

1986

Irwin G. Bunnell v. Industrial Commission of Utah, U. S. Steel Corporation and Second Injury Fund : Brief of Respondent

Utah Supreme Court

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DOCKET NO.

860196

IN THE SUPREME COURT OF THE
STATE OF UTAH

IRWIN G. BUNNELL,

Applicant/Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH,

U. S. STEEL CORPORATION and

SECND INJURY FUND,

Defendants/Respondents.

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BRIEF OF RESPONDENT
SECOND INJURY FUND

Case No. 860196

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FILED

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
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IRWIN G. BUNNELL,

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vs.

INDUSTRIAL COMMISSION OF UTAH,
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IRWIN G. BUNNELL,	*	
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Applicant/Appellant,	*	
vs.	*	BRIEF OF RESPONDENT
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U. S. STEEL CORPORATION and	*	
SECOND INJURY FUND,	*	
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Defendants/Respondents.	*	
	*	

I. STATEMENT OF THE ISSUES

1. Is there substantial evidence in the record to support the Findings of Fact, Conclusions of Law and Order issued on February 25, 1986 by the Administrative Law Judge and affirmed unanimously by the full Industrial Commission on March 20, 1986 dismissing applicant's permanent total disability claim filed with the Industrial Commission of September 16, 1985 alleging that applicant's disabling pulmonary problems resulted from an industrial injury of November 13, 1953.

2. Was applicant denied his right to a fair and unbiased hearing?

II. STATEMENT OF THE CASE

This is a worker's compensation claim for total disability benefits. The claim was dismissed after a hearing before the Administrative Law Judge. (R.136) A timely Motion for Review was denied by the Industrial Commission with a comment adopting and affirming the Findings and Conclusions of the Administrative Law Judge. (R.150)

III. DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held on February 14, 1986 before the Industrial Commission Administrative Law Judge Timothy C. Allen on Irwin G. Bunnell's application for permanent total worker's compensation benefits. On February 25, 1986 an Order was entered by Judge Allen denying applicant's claim that his present complaints of permanent and total disability from pulmonary problems are a result of his industrial accident of November 13, 1953.

A Motion for Review was filed in behalf of the applicant on March 12, 1986. On March 20, 1986 the Industrial Commission denied the Motion for Review and the Administrative Law Judge's Order was affirmed.

IV. STATEMENT OF FACTS

Applicant, Irwin G. Bunnell at 6:45 a.m. on November 13, 1953 was working as a carpenter doing repair work on the number 6 open hearth furnace at U. S. Steel's Geneva Works when he lost his footing and fell approximately 15 feet to the furnace floor. According to testimony at the hearing some 32 years later, fellow workers reached him within a matter of seconds and within 30 to 40 seconds fellow workers had applicant lifted outside the furnace area. (R.30) The record shows that applicant was removed immediately by ambulance to the Geneva dispensary for first aid after which he was brought immediately to St. Mark's Hospital in Salt Lake City. (R.108) There was testimony at the Industrial Commission hearing almost 33 years later that applicant was unconscious for 5 days; however, the admissions note at St. Mark's Hospital on the date of the accident (November 13, 1953) clearly indicates otherwise. (R.92) In any event, he remained at the St. Mark's Hospital in Salt Lake City for almost 2 weeks

before being discharged on November 28, 1953. (R.94) According to medical records he continued to improve and was returned to light work at his full former earnings effective January 14, 1954. He continued on light work status at full earnings although testimony at the 1986 hearing suggested that to some extent he was being "carried" by fellow employees at the Geneva open hearth. (R.26) In any event on July 29, 1954 he was released for regular work at his former occupation of carpenter and he remained at that job performing the full extent of the duties for 14 additional years until he retired in 1968 at the normal retirement age of 65. In 1985, almost 17 years later, applicant filed with the Utah Industrial Commission his claim for permanent total disability due to pulmonary problems which he alleged resulted from his 1953 fall at the Geneva open hearth. All available medical records were provided to the Administrative Law Judge and the Commission and testimony was taken at the hearing from the applicant (now 83 years of age), his wife, a fellow employee who retired even prior to applicant's leaving U. S. Steel and a neighbor who claimed have grown up with the applicant. The record also revealed (R.5) that applicant was paid temporary total disability benefits for his 60 days temporary total disability at the rate (maximum) of \$28.875 per week, that he was paid 15% permanent partial disability at the same rate totalling \$866.25 and that he retired on September 30, 1969 one month prior to his 66th birthday on a normal longevity retirement at a monthly pension of \$143.52 which was in excess of the maximum permanent total disability rate applicant could have received had he been drawing permanent total disability.

The Administrative Law Judge reviewed the entire record including additional medical reports submitted by counsel for the applicant and

concluded that the applicant had failed to sustain the burden which was his to show the necessary causal relationship between claimant's ultimate pulmonary disability and his open hearth fall injury of 1953. Likewise, the full Industrial Commission, upon Motion for Review reviewed the entire record (R.150) and concluded that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. On April 15, 1986 applicant filed his Petition for Writ of Review with this Court on April 15, 1986.

V. SUMMARY OF ARGUMENT

A. There is sufficient evidence in the record to support the Industrial Commission's finding that plaintiff did not meet his burden to show by a preponderance of the medical evidence that his permanent total disability from pulmonary problems was a residual result of his industrial accident of November 13, 1953.

B. Plaintiff was not denied the right to a fair and impartial hearing.

VI. ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION'S DECISION WHICH DENIED WORKER'S COMPENSATION BENEFITS TO PLAINTIFF MUST BE UPHELD IF THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The standard of review exercised by this Court in cases appealing decisions of the Industrial Commission is well established. In Higgins vs. Industrial Commission 700 P.2d 704, 706 (Utah 1985) this Court stated:

Our standard for review of the Industrial Commission's Findings of Fact in workmen's compensation cases is well-settled. We are

limited to determining whether the Commission's findings are supported by substantial evidence. Kennecott vs. Industrial Commission, Utah, 675 P.2d 1187, 1192 (1983); Kent vs. Industrial Commission, 89 Utah 381, 385, 57 P.2d 724, 725, (1936).

This standard was reaffirmed in such recent cases as Hardman vs. Salt Lake City Fleet Management, 41 Utah Adv. Rep. 7 (September 8, 1986) and Bigfoot's Inc. vs. Industrial Commission, 28 Utah Adv. Rep. 17 (February 26, 1986) in which case this Court stated also that where the evidence is in conflict "this Court has no power to determine the weight of the evidence and credibility of the witnesses under the Statute." Staker vs. Industrial Commission, 61 Utah 11, 209 P.880 (1922).

POINT II

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS OF THE COMMISSION.

The Commission relied upon the extensive medical evidence in the record to support its findings and decision. Analysis of the medical evidence makes it clear beyond question that finding plaintiff's disabling pulmonary problems to be a residual result of his November 13, 1953 industrial accident is not the only inevitable conclusion from the evidence. In fact the medical evidence is for the most part directly to the contrary and does not even suggest such an "inevitable conclusion". In the first place, despite contrary testimony at the hearing almost 33 years later by plaintiff and his witnesses, the medical record fails to disclose any pulmonary complaints on the part of plaintiff until 1968 almost 15 years following the injury, when reference is made in a report by Dr. Bigelow (R.120) to the effect that "this is a 64 year old man who comes in for investigation of a cough which has been going on for over a year but last six weeks, much worse." Dr. Boyd Larsen U. S. Steel's physician at Geneva reported for the first time (R.116) on August 30, 1968 that plaintiff had "cough for about a month". Likewise Dr. E. A. White attending

physician on November 16, 1968 reports (R.127) "approximately five months ago he developed a cough which has been progressively more productive. . ." and further refers to his industrial accident of 1953 and one subsequent pneumonia "but following this and for the last 16 years up until earlier this year he has had no chest complaints." (R.127) The pathologic diagnosis at that time (R.128) was moderate, chronic bronchitis, benign. Of interest also is the discharge diagnosis of Dr. Bigelow (R.131) of:

Chronic congestive failure with pulmonary congestion.

Old pulmonary scarring compatable with healed granulomatous T.B.

No calcium, but is bilateral and apical.

Has some very minor pulmonary disease, chronic and obstructive, very likely has an underlying arteriosclerotic disease, but this could not be proved with present evidence.

Nothing in the above leads to the "inevitable conclusion" that plaintiff's pulmonary problems were a result of his 1953 industrial accident.

Likewise the many chest x-ray reports in the record do not reveal such an "inevitable conclusion" or even a reasonably reliable suggestion. On March 15, 1966 Dr. Larsen requested a "routine x-ray" (R.114) in which James R. Matheson, M.D., found "there is a slight to moderate degree of pulmonary emphysema and pulmonary scarring. The appearance of the chest is very similiar to that seen in 1952." Thus indicating that plaintiff had pulmonary indications of emphysema even prior to the November 13, 1953 industrial accident. Similarly in 1954 (R.102) radiologist H. J. Brown noted "considerable emphysema is present in both lungs and this has produced a barrel chest deformity." Again on March 14, 1955 (R107) Dr. Brown notes ". . .chest - considerable emphysema is present in the lungs. The lungs are otherwise normal. . ." Also noted by Dr. Brown were the old healed fractured

ribs. . .with the further notation "these should be of no clinical significance at this time." On September 3, 1968 (R.116) notes that "lungs are essentially unchanged from previous film. The increased markings throughout lung fields are about the same. There is evidence of maderate emphysema and marked increase in both bases suggestive of bronchiectasis." In summary, the x-ray readings and reports simply do not suggest a causal relationship, yet alone the required "inevitable causal conclusion" between plaintiff's industrial accident of November 13, 1953 on the one hand and his indications of longstanding pulmonary emphysema, tuberculosis and/or bronchitis on the other.

Finally, the medical evidence contains the numerous reports of Dr. Martin Lindem U. S. Steel's chief surgeon located in Salt Lake City, Utah and Dr. Boyd G. Larsen, U. S. Steel's physician in charge of the Geneva plant medical program. Neither Dr. Lindem's initial report dated November 16, 1953 (R.97) nor his medical records summary dated March 17, 1955 addressed to the Industrial Commission of Utah for permanent disability evaluation (R.108) contains any indication of pulmonary complaints or pulmonary findings in any way attributable to plaintiff's injury of November 13, 1953. Indeed, both reports indicate satisfactory convalescence on the part of the plaintiff and the March 17, 1955 report shows the return of plaintiff to light work on January 13, 1954 and regular work on July 29, 1954. (R.108) Dr. Larsen's reports are found throughout the medical record beginning with the First Report of Injury dated November 17, 1953 (R.90), continuing with his evaluation of permanent partial disability report dated October 21, 1954 following plaintiff's return to regular duty and recommending a 15% permanent partial disability residual settlement (R.106) and ending with his requests for routine chest x-ray and report dated March 15, 1966 (R.114) which report indicates "a slight to moderate degree of pulmonary emphysema and pulmonary

scarring and a chest appearance very similiar to that seen in 1952, are consistent in their absence of any indications of pulmonary problems of any kind on the part of plaintiff during the 14 year period of such reports. Indeed there is no reference at any time even suggesting any pulmonary problems attributable to the open hearth fall of plaintiff of November 13, 1953. Also significant is the Industrial Commission Order dated May 9, 1955 (R.134) following the examination and evaluation of plaintiff by the Disability Rating Board appointed by the Industrial Commission which evaluation contained no reference of any kind to either pulmonary complaints on the part of the plaintiff or any pulmonary problems or disabilities recognized by the rating board. Applicant's wife referred to the examination by the Disability Rating Board in March of 1955 as part of plaintiff's assertion that he was denied a fair and impartial hearing. (R.58) It was contended on behalf of plaintiff that he was prejudiced because Mrs. Bunnell was not permitted to attend the examination of plaintiff by the Disability Rating Board and that they could not appeal the eventual 15% permanent partial disability rating because they were too poor and because plaintiff "out of work and had no wages coming in at that time." (R.58) Such representations point out not only plaintiff's lack of understanding of the evaluation process on the part of the Disability Rating Board in which outsiders including counsel as well as physicians or other representatives from either the employer or the employee are excluded (R.61) but more significantly plaintiff's faulty recollection of happenings and events 30 years before. While plaintiff's wife testified that at the time of the Disability Rating Board's examination and evaluation in 1955, plaintiff was out of work and had no money coming in, (R.58) The actual facts were that plaintiff had returned to work with his employer United States Steel in January, 1954 and was earning his full salary throughout the entire period involved. Indeed, he continued to work for U. S. Steel for 13

additional years at full pay prior to his retirement at age 65 in 1968. Thus, the testimony is clear that there was complete confusion at the hearing on the part of plaintiff, his wife and counsel with respect to the 1955 Disability Rating Board examination which was conducted at a time when plaintiff was working full time and realizing his full earnings as a carpenter for U. S. Steel, earnings which he continued to enjoy at even an increased rate for the next 13 years. Such confusion demonstrates the inaccuracies and misrepresentations inherent in attempted recollection of facts and events 30 years after the fact. It also has provided further justification, if any is needed, for the reliance by the Administrative Law Judge upon medical records prepared at the time of examination in preference to testimony and faulty recollection 30 years later dimmed by the long passage of time and perhaps colored by personal involvement in the ultimate resolution of the compensation claim. In any event, the bottom line is that the Administrative Law Judge under the circumstances, clearly was in the best position to evaluate the conflict in the evidence and where, as here, there is evidence to support his findings and decision, they properly should not be disturbed on appeal before this Court.

Plaintiff has placed great reliance upon the one page letter report to plaintiff's counsel dated January 20, 1986 by Dr. Tracy A. Hill who acknowledged that the etiology of the obstructive lung disease of plaintiff to be uncertain because plaintiff was a non-smoker and did not have a history of asthma. (R.132) Nevertheless, based upon his review of the medical records provided to him by plaintiff's counsel, he stated that it was "reasonable to speculate" that plaintiff's pulmonary problems originated with his injury at U. S. Steel in 1953. Such "speculation" ignores x-ray indications of already existing emphysema markings in plaintiff's chest as well as recorded history of bronchitis as a child (R.120) and diagnosis of possible heart congestion

and old healed tuberculosis. (R.121) Moreover there is some indication that plaintiff's pulmonary problems may have been aggravated through the years by his work in the dusty Geneva open hearth area. This, of course, under other circumstances possibly could provide a basis for an occupational disease claim, but as pointed out by the Administrative Law Judge, (R.139) such a claim in this case would be precluded under the Utah Occupational Disease Act. In summary, the one page letter report of Dr. Hill directed to plaintiff's counsel 32 years after plaintiff's accident and almost 20 years following the bulk of the medical evidence comprising the record in this case clearly is not sufficient to render the Commission's findings "wholly without cause" or to make such findings of the Commission contrary to the "one inevitable conclusion from the evidence". At best there is a conflict of evidence as to the effect, if any, of plaintiff's 1953 open hearth accident upon his present pulmonary problems. Under such circumstances the Commission's Findings of Fact should not be set aside in the light of established principles of review clearly set forth by this Court in the many cases cited above.

POINT III.

PLANTIFF WAS NOT DENIED A FAIR AND UNBIASED HEARING.

Plaintiff in his brief has gone to great lengths to point out rulings or statements on the part of the Administrative Law Judge which he characterizes as a denial of a fair and unbiased hearing. It is true that testimony was rejected by the Administrative Law Judge, some on the basis of obvious irrelevancy (R.37) and some clearly hearsay statements of a medical nature alleged to have been made 33 years ago by the treating physicians one of whom has been dead for many years (Dr. Martin Lindem) and the other who has been retired for some time and now is partially blind (Dr. Boyd J. Larsen). All of the medical reports of U. S. Steel

including those by Drs. Lindem and Larsen were made a part of the record and in accordance with established Industrial Commission procedure and practice represent the medical evidence of the treatment and diagnosis accorded to plaintiff by those treating physicians. For instance, testimony relating to the 3 hour delay in advising plaintiff's wife of his serious industrial accident was offered ostensibly to indicate lack of sympathy, lack of competence or negligence on the part of U. S. Steel in the handling of plaintiff's injury and treatment. (R.33) Upon objection this testimony was rejected for the obvious reason of relevance. (R.44) The Administrative Law Judge also rejected hearsay statements on the part of Drs. Lindem and Larsen tending to suggest a lack of feeling, possible incompetence or even a "cover up" with respect to the medical treatment and the medical records made available to the Commission when this case was filed some 32 years following the accident and the medical treatment accorded to the plaintiff. For instance the medical reports in the record clearly show the nature and extent of plaintiff's injuries and the progress during his stay at the St. Mark's Hospital and his period of convalescence prior to his return to light work for the employer on January 13, 1954 approximately 60 days following his injury. (R.90-employer's initial surgical report; R.91-96-reports on admission, treatment progress and discharge, St. Mark's Hospital 11/13/53 through 11/28/53.) It should be noted that the progress notes on the day after the injury (R.93) indicate that x-rays had been taken and that "patient is doing well". Upon objection by Defendants the Administrative Law Judge rejected plaintiff's wife's attempt to tell of the injuries her husband received 33 years earlier and what Dr. Lindem told her at the time. We believe that the rejection of such evidence was entirely proper. Likewise, the rejection of hearsay evidenced by Mrs.

Bunnell as to why she stayed in the hospital with her husband during part or all of the 15 days he was at St. Mark's. (R.37) Indeed, the progress notes made at the time (R.93) show on 11-14-53". . . patient is doing well." The note on 11-20-53 states, "is sitting up in bed, feeling much better. TPR normal."; and on 11-28-53: "has been up in wheelchair. TPR normal. May go home according to Dr. Lindem."

Plaintiff also complained because Mrs. Bunnell was not allowed to attend the examination and evaluation of Mr. Bunnell which was made by the Disability Rating Board appointed by the Industrial Commission in March of 1955. (R.58) In response it should be pointed out that the practice then and now is not to permit any outsiders including relatives, attorneys or treating physicians when disability rating examinations are made. (R.61) It is also noteworthy in connection with the permanent partial disability rating accorded to plaintiff in this case that he was referred by the U. S. Steel medical division to the Industrial Commission for evaluation and rating (R.108) and further that the company accepted and paid the 15% permanent partial rating accorded to plaintiff by the Industrial Commission's Disability Rating Board. (R.134) As part of his allegation of unfairness plaintiff refers to his award of \$400.00 (R.58) (it should be noted that the actual amount was \$866.25) and then attempted^{to} explain the failure to appeal or protest the award by saying, "he was out of work. . . he had no wages coming in." and further that attorneys they had contacted had said, "Don't try to fight Geneva. You can never win against Geneva." (R.58,59) Such testimony in our opinion properly should have been excluded by the Administrative Law Judge. In addition, the above demonstrates the inaccuracy of recollection attempted to be made 30 to 35 years after the event in question. As you will note from the payment

award to plaintiff (R.134) it is dated on June 20, 1955 at a time when plaintiff was working full time and for full wages, incentives and fringe benefits for his employer U. S. Steel. Indeed, plaintiff continued to work with full earnings, incentives fringe medical and insurance benefits for another 13 years prior to his normal retirement at age 65 in 1968. Once again the facts and the medical evidence are at complete variance with the attempted recollection and testimony offered by plaintiff and his wife more than 30 years later.

As indicated above there was volunteered testimony and hearsay statements presented in behalf of the plaintiff which were rejected upon objections by defendants. Much of the rejected material suggests that the company and its medical staff were unsympathetic and unfeeling, incompetent and/or negligent, and arbitrarily unfair in their handling of plaintiff's injury, his subsequent medical treatment, his return to work at light duty after only 60 days convalescence and in the compensation payments ultimately accorded to him. The medical record clearly shows otherwise and in summary it is as follows:

Plaintiff's injury occurred at approximately 6:45 a.m. on November 13, 1953. Help came and within 30 to 40 seconds plaintiff had been moved outside the open hearth furnace area. (R.30) Plaintiff was taken immediately to the Geneva Dispensary facilities of U. S. Steel for emergency treatment and then was taken immediately by ambulance to the St. Mark's Hospital in Salt Lake City. The hospital records and the reports of plaintiff's treating physicians adequately describe his convalescent period his discharge from the hospital and his later release for light work effective

January 14, 1953. (R.99) It has been contended that plaintiff was returned to light work too early and that his fellow employees had to "carry him" during the first few months following his return to work. This may be true; yet plaintiff has indicated that he was able to perform his functions with some help from his associates during that period of time and that by the time he was returned to regular work he was able to perform all of his former duties as the Geneva open hearth. This is important because in putting plaintiff back to work at the earliest time, he was able to be paid his full earnings including fringe benefits instead of the minimal compensation benefits which at that time in Utah were at the rate of \$28.875 per week. Plaintiff's regular earnings (more than \$90.00 per week) were several times higher than that; thus it was important financially to him to get on the job as soon as possible. Another important item not to be overlooked is that the employer could have paid the relatively minimal worker's compensation rating accorded to plaintiff by the Industrial Commission and dismissed him from employment as being unable to handle all the responsibilities of his work. Instead, U. S. Steel placed him back on his regular job, "carried" him for approximately six months and then retained him at full wages and other employment benefits for another 14 years until plaintiff retired of his own volition at a pension which was well in excess of what his compensation benefits would have been during any period of the time in question. Moreover, there is nothing in the medical records to suggest that the attention and treatment accorded to plaintiff in connection with his industrial injury and subsequent convalescence was anything other than the highest type and for the best interests of the injured employee.

In summary, plaintiff did in fact receive a fair and unbiased hearing; his witnesses were permitted to testify at great length even as to their recollection of events and conversations which allegedly took place as many as 35 years ago as well as in areas which really were not pertinent to the critical issues actually involved in plaintiff's claim. The Administrative Law Judge in his efforts to confine that extensive testimony within reasonable bounds of relevance and admissibility rejected some proffered testimony of plaintiff and his other witnesses, some because of obvious irrelevancy and some because it was improper hearsay with respect to medical opinions, diagnoses and findings already a part of the medical record. Overall analysis of the record, however, shows clearly that plaintiff was accorded a fair and unbiased hearing with respect to his claim.

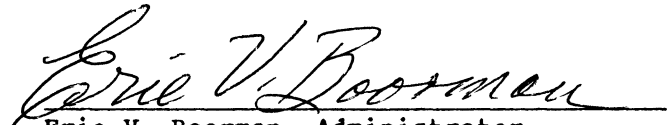
VII. CONCLUSIONS

In denying compensation benefits to plaintiff, the Industrial Commission did not act arbitrarily or capriciously, wholly without cause or contrary to the one inevitable conclusion from the evidence. Rather, there is substantial evidence to support the Commission's findings and the record without question contains sufficient contradictory evidence to preclude the finding alleged by plaintiff as the "one inevitable conclusion" to be drawn. Therefore, under the standard of review well established by this Court it is not properly within the province of the Court to measure the relative probabilities and disturb the findings of the Industrial Commission. Analysis of the record in its entirety makes

it clear also that plaintiff was accorded a fair and unbiased hearing and that there was no denial of due process.

Accordingly respondents herein respectfully request that this Court affirm the decision of the Industrial Commission denying benefits as sought by plaintiff, Irwin G. Bunnell.

DATED THIS 17th day of November, 1986.


Erie V. Boorman, Administrator
Second Injury Fund

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Industrial Commission of Utah and
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CERTIFICATE OF MAILING

I certify that 4 copies of the above and foregoing Respondents Brief were hand delivered to Bruce Wilson, Attorney for Plaintiff, at his home 290 East 4000 North, Provo, Utah 84604 on November 17, 1986 and that subsequently thereto, 4 copies were mailed first class postage prepaid, to the following:

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THE INDUSTRIAL COMMISSION OF UTAH

By Madelyn