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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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PAINTER MOTOR COMPANY and the STATE INSURANCE FUND,	:	
	:	
Plaintiffs-Appellants,	:	
vs.	:	Case No. 16,59[illegible]
HOWARD C. OSTLER and the INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
Defendants-Respondents.		

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WRIT OF REVIEW FROM AN ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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BRIEF OF DEFENDANTS-RESPONDENTS

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IN THE SUPREME COURT

OF THE STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

PAINTER MOTOR COMPANY and the STATE INSURANCE FUND,

Plaintiffs-Appellants,

vs.

HOWARD C. OSTLER and the INDUSTRIAL COMMISSION OF UTAH,

Defendants-Respondents.

Case No. 16,598

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WRIT OF REVIEW FROM AN ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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BRIEF OF DEFENDANTS-RESPONDENTS

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PAINTER MOTOR COMPANY and the STATE INSURANCE FUND,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 16,598
vs.	:	
HOWARD C. OSTLER and the INDUSTRIAL COMMISSION OF UTAH,	:	
Defendants-Respondents.	:	

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BRIEF OF DEFENDANTS-RESPONDENTS

- - - - - - - - - - - - - - - - - - - -

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Appellants are appealing an Order of the Industrial Commission awarding workmen's compensation benefits to Howard C. Ostler for injuries received in the course and scope of his employment.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission awarded workmen's compensation benefits to Howard Ostler in an order dated June 28, 1979, for injuries sustained on March 4, 1977, and July 5, 1977.

RELIEF SOUGHT ON REVIEW

Respondent seeks affirmance by this Court of the order of the Industrial Commission awarding benefits to Howard Ostler.

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STATEMENT OF FACTS

Howard Ostler has been the parts manager of Painter Motors since 1966. (T.5) On March 4, 1977, he was directed to go to a new building that was being constructed by Painter Motors, and assist the carpenter, Mr. Ingram, in mounting some electrical boxes in the overhang around the outside of the building (T.6). Applicant was asked to drill holes while standing on a leaning ladder, not a step ladder, fourteen (14) feet high, and to drill holes from the bottom side up (T.6). The drill he was using was a two-hand drill. He was standing on the top or the next to the top step of the ladder and leaning over and drilling upward. While in this position his back started "hurting something terrible" (T.7). The pain started in his shoulders and then quickly moved down to the center of his lower back (T.7). Applicant reported this to Mr. Painter, his employer, the night of March 4th stating that he would continue to work at the building but that he would have to see a doctor (T.8). Applicant continued to have pain after March 4th and the pain seemed to be getting a little worse as time passed. He was taking Moltren tablets and was hurting somewhat until the events that occurred on July 5, 1977. (T.9)

On July 5, 1977, the applicant was assigned the job of moving the parts department to the newly completed building. His job entailed putting the smaller boxes of parts that were on the shelves into bigger boxes on the floor and then loading these bigger boxes into the back of his pickup

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truck. When he was loading these bigger boxes, the strain on his back from the lifting started his back "hurting plenty bad". This occurred mainly in the afternoon of July 5, 1977. (T.10) He reported the injury to his employer, Mr. Painter, and told him that he would have to make an appointment to see Dr. Charles Smith, Jr., an orthopedic surgeon. (T.10-11) Applicant had had a previous low back fusion in 1968, but prior to March 4, 1977, he was functioning well, was free of pain, and had not seen a doctor regarding his back since 1969. (T.15) After the injuries of March 4th and July 5, 1977, he continued working in pain that kept getting worse until it reached the point that he had to have a second fusion. (T.16) This latter fusion kept the applicant off work from December 3, 1977, to July 1, 1978. (T.14)

ARGUMENT

POINT I

THE ISSUE ON APPEAL IS WHETHER THE FINDING OF THE INDUSTRIAL COMMISSION THAT AN ACCIDENT OCCURRED IS ARBITRARY OR CAPRICIOUS OR WITHOUT SUBSTANTIAL SUPPORT IN THE EVIDENCE.

A. Standard of Review in Supreme Court of Industrial Commission Findings - The legislature set up the Industrial Commission as the ultimate finders of fact in cases regarding worker's compensation and provided that these findings of fact were not subject to review. This statutory scheme is shown in §35-1-85, U.C.A. 1953 which reads:

> After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions

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of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate fact and the findings and conclusions of the commission. . .(Emphasis Added)

This Court has interpreted this statute to mean that the Court has no authority to reverse a finding of the commission unless such a finding was arbitrary, capricious, or without substantial support in the evidence. In Savage v. Industrial Commission, 565 P.2d 783 (Utah, 1977), this Court said:

> Clearly the Court, pursuant to the foregoing section [35-1-85] and in the absence of an obvious abuse of discretion or under circumstances where the ruling is contrary to the evidence, does not have the authority to review findings of fact made by the commission, and by implication has only the power to consider issues of law dealing with the commission's decision.

In Wiseman v. Village Partners, 589 P.2d 754 (Utah, 1978) this Court also said:

> We cannot reverse and compel an award unless there is credible evidence without substantial contradiction which points so clearly and pursuasively in plaintiff's favor the failure to so find must be regarded as capricious and arbitrary. Conversely, if there is any reasonable basis in the evidence, or from the lack of evidence which will justify the refusal to so find, we must affirm. We may not weigh the contradictory evidence for the purpose of interposing our own judgment as to what the facts are. (Emphasis added)

B. There is Substantial Evidence of the Occurrence of an Accident in this Case to Support Such a Finding by the Commission. - An accident, as it is defined by this Court, was clearly shown to have occurred. Mr. Ostler, who was usually employed as a parts manager, (T.5) was instructed

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to assist the carpenter who was constructing a new building for the business. (T.6) On July 5th, the second date of injury, he was instructed to cease his usual duties, and to help move all of the inventory from the old building to the newly constructed building. (T.10) These new duties put an unusual amount of strain on the claimant's back and resulted in his injuries.

The circumstances of Mr Ostler's injury are well within the parameters of the term "accident" as this court has defined it. This Court has long held that an internal injury brought about by exertion is just as much of an "accident" as a fall or a traumatic contact with a foreign object. In Jones v. California Packing Corporation, 244 P.2d 640, 642 (Utah, 1952) this Court said:

> It is settled beyond question. . . that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of Section 42-1-43, U.C.A. 1943, without the requirement that the injury resulted from some incident which happened suddenly and is identifiable at a definite time and place.

This Court has also long held that an injury sustained by an employee is an accident when it is sustained during an activity which is unusual for that employee's line of work either in the type of work done of in the amount of exertion required. In Thomas D. Dee Memorial Hospital Association v. Industrial Commission, 138 P.2d 233 (Utah, 1943), this Court held that a compensable "accident" had occurred where a hospital furnaceman (with previously existing heart disease) suffered

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a heart attack while engaged in unusually heavy work. The Court said:

> We are not required in the case at bar to go so far as the English cases have gone, for here we have a commission finding supported by the evidence that the applicant suffered the heart attack while engaged in unusually heavy work which was greatly in excess of his ordinary duties. The expert medical testimony adduced clearly established the fact that the heart attack was directly attributable to this extra work or over-exertion. (Emphasis added)

In another case, Merle Hinds Company v. Industrial Commission, 437 P.2d 451 (Utah, 1968), this Court sustained the findings of the Commission that an accident had occurred when a salesman injured his knee when squatting down to read the labels on some boxes he needed to fill an order. The unanimous Court said:

> We are of the opinion that the findings of the commission that the applicant was engaged in activities unusual to him which required him to assume an unusual position which created an unusual strain upon his knee, which in turn resulted in the injury is amply supported by the evidence. The findings of the commission in this respect fall within the definition of the term "accident" by this Court in prior decisions. It has been defined as connoting an unanticipated, unintended occurrence different from that which would normally be expected to occur in the normal course of events. (Emphasis added)

The Commission in the present case explicitly found that Mr. Ostler had been engaged in unusual activities at the times he sustained injury. (Granting of Motion for

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Review, page 2.) This finding is fully supported in the record by substantial evidence. It is without dispute that Mr. Ostler, normally the parts manager, was sent to work with the carpenter of the new building on March 4th. In pursuit of these instructions, Mr. Ostler was required to help install the electrical system immediately under the overhang of the roof. He had to stand near the top of a 12 foot leaning ladder in order to reach the overhang which was 16 feet high and while in this position, use both hands on a large two-handed power drill. As a further strain on him, he had to drill upwards so that he was not only pushing against the metal of the electrical box when he was drilling but he had to push against the weight of the drill itself. After several hours of this, his back began to "hurt something terrible" and he complained of this to Mr. Ingram, the carpenter. Mr. Ostler then assumed a drilling job elsewhere in the building in a less strenuous position and finished the day of work, taking frequent rests. (T.7)

Based on this evidence there can be no doubt that the commission had substantial evidence upon which to base its finding that the applicant had been injured in the pursuit of work which required an unusual strain and was hence an accident under this Court's definition of that term.

There can also be no doubt that Mr. Ostler's activities of July 5th also gave the Commission substantial evidence from which it could find an unusual strain. On this day,

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Painter Motors was in the process of moving to its new location, and the applicant was working more as a professional mover than as a parts manager. He spent most of that day packing his inventory of parts into large boxes, and then lifting these large boxes into his pickup truck. By the afternoon of this day, his back was "hurting pretty bad" and he notified Mr. Painter of this, though he continued to work, taking frequent rests. (T.10)

This moving work was clearly unusual for Mr. Ostler. While his normal work did occasionally require him to move boxes of parts, on this day he was required to put his regular boxes of parts into much larger, heavier boxes, and to then carry these heavier boxes to his truck. In addition, he was required to do this work for the entire day, not for the short time required to unload regular deliveries. There was thus sufficient evidence for the Commission to make a reasonable finding that Mr. Ostler was engaged in unusually strenuous work that day.

The evidence relied upon by the Commission was not solely from the applicant's mouth; his testimony was confirmed by both the carpenter, Nick Ingram, (T.28-30) and the service manager, Ervine Shelley. (T.32-33) Further, an industrial medical panel was convened and its conclusion was that "the applicant did have an industrial injury" (Medical Panel Report page 2).

Plaintiff has cited Church of Jesus Christ of Latter-Day Saints v. Industrial Commission, 590 P.2d 328 (Utah, 1979);

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Redman Warehousing Corporation v. Industrial Commission, 22 U.2d 398, 454 P.2d 283 (1969); Carling v. Industrial Commission, 16 U.2d 260, 399 P.2d 202 (1965); and Pintar v. Industrial Commission, 14 U.2d 276, 382 P.2d 414 (1963) in support of its position. These cases are inappropriate. Each of them involved a workman who had a progressively worsening ailment which happened to manifest itself as an injury while he was performing his everyday duties. In each case, this Court felt that it was determinative that the workman at the time of his injury was not engaged in any unusual activity or was not under any unusual strain. Church of Jesus Christ, etc. supra, involved a janitor who was setting up chairs in preparation for a meeting. This Court said:

> There is nothing in his testimony that shows anything unusual about his activities, that shows any unusual exertion or strain, or that shows any contact with objects or a fall. There was simply nothing different about his activities on the day in question than on any other such working day.(Emphasis added)

Likewise, Redman Warehousing Corporation, supra, involved a truck driver who's back problems manifested themself while he was sitting and driving his truck. This Court said in denying recovery that,

> There is nothing in this record that shows any unusual event or an "accident" if you please, justifying compensability within the nature intent or spirit of the workmen's compensation act. . . .As a matter of fact the record reflects up to the time of the pains inception, applicant was doing exactly what he had been doing continuously for eleven years prior thereto. . . (Emphasis added)

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The Carling, supra, and Pintar, supra, cases also involve workmen who's gradually worsening ailments culminated in problems while in the course of their normal work.

These cases are not in point for two reasons: One, Mr. Ostler was not performing his normal duties at the time of the injuries but was engaged in unusually strenuous work; and two, there was no evidence that he suffered from a continually worsening back problem which merely happened to occur while he was at work. On the contrary, he testified that his 1968 operation had been a complete success, that he had been free of pain since his recovery and that he had not seen a doctor regarding his back since 1969. (T.15) Even if this was not true, it is clear under the decisions of this Court that the existence of a previous injury is irrelevant if the requirements of an "accident" are otherwise met. Powers v. Industrial Commission, 427 P.2d 740, 743 (Utah, 1967) ("The aggrevation or lighting up of a pre-existing disease by an industrial accident is compensable. . .").

Plaintiff's brief and its citation of the above cases indicate a misunderstanding of the issues on appeal. Its arguments and cases become relevant only when it is established that Mr. Ostler's injury occurred in the course of his normal work. However, it was explicitly found by the Industrial Commission that the applicant was not in the course of his normal work when he was injured. The decisive issue on this appeal is whether the Commission was unreasonable in this finding of fact. Plaintiff has failed to address

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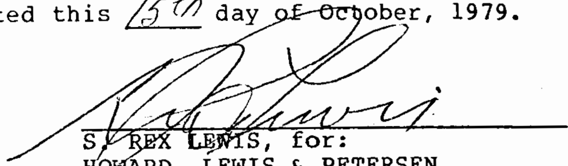
this issue.

CONCLUSION

An "industrial accident" occurs when a workman sustains an injury while in a course of work unusual for his position. In this case, the Industrial Commission found that an accident had occurred on the grounds that it was unusual work for a parts manager to assist a carpenter in mounting electrical boxes under the roof of a building being constructed, and that it was unusual work for a parts manager to pack up his inventory and move it to a new building. Such holdings are clearly reasonable and are supported by substantial evidence. Thus this Court should sustain the findings of the Commission and its award to Mr. Ostler.

Respectfully submitted this 15th day of October, 1979.



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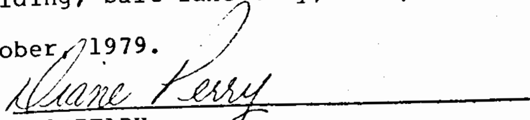
MAILING CERTIFICATE

MAILED two (2) copies of the foregoing Brief to Mr. M. David Eckersley, Attorney for Plaintiffs, 500 Ten West Broadway Building, Salt Lake City, Utah, 84101, and Mr. Frank V. Nelson, Assistant Attorney General, Attorney for Defendant Commission, State Capitol Building, Salt lake City, Utah, 84114, this 15th day of October, 1979.



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