

1992

Jacqui C. Walls v. Uncle Barts, Uninsured Employers' Fund, Board of Review of the Industrial Commission of Utah : Brief of Respondent Uninsured Employers' Fund

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
OF U

SUBJECT NO 920499

IN THE UTAH COURT OF APPEALS

JACQUI C. WALLS,)	
)	
Applicant and Petitioner,)	Case No. 920499
)	
vs.)	
)	Priority No. 7
UNCLE BARTS, UNINSURED EMP-)	
LOYERS' FUND, BOARD OF REVIEW)	
OF THE INDUSTRIAL COMMISSION)	Industrial Commission
OF UTAH,)	Case Nos. 90000716
)	90000342
Defendants and Respondents.)	

BRIEF OF RESPONDENT UNINSURED EMPLOYERS' FUND

PETITION FOR REVIEW FROM THE INDUSTRIAL COMMISSION OF UTAH

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NOV 25 1992

Mary T Noonan
Clerk of the Court
Utah Court of Appeals

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All statutory citations are to Utah Code Annotated 1953, as amended.

JURISDICTION

Sections 78-2a-3(2)(a) and 35-1-86 grant the court jurisdiction of this appeal.

ISSUES PRESENTED AND APPLICABLE STANDARD OF REVIEW

Issue: Did Jacqui Walls' injury to her foot arise out of the course of her employment with Uncle Bart's?

Standard of review: The commission's decision is entitled to deference. An agency is entitled to deference

where the governing statute explicitly or implicitly contains a grant of discretion. *Morton International, Inc. vs. State Tax Commission*, 814 P.2d 581 (Utah, 1991). The Workers' Compensation Act grants broad discretion to the Industrial Commission, as follows:

35-1-16(1) "It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority to:

(a) supervise every employment and place of employment and to administer and enforce all laws for the protection of the life, health, safety, and welfare of employees;"

35-1-20. "All orders of the commission within its jurisdiction shall be presumed reasonable and lawful until they are found otherwise in an action brought for that purpose, or until altered or revoked by the commission."

35-1-33. "A substantial compliance with the requirements of this title shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature."

These statutes clearly grant the Industrial Commission broad authority and discretion to interpret, construe, consider and determine the matters before it under the Worker's Compensation Act. Accordingly, the Commission's order in this matter is entitled to deference.

Further, the Commission's finding that Ms. Walls was not acting in the course of her employment at the time of her accident is a factual determination and must be affirmed if there is substantial evidence in light of the record as a

whole. Section 63-46b-16(4)(g) and *Grace Drilling vs. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

DETERMINATIVE STATUTE

35-1-45. "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."

STATEMENT OF THE CASE

This is an appeal from a final order of the Industrial Commission denying the applicant compensation and benefits under the Workers' Compensation Act for an injury she sustained on December 29, 1989.

STATEMENT OF FACTS

These are the relevant facts found by the Commission's administrative law judge:

The applicant, Jacqui Walls, worked as a bartender at Uncle Bart's, a bar in Ogden, Utah. R-36. Ms. Walls worked the day shift at Uncle Bart's from 10:00 a.m. to 5:00 p.m. R-36.

On December 29, 1989, after the end of her shift, Ms.

Walls' figuratively removed her bartender hat and donned the hat of a customer of Uncle Bart's. She remained at the bar drinking beer, shooting pool and socializing. R-37. She performed no work related activities. R-37.

Ms. Walls' theory at the hearing was that she had been asked to remain and help train one Ryan Thomas, a new employee. R-37. The administrative law judge found that assertion was not worthy of belief in light of his observation of the applicant's testimony and the testimony of Thomas, who stated that he knew the things that Ms. Walls alleged she was to teach him, principally the operation of the cash register, and that he was supervised by one Toby Racine, the night manager. R-37, 38.

Both Thomas and Racine were "large individuals", Thomas standing in excess of six feet tall and weighing at least 215 pounds. R 37-38. Ms. Walls, at 5'2" tall and weighing 102 pounds, is best described as slight. R-37. Ms. Walls' description of the accident and her motive for the action she supposedly was engaged in will show the relevance of this size difference.

Sometime between 10:30 to 11:00 p.m., some five and one-half to six hours after her shift ended, Ms. Walls alleges that she took it upon herself to make a 130 pound keg of beer ready for tapping, although no one had instructed her to do so. R-37. As she opened the door of the

cooler where Uncle Bart's stored its chilled beer, a keg fell on Ms. Walls' foot causing the injury for which she now seeks compensation under the Worker's Compensation Act. R-37. It beggars the imagination that a person of Jacqui Walls' physical stature was in fact attempting to help her employer by moving a keg of beer weighing more than she did, when both the bartender and assistant manager were present and more than up to the task.

The administrative law judge found that Ms. Walls was not in the course of her employment at the time of her injury. R-38.

SUMMARY OF ARGUMENT

The Court should affirm the decision of the Industrial Commission because Ms. Walls' injury occurred long after her duty hours and while she was a patron, not an employee, of Uncle Bart's.

ARGUMENT

MS. WALLS FAILED TO PROVE THAT HER INJURY AROSE OUT OF THE COURSE OF HER EMPLOYMENT.

Preliminarily, it should be noted that it was Ms. Walls' burden at the hearing to prove by a preponderance of the evidence that she sustained her injury in the course of her employment. *Higley vs. Industrial Commission*, 75 Utah 361, 285 P. 306 (1930).

Section 35-1-45 provides that injuries are only compen-

sable if they arise "out of and in the course of employment." Under Utah law, that phrase contains two separate conditions. The Commission's administrative law judge found that Ms. Walls did not meet the second condition which is that the injury must arise in the course of her employment.

An injury only occurs "in the course of employment" if "it occurs while the employee is rendering service to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service." *M & K Corp. vs. Industrial Commission*, 112 Utah 488, 189 P.2d 132, 134 (1948). (emphasis added.) Reduced to its essence, the injury must occur while the employee is within her employment relationship, as defined by the agreement between the parties. Obviously, one of the terms of that agreement is the employee's work schedule. Ms. Walls' injury occurred long after her quitting time, while she was at best a patron of Uncle Bart's and while she was outside of her employment relationship.

Whether an accident occurs before work starts or after it is over is an element which determines if an injury occurs within the course of employment. Generally, an employee who sustains an injury within a reasonable time before or after his or her shift is entitled to worker's compensation benefits. 1A A. LARSON, THE LAW OF WORKMEN'S

COMPENSATION § 21.60(c). However, if an employee merely loiters after hours, she may be found to be outside the course of her employment. *Ibid.* In a case remarkably similar to this one, *Lona vs. Sosa*, 420 N.E. 2d 890 (Ind. App. 1981), the court found that a bartender was not within the course of employment at the time of his death when he stayed in the bar drinking for 2 1/2 hours after his shift ended, and was shot and killed by the assistant manager, apparently over a dispute involving a shortage in the till.

When Jacqui Walls' shift ended and she remained in the bar, her relationship to Uncle Bart's fundamentally changed. She became a customer. When that occurred, Uncle Bart's was no longer strictly liable under the Workers' Compensation Act for virtually any misfortune that may have befallen Jacqui Walls. As a patron, Uncle Bart's owed Ms. Walls those duties which a business owes to its customers, and subject to all of the rights and liabilities inherent in that relationship.

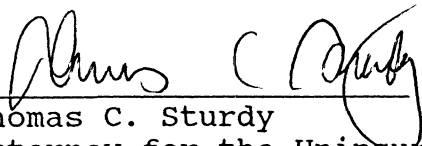
On appeal, Ms. Walls, applying *Black vs. McDonald's of Layton*, 733 P.2d 154 (Utah, 1987), claims that she was in the course of her employment. *Black* is consistent with *M & K Corp. vs. Industrial Commission*, supra. They both require, as a condition to employer liability under the Workers' Compensation Act, that the employee be working during the period of her employment and doing work which her em-

ployer required her to perform. At the time of Ms. Walls' accident, Ryan Thomas, not the applicant, was the bartender at Uncle Bart's. Her responsibility to replenish the beer supply ended at the same time her shift ended, *five and one-half hours* before her accident. Uncle Bart's neither extended her work hours nor called her back to duty to replenish the bar.

CONCLUSION

Jacqui Walls failed to prove that she was in the course of her employment when she slipped off a barstool in Uncle Bart's and took it upon herself to ready a new keg of beer for consumption. Substantial evidence shows that at that time her relationship with Uncle Bart's was as a customer, not as an employee. Under Utah law she was not entitled to receive benefits under the Workers' Compensation Act, and the Utah Court of Appeals should affirm the order of the Industrial Commission.

RESPECTFULLY SUBMITTED this 15th day of November, 1992.



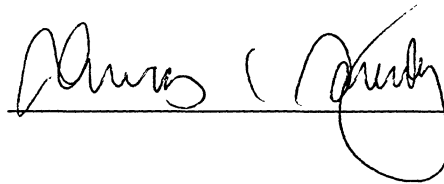
Thomas C. Sturdy
Attorney for the Uninsured
Employers' Fund
Defendant/Respondent

CERTIFICATE OF SERVICE

I certify that I mailed two true and correct copies of the Brief of the Uninsured Employers' Fund, on November 25, 1992, to each of the following:

Robert Breeze
211 East Broadway #215
Salt Lake City, UT 84111

Benjamin A. Sims
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The Industrial Commission of Utah
P.O. Box 146600
160 East 300 South, Third Floor
Salt Lake City, UT 84114-6600

A handwritten signature in black ink, appearing to read "Benjamin A. Sims", is written over a horizontal line.

APPENDIX "A"

Case No. B90000716 & 90000342

* * * * *

*
*
* FINDINGS OF FACT
*
* CONCLUSIONS OF LAW
*
* AND ORDER
*
*
*
*
*

Uninsured Employers Fund was represented by Cynthia Anderson, Associate Legal Counsel.

JACQUI C. WALLS
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Subsequent to the first hearing in this matter, the Administrative Law Judge was informed by Mr. Eckersley, counsel for the defendant and the estate of Bart Dunsdon, that the estate was insolvent, and, accordingly, the estate was dismissed as a party defendant. That left the Uninsured Employers Fund as the remaining party defendant in this matter. At the conclusion of the first evidentiary hearing in this matter, unrecorded telephonic testimony was taken from a co-employee of the applicant, Ryan Thomas. Pursuant to the objection of the applicant's counsel after the testimony had been taken, further proceedings were scheduled for the purpose of taking Mr. Thomas's testimony under oath. Those subsequent proceedings were had on March 23, 1992. It is interesting to note that the applicant did not appear at the further proceedings scheduled in this matter, and, as such, did not rebut the testimony of Mr. Thomas in this matter. Being fully advised in the premises, the Administrative Law Judge is prepared to enter the following

FINDINGS OF FACT:

At the outset, I should indicate that this case involves a serious credibility issue. This is especially so, since the original defendant in this matter, Bart Dunsdon, owner of Uncle Barts, passed away and, as such, is unable to either corroborate or dispute the applicant's testimony, concerning conversations and/or instructions she received from the decedent. Accordingly, for this reason, the credibility of the applicant is of critical importance as is the credibility of the only other testifying witness, Mr. Thomas. Having had the opportunity to observe the demeanor of both the applicant and the witness, I conclude that the applicant's credibility is wanting in this matter. Because of the unavailability of Mr. Dunsdon, it is necessary to weigh the applicant's testimony, taking into full account the extreme likelihood that her testimony would be of a self-serving nature. Weighing the obvious self-serving nature of the applicant's testimony as against the testimony of Mr. Thomas, I find that Mr. Thomas has no interest in this matter, and, as such, his testimony is more credible. His testimony is especially more credible in light of the remaining circumstantial evidence contained on the file.

The applicant was employed by Uncle Barts as a bar tender, and had started that employment in September of 1989. The applicant was so employed on December 29, 1989, when she alleges that she sustained a compensable industrial accident. The applicant testified that her shift started at 10:00 a.m., and would normally end at 5:00 p.m.. Which shift consisted of the day shift. Mr.

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Ryan Thomas on December 29, 1989, was to work the evening shift, which started at 6:00 p.m., and continued until closing, which was at 1:00 a.m..

The applicant testified that following the end of her shift, she decided to hang around the bar and informed Mr. Dunsdon of that fact. The applicant contends that Mr. Dunsdon instructed her to help Mr. Thomas with the till. However, Mr. Thomas testified that he did not require any instruction with the till, and that besides, Mr. Toby Racine was the night manager and he was instructed to train Mr. Thomas. Mr. Thomas testified that the applicant was sitting on the other side of the bar, meaning that she was sitting on the stool during his work shift. The applicant in her direct testimony, admitted that she was engaged in social activities such as playing pool and the applicant admitted that she had four beers before her injury. Given the length of time the applicant was at the bar, I find her testimony that she only had four beers strains credulity.

The applicant went on to testify that at approximately 10:30-11:00 p.m., the applicant became aware that a keg of beer was empty. The applicant testified that she was going to get the keg ready for Ryan to tap, and towards that end, she went to the back room where cold kegs were kept in an old refrigerator. As she opened the door, the keg slid out and crushed her left foot. According to the applicant's theory of the injury, she was required to be on the premises to help Mr. Thomas with the till, and also to help him to get the keg ready for tapping. However, the applicant's theory of why she remained on the premises does not bear scrutiny.

The applicant, herself, testified that after quitting time, she remained at the bar for the purpose of socializing and playing pool. Mr. Thomas testified that he already had been trained in the operation of the cash register by Mr. Racine, and, further, he testified that the applicant was performing no work related activities whatsoever during his shift. Rather, as admitted by the applicant, she was socializing and imbibing alcohol as a customer of Uncle Barts and not as an employee. That the applicant would be required to help Mr. Thomas with the keg, is also unbelievable, considering the physical stature of the applicant. The applicant, at the time of the injury, stood 5 foot 2 inches tall and weighed approximately 102 pounds. The Administrative Law Judge takes judicial notice of the fact that a full keg of Coors beer contains 15 and 1/2 gallons of beverage and weighs approximately 130 pounds. The applicant's testimony that she was somehow instructed or gleaned some implied instruction from Mr. Dunsdon that she stay five or six hours after work and help Mr. Thomas and Mr. Racine with a keg of beer, is simply incredible. By contrast, Mr. Thomas stands in excess of 6 feet tall, and weighed at least 215 pounds.

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Although I did not have an opportunity to observe Mr. Racine, the applicant testified on cross-examination, that both Mr. Racine and Mr. Thomas were rather large individuals, which rings true, since most taverns tend to prefer larger male individuals for "bouncer" purposes. That the applicant would have been expected to move a 130 pound full keg of beer at her weight of 102 pounds, simply defies logic.

The more likely scenario, is that the applicant finished her work at 5:00 p.m., and having nothing better to do that evening, decided to remain at the bar after quitting time to play pool and drink beer. The applicant was not on duty, because Uncle Barts had two other employees on duty, namely, Ryan Thomas and Toby Racine. Mr. Racine was the night manager, while Mr. Thomas was the bar tender. The applicant apparently on her own, decided that she would ready the keg for Mr. Thomas, although she was instructed by no one to do so. Therefore, at 10:30 or 11:00 p.m. on December 29, 1989, I find that the applicant was not in the course of her employment, but rather, was on the premises of her employer as a customer, and not as an employee. I would also add that the applicant's predominate motive at that time was not a good faith and intention to further her employer's work, but rather, she was there for personal entertainment reasons. Any "benefit" to the employer was merely an incidental by-product. Therefore, I find that the applicant's injury did not arise out of and in the course of her employment on December 29, 1989.

CONCLUSIONS OF LAW:

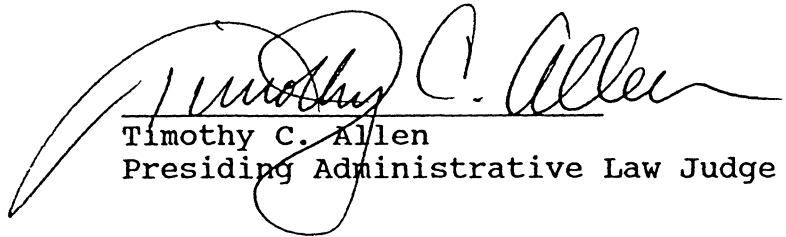
The injury to the applicant of December 29, 1989, did not arise out of and in the course of her employment with Uncle Barts (Uninsured).

ORDER:

IT IS THEREFORE ORDERED that the workers compensation claim of Jacqui C. Walls, alleging a compensable industrial accident arising out of and in the course of her employment with Uncle Barts on December 19, 1989, should be, and the same is hereby dismissed with prejudice.

JACQUI WALLS
ORDER
PAGE FIVE

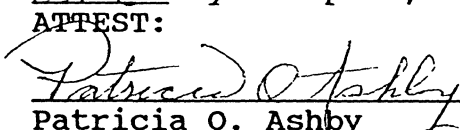
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

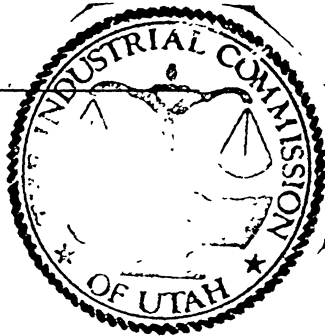

Timothy C. Allen
Presiding Administrative Law Judge

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

3rd day of April, 1992.

ATTEST:


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on April 3rd, 1992, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Jacqui C. Walls, was mailed to the following persons at the following addresses, postage paid:

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Joyce Sewell
Administrator
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Cynthia Anderson
Associate Legal Counsel
Uninsured Employers Fund

INDUSTRIAL COMMISSION OF UTAH

By

Wilma Burrows
Wilma Burrows
Adjudication

APPENDIX "B"

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6600

Jacqui C. Walls,	*	
	*	
Applicant,	*	DENIAL OF MOTION
vs.	*	FOR REVIEW
	*	
	*	
Uncle Barts (Uninsured),	*	
Uninsured Employers' Fund,	*	Case No. B90000716 &
	*	90000342
Respondents.	*	

The Industrial Commission of Utah reviews the Motion for Review of applicant in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant filed a Motion for Review on April 23, 1992 of the administrative law judge's (ALJ) order of April 3, 1992. On April 23, 1992, also, the applicant filed a Motion For Order Extending Time In Which To File Motion For Review While Transcript Is Prepared asking for an extension of time until 15 days after the receipt of the transcript. On May 12, 1992, the applicant filed a perfected Motion for Review alleging the following errors:

1. The ALJ's conclusion that the injuries sustained by the applicant did not arise out of and in the course of employment;
2. Dislike of the ALJ for the applicant, and his wrongfully attempting to cast the applicant in a disreputable light;
3. The finding of the ALJ that the bartender on duty, Ryan Thomas, needed no help; and,
4. The attempt by the ALJ to allow into evidence a telephonic question and answer session with an individual who purported to be Ryan Thomas.

The respondent, Bart Dunsdon, namesake of Uncle Barts, died during the pendency of these proceedings, and as a result, his estate was dismissed as a party defendant. The Uninsured Employers' Fund was left as the remaining respondent since Uncle Barts was uninsured, and insolvent.

The applicant had been employed at the time of the injury as a bar tender since September 1989. On the date of injury, December 29, 1989, the applicant remained after her normal day shift ended at 5:00. She was replaced at that time by Mr. Ryan Thomas who was to work from 6:00 p.m. until 1:00 a.m.

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The applicant alleges that she informed Mr. Dunsdon of her desire to hang around the bar, and that he instructed her to assist Mr. Thomas with the till. However, Mr. Thomas testified that he did not require any till instruction, and that Mr. Toby Racine, night manager, was required to train Mr. Thomas.

Mr. Thomas testified that the applicant sat on the stool side of the bar during his shift. The applicant admitted to engaging in social activities such as playing pool, and had four beers before her injury.

The applicant claimed to have become aware that around 10:30-11:00 p.m., a keg of beer was empty, and that she went to the back room to get the keg ready for Mr. Thomas to tap. As she opened the refrigerator door where the cold kegs were kept, the keg slid out and crushed her left foot. She testified that she was required by Mr. Dunsdon to be on the premises to help Mr. Thomas with the till, as well as to get kegs ready for tapping.

The ALJ determined that the applicant's version of why she remained at the bar was incredible based on her testimony, and that of Mr. Thomas. The ALJ concluded that the applicant probably had nothing better to do that evening, and so she decided to remain at the bar after her shift was finished to play pool and drink beer. The applicant was determined by the ALJ to not be on duty since there were two other employees on duty, Mr. Thomas and Mr. Racine. The applicant decided that she would on her own ready the keg for Mr. Thomas, and the ALJ found that in doing so she was not in the course of her employment; she was a customer for personal entertainment reasons, and not an employee during this episode; and, whatever benefit was derived by the employer was purely incidental. Therefore, the ALJ found that the applicant's injury did not arise out of and in the course of her employment on December 29, 1989.

An examination of the physical stature of the applicant compared with the employees on duty on the evening in question is helpful. The applicant is five feet two inches tall and weighs approximately 102 pounds. A full keg of Coors beer contains 15 1/2 gallons of beer, and weighs approximately 130 pounds. Mr. Thomas stands in excess of six feet tall, and weighs at least 215 pounds. Although the ALJ did not observe Mr. Racine, the applicant testified that both Mr. Thomas and Mr. Racine were rather large individuals.

We agree that the facts of this case as found by the ALJ who saw the witnesses, observed their demeanor, and listened to their testimony dictate a result contrary to the version espoused by the

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PAGE THREE

applicant. There is substantial evidence in the file to support the findings of the ALJ.

With regard to the allegation that the ALJ's dislike for the applicant, except for the applicant's assertion of the ALJ's dislike for her, we find no evidence of bias, and the applicant has shown us no evidence to support such claim. We therefore find this assertion to be without merit.

Next, the applicant alleges that the ALJ erred when he determined that Mr. Thomas needed no help, and that Mr. Thomas had been trained. As evidence that he was untrained, the applicant states that Mr. Thomas indicated that he had only been employed for one week, that many prices were unmarked, and that he was not familiar with all of the prices.

The ALJ had ample evidence to conclude that the applicant's mission at the bar was not to assist Mr. Thomas with tapping a keg of beer. There was testimony that there were two people on duty during the period in question, Mr. Thomas and Mr. Racine, and either of them appeared to have been capable of performing this duty. There is no evidence that Mr. Racine did not know the prices, and there was testimony that Mr. Racine was in charge, and could have assisted Mr. Thomas with price and other information. When the physical size of the parties are considered, along with the circumstances under which the applicant was at the bar, we agree with the ALJ that her presence was social, and not as an employee.

The last argument appears to be a makeweight issue which was apparently eliminated as an issue when the ALJ had a hearing in which Mr. Thomas testified. The applicant alleges that the ALJ "at one point attempted to allow into evidence a telephonic question and answer session with an individual who purported to be Ryan Thomas." The applicant states that she continues to object. The operative word here upon which this allegation of error must fail is "attempted." The claimant has neglected to show how she was prejudiced by this attempted session. Since the ALJ apparently delayed the hearing until Mr. Thomas could testify under oath, and could be cross examined, there could be no error. We note also, that the applicant did not appear at the hearing, but that she was represented by counsel.

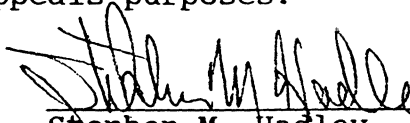
For these reasons, we find the ALJ's findings of fact, conclusions of law, and order to be supported by substantial evidence in light of the entire record, and that the allegations of error by the applicant are without merit.

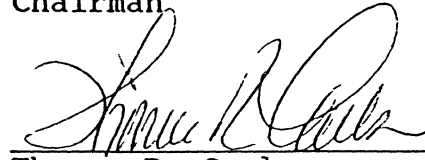
WALLS
ORDER
PAGE FOUR


ORDER:

IT IS ORDERED that the order of the administrative law judge dated April 3, 1992 is affirmed.

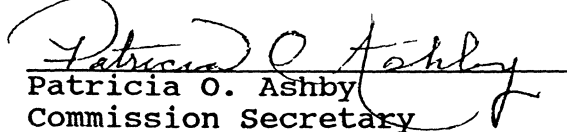
IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.


Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

Certified this 6th day of July 1992.
ATTEST:


Patricia O. Ashby
Commission Secretary



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CERTIFICATE OF SERVICE

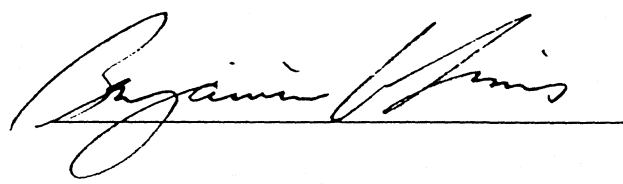
I certify that I did mail by prepaid first class postage the Denial of Motion for Review on Jacqui C. Walls, Case Numbers B90000716 and 90000342, on 12 July 1992 to the following:

Robert Breeze, Esq.
211 East Broadway, #215
Salt Lake City, Utah 84111

Jacqui C. Walls
613 4th Avenue South #C-5
Great Falls, Montana 59405

Presiding Judge Allen (by interoffice mail)

Thomas C. Sturdy, Esq.
Uninsured Employers' Fund (by interoffice mail)



A handwritten signature in cursive script, appearing to read "Benjamin H. Hines", is written over a horizontal line.