2002

Mountain States Casing Service and/or State Insurance Fund v. Jerry L. McKean and/or Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

James R. Black
Mary A. Rudolph
BLACK & MOORE
261 East Broadway, Suite 300
Salt Lake City, Utah 84111
Telephone: 363-2727

20508

IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND, Defendants/Appellants, vs. JERRY L. McKEAN and/or INDUSTRIAL COMMISSION OF UTAH, Applicant/Respondents.	DEFENDANTS/APPELLANTS' BRIEF Supreme Court No. 20508

WRIT OF REVIEW FROM THE
INDUSTRIAL COMMISSION, STATE OF UTAH

Mary Corporon
Chris Nichols
Attorney for Respondent
142 East 200 South, #300
Salt Lake City, Utah 84111

Stephen Schwendiman
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

James R. Black
Mary A. Rudolph
Attorneys for State Insurance Fund and Mountain States Casing Service
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

James R. Black
Mary A. Rudolph
BLACK & MOORE
261 East Broadway, Suite 300
Salt Lake City, Utah 84111
Telephone: 363-2727

IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND, Defendants/Appellants, vs. JERRY L. McKEAN and/or INDUSTRIAL COMMISSION OF UTAH, Applicant/Respondents.	DEFENDANTS/APPELLANTS' BRIEF Supreme Court No. 20508

WRIT OF REVIEW FROM THE
INDUSTRIAL COMMISSION, STATE OF UTAH

Mary Corporon
Chris Nichols
Attorney for Respondent
142 East 200 South, #300
Salt Lake City, Utah 84111

Stephen Schwendiman
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

James R. Black
Mary A. Rudolph
Attorneys for State Insurance Fund and Mountain States Casing Service
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND, Defendants/Appellants, vs. JERRY L. McKEAN and/or INDUSTRIAL COMMISSION OF UTAH, Applicant/Respondents.	DEFENDANTS/APPELLANTS' BRIEF Supreme Court No. 20508

BRIEF OF DEFENDANTS/APPELLANTS

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented on appeal is whether an injury the applicant sustained while in his home is compensable under the Workers' Compensation Act of Utah.

STATEMENT OF FACTS

On January 8, 1982, while working for Mountain States Casing Service in Coalville, Utah, Jerry L. McKean, the applicant-respondent herein, caught his right arm in a drilling apparatus. The arm was completely severed in the accident. (R. 1-3). After impressive surgical intervention, the limb was saved. Six or seven subsequent surgeries were required, however, leaving the applicant with little or no feeling in the arm. (R. 43, 45, 67-68, 98).

The State Insurance Fund paid all medical bills, temporary total disability compensation and certain other expenses following the accident. (R. 4, 9-12, 58-61, 116-117).

On or about April 6, 1982, the applicant seriously burned his right hand while engaged in various activities at his home, including working on a steam heater, working on headers to an automobile exhaust system, and cooking on a stove. (R. 66-67). The injury was rather serious because applicant apparently did not feel any heat on his hand when it was burned. (R. 31-32, 43, 45, 117). This burn injury necessitated skin graft surgery. The applicant was admitted to the University of Utah Hospital on April 13, 1982, for the surgery and released on April 19, 1982. (R. 92, 117).

The State Insurance Fund denied liability for treatment of the burn injury, contending that the causal connection between the burn injury and the earlier industrial injury of January 8, 1982, was broken. (R. 117). A hearing was held on the matter on January 14, 1985. (R. 16-87).

The Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order on January 23, 1985, holding that State Insurance Fund was liable for expenses resulting from the applicant's burn injury. (R. 98-102).

A Motion for Review was submitted by State Insurance Fund and Mountain States Casing Service, defendant-appellants herein, on January 29, 1985. (R. 104-108). On February 6, 1985, the Administrative Law Judge's Order was affirmed by the Industrial Commission in its Denial of Motion for Review. (R. 110).

Appellants submitted a Petition for Review and Docketing

Statement to this Court on March 4, 1985. (R. 112-133). Appellants now submit their Supreme Court Brief in this matter.

SUMMARY OF ARGUMENT

The Administrative Law Judge found that Mr. McKean's burn injury occurred within the so-called "quasi-course of employment" and was thus compensable. The doctrine of quasi-course of employment, however, is not part of Utah law. In any case, McKean's injury does not properly come within the quasi-course of employment; and, hence, the injury is not compensable on that ground. Neither is McKean's injury compensable on the basis of general rules concerning subsequent injuries. The chain of causation leading from McKean's original industrial injury was broken by his own negligent conduct.

ARGUMENT

POINT I

THE INJURY IN QUESTION WAS NOT THE RESULT OF AN INDUSTRIAL ACCIDENT AND WAS NOT SUSTAINED DURING THE "QUASI-COURSE OF EMPLOYMENT".

In the Findings of Fact, Conclusions of Law and Order, affirmed by the Industrial Commission, the Administrative Law Judge based his conclusion of law on Professor Larson's analysis of the "quasi-course of employment". Appellants contend, first, that Larson's concept of "quasi-course of employment" is not part of Utah law and, second, that the Administrative Law Judge, in any event, misapplied Larson's concept in the instant case.

No Utah case is cited anywhere in the Administrative Law Judge's Findings of Fact or in the Industrial Commission's Denial of Motion for Review to suggest that Utah has adopted Professor Larson's concept of "quasi-course of emloyment" activities. Appellants note that at least a minority of states have rejected Larson's concept. According to Larson, activities in the so-called "quasi-course of employment" are activities undertaken by the employee following an industrial injury that, although they occur outside the time and space limits of the employment, "are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury." Larson, Vol. 1, Section 13.11(d) (emphasis added). Larson illustrates activities in the "quasi-course of employment" with the example of trips to and from a physician's office for treatment of the industrial injury. Larson, Vol. 1, Section 13.11(d).

A number of states, however, have disallowed compensation for injuries in such circumstances. In Anderson v. Chatham Electronics, 70 N.J. Super. 202, 175 A.2d 256 (1961), the court rejected the quasi-course of employment argument. In that case, the employee sustained injuries in an auto collision while returning from her doctor's office where she had gone for a medical clearance slip required by her employer before returning to work following surgery unrelated to her employment. The court held that those injuries did not "arise out of and in the course of the employment."

Kiger v. Idaho Corp., 85 Idaho 424, 380 P.2d 208 (1963) involved an initial work-related injury and a subsequent automobile accident which aggravated the first injury. The auto accident occurred on a day when the claimant was not working for her employer, but while she was enroute to a doctor for treatment of injuries sustained in the industrial accident. The Idaho Supreme Court found the auto accident did not arise out of and in the course of claimant's employment, because there was no causal connection between the industrial injury and the accident. Following Farmers Gin Co. v. Cooper, 147 Okl. 29, 294 P. 108 (1930), the Idaho Court found the highway collision to be an intervening cause breaking the causal connection between the injury and the employment.

The court in Bankers Investment Co. v. Boyd, Okl., 560 P.2d 958 (1977) came to a similar conclusion. In that case, the claimant was traveling to a hospital for treatment of a prior industrial injury when she was involved in an automobile accident. Since the auto accident occurred six months after the claimant's termination of employment, the Oklahoma Supreme Court held that the resulting injuries neither arose out of nor occurred in the course of employment and were, therefore, not compensable.

Even if Utah, in an appropriate case, would adopt Professor Larson's concept of quasi-course activities, the concept does not apply in the instant case. The Administrative Law Judge misapplied the concept in his Findings of Fact. The Administrative Law Judge cited the following passage from Larson, in

which Larson explains his concept of the quasi-course of employment:

> . . . activities undertaken by the employee following upon his injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. Larson, Vol. 1, Section 13.11(d); R. 99 (emphasis added).

From this passage, the Administrative Law Judge inferred that any necessary or reasonable activities would be included in Larson's quasi-course of employment. Accordingly, the Administrative Law Judge found that McKean's activities on the day of his injury (working on an exhaust header, working on a steam radiator, cooking on a stove) were entirely reasonable. The Administrative Law Judge stated:

> Applying the foregoing to the instant matter, the question becomes: was the applicant's conduct on or about April 6, 1982 reasonable such that his activities may be considered reasonable or necessary. Considering all of the circumstances of the case, I do not find it unreasonable that the applicant would have been working on his car on April 6, 1982 nor do I find the applicant's conduct unreasonable in preparing his meals, since he and his wife were separated at that time. Finally, I do not see anything unreasonable about the applicant attempting to repair an inoperative steam radiator for the purpose of having heat in the home. Rather, each of these activities are [sic.] reasonable, usual daily activities of living. (R. 100).

It is clear from this passage that the Administrative Law Judge misconstrued Larson's concept of quasi-course of

employment. Larson does not speak of activities which are "necessary or reasonable" simplicitor. Larson says, ". . . necessary or reasonable activities that would not have been undertaken but for the compensable injury." Larson goes on to state, "'Reasonable' at this point relates not to the method used, but to the category of activity itself." Larson, Vol. 1, Section 13.11(d). When Larson speaks of "necessary or reasonable activities", he has in mind those activities that are necessitated by the employee's original industrial injury. This is made clear by the examples he gives, such as the example of trips to and from a physician's office for treatment of the industrial injury.[1] Larson, Vol. 1, Section 13.11(d). Activities of this kind, of course, are necessitated (i.e., made necessary and reasonable) by the employee's injury. In contrast, the activities undertaken by Mr. McKean on April 6, 1982, were not necessitated by his original industrial injury. McKean's activities were entirely unrelated to his original injury. As the Administrative Law Judge correctly noted, each of McKean's activities was a normal activity of daily living. (R. 100). Consequently, Mr. McKean's activities were not activities within the quasi-course of employment; and, accord-

---

[1]Cases exemplifying quasi-course of employment activities, in addition to those cited in Larson, are: Wood v. State Acc. Ins. Fund, 30 Or. App. 1103, 569 P.2d 648 (1977) (Injury sustained during vocational rehabilitation program designed to restore employee to full employability after initial on-the-job injury was itself compensable); Whitington v. Indus. Com'n, 10 Ariz. App. 461, 459 P.2d 740 (1969) (Compensation paid on auto-accident injury which occurred while employee was driving to attend medical consultation concerning his earlier industrial accident).

ingly, the burn injury resulting from one or more of those activities is not compensable.

POINT II

THE CHAIN OF CAUSATION LEADING FROM THE ORIGINAL INDUSTRIAL INJURY WAS BROKEN BY THE APPLICANT'S OWN NEGLIGENT CONDUCT.

The general rule regarding the compensability of injuries subsequent to an original industrial injury is stated by Professor Larson as follows:

> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Larson, Vol. 1, Section 13.11.

As noted at Point I, Larson distinguishes activities in the quasi-course of employment; and Larson maintains that, with regard to such activities, only intentional conduct by the employee will break the chain of causation. Larson, Vol. 1, Section 13.11(d). With regard to non-quasi-course activities, however, the employee's negligence is enough to break the chain of causation. About such non-quasi-course activities, Larson writes:

> When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, . . ., the chain of causation may be deemed broken by either intentional or negligent claimant misconduct. Larson, Vol. 1, Section 13.11(d), 3-380 (emphasis added).

The instant case falls within the category of cases Professor Larson has collected under the heading of "Weakened member contributing to later fall or other injury". Larson,

Vol. 1, Section 13.12. Larson cites cases both allowing and disallowing compensation. The operative distinction between the cases is whether or not the claimant was negligent. In one case, for instance, the claimant, because of a compensable eye injury, was required to wear dark glasses. At 11:00 at night, in his own home, he fell down the stairs because of the obscuring of his vision by the glasses. The aggravation of his eye condition resulting from the fall was held compensable. The claimant in the case was not found to have been negligent, however. Randolph v. E. I. Du Pont De Nemours Co., 130 N.J.L. 353, 33 A.2d 301 (1943). A contrary result was arrived at in Sullivan v. B. & A. Constr., Inc., 122 N.Y.S.2d 571, rev'g 307 N.Y. 161, 120 N.E.2d 694 (1954). In this case, the claimant was found to have been negligent. The claimant had previously suffered two compensable knee injuries; and, as a result of these accidents, his right knee occasionally "locked", rendering the right leg practically useless. While driving an automobile, his right knee locked; he was unable to apply his brakes; and an accident occurred. The injuries sustained in the automobile accident were held noncompensable, on the ground that claimant's own act of driving with knowledge of his condition broke the chain of causation between the industrial accident and the car crash. Appellants contend that the instant case is much more like Sullivan than Randolph. Appellants contend that Mr. McKean was negligent when he engaged in the activities of April 6, 1982, without taking any precautions against burning his hand.

Utah cases are consistent with the categories and distinctions set out by Professor Larson. The implication that negligence will cut off the chain of causation is found in Gunnison Sugar Co. v. Indus. Com'n of Utah, Utah, 275 P. 777 (1929). In that case, an employee injured his back while on the job. He went to a doctor who misdiagnosed his condition as rheumatism and advised the employee to have all his teeth extracted. Following the physician's orders, the employee had his teeth extracted. He then sought compensation for these expenses. Holding that the additional expenses were compensable, the Utah Supreme Court stated:

> So, though it be assumed that the physician who diagnosed the employee's condition as that of rheumatism was . . . incompetent, and that in consequence thereof the employee's teeth were extracted, yet, inasmuch as no claim is made that the employee was negligent in seeking or employing such physician, the aggravated . . . condition of the employee so occasioned by the . . . unskillfulness of such physician cannot be said to be due to an independent and intervening cause. . . . 257 P. at 779 (emphasis added).

Two relatively recent Utah cases held the applicant's subsequent injury to be compensable. In Fruehauf Trailer Co. v. Indus. Com'n, 16 Utah.2d 95, 396 P.2d 409 (1964), the applicant injured his knee while working and developed thrombophlebitis as a result. Later, he developed a gall bladder condition and pulmonary embolus. The Utah Supreme Court found that there was sufficient evidence of a causal relationship between the previous, industrial injury and the pulmonary embolus to uphold the reward of compensation. In Fruehauf, there was no question of

the applicant's subsequent medical problems being brought about by any negligence on his part. Likewise, there was no issue of the applicant's negligence in Perchelli v. Utah State Indus. Com'n, 25 Utah 2d 58, 475 P.2d 835 (1970). In that case, the applicant had injured his back in an industrial injury. Some years later, his condition was triggered by a sneeze into a disc herniation, which required surgery. The medical evidence was that the applicant had a progressive back condition due to the work-related injury and that if the claimant had not sneezed, some other major or minor event would have eventually necessitated the surgery.

In his commentary on the case, Larson holds that the result in Perchelli is "clearly correct." Larson points out that the sneezing incident should not obscure the true nature of the case, which is merely the further medical complication flowing from a compensable injury. Larson notes that if the herniation had occurred while the applicant rolled over in his sleep, its characterization as a natural sequel to the compensable injury would have seemed obvious. Finally, Larson distinguishes the case from one involving negligence by the applicant:

> A different question is presented, of course, when the triggering activity is itself rash in the light of claimant's knowledge of his condition. Larson, Vol. 1, Section 13.11(a).

Appellants contend that the instant case is easily distinguishable from Fruehauf and Perchelli in that applicant McKean was negligent in not protecting his right arm and hand during his activities of April 6, 1982.

In his Findings of Fact, the Administrative Law Judge placed great weight on the fact that Mr. McKean's physician told him that some feeling should return to his right arm and hand. The Administrative Law Judge concluded that McKean was not negligent in working with hot objects (exhaust headers, steam radiator, stove), because he did not know his arm was without feeling. The Administrative Law Judge stated:

> Based on his lack of prior knowledge, the applicant's activities of the date in question, April 6, 1982 do not appear to the Administrative Law Judge to have been unreasonable in light of all the facts and circumstances. Therefore, the Administrative Law Judge finds that the chain of causation between the industrial injury of January 8, 1982 and the burn injury sustained by the applicant on or about April 6, 1982 has not been broken by any intentional or negligent misconduct by the applicant. (R. 100).

Regardless of what Mr. McKean's physician told him he might expect about recovering some feeling in his arm, it is impossible to believe that Mr. McKean did not know, of his own immediate experience, whether he had feeling in his arm at the time of his activities of April 6, 1982. Indeed, from McKean's testimony, it is perfectly clear that he did know that his arm was numb. (R. 45, 67-68).

Although Mr. McKean did and should have undertaken activities of daily living, his conduct of those activities should not have been negligent. Since he was experiencing numbness in his right arm and hand, he should have taken reasonable precautions against further injury. The fact that McKean burned his hand and was never aware of the burning when it occurred, shows

negligence res ipsa loquitur. At the very least, Mr. McKean should have protected his hand while working with hot objects with some sort of protective covering, such as a heat-resistant glove.

Mr. McKean's burn injury was a result of his own negligent conduct. This negligence broke the chain of causation between the original industrial accident of January 8, 1982, and the burn injury of April 6, 1982. As such, neither Mr. McKean's employer nor State Insurance Fund should be held liable for the expenses incurred by Mr. McKean for the treatment of the burn injury to his right hand.

CONCLUSION

Mr. McKean's subsequent burn injury does not come within Professor Larson's quasi-course of employment. Furthermore, the chain of causation from McKean's original industrial injury was cut off by McKean's own negligent conduct. Accordingly, appellants request that the Industrial Commission's Denial of Motion for Review, ordering compensation for McKean's burn injury, be reversed.

DATED this 26th day of April, 1985.

BLACK & MOORE

Mary A. Rudolph

MARY A. RUDOLPH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Defendants/Appellants was placed in the United States mail, with first-class postage thereon, on the 26th day of April, 1985, addressed as follows:

Mary Corporon
Chris Nichols
Attorney for Respondent
142 East 200 South, #300
Salt Lake City, Utah 84111

Industrial Commission of utah
160 East 300 South
Salt Lake City, Utah 84111

Stephen Schwendiman
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Mary A. Rudolph

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 85000085

JERRY MCKEAN, Applicant, vs. MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND, Defendants.	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 332, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on January 14, 1985, at 10:00 o'clock a.m.; same being pursuant through order and notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: Applicant was present and represented by Chris Nichols, Attorney at Law.

Defendants were represented by Dennis V. Lloyd, Attorney at Law.

At conclusion of the evidentiary hearing, the State Insurance Fund, by and through counsel, made a motion to dismiss the applicants claim for medical expenses incurred as the result of the surgery he received on April 13, 1982, for a burn received while at home. In addition, the State Insurance Fund also made a motion for the allowance of an offset against the applicants temporary total disability benefits, for sums received in lieu of payment for janitorial services. The motions were taken under advise by the Administrative Law Judge, being fully advised in the premises, the Administrative Law Judge is prepared to enter the following.

FINDINGS OF FACT:

This case involves the tragic amputation of the arm of the applicant, Jerry McKean. This industrial injury was sustained on January 8, 1982 while the applicant was working for Mountain States Casing in Coalville, Utah. As a result of his injury, the applicants arm was caught in the tongs of the drilling apparatus, and was amputated. After gallant surgical intervention, the limb was saved, however the applicant has had six or seven surgeries to the arm as a result. The State Insurance Fund, to its credit, has paid the

applicant all temporary total disability benefits which have been indicated to date. However, the dispute causing the need for a hearing, revolves around the applicants injury he sustained while at home in Shoshone, Idaho on or about April 6, 1982. On that date, the applicant was at home and had worked on his car installing an exhaust header. That day he also worked on a steam radiator in his house which was not working. The applicant also testified that he had cooked his meals that day. When the applicant had a bath that evening he noticed no problems with his hand, but the following morning he had a blister on his right thumb. The applicant testified that since the injury, he has been suffering from diminished sensation in his right hand, but that he had been told by his doctor that the feeling should come back, and that if it did not surgery would be undertaken towards that end. However, the applicant was not told to restrict his activities of living.

Following the discovery of the blister on his thumb, the applicant reported for medical treatment to Dr. Leonard, and at that time was advised that he would need surgery or else he would possibly lose half of his hand. The applicant was admitted to the University of Utah Hospital on April 13, 1982 for skin graft surgery, and was eventually released on April 19, 1982. The State Insurance Fund has denied liability for this treatment, contending that the causal connection between that injury and the industrial injury of January 8, 1982 was broken. As support for their position, the State Insurance Fund relies on Professor Larsen's Workmen's Compensation. In section 13.00 of the same, Professor Larsen sets forth the general considerations governing cases involving the "range of compensable consequences":

> When the primary injury is shown to have arisen out of or in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of independent intervening cause attributable to claimant's own intentional conduct.

In further talking about this area, Professor Larsen has contrived a new concept, which he calls "Quasi-Course of Employment." In this regard, the expression means:

> activities undertaken by the employee following upon his injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.

In other words, when an injury arises out of Quasi-Course activity, the causal chain is not broken by mere negligence of the applicant in the performance of that activity, but rather is only broken by the intentional conduct of the applicant which might be regarded as expressly or impliedly prohibited by the employer.

Applying the forgoing to the instant matter, the question becomes: was the applicant's conduct on or about April 6, 1982 reasonable such that his activities may be considered reasonable or necessary. Considering all of the circumstances of the case, I do not find it unreasonable that the applicant would have been working on his car on April 6, 1982 nor do I find the applicant's conduct unreasonable in preparing his meals, since he and his wife were separated at that time. Finally, I do not see anything unreasonable about the applicant attempting to repair an inoperative steam radiator for the purpose of having heat in the home. Rather, each of these activities are reasonable, usual daily activities of living.

Had the applicant burned his hand prior to the injury of April 6, 1982 then, the State Insurance Fund's point would be well taken and his case would be analogous to those cited by Professor Larsen. For example, one of the cases cited by Professor Larsen involves a claimant who knew he had a history of an unstable knee. Possessed of this knowledge, this claimant proceeded to climb down a flight of stairs to take out the trash, whereupon an injury was sustained. Compensation in that instance was denied, and properly so. However, the evidence in the file before me does not inescapably point to that conclusion or result. Rather, the applicant testified that his doctor had advised him that his feeling would come back in the arm, and the applicant testified that he did in fact have some feeling in the arm. Based on his lack of prior knowledge, the applicant's activities of the date in question, April 6, 1982 do not appear to the Administrative Law Judge to have been unreasonable in light of all of the facts and circumstances. Therefore, the Administrative Law Judge finds that the chain of causation between the industrial injury January 8, 1982 and the burn injury sustained by the applicant on or about April 6, 1982 has not been broken by any intentional or negligent misconduct by the applicant. Rather, his injury of April 6, 1982 is an unfortunate but natural consequence of his industrial injury of January 8, 1982.

The defendants, by and through counsel, also made a motion for an offset of the value of the rental fee of the applicant's present living quarters has against their liability for temporary total disability. The applicant testified that he was staying in a downstairs apartment of a building which has been converted to professional offices. The applicant's testimony was that his wife works five days a week at the job of cleaning these offices, and that he works two days per week, which consists of emptying the trash. In addition the applicant is also required to contribute a $50.00 per month improvement to the apartment. Based on the applicant's testimony, and considering the equities of the case, including the fact that the applicant is planning on returning to his home in Yakima, Washington, the Administrative Law Judge finds that there is insufficient evidence to grant the relief sought by the State Insurance Fund. Based on the applicant's testmony, it would appear to the Administrative Law Judge that the bulk of the work is being done by his wife such that an offset of the applicant temporary total disability benefits would not be proper.

At the conclusion of the evidentiary hearing, the State Insurance Fund, by and through counsel, indicated its willingness to pay the applicant

travel reimbursement for seven trips to Salt Lake City from Yakima, Washington, payable at the rate of 16¢ per mile and based on the mileage as indicated in the road atlas. The State Insurance Fund has also agreed to pay the applicant's future medical expenses for his treatments in Washington, subject to the Utah Medical and Surgical Fee Schedule. The Administrative Law Judge fully explained the manifestations of this situation to the applicant, so that there would be no misunderstanding in this regard. The State Insurance Fund also agreed to pay the applicant for five nights of per diem at $22.50 per night as reimbursement for trips he made from Yakima, Washington to Salt Lake City which involved overnight stays.

Finally, the applicant produced a W2 form for 1981 which he testified covered wages for the period November 24, 1981 to and including the end of the year. Based on that W2 statement, the applicant was earning wages sufficient to entitle him to the maximum award for temporary total disability benefits of $256.00 per week. The State Insurance Fund has heretofore paid the applicant temporary total compensation at the rate of $248.00 per week, thereby creating an $8.00 per week underpayment. The State Insurance Fund is to make the necessary adjustments to the applicant's compensation rate, and the difference should be awarded to him in a lump sum.

CONCLUSION OF LAW:

Jerry McKean is entitled to workmen's compensation benefits for the industrial accident sustained on January 8, 1982, which accident arose out of or during the course his scope of his employment with the defendants, Mountain States Casing.

ORDER:

IT IS THEREFORE ORDER THAT defendants, Mountain states Casing and or State Insurance Fund, pay Jerry McKean compensation at the rate of $256.00 per week for temporary total disability benefits, said benefits to continue until the applicant's condition stabilizes. Since the applicant has heretofore been paid temporary total disability benefits at the rate of $248.00 per week, there has been an $8.00 per week underpayment of benefits, which should be paid to the applicant in a lump sum.

IT IS FURTHER ORDERED that defendants, Mountain States Casing and or State Insurance Fund, pay all medical expenses incurred as the result of the industrial injury of January 8, 1982; 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, Mountain States Casing and or State Insurance Fund, pay all medical expenses incurred as the result of the injury of or about April 6, 1982, said expenses to be paid in accordance with Medical and Surgical Fee Schedule of the Industrial Commission of Utah.

IT IS FURTHER ORDERED that the defendants, Mountain States Casing and or State Insurance Fund, pay applicant mileage at the rate of 16¢ per mile for

seven round trips between Yakima, Washington and Salt Lake City; and in addition the State Insurance Fund shall also pay five days of per diem at the rate of $22.50 per day to the applicant.

IT IS FURTHER ORDERED that the defendants, Mountain States Casing and or the State Insurance Fund, pay Chris Nichols, attorney for the applicant, 15% of the foregoing underpayment of temporary total compensation, travel allowance, and per diem allowance, the same to be deducted from the aforesaid awards and remitted directly to his office.

IT IS FURTHER ORDERED that the offset of temporary total disability sought by the State Insurance Fund should be, and the same is hereby denied.

Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 23rd day of January, 1985

ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

I certify that on January 23, 1985 a copy of the attached Findings of Fact and Conclusion of Law was mailed to the following persons at the following addresses, postage paid:

Jerry McKean, 731 East South Temple downstairs apartment, Salt Lake City, Utah 84102

Chris Nichols, Attorney, 142 East 200 South #300, Salt Lake City, Utah 84111

State Insurance Fund, Dennis Lloyd, Attorney 560 South 300 East Salt Lake City, Utah 84111

THE INDUSTRIAL COMMISSION OF UTAH

By Barbara

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000085

JERRY MCKEAN, Applicant, vs. MOUNTAIN STATES CASING SERVICES and/or STATE INSURANCE FUND, Defendants.	DENIAL OF MOTION FOR REVIEW

On or about January 23, 1985, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about January 29, 1985, the Commission received a Motion for Review from the Defendants by and through their attorney.

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

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of January 23, 1985, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 6th day of February, 1985.

ATTEST:

Linda J. Strasburg
Commission Secretary

Stephen M. Hadley
Chairman

Walter T. Axelgard
Commissioner

CERTIFICATE OF MAILING

I certify that on February 7th, 1985, a copy of the attached Denial of Motion for Review was mailed to the following persons at the following addresses, postage paid:

Jerry McKean, 731 East South Temple, Downstairs Apartment, SLC, UT 84102

Chris Nichols, Atty., 142 East 200 South, #300, SLC, UT 84111

Dennis Lloyd, Atty., State Insurance Fund, 560 South 300 East, SLC, UT 84111

THE INDUSTRIAL COMMISSION OF UTAH

By Wilma