1984

Theodore Hodges v. Western Piling & Sheet Company, State Insurance Fund And Second Injury Fund : Brief of Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

THEODORE J. HODGES,	:	
	:	
Plaintiff/Appellant,	:	Supreme Court No. 19248
	:	
vs.	:	
	:	
WESTERN PILING & SHEET COMPANY, STATE INSURANCE FUND and SECOND INJURY FUND,	:	
	:	
Defendants/Respondents.	:	

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a review of a final order of the Industrial Commission of Utah that awarded appellant benefits under Utah's worker compensation laws.

DISPOSITION OF THE CASE

The Industrial Commission of Utah affirmed the Administrative Law Judge's Supplemental Order, which reversed a previous order awarding permanent total disability benefits to appellant. The Supplemental Order also reduced appellant's weekly benefits from those awarded in the previous order after a recalculation of appellant's weekly wages at the time of his industrial accident.

RELIEF SOUGHT ON APPEAL

Respondent's request that the Utah Supreme Court reaffirm the final order of the Industrial Commission of Utah.

FACTS

Appellant, Theodore J. Hodges, had been a pile butt welder for Western Piling & Sheet Company for some eight to ten years. (R, 23) On February 23, 1981, he was injured on the job when a length of heavy pipe he was helping to load struck him in the right upper arm. (R, 1,2,11,13,17,25-26)

Mr. Hodges was 68 at the time of the accident. He had begun receiving Social Security retirement benefits at age 65, but he had continued to work off and on for Western Piling. At the time of his accident in February, 1981, Hodges was working approximately 40 hours per week. (R, 17,24) But he was aware that his Social Security benefits might be reduced if he earned over a certain amount per annum. (R, 42)

Mr. Hodges consulted his chiropractor, Dr. Bruce Egbert, the day after the accident. After one or two visits for "adjustments" to his back and shoulders, Hodges was referred to Gordon R. Kimball, M.D. (R. 2, 13, 30-31)

Dr. Kimball first saw Mr. Hodges on March 2, 1981. he diagnosed Hodges' injury as ". . . a severe contusion to the right arm and shoulder with a partial tear of the bicep muscle; . . . ." He also noted a large amount of swelling in Hodges' right arm and shoulder. (R, 11-12, 31, 76) In a letter, Dr. Kimball concluded that it was reasonable to give Mr. Hodges a permanent partial disability rating of 20% impairment to the whole arm as of June 23, 1981. (R, 77)

After the first one or two visits, Dr. Kimball treated

Mr. Hodges with injections of xylocaine and cortisone. (R, 76,78) Following that or four office visits, Dr. Kimball saw Hodges again on June 19, 1981; and found Hodges then seriously incapacitated with multiple arthralgias. (R, 76, 78) According to Mr. Hodges' testimony, he experienced body swelling and pain in his joints. His weight went from 165 to 190 pounds. (R, 32) This condition was so severe that Dr. Kimball had Hodges admitted to the hospital on June 19, 1981, and arranged for consultation from Paul Miner, M.D. (R, 32-33, 76)

Dr. Miner diagnosed this condition of Hodges as "probable osteoarthritis" and treated Hodges with Mortrin. (R, 4) On or about June 20, 1981, Hodges was released from the hospital on a home program of local heat and medications. (R, 33) He was readmitted shortly thereafter for further evaluation of his joint complaints and fluid retention, under Dr. Miner's supervision. (R, 4)

Dr. Frank Dituri, M.D., a medical consultant hired by the State Insurance Fund, interviewed and examined Mr. Hodges in the hospital sometime during his second stay in the later part of July, 1981. (R, 43-45, 64-65) Dr. Dituri's diagnosis was that Hodges' accident had caused "injury to the right upper extremity which produced an ecchymosis and a tear of the body of the biceps muscle." Dr. Dituri concluded further that Hodges' flareup or osteoarthritis related to a pre-existing arthritic condition and could not "be attributed to the industrial injury of February, 1981," nor "to some allergy to cortisone that was

injected into [Hodges'] shoulders." (R, 67)

Dr. Miner continued seeing Mr. Hodges after his hospitalizations for about four months. Dr. Miner then referred his patient to a Dr. Knibbe, an arthritis specialist. (R, 34)

Appellant Hodges timely filed his claim for worker's compensation benefits (R, 1,71) and Application for Hearing (R, 17). On March 11, 1982, a hearing was held before the Industrial Commission of Utah on Mr. Hodges' claims. Hodges was still under Dr. Knibbe's care as of the date of the hearing, but there are no reports from Dr. Knibbe in the record. (R, 33,45)

Dr. Kimball again saw Mr. Hodges on March 17, 1982, and found that the arthritic condition had severly deteriorated. In reviewing the case, Dr. Kimball concluded, however, that "the arthritis [was] completely unrelated to the industrial injury" and that the industrial injury to the right upper arm only "necessitated [Hodges'] temporary total disability for a period of four months . . . . " (R, 76-77) (Emphasis added)

At the conclusion of the March 11 hearing, Boyd G. Holbrook, M.D., was appointed to head a medical panel to make an impartial evaluation of the case. (R, 62, 72-74) Dr. Holbrook's report concluded that, while Hodges was 100% impaired as a result of his arthritis alone, "the diffuse severe arthritic problem had its onset subsequent to the accident of February 23, 1981 but was in no way related to those events." (R, 91) (Emphasis added) The report stated further, "It does not appear that the applicant was totally and permanently disabled at the time his industrial

condition was stabilized about June 23, 1981 . . . ." (R, 91) (Emphasis added) The report assigned percentages of impairment, as follows:

> The total impairment excluding the generalized arthritis is 35% permanent loss of body function. 26% permanent loss of body function pre-existing. 9% permanent loss of body function due to injury to the right shoulder in this accident. (R,91)

Dr. Holbrook reaffirmed these percentages of impairment at a later hearing on August 5, 1982. (R,111) Dr. Holbrook also pointed out at the hearing that, according to best medical knowledge, Hodges' arthritic symptoms could not have been brought on either by his treatment or by the industrial injury itself. (R, 113, 114-115)

On August 24, 1982, the Division of Rehabilitation Services submitted a report concluding that Mr. Hodges was not a good candidate for rehabilitation in view of his age and physical impairment. (R, 99)

After receipt of the reports from Dr. Holbrook and the Division of Rehabilitation Services, the Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order on September 22, 1982. The Administrative Law Judge found that Mr. Hodges' overall permanent physical impairment attributable to conditions exclusive of the generalized arthritis was 35%, and he found 12% loss of body function specifically attributable to the industrial injury because of impairment to Hodges' right arm. (R, 101) However, the Administrative Law Judge also found:

> . . . the applicant's impairment combined

> with employment problems incident to age, education, and experience, are sufficient to render the applicant permanently and totally disabled irrespective of any consideration of his generalized arthritis. (R, 102)

Accordingly, the Administrative Law Judge awarded Hodges permanent total disability benefits provided for under Utah law. (R, 102) (Section 35-1-67 U.C.A.)

In due course, Western Piling & Sheeting, the Second Injury Fund, and State Insurance Fund (defendants below, respondents here) filed a Motion for Review on October 7, 1982, and supporting memorandum on January 27, 1983. (R, 105-106, 120-133) The Administrative Law Judge then issued a relatively lengthy Supplemental Order on February 24, 1983. In this order, the Administrative Law Judge revised his earlier holding. He found that the effects of Hodges' industrial injury had stabilized as of June 23, 1981, and that Hodges "was not at that time so severely impaired as to be found permanently and totally disabled except as a result of the subsequently developing arthritis which was unrelated to the industrial injury . . . ." (R, 138)

The Administrative Law Judge also adjusted Hodges' benefits after recomputing the wages he was earning at the time of the industrial accident. Since Mr. Hodges had been working only long enough each year to earn the maximum of $5,500.00 allowed before his earnings would be offset against Social Security benefits, the Administrative Law Judge adopted the amount of $106.00 ($5,500.00 divided by 52 weeks) as correctly representing Hodges' weekly earnings. (R, 138-139) The Administrative Law Judge thus reversed

his earlier finding that Hodges' earnings were $624.00 per week. (R, 102, 138)

On February 28, 1983, appellant Hodges submitted an Objection to Supplemental Order and Motion to Reconsider. (R, 142-147) The Second Injury Fund submitted a Request for Amended Supplemental Order on March 9, 1983. (R, 148-149)

On May 17, 1983, the Industrial Commission of Utah issued a Partial Granting of Motion for Review and Amended Order, in which it amended the Supplemental Order of February 23, 1983, in accordance with the Request of Second Injury Fund and reaffirmed the remainder of the Supplemental Order. (R, 152-154)

Appellant Hodges submitted a Petition for Writ of Review to the Utah Supreme Court on June 8, 1983. (R, 155-159) This was granted, and Peitioner's Brief was submitted February 8, 1984.

Respondents now submit their brief in this matter.

ARGUMENT

POINT I

APPELLANT'S WEEKLY COMPENSATION BENEFIT RATE WAS CORRECTLY CALCULATED IN THE FINAL ORDER OF THE INDUSTRIAL COMMISSION BECAUSE OF PETITIONER'S TESTIMONY THAT HE ONLY INTENDED TO EARN THE MAXIMUM ALLOWABLE BEFORE SOCIAL SECURITY OFFSETS.

Under the first point in his brief, counsel for appellant claims that the Industrial Commission was mistaken when it assumed that Hodges could earn only up to $5,500.00 per year before suffering an offset against his Social Security benefits. Counsel bases his claim on the fact that Social Security law states that after

age 70, there is no offset against wages earned. (Appellant's Brief, 6-7)

Respondents are at a loss to see the relevance of this line of argument. Mr. Hodges was 68 at the time of the accident. Social Security law does, indeed, provide in part:

> . . . an individual's excess earnings for a taxable year shall be . . ., except that, in determining an individual's excess earnings for the taxable year in which he attains age 70, there shall be excluded any earnings of such individual for the month in which he obtains such age and any subsequent month . . . . 42 U.S.C. Section 403 (f)(3).

But the relevant Utah Worker's Compensation Law provides in pertinent part:

> . . . the average wage of the injured employee <u>at the time of the injury</u> shall be taken as the basis upon which to compute the weekly compensation rate. . . . (Emphasis added)
> Utah Code Ann. Section 35-1-75(1), (1953 as amended).

The issue before the Commission, therefore, was to determine Mr. Hodges average earnings <u>at the time of his accident</u>. What Hodges might be allowed by Social Security to earn per year at age 70 is irrelevant. This argument by appellant's counsel is a red herring.

The best evidence in this case supports the findings of the Administrative Law Judge in his Supplemental Order and the Commission in its final order. At the time of his accident, Mr. Hodges had been working and intended to continue working for Western Piling only intermittently . . . working each year only until he reached the earnings limit allowed by Social Security. Counsel for appellant says that it is "sheer speculation" to

conclude that Hodges would have earned only $5,500.00 but for his injury. (Appellant's Brief p. 9) But Hodges told Dr. Dituri that for the past few years (before the accident) he had been working just enough to earn the maximum allowed under Social Security. (R. 65) Hodges testified similarly at the hearing in this matter on March 11, 1982:

> Q. Are you on Social Security?
>
> A. Yes.
>
> Q. How long have you been on Social Security?
>
> A. Oh. I was off on a disability with my knee, and I don't even know how long I was off. Then I decided I was going to take a stab at it, and go back to work. The Social Security told me that I had a period of nine months that I could go back and try, and see if I could do the work. That was prior to being 65.
>
> Q. I see.
>
> A. So I went back to work. I took pain pills, and I went to work for approximately two years probably for Western Sheeting & Piling. Then I decided to give it up after I was 65, and I went back on Social Security.
>
> Q. On a normal retirement?
>
> A. Yes.
>
> Q. Now since you have been on Social Security, you have continued to work? Is that correct?
>
> A. Well, you're entitled to work--well, like this year I can make $5,500.00 and stay on Social Security.
>
> Q. So you worked just enough to --
>
> A. I try to keep working, to keep in shape. Because if you lay around, you're not going to be worth a shit. So I try to keep working. I was in good shape, and I tried to keep

> working. I could use the money. That's about what it amounted to. (R. 41-42)

The real issue before this Court is how appellant's weekly compensation rate should be calculated, given the fact that he intended to earn only up to $5,500.00 per year. Utah Code Ann. Section 35-1-75(1) provides a number of ways to compute the weekly compensation rate, depending on how the employees wages are fixed. (See appendix I attached hereto) None of the subsections, however, precisely fits appellant Hodges' situation. Section 35-1-75(3) provides:

> If none of the methods in subsection (1) will fairly determine the average weekly wage in a particular case, the Commission shall use such other method as well, based on the facts presented, fairly determine the employee's average weekly wage. (Emphasis added)

Pursuant to this subsection [the Administrative Law Judge mistakenly cites subsection (4)], the Administrative Law Judge calculated Hodges benefits based on his intended maximum earnings of $5,500.00. The Administrative Law Judge reasoned as follows:

> . . . it is extremely difficult to justify an award of compensation for permanent partial impairment based upon the state maximum because 52 weeks of benefits paid at the rate of $153.00 per week would result in the payment of $7,956.00 which is nearly $1,500.00 more than the applicant would have earned had he continued working and the accident had never occurred. Consequently, it seems only fair and reasonable to apply the provisions of subparagraph 4 of Section 35-1-75 in determining the applicant's rate of compensation for permanent partial impairment and limiting such payments to the income lost thereby or $106.00 per week ($5,500.00 divided by

52 weeks [illegible] days. (R, 138-139)

Quite appropriately, the guiding principal for the Administrative Law Judge was compensation for actual income that would have been earned but for the accident. In the Supplemental Order, the Administrative Law Judge states, "It must be ever borne in mind that the basic theory of workmen's compensation is not damages but replacement of lost income." (R, 138)

Counsel for appellant cites a number of cases to support his contention that an injured employee's weekly wages should be assumed to have continued indefinately but for the injury. (Appellant's Brief, 7-8)

The first case cited, Millard County v. Industrial Commission, Utah, 217 P. 974 (1923), simply holds that earnings during employments previous to an industrial accident are irrelevant for purposes of computing benefits. Millard County provides no guidance for the present case, since the issue here is whether intended future "leaves of absence" are to be taken into account.

Morrison-Merrill & Company v. Industrial Commission of Utah, 81 Utah 363, 18 P.2d 295 (1933), and Park Utah Consol. Mines Company v. Industrial Commission of Utah, 84 Utah 481, 36 P.2d 979 (1934), are cited for the proposition that the statute presumes that an injured employee's weekly wages would have continued indefinitely but for the injury. This is true as a general rule, but it is only a presumption; and evidence in the case at bar simply refutes the presumption that Hodges' wages would have continued indefinitely throughout the year but for his injury.

Regarding the evidence in the instant case, it may be noted that Park Utah Consol. Mines Company confirms:

> In the determining of facts, the conclusions of the Commission are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence. 36 P.2d at 982.

Contemporary Utah cases are to the same effect. Entwistle Co. v. Wilkins, Utah, 626 P.2d 495 (1981). Clark v. Interstate Homes, Inc., Utah, 604, P.2d 937 (1979).

> [The Supreme] Court's function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the court agrees with the Commission's finding or whether they are supported by the preponderance of evidence. Instead, the reviewing court's inquiry is whether the Commission's findings are "arbitrary or capricious", or "wholly without cause" . . . . Only then should the Commission's findings be displaced. Kaiser Steel Corp. v. Monfredi, Utah, 631 P.2d 888, 890 (1981).

Furthermore, all three of the Utah cases cited by appellant's counsel (Millard County, Morrisson-Merrill & Company, and Park Utah Consol. Mines Company, supra,) have to do with the construction of law that took effect in 1921 and was amended in 1933. The present law, Section 35-1-75, was enacted in 1971 and repealed the laws of 1921, and of 1933, relating to the basis for computing average weekly wages.

Counsel for appellant cites a Texas case which held that a claimaint's intentionally limiting his earnings to protect his Social Security is not relevant for purposes of determining claimant's wage rate under Texas law. Texas Employer's Insurance Association v. C.A. McMahon, 509 S.W. 2d 665 (Texas, 1974).

The case seems to support appellant's position; but it concerns the interpretation of specific language about "an employee of the same class" in the Texas statute. 509 S.W. 2d at 668. The Utah statute does not use such language at all; and, therefore, the Texas case cannot provide guidance in the interpretation of the Utah statute. More importantly, Texas law, of course, is not Utah law; and the task before this Court remains that of determining whether the Industrial Commission used as the trier of fact a method that would ". . . fairly determine . . . the average weekly wage." Section 35-1-75(3) supra. Unless the Supreme Court finds that the Commission was arbitrary and capricious and that its method has no reasonable foundation in the evidence, its decision on the compensation rate should be sustained.

POINT II

APPELLANT IS NOT ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY BENEFITS, BECAUSE APPELLANT BECAME TOTALLY DISABLED ONLY FROM A PHYSICAL IMPAIRMENT AS A RESULT OF A NON-INDUSTRIAL ARTHRITIC CONDITION WHICH BECAME MUCH WORSE AFTER THE INDUSTRIAL ACCIDENT BUT WAS NOT CAUSED, AGGRAVATED OR CONTRIBUTED TO BY THE INDUSTRIAL ACCIDENT.

In Point II of appellant's brief, it is argued that Mr. Hodges is entitled to permanent total disability benefits based on 35% impairment. Respondents dispute the claim that Hodges is entitled to <u>total</u> disability benefits. Respondent's position is that the effects of Mr. Hodges' industrial injury stabilized as of June 23, 1981, and that he was not then so impaired as to be found permanently and totally disabled, except as a result of the subsequently developing arthritis which was unrelated

to the industrial injury.

The Administrative Law Judge agreed with respondents and so found in his Supplemental Order. (R, 137-138) The Administrative Law Judge based his finding on the fact that both appellant's treating physician and the medical panel found the effects of the industrial injury to have stabilized by June 23, 1981. (R, 138) Dr. Kimball thought a permanent partial rating of 20% impairment of the arm was reasonable. (R, 77) Dr. Holbrook's medical panel report maintained that, excluding the arthritis, Hodges had 35% permanent partial impairment of the whole man, 26% of which was attributable to pre-existing conditions and 9% of which was due to the injury to his right shoulder in the industrial accident. (R, 91)

In Entwistle Co. v. Wilkins, Utah, 626 P.2d 495 (1981), this Court stated:

> The extent and the duration of an employee's disability are questions of fact to be determined by the Commission. We review the evidence in the light most favorable to the Commission's findings, and when there is substantial evidence to support the facts as found by the Commission, its order will not be disturbed. 626 P.2d at 498; footnotes dropped.

Respondents submit that there is more than "substantial evidence" in the record to support the findings of the Administrative Law Judge and the Industrial Commission that Mr. Hodges is not permanently and totally disabled as a result of the industrial accident. Accordingly, the Supreme Court should affirm the final order of the Commission in this regard.

Contrary to appellant's position, there is no medical

evidence in the record that Hodges was permanently and totally impaired as a result of the industrial injury. Counsel's argument seems to be that Hodges' 35% physical impairment when combined with his age, education and experience, render him permanently and totally disabled for any gainful employment.[1] Appellant's counsel cites a statement by the Administrative Law Judge in his original Findings of Fact, Conclusions of Law and Order. (Appellant's Brief 10) In that statement, the Administrative Law Judge combined Hodges 35% physical impairment with his age, education and experience and found Hodges to be permanently and totally disabled. (R, 101-102) However, the Administrative Law Judge reputiated that statement as a mistake in his Supplemental Order. (R, 137) In other words, the Administrative Law Judge decided the evidence showed that Hodges could have returned to work when the effects of his injury stabilized (on June 23, 1981) but for his arthritis, which was unrelated and increased in severity after the industrial injury but not as a result of the industrial injury. The Administrative Law Judge corrected his findings accordingly:

> The Administrative Law Judge believes and now finds that the [statement of medical panel] really had reference to the extent of the applicant's permanent physical impairment which the panel concluded would not have removed him from the job market in and of

---

[1] "Impairment" and "disability" are to be distinguished. Impairment refers to the person's physical limitations. Disability refers to the person's inability to engage in gainful employment--because of age, education and experience, as well as physical impairment. See: Northwest Carriers, Inc. v. Industrial Commission, Utah, 639 P.2d 138 (1981), note 3 at 140.

> itself and that the reason for his inability to continue working was due to the development of the subsequent onset of his severe arthritis. (R, 137) (Emphasis added)

Appellant's counsel also cites the report of the Division of Rehabilitation Services, which found Hodges "not a good candidate for rehabilitation." (R, 99) It is clear from the report, however, that the Division based its assessment of Mr. Hodges primarily on the 100% physical impairment caused by his arthritis. The Division did not undertake an assessment as to what Hodges' prospects for rehabilitation might have been apart from his arthritic condition. Therefore, the report of the Division of Rehabilitation Services does not support appellant's position. In his Supplemental Order, the Administrative Law Judge explicitly makes note of the Division's report before concluding that Hodges was not permanently and totally disabled as a result of his industrial injury. (R, 137)

Finally, counsel for appellant urges that the present case is almost identical to Brundage v. IML Freight Inc., 622 P.2d 790 (Utah, 1981), and that the Court should follow Brundage in the present case. Respondents contend that Brundage has no particular relevance to the present case.

The cases are not comparable on the facts. In Brundage, the plaintiff claimed permanent total disability resulting in part from his industrial accident, as does appellant in the present case. But the evidence was much different in Brundage. The medical testimony was that the claimant could not stand or sit for any prolonged period of time, that he was restricted in bending

over, twisting and walking, and that he should lift no more than 15 pounds. Unlike the present case, the claimant's condition of permanent and total disability in Brundage resulted from a combination of his industrial injury and pre-existing impairments--not from a combination of an industrial injury and later, unrelated arthritic symptoms. Further, no evidence was presented to refute plaintiff's claim of permanent and total impairment. By contrast, there is substantial evidence in the present case that Mr. Hodges would have been able to return to work, had he not subsequently developed arthritic symptoms. Both the medical panel and Mr. Hodges' treating physician would have released Hodges to his ususal work, absent the arthritis.

POINT III

THE ADMINISTRATIVE LAW JUDGE DID NOT ACT ARBITRARILY AND CAPRICIOUSLY AND DID CONSIDER THE EFFECT, IF ANY, THE APPELLANT'S ARTHRITIC CONDITION HAD IN RELATIONSHIP TO THE ISSUE OF PERMANENT TOTAL DISABILITY AND APPROPRIATELY WEIGHED THE SUBSTANTIVE EVIDENCE PRESENTED.

Under Point III of his brief, Counsel for the appellant argues that Mr. Hodges had an arthritic condition prior to his accident and that this should have been considered in determining the amount of Mr. Hodges permanent partial disability.

The answer to this is that Hodges prior arthritic condition was considered. Medical evidence did show that Mr. Hodges had an arthritic condition prior to the industrial accident, but the Administrative Law Judge did not find that this caused any impairment or disability. (R, 136-137) There is sufficient evidence in the record to support this finding, including Mr. Hodges'

own testimony that he was in good physical condition prior to the accident (R, 34) and the testimony of a co-worker that Mr. Hodges was physically very active before the accident (R, 51). Furthermore, the medical panel report expressly takes account of Mr. Hodges' arthritis in making its assessment of previous impairments. For example, it states:

> (4) The percentage of permanent physical impairment attributable to previously existing conditions has been identified from the record as follows: 10% of the right upper extremity due to arthritis and other factors. . . .(R, 91)(Emphasis added)

Counsel for appellant also charges that the Administrative Law Judge was arbitrary in that, by changing his mind (in the Supplemental Order), the Administrative Law Judge denied appellant the opportunity to have additional hearings on the medical panel report. Counsel complains that if he had known that Mr. Hodges' 35% impairment would not have been deemed sufficient to render him totally disabled, counsel would have objected to the medical panel report concerning its view of Mr. Hodges' arthritic condition.

All normal procedures were followed by the Commission. Under Utah Code Ann., Section 35-1-77 (1953, as amended), a claimant has 15 days after distribution of the medical panel report in which to file objections with the Commission. It is incumbant upon counsel to bring forward all legitimate objections at that time -- not to sit back and second-guess the Administrative Law Judge, waiting to bring forward objections at a later date only if necessary. If there was any question about any part of the medical panel report, then that question should have been raised.

The panel's statement concerning what was causing the continuing disability and its relationship to the industrial accident was clear. If it was not clear, then the burden was on the appellant to object. Not having objected, the report becomes evidence from which a finding can be based. Thus, the Administrative Law Judge was certainly not arbitrary or capricious in issuing his Supplemental Order.

CONCLUSION

The Supreme Court should affirm the final order of the Utah Industrial Commission. Contrary to the arguments set forth in the appellant's brief, there are no grounds for reversal. First, the benefits for appellant were correctly calculated under Section 35-1-75 (3) in a way that fairly determined his average weekly wage. Second, the evidence in this case more than adequately supports the findings of the Administrative Law Judge and the Industrial Commission that appellant is entitled to disability benefits based on a finding of 35% impairment with appropriate apportionment between the State Insurance Fund and the Second Injury Fund as ordered, and is not entitled to permanent total disability benefits when the permanent total condition resulted from a subsequent condition not caused by, aggravated by, or related to the industrial injuries. It would have been reversible error to have found otherwise, given the evidence before the Commission. Third, appellants prior arthritic condition was considered by the medical panel and the Administrative Law Judge.

The findings of the Industrial Commission were based

upon competent, substantial evidence and therefore were not arbitrary and capricious. This Court should sustain the Industrial Commission's Order.

DATED THIS 3 Day of April, 1984.

BLACK & MOORE

BY James R. Black
JAMES R. BLACK

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 3 Day of April, 1984, to the following:

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APPENDIX I

[illegible] Average weekly wage — Basis of computation. (1) Except as otherwise [illegible] wage of the injured employee at the [illegible] to compute the weekly [illegible]

[illegible] fixed by the year, the average [illegible] for [illegible]

[illegible] wages are fixed by the month, the average [illegible] multiplied by [illegible]

[illegible] If the wages are fixed by the week, that amount [illegible] average weekly wage.

[illegible] If the wages are fixed by the day, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the accident, or would have worked if the accident had not intervened. In no case shall the daily wage be multiplied by less than three for the purpose of determining the weekly wage.

(e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than 20 for the purpose of determining the weekly wage.

(f) If at the time of the injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are rendered by paid employees.

(g) (1) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury.

(2) If the employee has been employed by that employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed as under subsection (1) (g) (1), presuming the wages, not including overtime or premium pay, to be the amount he would have earned had he been so employed for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

(3) If none of the methods in subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

(4) When the average weekly wage of the injured employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar.

History: C. 1953, 35-1-75, enacted by L. 1971, ch. 76, § 10; L. 1975, ch. 101, § 7; 1977, ch. 156, § 9.

Compiler's Notes.

The 1975 amendment substituted "divided" for "multiplied" in subd. (1)(b), redesignated the subsection paragraph beginning "If none of the methods * * *" as subsec. (3); and added subsec. (4).

The 1977 amendment deleted "then be rounded to the nearest dollar and shall" after "it shall" in the first sentence of subsec. (4) and added the last sentence to subsec. (4).