibility. If all parties agree to the use of a medical director or medical consultants, they shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) The medical panel, medical director, or medical consultants shall make such study, take such X-rays, and perform such tests, including post-mortem examinations if authorized by the commission, as it may determine to be necessary or desirable.

(b) The medical panel, medical director, or medical consultants shall 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.

(c) The commission shall promptly distribute full copies of the report to the applicant, the employer, and its insurance carrier by registered mail with return receipt requested. Within 15 days after the report is deposited in the United States post office, the applicant, the employer, or its insurance carrier may file with the commission written objections to the report. If no written objections are filed within that period, the report is considered admitted in evidence.

(d) The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding.

(e) If objections to the report are filed, the commission may set the case for hearing to determine the facts and issues involved. At the hearing, any party so desiring may request the commission to have the chairman of the medical panel, the medical director, or the medical consultants 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 or the medical director or medical consultants, to be present at the hearing for examination and cross-examination.

(f) The written report of the panel, medical director, or medical consultants may be received as an exhibit at the hearing, but may not be considered as evidence in the case except as far as it is sustained by the testimony admitted.

(g) The expenses of the study and report of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the Employers' Reinsurance Fund.

History: L. 1951, ch. 52, § 1; C. 1943, Supp., 42-1-71.10; L. 1955, ch. 57, § 1; 1969, ch. 86, § 9; 1979, ch. 138, § 6; 1982, ch. 41, § 1; 1988, ch. 116, § 7.

Amendment Notes. — The 1988 amendment, effective July 1, 1988, designated the previously undesignated first sentence as Subsection (1)(a), the previously undesignated second sentence as Subsections (2)(a) and (2)(b), the previously undesignated third and fourth sentences and the beginning of the previously undesignated fifth sentence as Subsection (2)(c), the end of the previously undesignated fifth sentence as Subsection (2)(d), the previously undesignated sixth and seventh sentences as Subsection (2)(e), the previously undesignated eighth sentence as Subsection (2)(f) and the previously undesignated ninth sentence as Subsection (2)(g). The amendment also, in Subsection (1), added Paragraph (b) and, in Paragraph (a), divided the formerly undivided language into two sentences and made a series of minor stylistic changes; in Subsection (2)(a), inserted "medical director, or medical consultants", substituted "to be necessary or desirable" for "and thereafter" and made a series of minor stylistic changes; added "The medical panel, medical director, or medical consultants shall" at the beginning of Subsection (2)(b); in Subsection (2)(c), deleted "of the panel" following "report" in the first sentence, inserted "written" in the last two sentences and made a series of minor stylistic changes throughout the subsection; in Subsection (2)(d), inserted "medical director, or medical consultants", deleted "by the commission" at the end and made a series of minor stylistic changes; in Subsection (2)(e), divided the former first sentence into the present first two sentences, inserted "the medical director, or the medical consultants" in the second sentence and "or the medical director or medical consultants" in the third sentence and made a series of minor stylistic changes throughout the subsection; in Subsection (2)(f) inserted "medical director, or medical consultants" and "at the hearing" and made a series of minor stylistic changes; and rewrote Subsection (2)(g), which read "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 by § 35-1-68."

NOTES TO DECISIONS

Analysis

Duty of commission on remand of case.

Where an order of the commission was vacated and the cause remanded because of a deficiency in the evidence to support the report of a medical panel appointed by the commission, the commission was not required to make an award based solely on the plaintiff's evidence; but it was the responsibility of the commission to make some disposition of plaintiff's application for an award and it was the prerogative of the commission to make a determination upon the evidence in the light of the decision of the Supreme Court or to order and hold a supplemental hearing to allow the parties to present additional evidence. Hackford v. Industrial Comm'n, 12 Utah 2d 250, 364 P.2d 1091 (1961).

Effect of 1982 amendment.

The 1982 amendment of this section, making the granting of a hearing discretionary, does not enlarge or destroy vested or contractual

R490-2-11. Hospital Fees Separate

Fees covering hospital care shall be separate from those for professional services and shall not extend beyond the actual necessary hospital care. When it becomes evident that the patient needs no further hospital treatment, he must be discharged. All billings must be properly itemized and coded.

R490-2-12. Charges for Special Drugs, etc.

Charges for reasonably prescribed and administered supplies shall be paid upon receipt of an itemized, coded billing.

R490-2-13. Charges for Ordinary Drugs, etc.

Fees covering ordinary dressing materials or drugs used in treatment shall not be charged separately but shall be included in the amount allowed for office dressings or treatment. If the record of the case shows that it was necessary to use an extraordinary amount of dressing material or drugs, as in treating large infected wounds or burns, these extra dressing materials or drugs will be paid for at cost.

R490-2-14. Fees for Unscheduled Procedures

Fees for medical or surgical procedures not appearing in the Commission's current fee schedule publication are subject to the Commission's approval and should be submitted to the Commission when the physician and employer or insurance carrier do not agree on the value of the service. Such fees shall be in proportion as nearly as practicable to fees for similar services appearing in this schedule.

R490-2-15. Dental Injuries

Where a worker sustains an accident in the course of his employment resulting in the loss of or injury to teeth, making dental work necessary, the injured worker shall consult a dental surgeon and receive such first aid as may be necessary to preserve, if possible, the normal function of the injured teeth. The dental surgeon shall then file with the insurance carrier a report setting forth the nature of the injury together with an estimate of the cost of restoration. The dental surgeon shall not proceed with the restoration until authority has been granted by the insurance carrier, provided, however, that if an employer maintains a medical staff or designates a company doctor, the employee shall first report to that medical staff or medical officer and be guided by directions then given. If the carrier refuses payment at the level estimated by the dental surgeon, the employee may choose to pay the difference and seek adjudication by Application for Hearing. A dental surgeon may choose to settle for the payment allowed, or the carrier shall direct the employee to a dental surgeon who will provide his services at the payment level specified by the carrier.

R490-2-16. Ambulance Charges

Ambulance charges must not exceed the rates adopted by the State Emergency Medical Service Commission for similar services.

R490-2-17. Travel Allowance/Per Diem

A. An employee who, based upon his/her physician's advice, requires hospital, medical, surgical, or consultant services for injuries arising out of or in the course of employment and who is authorized by the self-insurer, the carrier, or the Industrial Commission of Utah to obtain such services from a physician and/or hospital shall be entitled to:

(1) Actual and reasonable subsistence expenses not to exceed $15 per day for meals and not to exceed $25 per day for lodging, provided:

a. The employee travels to a community other than his/her own place of residence and the distance from said community and the employee's home prohibits return by 10:00 p.m. and

b. The absence from home is necessary at the normal hour for the meal billed; and

(2) Reasonable travel expenses, regardless of distance, amounting to the lesser of:

a. Taxi fare,

b. Bus fare,

c. Train fare, or

d. $.20 per mile for private conveyance.

B. This rule applies to all travel to and from medical care with the following restrictions:

(1) The carrier is not required to reimburse the injured employee more often than every three months, unless

a. More than $100 is involved or

b. The case is about to be closed, and

(2) All travel must be by the most direct route and to the nearest location where adequate treatment is reasonably available.

(3) Travel may not be required between the hours of 10:00 p.m. and 6:00 a.m., unless approved by the Commission.

(4) The Industrial Commission shall have jurisdiction to resolve all disputes.

R490-2-18. 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. Significant medical issues are involved when there are:

(a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person; or

(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than ninety (90) days; or

(c) Medical expenses in controversy amounting to 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 the medical considerations.

3. 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, cost s to be assessed against the employer and/or Second Injury Fund.

4. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or evidence showing a need to clarify the medical panel report.

5. 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:

(a) The treating physician has failed or refused to give an impairment rating;

(b) The employer or doctor considers the claim to be non-industrial;

(c) A substantial injustice may occu
further evaluation.

R490-2-19. Notice to Health Care Pro

Any notice from a carrier denying
must be mailed to the Commission
on the same day as it is mailed to
provider. Where it can be shown,
medical care provider and the injured
received a denial of further care by
carrier or self-insured employer, fur
may be performed at the expense of
Any future ratification of the denial
ission will not be considered a retroac
will serve to uphold the force and
previous denial notice.

R490-2-20. Medical Records

Medical practitioners shall provi
medical records to the parties to an
for the following rates:

A. The first 20 copies at $.50 each an

B. the remainder at $.35 each fo
from microfilmed records, and

C. $.25 each for copies made from or

D. These charges are designed to
costs of copying and the wages of
work.

E. Those persons or entitites entitl
medical records involving an industria

(1) The injured employee,

(2) The employer of the injured empl

(3) The employer's workers' comp
rance carrier,

(4) The Uninsured Employer;s
Indemnity Fund prior to July 1, 1986),

(5) The Second Injury Fund

(6) The Industrial Commission, and

(7) Any attorney representing any
the industrial matter.

F. Any other person or entity woul
tled unless ordered by a Court or p
notarized release executed by the injure

G. The Industrial Commission will
these same rules in the release of any
files.

H. It is highly recommended that th
industrial case coordinate their reque
to minimize requests made of medical p

1987 35-1-90, 35-1-96, 35-1-10, 35-1-81, 35-1-77

R490-3. Workers' Compensati
and Regulations - Self Insuran

R490-3-1. Definitions

A. Reserve is defined as the amoun
satisfy all debts, past, present, and fu
by reason of an industrial accident o
disease, the origin of which commence
date of reserve determination.

B. Aggregate Excess Insurance is
amount of insurance required to ec
accumulated workers' compensation b
claims payable for a given period of

employee travels to a community other
her own place of residence and the dist-
m said community and the employee's
hibits return by 10:00 p.m. and
absence from home is necessary at the
our for the meal billed; and
sonable travel expenses, regardless of dis-
ounting to the lesser of:
fare,
fare,
n fare, or
per mile for private conveyance.
is rule applies to all travel to and from
are with the following restrictions:
e carrier is not required to reimburse the
employee more often than every three
unless
e than $100 is involved or
case is about to be closed, and
travel must be by the most direct route and
earest location where adequate treatment is
ly available.
avel may not be required between the hours
p.m. and 6:00 a.m., unless approved by the
sion.
ie Industrial Commission shall have jurisdi-
resolve all disputes.

18. Guidelines for Utilization of Medical

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the necessity of submitting a case to a
panel:
panel will be utilized where:
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m by conflicting medical reports. Significant
issues are involved when there are:
Conflicting medical reports of permanent
l impairment which vary more than 5% of
le person; or
Conflicting medical opinions as to the temp-
otal cutoff date which vary more than ninety
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ledical expenses in controversy amounting to
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lependent medical evaluation, cost s to be
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The Commission may authorize an injured
to be examined by another physician for the
e of obtaining a further medical examination
luation pertaining to the medical issues invo-
and to obtain a report addressing these
l issues in all cases where:
The treating physician has failed or refused to
impairment rating;
The employer or doctor considers the claim to
industrial;

(c) A substantial injustice may occur without such further evaluation.

R490-2-19. Notice to Health Care Providers

Any notice from a carrier denying further liability must be mailed to the Commission and the patient on the same day as it is mailed to the health care provider. Where it can be shown, in fact, that a medical care provider and the injured employee have received a denial of further care by the insurance carrier or self-insured employer, further treatment may be performed at the expense of the employee. Any future ratification of the denial by the Commission will not be considered a retroactive denial but will serve to uphold the force and effect of the previous denial notice.

R490-2-20. Medical Records

Medical practitioners shall provide copies of medical records to the parties to an industrial case for the following rates:

A. The first 20 copies at $.50 each and

B. the remainder at $.35 each for copies made from microfilmed records, and

C. $.25 each for copies made from originals.

D. These charges are designed to cover both the costs of copying and the wages of staff doing the work.

E. Those persons or entitites entitled to copies of medical records involving an industrial injury are:

(1) The injured employee,

(2) The employer of the injured employee,

(3) The employer's workers' compensation insurance carrier,

(4) The Uninsured Employer;s Fund (Default Indemnity Fund prior to July 1, 1986),

(5) The Second Injury Fund

(6) The Industrial Commission, and

(7) Any attorney representing any of the above in the industrial matter.

F. Any other person or entity would not be entitled unless ordered by a Court or provided with a notarized release executed by the injured worker.

G. The Industrial Commission will operate under these same rules in the release of any records in its files.

H. It is highly recommended that the parties to an industrial case coordinate their requests for records to minimize requests made of medical practitioners.

Amd: 35-1-98, 35-1-96, 35-1-10, 35-1-81, 35-1-77

R490-3. Workers' Compensation Rules and Regulations - Self Insurance

R490-3-1. Definitions
R490-3-2. Application
R490-3-3. Qualifying Requirements
R490-3-4. Administration of the Self-Insurance Program
R490-3-5. Notice of Certification for Self-Insurance or Denial and Renewal
R490-3-6. Revocation of right to self-insure

R490-3-1. Definitions

A. Reserve is defined as the amount necessary to satisfy all debts, past, present, and future, incurred by reason of an industrial accident or occupational disease, the origin of which commenced prior to the date of reserve determination.

B. Aggregate Excess Insurance is defined as the amount of insurance required to cover the total accumulated workers' compensation benefits for all losses payable for injuries given during any [illegible]

employer retaining an obligation for a designated amount as a deductible and the insurance company paying all amounts due thereafter up to a maximum total obligation.

C. Specific Excess Insurance is defined as the amount of insurance required to cover the workers' compensation benefits arising out of a specific occurrence (accident) or occupational disease under the Workers' Compensation Law with the employer retaining an obligation for a designated amount as a deductible and the insurance company assuming the obligation for all amounts due thereafter up to a maximum total obligation.

R490-3-2. Application

A. An employer seeking authorization to become self-insured under the provision of section 35-1-46(3) of the Utah Workers' Compensation Act must apply to the Industrial Commission, entitled "Application for Self Insurance."

B. The initial and all renewal applications must be completed and signed by the applicant.

C. The Commission will require an annual renewal application. Renewal applications will require an update of the initial information. Renewal information must be submitted at least forty-five (45) days before the self-insurance anniversary date. Failure to file a renewal application on time may result in an interruption of self insurance privileges.

R490-3-3. Qualifying Requirements

A. To quality, an employer must be in business for a period of not less than five years and shall demonstrate sufficient financial strength and liquidity of the business to assure that all obligations will be promptly met. An employer in business less than five years will be considered only if a pre-existing parent corporation (in business more than five (5) years) guarantees the liability. In cases of merger or name identification change, the history of the pre-existing entity will be considered for the five year requirement. Upon applying for self-insurance privileges, the applicant must forward a current, certified financial statement or other proof of financial ability to pay direct compensation and other expenses as provided by the Utah Code Annotated, Title 35. Mergers occurring after an entity is self-insured will require a new application by the merged entity. However, entities whose financial information can be obtained from Dun and Bradstreet will not be required to file financial statements unless clarification or supplemental statements are deemed appropriate or necessary.

B. Specific or aggregate excess insurance with policy limits and retention amounts acceptable are required as a condition of approval and continuation of self-insurance privileges.

C. A minimum $100,000.00 surety bond, an irrevocable letter of credit, or other acceptable security shall be required of each self-insurer.

D. No corporate surety shall be eligible to write self-insurers' surety bonds or excess insurance unless authorized to transact such business in this state.

E. Surety bonds must be issued on a prescribed form and shall be exchanged or replaced with another surety bond only if sixty days notice of termination of liability is given by the bonding company. The replacement bond must be issued on a form as prescribed by the Commission. No replacements will be authorized by the Commission

APPENDIX 1:

INTERIM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INDUSTRIAL COMMISSION OF UTAH

CASE No. 87000510

DOUGLAS YOUNGFIELD, Applicant, vs. SMITH & EDWARDS COMPANY and/or WORKERS COMPENSATION FUND OF UTAH and SECOND INJURY FUND, Defendants.	INTERIM FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on July 21, 1987, at 10:00 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Gilbert A. Martinez, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Joseph C. Foley, Attorney at Law.

The defendants were represented by Dennis V. Lloyd, Attorney at Law.

The Second Injury Fund was not present at the hearing.

At the commencement of the hearing, the parties set forth the issues to be resolved by the Administrative Law Judge, which include the following:

1. Whether the industrial incident of February 5, 1987, constitutes a compensable industrial accident under the Utah Workers' Compensation Act?

2. Whether or not the applicant is entitled to temporary total disability as a direct result of the industrial accident of February 5, 1987?

3. Whether liability should be apportioned between the defendant employer and the defendant Second Injury Fund?

4. Attorney's fees and interest, pursuant to Utah Code Annotated, Section 35-1-78 and 35-1-87.

At the conclusion of the hearing, the factual and medical issues were taken under advisement by the Administrative Law Judge. This case was diaried for thirty (30) days in order to allow the defendant employer and its insurer an opportunity to investigate the validity of the applicant's claim, regarding the actual weight of the object the applicant lifted at the time of his injury.

Based upon the testimony and evidence presented at the hearing, including the investigative report of the defendants dated August 5, 1987, and good cause appearing herein, the Administrative Law Judge finds as follows:

FINDINGS OF FACT:

The Administrative Law Judge hereby finds that the applicant in this matter, Douglas Youngfield, sustained an injury by accident on February 5, 1987, during the course of employment with the defendant employer, Smith & Edwards Company. On the date of the industrial accident, the applicant was performing his regular job duties as a stock clerk. At that time, the applicant was lifting a box of shotgun shells containing 25 small boxes of shells. The applicant testified that he lifted the box of shotgun shells from a cart to place the box onto a pallet. As the applicant lifted the box of shotgun shells and turned to the left to set the box onto a pallet, he felt a sharp pain into his low back, with pain radiating down into his right leg. The applicant was standing erect at the time of the injury, holding the box, and he felt the pain as he started to bend over to place the box of shotgun shells onto the pallet. The applicant testified that he did not know the exact weight of the box of shotgun shells, but estimated the weight to be approximately 75 pounds. He estimated the range of the weight of the box of shotgun shells to be between 75 to 100 pounds. After the hearing, the defendants were allowed an opportunity to investigate the claim and determine the exact weight of the box of shotgun shells. In an Affidavit dated August 10, 1987, Gary Utt, investigator for the defendant insurer, stated that Mike Casey, an employee of Smith & Edwards, and himself weighed the case of shotgun shells by using a scale maintained at the employer's premises. According to the Affidavit, the weight of the case of shotgun shells was 47-1/2 pounds, not the 75 pounds as estimated by the claimant in this matter.

Following this alleged industrial accident, the applicant sought chiropractic care from Richard Barton. The applicant received fifteen chiropractic treatments for his low back problems from Dr. Barton between February 7, 1987, to May of 1987. See Exhibit "A-2".

On February 16, 1987, the applicant visited Craig K. Julien, M.D.. See Exhibit "A-4". On February 26, 1987, the applicant underwent a magnetic resonance imaging test of his lumbar spine at the St. Benedict's Hospital.

The MRI test of the lumbar spine showed the following impression:

"Small focal herniation, L5-S1 rightward."

See Exhibit "A-5".

By way of history, the applicant testified he had prior low back problems before this industrial accident. In November of 1983, he visited a chiropractor in the State of Colorado for low back problems. The applicant received chiropractic care from Rick D. Weum, D.C., at the Colorado Springs Chiropractic Center. The applicant received twelve treatments for low back pain and shoulder problems from November 17, 1983, to May of 1984. On cross-examination, it was brought out that the applicant had low back problems dating back to 1977, when he was treated at the St. Benedict's Hospital for low back problems. In 1977, the applicant underwent x-rays of the lumbar spine regarding his low back problems.

In regard to non-related health problems, the applicant testified that he has a special skin disease entitled "Scleroderma Morphea." This skin disease was diagnosed in April of 1983, when the applicant was serving in the military at Fort Carson. The applicant testified that the Veteran's Administration has awarded him a 10% disability award for the skin disease, which has the potential of being terminal. The applicant receives approximately $69.00 per month from the Veteran's Administration for this skin disease.

In July of 1985, the applicant sustained injuries to his neck and mid-back as a result of an automobile accident when he was rear ended. The applicant testified that he received chiropractic treatment from Dr. Margolies from July of 1985, to October of 1985. The applicant testified that a personal injury claim has been filed and is still pending.

Following the current industrial accident of February 5, 1987, it appears from the medical records that the applicant has received basically chiropractic treatment. In addition, the applicant underwent the magnetic resonance imaging test at the St. Benedict's Hospital. Furthermore, on March 10, 1987, the applicant had a one time evaluation from Dr. B. E. Allison, orthopedic surgeon.

At the time of the industrial incident of February 5, 1987, the applicant, who is a 32-year-old male, was earning a weekly wage of $219.48 per week. The applicant was not married, however, he had one dependent child under the age of eighteen. Based upon this weekly wage and one dependent, the applicant qualifies for a compensation rate at $151.00 per week. The applicant was born on December 17, 1954, and his Social Security Number is 528-92-1497.

CONCLUSIONS OF LAW:

The key issue in this case is whether or not the applicant sustained a compensable industrial accident on February 5, 1987, during the course of employment with the defendant employer. Utah Code Annotated, Section 35-1-45, provides in pertinent part the following:

> "Every employee. . . who is injured. . . by accident arising out of or in the course of employment. . . shall be entitled to receive and shall be paid (compensation). . . "

The Utah Workers' Compensation Act fails to define what constitutes an injury "by accident". Since 1917, the Utah Supreme Court has attempted to provide guidelines regarding the definition of an accident. In the recent case of Allen v. Industrial Commission, 46 Utah Adv. Rep. 3 (Utah 1986), the Utah Supreme Court defined an accident as follows:

> ". . . An accident is an unexpected or unintended occurrence that may be either the cause or the result of the injury."

In other words, an accident is an "unexpected result", regardless of whether it is produced by a usual or an unusual event. This follows the definition of accident which was articulated in Carling v. Industrial Commission, 399 P.2d 202 (Utah 1965), where the Utah Supreme Court held that a compensable accident includes "the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such a manner as to properly fall" within the coverage of Section 35-1-45.

Applying this standard to the case at bar, the Administrative Law Judge finds no difficulty in determining that the low back injury sustained by Youngfield occurred by accident. Certainly, Mr. Youngfield did not intend that he should develop low back problems in the course of performing his

regular job duties, which included stocking and lifting boxes of shotgun shells. Under the standard of Allen, his injuries were the unexpected result of exertions which occurred at work and in the course of employment.

This conclusion, however, does not completely answer the question of whether Mr. Youngfield is entitled to benefits under Section 35-1-45. As the Utah Supreme Court explained in Allen, the second element of a compensable accident requires proof of a causal connection between the injury and the worker's employment duties. The majority opinion in Allen defines the term "accident" to mean "unexpected result." The majority then defines the term "arising out of or in the course of employment" to impose legal and medical causation requirements. See U.C.A., Section 35-1-45. Unfortunately, the requirement of "legal causation" has two different meanings, depending upon the physical condition of the employee at the time that he was employed by the employer. A worker having no pre-existing incapacities need only prove that the accident was caused by a "usual or ordinary exertion." However, in cases where the injured employee was suffering from pre-existing conditions, legal causation has a different meaning. Such a worker may receive compensation only if the employment contribution to the internal low back breakdown is "greater than that of non-employment life." Very simply, the Utah Supreme Court concluded in Allen that where the claimant suffers from a pre-existing condition, an unusual or extraordinary exertion is required to prove legal causation. Where there is no pre-existing condition, a usual or ordinary exertion is sufficient.

In the case at bar, the medical records contained in Exhibit "A-3", and "D-1" show that the applicant was suffering from pre-existing conditions into his low back. Even the applicant testified on the record that he had chiropractic care for low back problems from November of 1983, to May of 1984, at the Colorado Springs Chiropractic Center. On cross-examination, it was brought out that the applicant had low back problems dating back to 1977, when he was treated at the St. Benedict's Hospital for low back pain. Furthermore, in July of 1985, the applicant sustained injuries to his back as the result of an automobile accident when he was rear-ended. This evidence clearly establishes that the applicant had a pre-existing condition in his low back, and therefore the Administrative Law Judge is required to apply the higher standard of legal causation as set forth in the Allen case.

The key issue in this case now turns to the question of whether or not the lifting of an object weighing 47-1/2 pounds satisfies the higher legal standard for establishing legal causation. To meet the legal causation requirement involving a case with pre-existing conditions, the injured employee must establish that the employment contributed something substantial to increase the risk he already faced in everyday life. Allen v. Industrial Commission, 46 Utah Adv. Rep. 3 (Utah 1986) affirmed in Specialty Cabinet Company v. Montoya, 47 Utah Adv. Rep. 21 (Utah 1986).

In cases involving internal injuries such as low back problems, the issue is proof of a causal connection between the injury and the industrial event. Compensable injuries can be identified by first considering legal cause and then its medical cause. The standard of proof of a causal connection between the industrial incident and the complaints of pain is the preponderance of the evidence. Where the injured employee suffers from a pre-existing condition, such as the case at bar, an "unusual or extraordinary exertion" is required to prove legal causation. Unusual or extraordinary exertion must be defined objectively. The unusual exertion must be compared with non-employment life, instead of comparing it with employment activities that this or any other employee would have been engaged in. The unusual exertion must involve an exertion greater than that normally performed during non-employment life by a Twentieth Century person.

Whether lifting an object weighing 47-1/2 pounds constitutes "unusual exertion" for a Twentieth Century person in non-employment life is difficult to answer. The Administrative Law Judge takes judicial notice that lifting objects weighing 10, 15 and 20 pounds would not satisfy the unusual exertion test. There is a presumption that the Twentieth Century person performs non-employment lifting activities using weights in the amount of 10, 15 or 20 pounds. As the court pointed out in Allen, typical activities and exertions expected of men and women in the Twentieth Century include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. In a footnote, the court points out that lifting a 20 pound object does not satisfy legal causation in those cases where the employee had a pre-existing condition. See Footnote No. 8, Allen v. Industrial Commission, 46 Utah Adv. Rep. 12. The Administrative Law Judge also takes judicial notice that lifting objects weighing 80, 90, or 100 pounds constitutes an "unusual or extraordinary exertion" for a Twentieth Century person in non-employment life. The difficult question is whether lifting an object weighing 47-1/2 pounds constitutes unusual exertion to meet the higher standard of legal causation. Obviously, 47-1/2 pounds falls somewhere between the 20 pounds which would not be compensable and the 80 pounds which would be compensable.

In analyzing whether an object weighing 47-1/2 pounds constitutes "unusual exertion" requires a determination of which classification of Twentieth Century individuals we are addressing. As a former Marine in the United States Marine Corp, it is obvious that U. S. Marines as a classification of individuals would consider lifting a 47-1/2 pound object as being certainly a minor exertion for a puny weakling or a non-macho type. This, of course, does not apply to all groups. During the past 1-1/2 years, this Administrative Law Judge has had the opportunity of visiting a nursing facility on a weekly basis. Using the patients at the nursing facility as

another classification group, it certainly would be impossible for them to lift an object weighing 47-1/2 pounds. In many cases, these individuals find it difficult to lift a glass of water. This certainly does not suggest that nursing home patients are inferior citizens; they simply cannot exert physical strength like other groups of individuals.

What about classifications based upon age and gender. Obviously, a 25 to 35-year-old individual would have much less difficulty in lifting a 47-1/2 pound object than would an individual between the ages of 65 and 75. Although sex has never been a consideration in determining the compensability of workers' compensation claims, many could effectively argue that a male would have less exertion in lifting a 47-1/2 pound object than would a female.

Very simply, who is this Twentieth Century individual, and what are the typical activities expected of him or her during non-employment life? Perhaps, too much emphasis is given to the exact weight of the object being lifted. As stated above, a 20 pound object is considered easy to lift and an 80 pound object must be considered as extraordinary exertion. But, this may not be entirely an accurate reflection of how an injury may occur. The weight of the object is solely one factor. Let us not forget that there are four factors:

(1) Weight of the object being moved;
(2) The motion being performed (proper or improper ways of lifting);;
(3) The duration of the motion; and
(4) Position of the person performing the exertion.

By utilizing these four factors, an illustration perhaps can assist us in determining what constitutes an unusual or extraordinary exertion. Professional body builders and weight lifters teach you that the amount of weight to be lifted during an exercise is proportionately determined by the motion to be performed and the amount of repetitions in the exercise. Obviously, a weight lifter can use greater weight when performing squats and dead lifts, than can be lifted when performing french curls or lateral raises. An experienced body builder may use 400 pounds in squatting, but only use 50 pounds in performing lateral raises. In addition, the duration or numbers of repetition that the individual will be lifting the object has to be considered. A body builder performing one-arm dumbbells with the weight of 47-1/2 pounds may find the first five to ten repetitions to be fairly easy, however, after he has reached the 25th or 30th motion, his muscle becomes weak and the dumbbell weighing 47-1/2 pounds takes on the appearance that it weighs close to 100 pounds. This is when an individual is susceptible to injury. At a time when the muscle can no longer control the weight due to fatigue, and the weight of the object places complete stress upon the tendons, elbow and nerves.

In the case at bar, the evidence clearly establishes that the specific weight of the object (a box of shotgun shells) lifted by the applicant at the time of the allged industrial injury was 47-1/2 pounds. There was no evidence presented at the time of the hearing to establish that the applicant was utilizing improper motion in lifting this weight. Obviously, the proper means of lifting an object from the floor is to bend your knees, rather than bend at the waist and place the full stress on your lower back. In addition, there was no evidence to establish that the duration of the lifting motion was substantial or significant. The applicant lifted the 47-1/2 pound object once, not several times, and did not carry the box of shotfun shells any distance. The applicant solely lifted a box of shotgun shells from a cart to a pallet, and as he turned to set the box on the pallet, he felt a sharp pain in his low back. Furthermore, there was not evidence elicited to establish that the applicant was in an unusual position at the time that he was performing this lifting activity. In the case at bar, the applicant argues from the record that lifting an object weighing 47-1/2 pounds is certainly an unusual or extraordinary exertion without other factors.

The Administrative Law Judge hereby rules that the applicant, who is a 32-year old male, is entitled to Utah workers' compensation benefits as a direct result of his industrial accident of February 5, 1987, on the basis that lifting an object weighing 47-1/2 pounds represents an "unusual and extraordinary exertion" to establish proof of legal causation. Very simply, the Administrative Law Judge finds that a Twentieth Century person performing non-employment life activities would <u>not</u> be generally expected to lift an object of 47-1/2 pounds during a normal day away from work.

ORDER:

IT IS THEREFORE ORDERED that the defendants, Smith & Edwards Company and/or Workers Compensation Fund of Utah, shall pay the applicant, Douglas Youngfield, temporary total disability compensation at the rate of $151.00 per week for 12.286 weeks, or a total of $1,855.19, as temporary total disability for a period from February 8, 1987, to May 4, 1987, (the date the applicant returned to work), pursuant to Section 35-1-65, U.C.A.; said amount to be paid in a lump sum.

IT IS FURTHER ORDERED that the defendants, Smith & Edwards Company and/or Workers Compensation Fund of Utah shall pay interest on the amounts awarded under this Order at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable, pursuant to Section 35-1-78, U.C.A.

IT IS FURTHER ORDERED that any claims for a potential permanent partial disability, under Section 35-1-66, U.C.A., shall be reserved until the applicant has been rated by a qualified physician or orthopedic surgeon.

IT IS FURTHER ORDERED that the defendants, Smith & Edwards Company and/or Workers Compensation Fund of Utah, shall pay all of the reasonable medical expenses incurred as a direct result of the industrial accident of May 5, 1987; said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of the Industrial Commission of Utah.

IT IS FURTHER ORDERED that the defendants, Smith & Edwards Company and/or Workers Compensation Fund of Utah, shall pay Joseph C. Foley, attorney for the applicant, the sum of $371.04, as attorney fees in this case under Section 35-1-87, U.C.A.; said amount to be deducted from the aforesaid award of the applicant and to be paid in a lump sum directly to the attorney.

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.

Gilbert A. Martinez
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 26th day of October, 1987.
ATTEST:

Linda J. Strasburg
Commission Secretary

APPENDIX 2:

MOTION FOR REVIEW

Workers Compensation Fund of Utah

Blaine C. Palmer, Director
Rodney C. Smith, Assistant Director
560 South 300 East
Post Office Box 45420
Salt Lake City, Utah 84145-0420

November 12, 1987

Gilbert A. Martinez
Administrative Law Judge
Industrial Commission of Utah
160 East 300 South
Salt Lake City, UT 84145-0580

Re: Douglas Youngfield
File No: 87-04673
Inj: 02-05-87
Empl: Smith & Edwards Co.

Dear Judge Martinez:

Please accept this letter as the Workers Compensation Fund's Motion For Review of your Interim Findings of Fact, Conclusions of Law and Order entered on the above referenced matter on October 26, 1987. Specifically, the Workers Compensation Fund of Utah and Smith and Edwards Co. take exception to your finding that the claimant herein was involved in activities which satisfied the higher legal causation standard of the Allen accident test.

In this case, you found that Mr. Youngfield injured his back while lifting a 47 1/2 lb. box of shotgun shells. You note that there was no evidence of "improper motion in lifting." Further, you state that there was no evidence that repeated lifting was involved. Rather, Mr. Youngfield lifted the box of shotgun shells once, not several times, and did not carry the box any distance. Finally, you state that there was no evidence that Mr. Youngfield was in an unusual position at the time of his onset of back pain. You conclude,

> "In the case at bar, the applicant argues from the record that lifting an object weighing 47 1/2 lbs. is certainly an unusual or extraordinary exertion without other factors."

The defendants argue that the activity described herein is identical to the typical activities expected of men and women in the latter part of the 20th Century. The Utah Supreme Court has outlined such activities to include: taking full cans of garbage to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. On their face, these activities are as stressful as the one in which the claimant, Mr. Youngfield, was involved.

To substantiate our position, defendants proffer to the Industrial Commission the testimony of Laurie Stewart, Director of the Cottonwood Hospital Back Institute. Ms. Stewart holds an M.S. Degree in Health Services from the University of Utah along with two B.S. Degrees, one in Physical Therapy from the University of Utah and one in Physical Education from Brigham Young University. Ms. Stewart, upon reviewing the facts of this "accident" as found by the Administrative Law Judge, believes, and would testify, that the activity in which Mr. Youngfield was involved placed far less stress on his back than such ordinary everyday living activities as sneezing or coughing. In fact, there is no evidence of position or movement that would suggest any magnification of the weight in Mr. Youngfield's arms so as to transform his activities from those involving the usual wear and tear of non-employment life exertions to ones involving unusual exertions. Obviously, unusual exertion is needed to meet the higher legal causation standard in this matter.

The Workers Compensation Fund respectfully requests that the Administrative Law Judge, or the entire Commission, reverse the finding of compensability made on October 26, 1987. Simply stated, Mr. Youngfield did not suffer a compensable industrial accident given his pre-existing condition as he failed to show the requisite higher standard of legal causation. Objectively, his activities were not unusual or extraordinary. In the alternative, the defendants move that this matter be re-opened and that an additional hearing be set. At that hearing, the defendants would produce Ms. Stewart for the purpose of taking her testimony and allowing cross-examination relative to the mechanics of Mr. Youngfield's alleged industrial accident. Also, if desired, the claimant could present any expert testimony to substantiate his claim.

Yours truly,

WORKERS COMPENSATION FUND OF UTAH

Dennis V. Lloyd
Attorney at Law

DVL/jf

cc: Joseph C. Foley, Attorney at Law, 543 25th Street, Ogden, UT 84401
Erie V. Boorman, Adm. of Second Injury Fund

APPENDIX 3:

ORDER DENYING MOTION FOR REVIEW

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 87000510

DOUGLAS YOUNGFIELD, Applicant, vs. SMITH & EDWARDS COMPANY and/or WORKERS COMPENSATION FUND OF UTAH SECOND INJURY FUND, Defendants.	ORDER DENYING MOTION FOR REVIEW

On October 26, 1987, an Administrative Law Judge of the Industrial Commission issued Interim Findings of Fact, Conclusions of Law and Order awarding the applicant in the above-captioned case temporary total compensation and medical expenses (and reserving the issue of permanent partial impairment benefits) related to a February 5, 1987 industrial injury. The Administrative Law Judge found that the applicant's pre-existing low back condition required that the Administrative Law Judge apply the more stringent legal causation test as specified in Allen v the Industrial Commission, 729 P.2d 15 (Utah 1986) in order to determine whether the applicant's injury occurred "by accident" thus causing it to be compensable. That test requires that the applicant be injured pursuant to exertion that is greater than what is encountered by the average person in everyday non-employment life. After thoroughly discussing and analyzing the mechanics of the injury and the legal standard as set forth in the Allen case, the Administrative Law Judge determined that the applicant's lifting of a 47-1/2 lb box of shotgun shells was exertion sufficient to meet the Allen higher standard legal causation test. As result, the Administrative Law Judge found the applicant's February 5, 1987 injury was compensable and the Administrative Law Judge awarded benefits.

On November 12, 1987, pursuant to U.C.A. 35-1-82.53, counsel for the defendant/Workers Compensation Fund filed a Motion for Review. Counsel for the Fund states that the applicant's lifting injury is no different than the lifting activities listed in the Allen case as normal or usual exertions encountered by twentieth century individuals in non-employment life. As no unusual exertion is involved, counsel for the Workers Compensation Fund finds the Administrative Law Judge should have found the legal causation test was not met and should have denied all benefits as result.

The Commission finds that the only issue to be reviewed is the issue regarding whether the mechanics of the applicant's injury shows sufficient exertion to establish legal causation per the Allen compensability test. The Commission adopts the Findings of Fact as stated by the Administrative Law

Judge in the October 26, 1987 Interim Findings of Fact, Conclusions of Law and Order. In the Order, the Administrative Law Judge discusses the difficulty in determining what normal non-employment exertion is for the average twentieth century person. The variance between age and physical capacity that occurs within the group of all twentieth century persons is well illustrated by the Administrative Law Judge's discussion and the Commission agrees that what typifies the average person is difficult to discern. In addition, the Commission has commented in recent Orders on review regarding the difficulty of comparing the list of usual exertion activities from Allen with a particular injury fact scenario to determine whether the injury fits within the class of activities specified in Allen. Because the box lifted by the applicant in this case is not clearly within the Larson weight parameters quoted by the Supreme Court in Allen as being usual exertion, and keeping in mind the beneficent purpose behind workers compensation, the Commission must confirm the Administrative Law Judge's determination that the legal causation test is met in this case.

ORDER:

IT IS THEREFORE ORDERED that the defendant's November 12, 1987 Motion for Review is denied and the Administrative Law Judge's October 25, 1987 Order is hereby affirmed and final with further appeal to the Court of Appeals only within the thirty (30) day time limit and as specified in U.C.A. 35-1-83.

Stephen M. Hadley
Chairman

Lenice L. Nielsen
Commissioner

John Florez
Commissioner

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 3rd day of February, 1988.

ATTEST:

Linda J. Strasburg
Commission Secretary