

1992

# Gary E. Crosland v. Industrial Commission of Utah, Young Electric Sign Company, and Smith Administrators : Amicus Brief

Utah Supreme Court

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BRIEF

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DOCKET NO. 920247

IN THE UTAH SUPREME COURT

\* \* \* \* \*

GARY E. CROSLAND,	)	
	)	Court of Appeals No.
Applicant/Respondent.	)	910291CA
	)	
vs.	)	Priority No. 7
	)	
INDUSTRIAL COMMISSION OF	)	
UTAH; YOUNG ELECTRIC SIGN	)	
COMPANY and SMITH	)	
ADMINISTRATORS,	)	
	)	
Defendants/Petitioners.	)	

920247

\* \* \* \* \*

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WORKERS' COMPENSATION FUND OF UTAH'S  
AMICUS CURIAE BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI

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**FILED**

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CLERK SUPREME COURT  
UTAH

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IN THE UTAH SUPREME COURT

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**IDENTITY OF AMICUS CURIAE  
WORKERS' COMPENSATION FUND OF UTAH**

It has been stipulated among the parties that the Workers' Compensation Fund of Utah may appear as amicus curiae for the purposes of Young Electric Sign Company's Petition for Writ of Certiorari. Section 35-1-46 U.C.A. requires all employers in the State to secure payment of workers compensation benefits by purchasing private insurance, qualifying as a "self-insured" or by obtaining insurance from the Workers' Compensation Fund of Utah. (Hereinafter "WCF") WCF is a "...nonprofit, self-supporting, quasi-public corporation..." [Section 35-3-3(1)(a) U.C.A.] whose purpose is to "...insure Utah employers against liability for compensation based on job-related accidental injuries and occupational diseases; and...assure payment of this compensation to Utah employees who are entitled to it..." [Section 35-3-2(1)(b)(i) and (ii)]. WCF is charged by its enabling legislation to "...provide workers' compensation insurance at an actuarially sound price..." [Section 35-3-4(1) U.C.A.] WCF provides workers' compensation coverage for in excess of 24,000 Utah employers or approximately 80 percent of the gross number of employers in the State of Utah. Those 24,000 employers employ approximately 260,000 Utah workers.

(See affidavit of Rod Smith, Vice President, Workers' Compensation Fund of Utah, Appendix 1 hereto.) Because of the breadth of its involvement with the Workers' Compensation Act of Utah [Section 35-1-1 et seq.] and the Occupational Disease Act of Utah [Section 35-2-1 et seq.], WCF believes its input may be of assistance to the Court in determining whether to grant Young Electric Sign Company's Petition for Writ of Certiorari.

WCF is very concerned about the Court of Appeals decision in Crosland v. Board of Review of the Industrial Commission of Utah, 183 Utah Adv. Rep. 35 (Utah App. 1992) (Appendix 2) which it perceives to be a deviation from historical Utah workers' compensation administrative and judicial practice. Over at least the past fifteen years, employers and their insurance carriers have not been responsible to pay compensation for preexisting non-work related physical and mental impairments employees bring to the work place. WCF, having participated in the process leading to the passage of the 1988 amendments to Sections 35-1-66, 35-1-67 and 35-1-69 U.C.A., is firmly of the opinion that the Court of Appeals has misapplied the standard of review, has misunderstood legislative intent and has misinterpreted the meaning of "...permanent impairment

that existed prior to an industrial accident." Section 35-1-66 U.C.A. (as amended 1988).

#### QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reviewing the Industrial Commission's interpretation of the medical terms of art in Section 35-1-66 U.C.A. (1966) for correctness and not deferring to the Commission's experience and expertise as required by Section 63-46b-16 U.C.A. as explained in Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Appendix 3). Is the interpretation of the phrase "...Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident" (Section 35-1-66 U.C.A.) (emphasis added), subject to more than one permissible interpretation thereby making the interpretation of the Industrial Commission a policy decision for which the appellate court should not substitute its judgment? Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 at 589.

2. Did the legislature intend by its 1988 amendments to Sections 35-1-66 and 35-1-69 U.C.A. to make employers and their insurance carriers responsible to pay benefits for



preexisting, asymptomatic and undiagnosed non-work related physical impairments?

3. See Also, "Certiorari Inquiries" and "Ultimate Issues on Appeal" in brief of Amicus Curiae Utah Self-Insurers' Association and "Question Presented for Review" of Young Electric Sign Company in its Petition for Writ of Certiorari, each of which WCF adopts as its own.

#### **OPINION OF THE UTAH COURT OF APPEALS**

WCF joins as Amicus Curiae in Young Electric Sign Company's Petition for Writ of Certiorari of the Utah Court of Appeals decision in Crosland v. Board of Review of the Industrial Commission of Utah, supra. attached hereto as Appendix 2. WCF also adopts as its own the arguments contained in the Amicus Curiae Brief of Utah Self-Insurers' Association. The Court of Appeals was reviewing the Industrial Commission of Utah Findings of Fact, Conclusions of Law and Order dated September 11, 1990 (Appendix 4).

#### **JURISDICTION OF THE SUPREME COURT**

WCF agrees with the statement of this Court's jurisdiction in Young Electric Sign Company's Petition for Writ of Review.

## **CONTROLLING STATUTES AND RULES**

**The following provisions of the Utah Code Annotated (1953, as amended) are controlling and attached as appendices:**

Section 63-46b-16, U.C.A.  
(Standard of Review) . . . . . Appendix 5

Section 35-1-66, U.C.A.  
(Permanent Partial Disability) . . . . Appendix 6

Section 35-1-69, U.C.A. (Apportionment  
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**The controlling Utah Rule of Appellate Procedure is:**

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**The controlling medical definition of "permanent  
impairment" is:**

American Medical Association  
Guides to the Evaluation of  
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## **STATEMENT OF THE CASE**

WCF adopts as its own Young Electric Sign's Statement  
of the Case in its Petition for Writ of Certiorari.

## **STATEMENT OF FACTS**

WCF adopts as its own Young Electric Sign's Statement  
of Facts in its Petition for Writ of Certiorari.

## ARGUMENT

1. THE COURT OF APPEALS USED AN IMPROPER STANDARD OF REVIEW BY FAILING TO GIVE DEFERENCE TO THE INDUSTRIAL COMMISSION'S INTERPRETATION OF THE TECHNICAL MEDICAL TERM OF ART "PERMANENT IMPAIRMENT" AS IS REQUIRED BY SECTION 63-46b-16 U.C.A. FAILURE TO GIVE SUCH DEFERENCE CONFLICTS WITH THIS COURT'S DECISION IN MORTON INT'L INC. V. AUDITING DIV. OF THE UTAH STATE TAX COMM'N, 814 P.2d 581 (Utah 1991).

Rule 46(b) of the Utah Rules of Appellate Procedure provides that this Court will consider reviewing a decision of the Court of Appeals "When a panel of the Court of Appeals has decided a question of state...law in a way that is in conflict with a decision of the Supreme Court". In this instance, the Court of Appeals has misconstrued the Standard of Review required by Section 63-46b-16, U.C.A. it should have applied to the Industrial Commission's interpretation of medical terminology in a statute. The Court of appeals decided:

*...This case requires an interpretation of the 1988 amendment to the Workers' Compensation Act and thus presents a question of statutory construction and legislative intent which we may review for correctness. Under this higher standard, to afford relief we must find that the Commission erroneously interpreted the law to Crosland's substantial prejudice.*

Crosland, 183 Utah Adv. Rep. at 36.

This Court, however, stated the standard of review which should apply in a circumstance as presented here where

terms in a statute may be subject to more than one legitimate meaning and there is an absence of legislative intent<sup>1</sup>:

*...However, in the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination. Indeed, both the legislative history to section 63-46b-16 and our prior cases suggest that an appellate court should not substitute its judgment for the agency's judgment concerning the wisdom of the agency's policy. When there is no discernible legislative intent concerning a specific issue the legislature has, in effect, left the issue unresolved. In such case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue...*

The crux of this case is what is meant by the limitation the legislature placed on payments of permanent partial disability benefits in 1988 when it added the language "...Permanent partial disability compensation may

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<sup>1</sup>. WCF takes the position hereinafter in Point 2 that the legislature intended the employer to be responsible for the industrial injury only and not for a nonindustrial physical or mental anomaly for which medical experts can determine a percentage of impairment though the anomaly was not diagnosed and was asymptomatic before the industrial injury. There is nothing in the Workers' Compensation Act as amended in 1988 from which the Court of Appeals could have reasonably concluded to the contrary. We give the Court of Appeals perhaps unwarranted deference by implying in this argument that its interpretation is among more than one legitimate meaning of the terms in question.

not be paid for any permanent impairment that existed prior to an industrial accident" to section 35-1-66 U.C.A. (1988). The Court of Appeals opined that "...[W]e believe the term *permanent impairment* should be interpreted to refer to a ratable physical condition exhibiting some diminished function." Crosland, supra. at 183 Utah Adv. Rep. at 37. (Emphasis added)

Until 1990, the legislature did not choose to give a definition to the medical term "permanent impairment".<sup>2</sup> In that void it is entirely proper for the Industrial Commission to use the expertise it has gained in interacting with the medical community. It was proper for the Commission to rely on the medical panel it appointed in this case and its own experience to determine that "impairment" means "...what is wrong with the health of an individual"

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<sup>2</sup>. In 1990, the statutory definition amendments passed by the legislature merely codify the interpretation the Industrial Commission has consistently applied over the years and did in fact use in the present case:

35-1-44. Definition of terms.

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(4) "Disability" means becoming medically impaired as to function. Disability can be total or partial, temporary or permanent, industrial or nonindustrial.

\*\*\*\*\*

(6) "Impairment" is a purely medical condition reflecting any anatomical or functional abnormality or loss. Impairment may be either temporary or permanent, industrial or nonindustrial.

(See Guides to the Evaluation of Permanent Impairment, Chapter 1, Third Edition, 1988, pp. 1-6, Appendix 9 hereto). It was within the scope of its charge by the Commission for the medical panel to examine and report its opinions concerning the extent and permanency of the impairment. The Industrial Commission should be given deference of interpretation of medical terms. It was within the Commission's prerogatives as the finder of facts to rely on the opinions of the Medical Panel as to the issues of permanent partial impairments. (See also, Utah Self-Insurers' Association's Amicus Brief.)

**2. UTAH CASE LAW INVOLVING APPORTIONMENT OF COMPENSATION BENEFITS BETWEEN THE EMPLOYERS' REINSURANCE FUND AND EMPLOYERS OF INDUSTRIALLY INJURED WORKERS AS WELL AS THE 1988 AMENDMENTS TO SECTIONS 35-1-66 AND 35-1-69 U.C.A. MAKE IT CLEAR THAT EMPLOYERS ARE NOT RESPONSIBLE FOR PREEXISTING PHYSICAL CONDITIONS WHICH EMPLOYEES BRING WITH THEM TO THE WORK PLACE. THE COURT OF APPEALS HAS DECIDED THIS IMPORTANT CASE OF FIRST IMPRESSION IN A MANNER THAT SHOULD BE REVIEWED BY THIS COURT TO GIVE GUIDANCE TO ALL EMPLOYEES AND EMPLOYERS IN THE STATE.**

**A. THE HOLDING IN CROSLAND IS IN CONFLICT WITH LEGISLATIVE INTENT AND ESTABLISHED UTAH PUBLIC POLICY TO HIRE AND RETAIN AS EMPLOYEES THOSE WHO HAVE PREEXISTING PHYSICAL AND MENTAL LIMITATIONS.**

Interpreting the critical language in Section 35-1-66 U.C.A. presents an issue of first impression to this Court. It is an issue of vital concern to all employers and all employees in the State of Utah. The final decision will

have a significant impact on not only the amount of compensation injured employees may receive, but may also significantly affect the premiums employers will have to pay to provide workers' compensation insurance coverage. The decision may also significantly impact the costs of providing compensation benefits for those employers which qualify as self-insureds. (See Appendix 1, Affidavit of Rodney C. Smith) In this instance "...the Court of Appeals has decided an important question of ...state...law which has not been, but should be, settled by the Supreme Court." Rule 46(d) Utah Rules of Appellate Procedure.

Though Professor Arthur Larson in his treatise The Law of Workmen's Compensation states that the majority of jurisdictions have opted to not attempt to apportion payment for permanent partial disability compensation between preexisting nonindustrial injuries and subsequent industrial injuries, he acknowledges that a certain number of states do apportion. *id.*, Section 59, *Successive Disabilities*, Vol. 2, P. 10-492.329, 1992. It is clear from the language "Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident" of Section 35-1-66 U.C.A., Utah falls

in line with those states which do apportion. Section 35-1-66 U.C.A. (1988).<sup>3</sup>

The 1988 amendment to Section 35-1-66 U.C.A. was designed by the Legislature to perpetuate a concept clearly pronounced in the line of cases beginning with Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977). That is, in Utah the employer is not responsible to pay permanent partial disability compensation either for manifested or quiescent preexisting conditions. That rule of law arose in the context of apportionment of responsibility for payment of compensation between employers and the Second Injury Fund (now Employers' Reinsurance Fund) of Sections 35-1-68 and 35-1-69 U.C.A.<sup>4</sup> See also, Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980); Northwest Carriers v. Industrial Com'n, etc., 639 P.2d 138 (Utah 1981); American Coal v. Sandstrom, 689 P.2d 1 (Utah 1984); Second Injury Fund v. Perry's Mill, 684 P.2d 1269 (Utah 1984). "...Where

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<sup>3</sup>. It is important to note that the legislature did not choose to put similar limitations on the payment of temporary total disability compensation (Section 35-1-65 U.C.A.), temporary partial disability compensation (Section 35-1-65.1 U.C.A.) or medical benefits (Section 35-1-45 U.C.A.). Accordingly, in this case not involving a permanent total disability, Young Electric Sign Company quite appropriately paid all such benefits without apportioning between the preexisting condition and the industrial injuries.

<sup>4</sup>. The legislature also amended Section 35-1-69 U.C.A. in 1988 to limit apportionment consideration between employers and the Employers' Reinsurance Fund to permanent total disability cases (Section 35-1-67 U.C.A.) and to set a specific allocation of costs between the Employer's Reinsurance Fund and the employer.



the disability is the result of pre-existing conditions and not an industrial accident, a claimant is not entitled to disability benefits." Large v. Industrial Commission of Utah, 758 P.2d 954 (Utah App. 1988) at 957.

**B. THE DRAFTERS OF THE 1988 AMENDMENT TO SECTION 35-1-66 U.C.A. DID NOT INTEND TO SHIFT THE RESPONSIBILITY FOR PAYING COMPENSATION FOR ANY PREEXISTING NON-WORK RELATED CONDITION TO EMPLOYERS. THE CROSLAND COURT FAILED TO CONSIDER LEGISLATIVE HISTORY VERIFYING THAT INTENT.**

It was the intent of those recommending the 1988 amendment to Section 35-1-66 to the legislature to insure that employers would only be responsible to pay permanent partial disability for the industrially caused impairment, not that attributable to preexisting conditions. The Crosland Court did not discuss legislative history which verifies that intent. The heading of House Bill 218 (attached as Exhibit A to Appendix 10, Affidavit of Stuart L. Poelman) states the purpose of the bill:

**AN ACT RELATING TO WORKERS' COMPENSATION;  
CHANGING THE NAME OF THE SECOND INJURY FUND;  
CLARIFYING THAT PERMANENT PARTIAL DISABILITY  
COMPENSATION ENTITLEMENTS ARE BASED ON  
PHYSICAL IMPAIRMENT CAUSED BY AN INDUSTRIAL  
ACCIDENT; ESTABLISHING A STATUTE OF  
LIMITATIONS ON PERMANENT TOTAL DISABILITY  
CLAIMS AND PROVIDING AN OFFSET BASED ON  
CERTAIN OTHER INCOME; MODIFYING PROVISIONS  
REGARDING AWARDS FROM THE SECOND INJURY FUND;  
MODIFYING PROVISIONS REGARDING THE CONTINUING  
JURISDICTION OF THE COMMISSION AS IT RELATES**

TO STATUTES OF LIMITATION; CLARIFYING THE INDUSTRIAL COMMISSION'S AUTHORITY TO CONTROL MEDICAL CARE OF INJURED EMPLOYEES; AMENDING THE PREMIUM TAX IN SUPPORT OF THE SECOND INJURY FUND; PROVIDING AN ALTERNATIVE METHOD FOR EVALUATING MEDICAL ASPECTS OF ACCIDENTS; AMENDING STATUTES OF LIMITATIONS; MAKING TECHNICAL CORRECTIONS; AND PROVIDING AN EFFECTIVE DATE. (Emphasis added.)

The purpose of House Bill 218 was to amend the Workers' Compensation Act of Utah to insure the fiscal integrity of the Second Injury Fund (now Employers' Reinsurance Fund) That Fund had been facing insolvency because it had been paying a proportionate share of medical expenses, temporary total disability compensation and permanent partial disability compensation in addition to permanent total compensation on cases involving preexisting permanent partial disability claims since the Ortega, supra. decision in 1978. The Fund had more money being paid out in claims than it was taking in through the means provided it by state law. House Bill 218 alleviated that threatened insolvency by increasing the Fund's income while decreasing the claims obligations placed on it by the Ortega interpretation of Section 35-1-69 U.C.A. House Bill 218 increased the premium tax paid by employers or their insurance carriers, reduced apportioned reimbursement to employers of benefits in non-permanent total cases, eliminated benefits paid to injured employees for preexisting conditions not involving permanent

total disability and established a precise schedule of apportionment between the Employers' Reinsurance Fund and employers in permanent total disability cases.

House Bill 218 was not intended to transfer any of the prior apportionment liabilities of the Employers' Reinsurance Fund for permanent partial disability compensation benefits to employers. The intent was instead to "...eliminate permanent partial disability benefits...to the extent that [they] relate...to permanent partial impairment resulting from preexisting conditions.... It was never the intent of House Bill 218 to make an employer liable for compensation relating to asymptomatic preexisting conditions. All preexisting conditions related to asymptomatic or symptomatic preexisting permanent partial impairment were to go uncompensated." (Affidavit of Stuart L. Poelman, Appendix 10)

WCF viewed House Bill 218 as not in any way increasing its responsibility to pay compensation benefits for preexisting conditions of its insureds' injured employees. "Rather, WCF understood workers would no longer be compensated for any permanent partial disability related to pre-existing medical problems...." (Appendix 1, Affidavit of Rodney C. Smith) That understanding is supported by the Fiscal Note to House Bill 218 prepared by the Legislative

Fiscal Analyst which is silent as to any effect on employers' responsibilities for preexisting conditions. To the contrary, the Fiscal Note states, "In addition, pre-existing injuries which are aggravated by an industrial accident will no longer be eligible for compensation from the Second Injury Fund." (See Exhibit A to Appendix 1, Affidavit of Rodney C. Smith)

Professor Arthur Larson states very succinctly the controlling humanitarian public policy adopted by the Utah Legislature and acknowledged by this Court in prior decisions cited hereinbefore:

*While at first glance it might appear that the apportionment rule favors the employer and non-apportionment the employee, in practice the non-apportionment rule proved the worse of the two evils from the standpoint of the handicapped worker. As soon as it became clear that a particular state had adopted a rule requiring an employer to bear the full cost of total disability for loss of the crippled worker's remaining leg or arm, employers had a strong financial incentive to discharge all handicapped workers who might bring upon them this kind of aggravated liability. When loss of a single eye might mean a compensation liability of \$5,000 for a man with two good eyes but \$26,000 for a man with only one, the compensation insurance premium on the latter would naturally be markedly greater. It has been said, for example, that within the thirty days following the announcement of the non-apportionment rule in Nease v. Hughes*

Stone Company (citation omitted),  
between seven and eight thousand one-  
eyed, one-legged, one-armed, and one-  
handed men were displaced in Oklahoma.

The Law of Workmen's Compensation, Arthur Larson, Vol. 2,  
Sec. 59.13, pp. 10-492.397 through 10-492.398, 1992. It is  
the public policy in Utah to encourage and not discourage  
employers to initially hire and thereafter retain in  
employment those who may bring physical or mental impairment  
to the work place. See eg. Intermountain Smelting Corp. v.  
Capitano, supra. In exchange for that policy, employers are  
relieved of the responsibility to pay compensation for those  
non-work related conditions the employee brings to the  
employment. The Court of Appeals failed to recognize the  
significance of that public policy in making its  
determination.

**3. THE INTERPRETATION OF SECTION 35-1-66 U.C.A. BY THE  
COURT OF APPEALS CONTRAVENES THE EXPLICIT LANGUAGE IN THE  
STATUTE AND THE GUIDES TO THE EVALUATION OF PERMANENT  
IMPAIRMENT OF THE AMERICAN MEDICAL SOCIETY.**

WCF defers to and adopts as its own the argument set  
forth in Young Electric Sign Company's Petition for Writ of  
Certiorari. WCF will not elaborate further on this point  
though other argument points may overlap Young Electric Sign  
Company's arguments.

4. A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 46(a) OF THE UTAH RULES OF APPELLATE PROCEDURE BECAUSE THE COURT OF APPEALS DECISION IN CROSLAND v. INDUSTRIAL COMMISSION, supra. AND NYREHN v. INDUSTRIAL COMMISSION, 800 P.2d 330 (UTAH APP. 1990) (APPENDIX 11) CONFLICT ON THE ISSUE OF APPORTIONMENT BETWEEN INDUSTRIALLY CAUSED PERMANENT IMPAIRMENT AND THE IMPAIRMENT ARISING FROM AN ASYMPTOMATIC PREEXISTING CONDITION.

Regarding the above argument point, WCF adopts as its own and refers the Court to the argument in the amicus brief of Utah Self-Insurers' Association without further elaboration.

5. THE COURT OF APPEALS INTERPRETATION OF "PERMANENT IMPAIRMENT" FOR PURPOSES OF SECTION 35-1-66 U.C.A. (PERMANENT PARTIAL DISABILITY) CREATES A CONFLICT WITH THE USE OF THE SAME TERM FOR PURPOSES OF THE TEST FOR COMPENSABLE ACCIDENTAL INJURIES (SECTION 35-1-45 U.C.A.) AS ESTABLISHED BY THE SUPREME COURT IN THE CASES OF ALLEN v. INDUSTRIAL COMMISSION AND HOLLOWAY v. INDUSTRIAL COMMISSION.

The Crosland, supra. definition of "preexisting impairment" as excluding actual preexisting physical conditions which have not previously been rated because they were undiagnosed and asymptomatic prior to an industrial event, conflicts with prior decisions by this Court. The test for a compensable accidental injury is pronounced in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) and clarified in Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986). The compensability test places a heavier burden which is called "legal causation" on one who brings a

preexisting impairment to the work place. In the Holloway concurring opinion, Justice Zimmerman made it clear that latent, undiagnosed preexisting impairments which are lighted up by an industrial event invoke the heavier "legal causation" burden of proof on the claimant. WCF defers to and adopts as its own Utah Self-Insurers' Association's more detailed argument of this point in its amicus brief.

#### CONCLUSION

The Court of Appeals has improvidently awarded benefits to an injured worker for a preexisting physical impairment. Contrary to Sections 63-46b-16, U.C.A., Utah Administrative Procedures Act and Morton International, supra., the Court of Appeals failed to give deference to the Industrial Commission's interpretation of the statutorily undefined term of medical art, "permanent impairment."

The opinion in Crosland is in conflict with the result in Nyrehn in which another panel of the Court of Appeals remanded a case with similar facts to the Industrial Commission for further findings of fact.

The Court of Appeals decision creates an intolerable inconsistency in the Workers' Compensation Act of Utah. Preexisting "permanent impairment" will mean that asymptomatic and undiagnosed, though retrospectively

ratable, will be compensable for purposes of Section 35-1-66 U.C.A. However, for purposes of determining whether there is an underlying compensable industrial accident, an undiagnosed and asymptomatic condition will invoke the higher "legal causation" standard of the Allen and Holloway cases.

Alternatively, Crosland could be viewed as authority paving the way for a totally new standard of legal causation to determine compensability of alleged industrial accidents. For example, an asymptomatic preexisting condition might be viewed to not invoke the higher causation standard of Allen, in direct contradiction to the explanation of the standard provided in Holloway. This Court should review Crosland so that such a mixed message as to the important Allen tests for industrial accident compensability is put to rest. Absent such action by this Court, a tide of additional Industrial Commission litigation is likely.

The Crosland decision further goes contrary to a long line of Utah decisions which emphasize the controlling public policy to encourage the hiring and continued employment of those who bring physical and mental impairment to the work place. The Crosland decision to the contrary dissuades employers from hiring the impaired individual. Contrary to the strong public policy, Crosland encourages



the release of those already employed once the previously undiagnosed and asymptomatic condition is discovered through an industrial accident.

The Court of Appeals also did not examine any legislative history in divining its concept of legislative intent. The intent of the drafters of House Bill 218 did not intend the result of the Crosland opinion. To the contrary House Bill 218 was designed to insure the fiscal integrity of the Employers' Reinsurance Fund and not to place additional responsibility for compensation benefits on employers.

This Court should grant certiorari to review these issues which have a far reaching direct and indirect effects on nearly every Utah citizen.

DATED this 20 day of May, 1992.

WORKERS' COMPENSATION  
FUND OF UTAH

CALLISTER, DUNCAN & NEBEKER

By: Dennis V. Lloyd  
Dennis V. Lloyd  
General Counsel

By: James R. Black  
James R. Black  
Attorney for Amicus Curiae  
Workers' Compensation Fund  
of Utah

CERTIFICATE OF MAILING

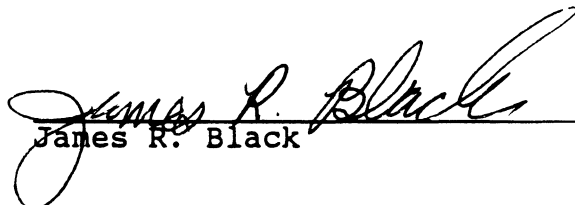
I hereby certify that a true and correct copy of the foregoing WORKERS' COMPENSATION FUND OF UTAH'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI was mailed, postage prepaid, on this 20<sup>th</sup> day of May, 1992 to the following:

J. Angus Edwards  
PURSER, OKAZAKI & BERRETT  
39 Post Office Place, Third Floor  
Salt Lake City, Utah 84101-2104  
Attorneys for Young Electric Sign Company and  
Smith Administrators

Benjamin A. Sims  
Industrial Commission of Utah  
160 East 300 South, #300  
P.O. Box 146600  
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Robert W. Brandt  
Micheal E. Dyer  
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DABNEY & DABNEY  
350 South 400 East, #202  
Salt Lake City, Utah 84111  
Attorneys for Gary E. Crosland

  
James R. Black

Tab 1

## **Appendix 1**

**Affidavit of Rodney Smith, Vice-President  
Workers' Compensation Fund of Utah  
with Fiscal Note to House Bill 218  
attached as Exhibit A**

James Black, #0347  
Attorney at Law  
Callister Duncan & Nebeker  
Kennecott Bldg. Ste 800  
Salt Lake City, UT 84101

Dennis V. Lloyd #1984  
Attorney at Law  
560 South 300 East  
Salt Lake City, UT 84111  
Telephone: (801) 538-8149

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BEFORE THE UTAH SUPREME COURT

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GARY E. CROSLAND,

Applicant/Respondent,

v

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION OF UTAH;  
YOUNG ELECTRIC SIGN COMPANY;  
and SMITH ADMINISTRATORS,

Defendants/Petitioners.

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AFFIDAVIT OF  
RODNEY C. SMITH  
IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI

Court of Appeals  
No. 910291CA

---

Comes now the affiant, Rodney C. Smith, being first duly sworn, deposes and says:

1. Affiant has been employed by the Workers Compensation Fund of Utah, hereafter WCF, for over ten years and currently serves as Executive Vice President.

2. Affiant by reason of his capacity as Executive Vice President and in the normal course of his duties has personal knowledge of the WCF's operations, as well as statistical data related to such operations, and WCF's legislative interactions.

3. WCF provides workers compensation insurance coverage for approximately 24,000 Utah employers or about 80 % of the total number of employers in Utah.

4. WCF covers some 260,000 workers employed by the Fund's 24,000 insured policyholders.

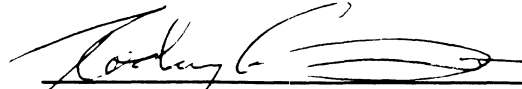
5. Affiant has personal knowledge that the payment of benefits not contemplated within the statutory framework of Chapters One and Two of Title 35 will increase the insurance rates and premiums paid by WCF's insured employers.

6. WCF did not view House Bill 218, as passed by the Utah State Legislature in 1988, as increasing employer liability for an injured worker's permanent partial disability compensation related to asymptomatic permanent partial impairment caused by pre-existing medical conditions. Rather, WCF understood workers would no longer be compensated for any permanent partial disability related to pre-existing medical problems. The primary fiscal impact of House Bill 218 foreseen to affect employers was the increase in premium tax allowed by the new law which was intended to infuse the Second Injury Fund with over \$5,000,000 in operating capital.

7. WCF received no feedback from the Office of the Legislative Fiscal Analyst describing House Bill 218 as making employers or their insurers liable for permanent partial disability compensation related to permanent impairment caused by pre-existing medical conditions. The Analyst's February 1, 1988 Fiscal Note regarding House Bill 218 merely states, "In addition, pre-existing injuries which are aggravated by an industrial accident will no longer be eligible for compensation from the Second Injury Fund." (See attached Exhibit A)

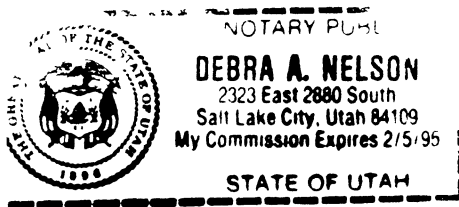
## **EXHIBIT A**

DATED this 18<sup>th</sup> day of May, 1992.



Rodney C. Smith  
Vice President,  
Workers Compensation Fund of Utah

Subscribed and sworn to before me this 18<sup>th</sup> day of May, 1992



  
Notary Public

Residing at Salt Lake County

My commission expires 2/5/95.



## Exhibit A

## **EXHIBIT A**

February 1, 1988

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MANAGEMENT AND FISCAL ANALYSIS

H.B. 218

This bill increases the premium tax on Worker's Compensation Insurance from the current 3 3/4% to 8% as follows:

	FY 1988	FY 1989	FY 1990
Second Injury Fund	3.00%	7.15%	7.25%
Industrial Commission - Industrial Accidents	0.00%	.10%	0.00%
Uninsured Employers - Fund	.50%	.50%	.50%
General Fund	.25%	.25%	.25%
	<u>3.75%</u>	<u>8.00%</u>	<u>8.00%</u>

Based on an annual premium of \$133,600,000 in FY 1989 and \$144,700,000 in FY 1990, the increases would be as follows:

	FY 1989	FY 1990
Second Injury Fund	\$5,544,400	\$6,149,800
Industrial Commission - Industrial Accidents	133,600	0
	<u>\$5.678.000</u>	<u>\$6.149.800</u>

In addition, pre-existing injuries which are aggravated by an industrial accident will no longer be eligible for compensation from the Second Injury Fund. This will decrease expenditures from the Second Injury Fund for both compensation to employees and reimbursements to employers and carriers. These expenditures will decrease approximately \$137,000 in FY 1989 and \$656,000 in FY 1990. These expenditures will continue to decrease until FY 1996 when there will be no expenditures for this purpose. This will save approximately \$4.0 million based on current disbursements. The time lag is due to the eight-year time period during which the injured person may file an application for compensation.

This bill includes hospitals, clinics, and other medical providers in compliance requirements. This is estimated to require one additional FTE at a cost of \$20,000, funded from the Second Injury Fund. The net effect of this bill in FY 1989 would be an increase \$5,661,400 to the Second Injury Fund, and \$133,600 to the Industrial Commission for Industrial Accidents. In FY 1990, the Second Injury Fund would increase by \$6,785,800, of this amount, approximately \$2,400,000 would be paid from the Workers' Compensation Fund, which is not a State budgetary fund.

  
OFFICE OF THE LEGISLATIVE FISCAL ANALYST

## Tab 2

## **Appendix 2**

Crosland v. Board of Review of the  
Industrial Commission of Utah  
183 Utah Adv. Rep. 35 (Utah App. 1992)

proficient in his work. General knowledge or expertise acquired through employment in a common calling cannot be appropriated as a trade secret. "The efficiency and skills which an employee develops through his work belong to him and not to his former employer." *Hallmark Personnel of Texas, Inc. v. Franks*, Tex. Cr. App. 562 S.W.2d 933, 936 (1978). The same principles apply to the covenant here. We hold that the covenant not to compete had the effect of preventing the defendant from exploiting skills and experience which he had a right to exploit.

*Finlay*, 645 P.2d at 628 (footnote omitted).

The trial court and the majority ignore the fundamental policy on which *Finlay* rested. If the trial court had correctly applied *Finlay* to the facts of this case, Kasco could not have made the requisite showing under Rule 65A(e)(1) that it was entitled to the relief demanded. *Finlay* requires that before a trial court can conclude that a covenant not to compete is enforceable, it must first determine that the employee was not engaged in a common calling and that the employer has a legally protectible interest. *Finlay*, 645 P.2d at 627. A generalized assertion that preventing the completion of a former employee will protect the employer's goodwill is not enough. *Id.* at 627-28; *System Concepts*, 669 P.2d at 426.

In this case, defendant Larry Benson was a salesman of butcher supplies. He was a route salesman, pure and simple. He covered a rural territory in Utah and Idaho. He had no trade secrets. He was not involved in management. As a result of his common calling, he necessarily knew both the actual and potential customers for the goods he sold in the communities of his territory. Customers of butcher supplies in such areas are not hard to find; a scan of local telephone books would quickly identify them. Finally, Kasco's customers are not found on a secret customer list.

The majority does not even address the issue of whether Benson was engaged in a common calling. It rests solely on the specious rationale that in his territory, Benson was Kasco. Route salespersons are commonly viewed in their territories as representatives of their employers. But that is no reason to hold them in semi-bondage to their former employers when they change jobs. The majority notes that Benson was one of Kasco's top five salespersons. The law, however, does not protect only less able individuals.

The consequence of the majority's ruling is that a noncompetition covenant may be enforced against any route salesperson whenever it could be said that the employer may lose

some sales, i.e., "goodwill," if the former employee is not restrained from competing. That, of course, can be said with respect to all route salespersons, no matter how common their callings.

Durham, Justice, concurs in the dissenting opinion of Justice Stewart.

1. Clearly, the terms of an injunction may be modified after it goes into effect. However, the law is that a movant must first show some change in circumstances. Kasco has not alleged any changed circumstances that bear upon the issue of when the injunction should have commenced.

2. In *Rose Park*, the employee enjoined was a professional person solely responsible for building the business of a small neighborhood pharmacy.

Cite as

183 Utah Adv. Rep. 35

## IN THE UTAH COURT OF APPEALS

Gary E. CROSLAND,  
Petitioner,

v.

BOARD OF REVIEW of the Industrial  
Commission of Utah; Young Electric Sign  
Co.; and Smith Administrators,  
Respondents.

No. 910291-CA  
FILED: March 20, 1992

Original Proceeding in this Court

ATTORNEYS:

Virginus Dabney, Salt Lake City, for  
Petitioner

J. Angus Edwards, Salt Lake City, for  
Respondents

Before Judges Billings, Jackson, and Russon.

This opinion is subject to revision before  
publication in the Pacific Reporter.

JACKSON, Judge:

Petitioner, Gary Crosland (Crosland), seeks review of an Industrial Commission order awarding him compensation for one-half of his industrial accident injury and denying compensation for the remainder. Crosland was denied compensation for the half of the injury that ensued from the accident's aggravation of a preexisting asymptomatic condition. We reverse.

### BACKGROUND

On February 9, 1989, Crosland injured his lower back as he attempted to help another employee move a 200-pound sign while working for Respondent, Young Electric Sign

Company. Crosland felt immediate pain when, moving the sign around the corner, he twisted his upper torso. When he could barely walk the next day at work, his employer sent him for medical treatment. Crosland's treating physician concluded that Crosland had a preexisting asymptomatic defect and that the industrial accident caused the defect to become acute and symptomatic. The insurance adjuster's examining physician determined that Crosland had preexisting, asymptomatic spondylolysis (breaking down or dissolution of the body of the vertebra) and spondylolisthesis (forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it), adding that all the present symptoms Crosland suffered were related to the industrial injury. Crosland had never had any back problems or required medical treatment for his back prior to this accident.

The medical panel appointed by the Administrative Law Judge (ALJ) found that following the accident, Crosland had a twenty percent permanent partial impairment of the whole body. The panel attributed half, or ten percent, permanent partial impairment, to the industrial accident and half to the asymptomatic preexisting condition medically aggravated by the accident. The panel commented that "[i]t is entirely possible he could have gone on for an indefinite period had it not been for the event described, but it is unlikely he would have had the degree of difficulty had he not had the developmental abnormality." Based on this evaluation, the ALJ denied Crosland compensation for the ten percent permanent partial impairment attributable to the preexisting asymptomatic condition aggravated by the industrial accident, thus allowing compensation only for the ten percent whole body permanent partial impairment attributable to the industrial accident itself. The Industrial Commission affirmed.

Crosland appeals, arguing that he should receive compensation for the entire twenty percent whole person permanent partial impairment caused by the industrial accident's aggravation of the preexisting asymptomatic condition.

#### STANDARD OF REVIEW

This proceeding is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Ann. §§63-46b-1 to-22 (1989 & Supp. 1991).<sup>1</sup> Section 63-46b-16(4)(d) governs the scope of our review of the Industrial Commission's order, allowing relief if Crosland has been "substantially prejudiced" because "the agency has erroneously interpreted or applied the law." In *Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 814 P.2d 581, 587-89 (Utah 1991), the supreme court held that under this section we may review for correctness and need not defer to the agency's interpretation unless

there is "a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language."<sup>2</sup> *Id.* at 589. When legislative intent can be discerned, however, we give the agency's interpretation no deference. *Id.*; accord *Mor-Flo Indus. v. Board of Review*, 166 Utah Adv. Rep. 17 (Utah App. 1991). This case requires an interpretation of the 1988 amendment to the Workers' Compensation Act and thus presents a question of statutory construction and legislative intent which we may review for correctness. Under this higher standard, to afford relief we must find that the Commission erroneously interpreted the law to Crosland's substantial prejudice.

#### ANALYSIS

The parties agree that Crosland suffered an industrial injury and that he has satisfied both the medical and legal cause requirements of *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986).<sup>3</sup> The sole issue on appeal is whether Crosland should receive compensation for the ten percent asymptomatic preexisting condition which was aggravated by his industrial accident and contributed to the injury. Utah courts have followed the well-established common law rule that when an industrial accident lights up or aggravates a preexisting deficiency or disease, the resulting disability is compensable as long as the industrial accident was the medical and legal cause of the injury. *Nuzum v. Roosendahl Const. and Mining Corp.*, 565 P.2d 1144, 1146 (Utah 1977); *Allen*, 729 P.2d at 25 (modifying *Nuzum* to add the higher standard for legal cause when preexisting conditions are involved); *Virgin v. Board of Review of the Indus. Comm'n*, 803 P.2d 1284, 1288 (Utah App. 1990); see also *Giles v. Industrial Comm'n*, 692 P.2d 743 (Utah 1984) (employee received compensation for detached retina resulting from work-related accident, even though employee's prior cataract surgery rendered him somewhat predisposed to retinal detachment). This rule is consistent with the stated policy of liberally construing and applying the Utah Workers' Compensation Act to provide coverage, accomplishing the Act's purpose of affording financial security to injured employees. *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051, 1053 (Utah 1984) (citation omitted). In addition, the rule comports with Professor Larson's comments:

Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special

statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. Apportionment does not apply in such cases, nor in any case in which the prior condition was not a disability in the compensation sense.

2. Larson, *Workmen's Compensation Law*, §59.22(a) (1989) (footnotes omitted).

Juxtaposed against this strong common law background allowing an employee compensation for aggravation of a preexisting latent condition is the policy of freeing an employer from liability for an employee disability existing prior to the work-related accident. For permanent partial impairments, this policy is effectuated by the medical and legal causation requirements of *Allen*.<sup>4</sup> In addition, by amendment effective July 1, 1988, the legislature added the following language to the Workers' Compensation Act: "Permanent partial disability compensation may not be paid for any *permanent impairment* that existed prior to an industrial accident." Utah Code Ann. §35-1-66 (1988) (emphasis added). We are now called upon to decide whether the asymptomatic weakness in Crosland's back was a "permanent impairment" within the meaning of the statute at the time of the injury.<sup>5</sup> The stated purpose of this amendment to section 35-1-66 is to clarify "that permanent partial disability compensation entitlements are based on physical impairment caused by an industrial accident." Laws of Utah ch. 116 H.B. no. 218 preamble. Crosland urges us to interpret the term "permanent impairment" to exclude asymptomatic conditions such as his and to include only conditions "[connoting] some deterioration or diminishment in function." This definition comports with the use of the word "permanent impairment" at the beginning of amended section 35-1-66, stating, with our emphasis, that an employee who receives a "permanent impairment as a result of an industrial accident ... may receive a permanent partial disability award." This wording implies functional "permanent impairment" and does not include asymptomatic nonratable conditions.

This interpretation is also in line with decisions in other states, which have allowed for compensation under similar statutes. Alabama courts, for example, have refused to require employees to accept reduced compensation for injuries resulting from aggravation of preexisting conditions. See, e.g., *International Paper Co. v. Rogers*, 500 So. 2d 1102, 1103 (Ala. Civ. App. 1986) (construing term "infirmity" in statute similar to Utah's to allow unreduced compensation for employee with preexisting asymptomatic spondylolisthesis: "[i]t is a fundamental principle that an employer take[s]

the employee subject to his physical condition when he starts his employment"); see also *Terwilliger v. Green Fuel Economizer, Inc.*, 468 N.Y.S.2d 73, 74 (App. Div. 1983) (no apportionment when preexisting condition was dormant and not disabling); *Daniels v. State Workmen's Compensation Comm'r*, 294 S.E.2d 184, 188 (W. Va. 1982) (under state apportionment statute, preexisting impairment must be definitely ascertained and rated; general rule is that apportionment statutes do not apply when "the prior condition was not physically disabling").

Like other states, Utah has not apportioned between the employer and the employee liability for symptoms resulting from one industrial accident.<sup>6</sup> We find no reason to conclude that section 35-1-66 as amended requires apportionment of liability for aggravation of an asymptomatic condition. Nor do we find that the amendment does more than to clarify that an employer is free from liability for an employee's preexisting ratable functional impairment not caused by the industrial accident. Based on the usage of the term "permanent impairment" in the statute, and on Utah case law at the time of the injury, which allowed full compensation for aggravation of a preexisting asymptomatic condition, we believe the term "permanent impairment" should be interpreted to refer to a ratable physical condition exhibiting some diminished function. Because Crosland's back was completely functional prior to the industrial accident and could have continued to be functional absent the accident, we conclude that apportionment was inappropriate in this case and that the Commission erroneously failed to award full compensation for Crosland's twenty percent whole person permanent partial impairment caused by the industrial accident. We reverse the order of the Industrial Commission.

Norman H. Jackson, Judge

WE CONCUR:

Judith M. Billings, Judge

Leonard H. Russon, Judge

1. The UAPA governs all administrative proceedings commenced after January 1, 1988.

2. A legislative grant of discretion might be implied when the terms of the statute leave the specific question at issue unresolved, allowing for more than one permissible reading of the statute. The choice among permissible interpretations might then be deemed a policy choice for the agency, and we would not substitute our judgment absent an abuse of the delegated discretion. *Morton Int'l*, 814 P.2d at 587-89.

3. To prove legal cause under the higher standard of *Allen*, a claimant with a preexisting condition which contributes to the injury must show that his work-related exertion was unusual or extraordinary, in excess of the normally expected level of nonemployment activity for men and women in the latter half of the twentieth century. *Allen*, 729 P.2d at 25-26.



If the claimant has no contributory preexisting condition, a usual or ordinary exertion suffices to prove legal cause. *Id.* (citing 1B Larson, *Workmen's Compensation Law* §38.83(a) & (b) (1991)). That Crosland's exertion in lifting the sign was greater than normal is undisputed in this case. Consequently, we need not evaluate the application of the *Allen* rule under the amended statute.

4. For permanent total disabilities, the policy is accomplished by providing the employer contribution from the Employers' Compensation Fund. See note 6.

5. A 1991 amendment to the Utah Workers' Compensation Act defines the terms "impairment" and "disability." "'Disability' means becoming medically impaired as to function." Utah Code Ann. §35-1-44(4) (Supp. 1991) (emphasis added). "'Impairment' is a purely medical condition reflecting any anatomical or functional abnormality or loss." Utah Code Ann. §35-1-44(6) (Supp. 1991) (emphasis added). Because these statutory definitions were not in effect at the time of Crosland's injury, we need not decide their applicability to the wording of the 1988 amendment. Instead we rely on the law as it existed at the time of the injury.

6. Apportionment has only occurred between the employer and the Employers' Compensation Fund under Utah Code Ann. §35-1-69 (1988), which, with our emphasis, states in pertinent part,

If an employee, who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by an accident arising out of and in the course of the employee's employment, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employers' Reinsurance Fund are liable for the payment of benefits as follows: ...

This provision thus fully compensates an employee when an industrial accident and a preexisting impairment result in permanent total disability, without imposing the complete burden of compensation for the total disability on the employer. The purpose of this statutory scheme appears to be to resolve the problems arising when the sum of two injuries is greater than the parts (e.g., an industrial accident resulting in blindness in one eye of a worker already blind in the other eye, thus creating permanent total disability), without discouraging employers from hiring handicapped persons. The employee is compensated for the permanent total disability, but the employer is partially compensated from the fund so that the cost to the employer is not as severe. *E.g.*, *Hall v. Industrial Comm'n*, 710 P.2d 175, 178 (Utah 1985) (under this section, a showing of causal connection between the preexisting impairment and the industrial injury is not required; only that they cumulatively result in substantially greater disability); see 2 Larson, *Workmen's Compensation Law*, §59.31(a) (1989). In making its apportioned award, the Commission relied upon *Nyrehn v. Industrial Comm'n*, 800 P.2d 330 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991). This reliance is misplaced because the *Nyrehn* case merely apportions between the employer and the fund under this section and does not address the issue of apportionment between the employer and the employee.

Cite as  
183 Utah Adv. Rep. 38

## IN THE UTAH COURT OF APPEALS

Louise D. STROLLO,  
Plaintiff and Appellant,  
v.  
David STROLLO,  
Defendant and Appellee.

No. 910237-CA  
FILED: March 23, 1992

Third District, Tooele County  
Honorable David S. Young

### ATTORNEYS:

David G. Challed, Salt Lake City, for  
Appellant

David Strollo, Tooele, Appellee Pro Se  
Before Judges Bench, Billings, and Russon.

This opinion is subject to revision before  
publication in the Pacific Reporter.

### BILLINGS, Associate Presiding Judge:

Plaintiff appeals the trial court's denial of a protective order under the Cohabitant Abuse Act, claiming the trial court erred in requiring her to demonstrate immediate peril. We reverse.

On February 21, 1991, plaintiff filed a complaint pursuant to the Cohabitant Abuse Act, Utah Code Ann. §§30-6-1 to-11 (1989 & Supp. 1991), and requested an ex parte protective order. Plaintiff's pro se complaint stated defendant threatened to kill her if she served him with divorce papers.

On February 28, 1991, both parties appeared in court without counsel. The judge stated that he had reviewed the complaint seeking a protective order. Before hearing any testimony, the judge stated he was going to dismiss the complaint. Explaining his decision, the judge continued:

I understand that you may be in fear, but this is an improper use of the protective order. The protective order is intended to cover those circumstances where one is in, what we call imminent fear. An imminent fear doesn't mean that you may anticipate some future problem. It means that you are in fear of some present problem. That is if there is an immediate threat. This threat is based upon your fear that if you file divorce papers that you may be in jeopardy. You have every right to file divorce papers. You have every right in that proceeding to

Tab 3

### **Appendix 3**

Morton Int'l Inc. v. Auditing Div.  
of the Utah State Tax Comm'n  
814 P.2d 581 (Utah 1991)

reverse his conviction under section 76-8-305 because, as the State concedes, Gardiner was not knowingly interfering with a peace officer "seeking to effect a lawful arrest." Since the State fails to establish a prima facie case under either statute, I see no need to consider defenses that could apply.

Finally, and with hindsight, I agree with the majority's comment that the Court of Appeals should have published its opinion in this case. In my view, publication of appellate opinions serves essentially two important purposes: It records and disseminates the development of the common law,<sup>3</sup> and it enables the public to monitor the quality of appellate judicial service.<sup>4</sup> However, some cases coming before a court hearing appeals as of right do not present issues that could enhance the development of the common law, and publication of the greater part of an Appellate Court's decisions provides an adequate sampling of Judicial performance. If a particular case has negligible value as precedent, the parties are better served by dispensing with publication and the greater delay it necessitates.

HOWE, Associate C.J., does not participate herein.

BENCH, Court of Appeals Judge, sat.



**MORTON INTERNATIONAL,  
INC., Petitioner,**

**v.**

**AUDITING DIVISION OF the UTAH  
STATE TAX COMMISSION,**

**Respondent.**

**No. 900325.**

Supreme Court of Utah.

June 24, 1991.

Taxpayer sought review of determination of Tax Commission that expenditures

3. M. Eisenberg, *The Nature of the Common Law* 4-5 (1988).

made in construction of facilities used in production of sodium azide pellets and igniter material were not exempt from sales and use tax. The Supreme Court, Hall, C.J., held that: (1) materials used in construction of production facilities did not qualify for exemption from sales and use tax, and (2) shells of production facilities were not "equipment" exempt from sales and use tax.

Affirmed.

Stewart, J., concurred in the result.

# 1. Administrative Law and Procedure ⌘764

Same standard used for determining harmfulness of error in appeals from judicial proceedings applies to review of agency action and under that standard, error will be harmless if it is sufficiently inconsequential that there is no reasonable likelihood that error affected outcome of proceedings. U.C.A.1953, 63-46b-16(4).

# 2. Administrative Law and Procedure ⌘781

It is not characterization of issue as mixed question of fact and law or characterization of issue as question of general law that is dispositive of determination of appropriate level of judicial review of agency action; rather, dispositive factor is whether agency, by virtue of its experience or expertise, is in a better position than courts to give effect to regulatory objective to be achieved.

# 3. Statutes ⌘219(2)

When legislative intent concerning specific question at issue can be derived through traditional methods of statutory construction, agency's interpretation will be granted no deference and statute will be interpreted in accord with its legislative intent. U.C.A.1953, 63-46b-16(4)(d).

# 4. Statutes ⌘219(1)

Agency's statutory construction should only be given deference when there is

4. K. Llewellyn, *The Bramble Bush* 81 (rev. ed. 1950).

grant of discretion to agency concerning language in question, either expressly made in statute or implied from statutory language. U.C.A.1953, 63-46b-16.

#### 5. Administrative Law and Procedure ⌘800

##### Taxation ⌘1222

Tax Commission's interpretation of statute exempting from sales and use tax sales and leases of materials, machinery, equipment, and services in excess of \$500,000 used in new construction, expansion, or modernization of synthetic fuel processing and upgrading plant did not grant the Commission any discretion; therefore, Commission's decision would be reviewed under correction of error standard. U.C.A.1953, 59-12-104(15), 63-46b-16(4).

##### 6. Taxation ⌘1245

Statute exempting from sales and use tax sales and leases of materials, machinery, equipment, and services of any person in excess of \$500,000 used in new construction, expansion or modernization of synthetic fuel processing and upgrading plants was intended to grant exemption for materials used in construction of plant which removes impurities from natural resources and did not apply to expenditures made in construction of facilities used in production of sodium azide pellets and igniter material. U.C.A.1953, 59-12-104(15).

##### 7. Statutes ⌘193

Under rule of *noscitur a sociis*, meaning of questionable words and phrases in statute are to be ascertained by reference to words or phrases associated with them.

##### 8. Taxation ⌘204(1)

Tax exemption statutes are to be strictly construed against party claiming exemption and all ambiguities are to be resolved in favor of taxation.

##### 9. Taxation ⌘1245

Tax Commission's determination that shells of taxpayer's facilities used in production of sodium azide pellets and igniter material did not constitute "equipment" under statute exempting from sales and use tax sales or leases of machinery and equipment purchased or leased by manufacturer

for use in new or expanding operations was not unreasonable. U.C.A.1953, 59-12-104(16).

##### 10. Taxation ⌘1245

Taxpayer failed to establish that prior agency practice was contrary to Tax Commission's refusing to grant taxpayer exemption from sales and use tax for expenditures made in construction of facilities used in production of sodium azide pellets and igniter material and, therefore, statute providing for judicial relief from agency action as contrary to agency's prior practice did not apply. U.C.A.1953, 59-12-104(15, 16), 63-46b-16(4)(h)(iii).

##### 11. Administrative Law and Procedure ⌘701

##### Taxation ⌘1319

In the absence of official guideline or well-established policy, decisions of auditors for Tax Commission do not constitute "agency practice" for purposes of statute providing for judicial relief when agency action is contrary to agency's prior practice. U.C.A.1953, 63-46b-16(4)(h)(iii).

See publication Words and Phrases for other judicial constructions and definitions.

##### 12. Taxation ⌘1245

Record supported Tax Commission's determination that shells of manufacturer's facilities used in production of sodium azide pellets and igniter material did not constitute "equipment" exempt from sales and use tax. U.C.A.1953, 59-12-104(16), 63-46b-16(4)(h)(iv).

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Randy M. Grimshaw, Maxwell A. Miller, Richard M. Marsh, Salt Lake City, for Morton Intern.

R. Paul Van Dam, Brian Tarbet, Salt Lake City, for State Tax Com'n.

HALL, Chief Justice:

Petitioner Morton International, Inc. ("Morton"), seeks review of the determination of the Utah State Tax Commission ("the Commission") that certain expenditures made in the construction of facilities used in the production of sodium azide pel-

ets and igniter material ("production facilities") are not exempt from sales and use tax under Utah Code Ann. § 59-12-104(15) or (16) (Supp.1987).

The facts underlying Morton's claims are not in dispute. In 1987, Morton began construction of facilities used in the production of sodium azide pellets and igniter material, which are components of the crash protection airbag system used in motor vehicles. The pellets and igniter material are inserted into small pressure vessels to form airbag inflators. When the pellet is ignited, it generates nitrogen gas, which rapidly inflates the airbag. Morton has manufactured sodium azide pellets for over a decade. The new facilities, however, constitute a significant expansion of this business.

The process of manufacturing sodium azide pellets and igniter material is unique and highly specialized. The chemicals used in the process are extremely energetic, explosive, and toxic. Accordingly, the facilities were specifically designed to incorporate safety and environmental features and support specialized and massive equipment, some of which is suspended above the floor. For example, separate facilities were built for each stage of production. This was done to minimize the risk to personnel, machinery, and equipment in case of fire, explosion, or chemical contaminant reactions. There are also many environmental features that are incorporated into the buildings themselves, such as, heavy metal free areas, special conductive flooring, protective blast and blowout walls and ceilings, chemical dust collection filters, and protected double-walled piping and sumps. Many of the production areas are operated by remote control. Personnel only enter for maintenance and quality control. Due to the toxic nature of the materials, personnel are not allowed in these areas without protective clothing, including respirators.

On June 26, 1989, Morton initiated this action. By stipulation, it was agreed that

the action would be treated as a request for refund and formal hearing. A hearing was held on March 7, 1990. At the hearing, Morton represented that since 1987, it had paid an excess of \$325,000 in sales and use taxes with respect to the construction of its sodium azide pellet production facilities. Morton contended that it was entitled to a refund of sales and use taxes pursuant to section 59-12-104(15) on the ground that the production facilities were a "synthetic fuel processing and upgrading plant" and, alternatively, pursuant to section 59-12-104(16), on the ground that the production facilities function as, and essentially are, "equipment." On June 7, 1990, the Commission issued its findings of fact, conclusions of law, and final decision determining that the fuel pellets were not a synthetic fuel and thus the production facilities did not qualify for an exemption under section 59-12-104(15). The Commission also determined that Morton's production facilities were real property and thus the sale of materials used in construction of the production facilities did not constitute the sale of equipment under section 59-12-104(16).

On July 27, 1990, Morton filed this petition for review. The general issue before this court is whether the Commission erred in concluding that the sale of certain materials used in the construction of Morton's production facilities is not exempt from sales and use tax under Utah Code Ann. § 59-12-104(15) or (16).

## I. STANDARD OF REVIEW

### A. *Administrative Procedure Act*

The instant case was initiated after January 1, 1988, and the Commission's decision was reached following a formal hearing. Therefore, the applicable standard of review of the Commission's action is set out in the Utah Administrative Procedure Act, Utah Code Ann. § 63-46b-16,<sup>1</sup> which provides in pertinent part:

(1) As provided by statute, the Supreme Court or the Court of Appeals has

1. Utah Code Ann. § 63-46b-22 (1987) provides: "(1) The procedures for agency action, agency review, and judicial review contained in this

chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on and after January 1, 1988."

jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

....  
 (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

...;  
 (d) the agency has erroneously interpreted or applied the law;

...;  
 (h) the agency action is:  
     (i) an abuse of the discretion delegated to the agency by statute;  
     (ii) contrary to a rule of the agency;  
     (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or  
     (iv) otherwise arbitrary or capricious.

[1] The Commission maintains that section 63-46b-16(4) grants agencies greater discretion than they had under prior case law. This argument is based on the language in section 63-46b-16(4) stating that appellate relief can only be granted if "on the basis of the agency's record" the appellate court determines that a person has

been "substantially prejudiced." We have always based our decisions on the agency's record. Therefore, this requirement does not disturb prior case law.<sup>2</sup> Furthermore, section 63-46b-16(4) deals with judicial relief, not judicial review. It is clear from this language that this section does not affect the degree of deference an appellate court grants to an agency's decision.<sup>3</sup> Rather, section 63-46b-16(4) ensures that relief should not be granted when, although the agency committed error, the error was harmless. Indeed, the language of section 63-46b-16(4) is similar to language in rules of procedure and evidence dealing with harmless error.<sup>4</sup> Given this similarity in language, we conclude that the legislature in enacting section 63-46b-16(4) intended that the same standard used for determining the harmfulness of error in appeals from judicial proceedings should apply to reviews of agency actions. Under this standard, an error will be harmless if it is "sufficiently inconsequential that ... there is no reasonable likelihood that the error affected the outcome of the proceedings."<sup>5</sup>

Section 63-46b-16(4)(a) through (h), however, incorporates standards that appellate courts are to employ when reviewing allegations of agency error.<sup>6</sup> Morton's claims

2. See *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982); see also Comments of the Utah Administrative Law Advisory Committee, Utah A.P.A. at 15 (Code Co Law Publishers, April 25, 1988) [hereinafter Advisory Committee].

3. The comments of the Utah Administrative Law Advisory Committee state that section 63-46b-16(4) is patterned after comparable provisions of the Model State Administrative Procedure Act ("MSAPA"). See Model State Admin. Procedure Act § 5-116, 15 U.L.A. 127-30 (1981). Section 5-116 of the MSAPA requires the showing of substantial prejudice for an appellate court to grant relief. It is clear from reading the comments to section 5-116 that the requirement of substantial prejudice does not require appellate courts to grant administrative agencies deference. Indeed, the comments state that appellate courts "may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation."

4. See Utah R.Civ.P. 61; Utah R.Crim.P. 30(a); Utah R.Evid. 103(a).

5. *State v. Verde*, 770 P.2d 116, 120 (Utah 1989). In a case such as the instant case, where we reject the argument that an agency has erred, this provision has no application.

6. The Utah Court of Appeals has interpreted section 63-46b-16(4)(a) through (h) as establishing standards of review that differ, in some cases, from our prior case law. See *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 66-68 (Utah Ct.App.1989) (different standard for reviewing agency action based on determination of fact); see also Advisory Committee at 15; MSAPA § 5-116, comments, 15 U.L.A. at 127-30. But see *Pro-Benefit Staffing v. Board of Review*, 775 P.2d 439, 441-42 (Utah Ct.App. 1989) (same standard for applying the law). We note that the analysis used in *Pro-Benefit* is inconsistent with the analysis expressed in this opinion.

Cite as 814 P.2d 581 (Utah 1991)

e based on subsections 63-46b-16(4)(d), (h)(iii), and (4)(h)(iv). The question presented, therefore, is whether the standard of review incorporated into these subsections differs from the standard of review developed in our prior case law.

### B. Prior Case Law

Prior to the adoption of the Utah Administrative Procedure Act, the Utah courts developed three levels of review in connection with agency action. First, agencies' findings of fact were granted considerable deference and would not be disturbed on appeal if supported by substantial evidence.<sup>7</sup> Second, a correction-of-error standard, giving no deference to agencies' decisions, was used to review agencies' rulings on issues the court characterized as concerning general law.<sup>8</sup> Examples of issues characterized as questions of general law include rulings concerning constitutional questions,<sup>9</sup> rulings concerning the agency's jurisdiction or statutory authority,<sup>10</sup> rulings

concerning common law principles such as the interpretation of contracts and certificates,<sup>11</sup> and rulings concerning interpretation of statutes unrelated to the agency.<sup>12</sup>

The correction-of-error standard was also used to review an agency's construction of, or application of the findings of fact to, the statutes which the agency is empowered to administer—when the agency's experience or expertise is not helpful in resolving the issue.<sup>13</sup> One example of such a situation is when a question of statutory interpretation turns on basic legislative intent.<sup>14</sup> Other examples include situations where the agency is construing ordinary statutory terms within the statutes which they administer, such as, application of limitation period under the workers' compensation act,<sup>15</sup> and the proper construction of the term "deficiency of service."<sup>16</sup> In fact, in any situation involving the application of the legal rules to the findings of fact, a correction-of-error standard is used if the court is as well-suited to determine the

7. See, e.g., *Savage Indus. Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 666 (Utah 1991); *Hurley v. Board of Review*, 767 P.2d 524, 526 (Utah 1988); *Bennett v. Indus. Comm'n*, 726 P.2d 427, 429 (Utah 1986); *Big K Corp. v. Public Serv. Comm'n*, 689 P.2d 1349, 1353 (Utah 1984). See also section 63-46b-16(4)(g) of the Utah Administrative Procedure Act, which provides that a party who is substantially prejudiced by an agency action can seek judicial relief on the ground that "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court."

8. See *Savage Indus.*, 811 P.2d at 666; *Utah Dep't of Admin. Serv. v. Public Serv. Comm'n*, 658 P.2d 601, 608 (Utah 1983).

9. See *Savage Indus.*, 811 P.2d at 666; *Utah Dep't of Admin. Serv.*, 658 P.2d at 608; *R.W. Jones Trucking v. Public Serv. Comm'n*, 649 P.2d 628, 629 (Utah 1982). See also Utah Administrative Procedure Act section 63-46b-16(4)(a), which provides that a party who is substantially prejudiced by an agency action may seek judicial relief on the ground that "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied."

10. See, e.g., *Utah Dep't of Admin. Serv.*, 658 P.2d at 608; *Utah Cable Television Operator Ass'n v. Public Serv. Comm'n*, 656 P.2d 398, 402-03

(Utah 1982). See also Utah Administrative Procedure Act section 63-46b-16(4)(b), which provides that a party who is substantially prejudiced by an agency action can seek judicial relief on the ground that "the agency has acted beyond the jurisdiction conferred by any statute."

11. See *Utah Dep't of Admin. Serv.*, 658 P.2d at 608; *W.S. Hatch Co. v. Public Serv. Comm'n*, 3 Utah 2d 7, 277 P.2d 809, 811 (Utah 1954). But see *Savage Bros. Inc. v. Public Serv. Comm'n*, 723 P.2d 1085, 1087 (Utah 1986) (interpretation of certificate of public convenience granted deference when agency's expertise is helpful in interpreting ambiguous and technical terms).

12. See generally *Hurley*, 767 P.2d at 527; *Bennett*, 726 P.2d at 429. Both cases state that no deference is granted to an agency's interpretation of statutes or application of statutory terms to factual situations unless the agency, by virtue of its expertise, is in a better position to give effect to the regulatory objective.

13. See, e.g., *Hurley*, 767 P.2d at 527; *Bennett*, 726 P.2d at 429; *Big K Corp.*, 689 P.2d at 1353.

14. See *Hurley*, 767 P.2d at 527; *Big K Corp.*, 689 P.2d at 1353.

15. *Dean Evans Chrysler Plymouth v. Morse*, 692 P.2d 779, 782 (Utah 1984).

16. *Big K Corp.*, 689 P.2d at 1353.



issue as the agency.<sup>17</sup>

Finally, an intermediate standard of review, granting some deference to the agency's decisions, has been used when the agency's experience or expertise puts the agency in a better position to resolve issues concerning the application of findings of fact to the legal rules governing the case and the interpretations of the operative provisions of the statutes the agency is empowered to administer.<sup>18</sup> This standard was also used when it was alleged that the agency abused the discretion granted to it by statute.<sup>19</sup> Under the intermediate standard of review, appellate courts did not disturb an agency's decision if the decision was within the bounds of reasonableness.<sup>20</sup>

In cases not involving discretion, it has not always been clear when the intermediate standard of review should be used.<sup>21</sup> In some early cases, we characterized the issues that are appropriate for the intermediate standard of review as questions of mixed fact and law<sup>22</sup> or, alternatively, as questions concerning the application of the law.<sup>23</sup> However, issues that are appropriate for the intermediate standard have also

been described as questions of statutory construction,<sup>24</sup> questions of special law,<sup>25</sup> and questions of law.<sup>26</sup> Indeed, we have stated, "An agency's interpretation of key provisions of the statute that it is empowered to administer is often inseparable from its application of the rules of law to the basic facts."<sup>27</sup>

[2] A review of our recent cases, however, makes it clear that it is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review. Rather, what has developed as the dispositive factor is whether the agency, by virtue of its experience or expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.<sup>28</sup> We have stated:

We do not defer to the Commission when construing statutory terms or when applying statutory terms to the facts unless the construction of the statutory lan-

17. See, e.g., *Hurley*, 767 P.2d at 527; *Bennett*, 726 P.2d at 429; *Big K Corp.*, 689 P.2d at 1353.

18. See, e.g., *Savage Indus.*, 811 P.2d at 666; *Hurley*, 767 P.2d at 527; *Logan Regional Hosp. v. Board of Review*, 723 P.2d 427, 428-29 (Utah 1986); *Savage Bros. Inc.*, 723 P.2d at 1087; *Barney v. Department of Employment Sec.*, 681 P.2d 1273, 1275 (Utah 1984).

19. See, e.g., *Big K Corp.*, 689 P.2d at 1353; *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982).

20. See, e.g., *Savage Indus.*, 811 P.2d at 666; *Hurley*, 767 P.2d at 527; *Logan Regional Hosp.*, 723 P.2d at 428-29; *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

21. See *Savage Indus.*, 811 P.2d at 666. Compare *Bennett*, 726 P.2d at 429 (correction-of-error standard used to review Industrial Commission's interpretation of "employee") with *Pinter Constr. Corp. v. Frisby*, 678 P.2d 305, 307 (Utah 1984) (intermediate standard used to review Industrial Commission's interpretation of "employee").

22. See, e.g., *Hurley*, 767 P.2d at 527; *Logan Regional Hosp.*, 723 P.2d at 429; *Gray v. Department of Employment Sec.*, 681 P.2d 807, 810 (Utah 1984); *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

23. Mixed questions of fact and law have been defined as "the 'application' of the findings of basic fact (e.g., what happened) to the legal rules governing the case." *Gray*, 681 P.2d at 811 n. 7 (quoting *Utah Dep't of Admin. Serv.*, 658 P.2d at 610). This court has used the terms mixed question of fact and law and application of the law interchangeably. See *Hurley*, 767 P.2d at 527-28; *Logan Regional Hosp.*, 723 P.2d at 429; *Barney*, 681 P.2d at 1275; *Clearfield City v. Department of Employment Sec.*, 663 P.2d 440, 443-44 (Utah 1983).

24. See *Chris & Dick's v. State Tax Comm'n.*, 791 P.2d 511, 513-14 (Utah 1990); *Bennett*, 726 P.2d at 429; *Big K Corp.*, 689 P.2d at 1353; *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

25. See *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

26. See *Chris & Dick's*, 791 P.2d at 513-14; *Hurley*, 767 P.2d at 527; *Bennett*, 726 P.2d at 429; *Big K Corp.*, 689 P.2d at 1353; *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

27. *Utah Dep't of Admin. Serv.*, 658 P.2d at 610.

28. *Savage Indus.*, 811 P.2d at 666; *Chris & Dick's*, 791 P.2d at 513-14; *Hurley*, 767 P.2d at 527; *Bennett*, 726 P.2d at 429; *Big K Corp.*, 689 P.2d at 1353.

guage or the application of the law to the facts should be subject to the Commission's expertise gleaned from its accumulated practical, first-hand experience with the subject matter.<sup>29</sup>

A clear example of this principle can be seen in *Savage Brothers Inc. v. Public Service Commission*.<sup>30</sup> There, we noted that questions involving interpretations of certificates of public convenience and necessity ordinarily involve questions of general law. However, we held that when an agency has specialized knowledge that is helpful in interpreting ambiguous and technical terms of a certificate, an intermediate standard of review is appropriate.<sup>31</sup>

In determining whether the standards of review incorporated in subsections 63-46b-16(4)(d), (4)(h)(iii), and (4)(h)(iv) differ from the standards established in our prior case law, we will address each section separately in the context of the claim raised under that section.

## II. STATUTORY CONSTRUCTION

### A. Section 63-46b-16(4)(d)

Morton's claim that it is entitled to judicial relief under section 63-46b-16(4)(d) is based on the allegation that the Commission erred in its construction of Utah Code Ann. § 59-12-104(15) and (16) or in its application of these subsections to the findings of fact. Under our prior case law, the standard used to review the Commission's determinations would be a correction-of-error

standard unless the Commission was granted some discretion in dealing with the issue or, by virtue of its expertise or experience, was in a superior position to decide the issue. The first question presented, therefore, is whether section 63-46b-16(4) departs from this standard.

It has already been established that in some situations, the standard of review provided in section 63-46b-16(4)(d) is identical to the standard of review in our prior case law. In *Savage Industries Inc. v. Utah State Tax Commission*,<sup>32</sup> we held that under section 63-46b-16(4)(d), a correction-of-error standard, giving no deference to the agency decisions, is to be used in cases involving statutory construction where the court is in as good a position as the agency to interpret the statute.<sup>33</sup> This holding was based on the term "erroneous," which connotes a correction-of-error standard,<sup>34</sup> and the legislative history of section 63-46b-16(4)(d), which implies that "a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation."<sup>35</sup> Similarly, section 63-46b-16(4)(h)(i) provides for judicial relief in cases where the agency has abused the "discretion delegated to the agency by statute."<sup>36</sup> In past cases, we have held that an agency has abused its discretion when the agency's action, viewed in the context of the language and purpose of the governing statute, is unreasonable.<sup>37</sup>

29. *Bennett*, 726 P.2d at 429.

30. 723 P.2d 1085 (Utah 1986).

31. *Id.* at 1087.

32. 811 P.2d 664, 668-671 (Utah 1991).

33. *Id.* at 668.

34. *Id.* at 670.

35. *Id.* at 670 (citing MSAPA § 5-116, comments, 15 U.L.A. at 128 (1981)).

36. The legislative history of section 63-46b-16(4)(d) also supports this position. The comments of the Utah Administrative Procedure Act state that section 63-46b-16(4)(d) is patterned after comparable provisions in the MSAPA. The comments to the relevant section of the MSAPA state that "the enabling statute normally

confers some discretion upon the agency. Accordingly, a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its discretion." See MSAPA § 5-116, comments, 15 U.L.A. at 128.

37. See *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982); *West Jordan v. Department of Employment Sec.*, 656 P.2d 411, 414 (Utah 1982); cf. *Utah Dep't of Admin. Serv. v. Public Serv. Comm'n*, 658 P.2d 601, 611-12 (Utah 1983). Focusing on the legislative grant of authority is important in determining whether an agency has abused its discretion. The court should be careful not to substitute its judgment for the judgment of the agency when considering the wisdom of the agency's policies. See Advisory Committee at 15; see also MSAPA § 5-116, comments, 15 U.L.A. at 128 (1981).

Therefore, in cases dealing with statutory construction, the Utah Administrative Procedure Act does not change the standard of review when the court is in as good a position as the agency to determine the issue or when the agency has been granted discretion in interpreting the statute. However, nothing in the language of section 63-46b-16 or its legislative history suggests that an agency's decision is entitled to deference solely on the basis of agency expertise or experience. Indeed, there is no reference to agency expertise or experience in the statute or the statute's legislative history. Rather, in granting judicial relief when an "agency has erroneously interpreted or applied the law," the language of section 63-46b-16(4) clearly indicates that absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term.<sup>38</sup> Therefore, to the extent that our cases can be read as granting deference to an agency's decisions based solely on the agency's expertise and not on a statutory delegation of authority, section 63-46b-16(4)(h)(i) constitutes a break from prior law.<sup>39</sup>

This, however, may not have a significant effect on the standard used to review agencies' statutory interpretations and applications of their own statutes. In many cases where we would summarily grant an agency deference on the basis of its exper-

tise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute.

The legislature, in many instances, has explicitly granted agencies discretion in dealing with specific statutory terms.<sup>40</sup> Apart from such explicit grants of authority, courts have also recognized that grants of discretion may be implied from the statutory language. For example, we have held that when the operative terms of a statute are broad and generalized, these terms "bespeak a legislative intent to delegate their interpretation to the responsible agency."<sup>41</sup> We have also granted an agency's statutory interpretation deference when the statutory language suggested that the legislature had left the specific question at issue unresolved. In *Salt Lake City Corp. v. Confer*,<sup>42</sup> we held that an agency's interpretation of statutory provisions is entitled to deference when there is more than one permissible reading of the statute and no basis in the statutory language or the legislative history to prefer one interpretation over another.<sup>43</sup>

[3] The approach used in *Salt Lake City Corp.* is consistent with section 63-46b-16. Questions of legislative intent are considered questions of law, which are reviewed for correctness under our prior case

38. As noted *supra* in notes 21-27 and accompanying text, in some of our earlier cases, in determining that an intermediate standard of review is appropriate, we have relied upon the characterization of an issue as an application of the law as opposed to an interpretation of the law. Although in our more recent cases the focus has turned to agency expertise, the fact that the Administrative Procedure Act incorporates the terms "application of the law" and "interpretation of the law" under a single standard supports the contention that absent a grant of discretion, an agency's interpretation or application of statutory terms should be reviewed for error.

39. In fact, the legislative history of the Administrative Procedure Act suggests that the legislature intended to alter the approach the courts developed to review agency action. See Sullivan, *Overview of the Utah Administrative Procedures Act*, Utah A.P.A. at 4-5 (Code Co Publishers July 8, 1988).

40. For example, section 59-12-104(16) provides for "sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements ... as determined by the commission)." (Emphasis added.)

41. *Utah Dep't of Admin. Serv.*, 658 P.2d at 610; see also *Salt Lake City Corp.*, 657 P.2d at 1316-17 (term "equity and good conscience" confers broad discretion).

42. 674 P.2d 632 (Utah 1983).

43. *Id.* at 636. The United States Supreme Court has recently adopted a similar approach. See *Dole v. United Steelworkers of America*, 494 U.S. 26, —, 110 S.Ct. 929, 938, 108 L.Ed.2d 23 (1990); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 841, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

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law<sup>44</sup> and section 63-46b-16(4)(d). Therefore, when a legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction, the agency's interpretation will be granted no deference and the statute will be interpreted in accord with its legislative intent.<sup>45</sup> However, in the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of the statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination.<sup>46</sup> Indeed, both the legislative history to section 63-46b-16<sup>47</sup> and our prior cases<sup>48</sup> suggest that an appellate court should not substitute its judgment for the agency's judgment concerning the wisdom of the agency's policy. When there is no discernible legislative intent concerning a specific issue the legislature has, in effect, left the issue unresolved. In such a case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue. Such an approach is particularly appropriate when it is reasonable to assume that the legislature intended the agency to have some discretion in dealing with the statutory provision at issue.

[4] We do not mean to suggest that these are the only methods of determining whether the legislature has granted the agency discretion in dealing with an issue. However, it is clear from the wording of section 63-46b-16 that an agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.

4. See *Savage Indus.*, 811 P.2d at 666, 670; *Hurley v. Board of Review*, 767 P.2d 524, 527 (Utah 1988).

5. See *Savage Indus.* at 670; *Hurley*, 767 P.2d at 527.

6. See *Salt Lake City Corp.*, 674 P.2d at 636; *Utah Dep't of Admin. Serv.*, 658 P.2d at 611.

### B. Section 59-12-104(15)

Morton's first argument is that the sale of certain materials, machinery, and equipment used in the construction of its production facilities is exempt from sales and use tax under Utah Code Ann. § 59-12-104(15), which provides:

The following sales and uses are exempt from taxes imposed by this chapter:

....

(15) sales or leases of materials, machinery, equipment, and services of any person in excess of \$500,000 for any tax year used in the new construction, expansion, or modernization (excluding normal operating replacements as determined by the commission) of any mine, mill, reduction works, smelter, refinery (except oil and gas refineries), *synthetic fuel processing and upgrading plant*, rolling mill, coal washing plant, or melting facility in Utah commencing after July 1, 1984, and ending June 30, 1989.<sup>49</sup>

Morton argues that the sodium azide pellets are synthetic fuels and that, therefore, Morton's facilities constitute a "synthetic fuel processing and upgrading plant" as that term is used in section 59-12-104(15).

[5] The question presented is one of statutory construction or application, and absent a grant of discretion, the Commission's decision will be reviewed under a correction-of-error standard. The statutory terms in question are of a specific nature and do not connote a general grant of discretion. Furthermore, the precise issue presented, whether facilities such as those in question can be considered synthetic fuel processing and upgrading plants, can be resolved through the use of traditional rules of statutory construction.<sup>50</sup> It is apparent that the Commission has not been granted any discretion in re-

47. See Advisory Committee at 15; see also MSA-PA § 5-116, comments, 15 U.L.A. at 128.

48. See *Salt Lake City Corp.*, 674 P.2d at 636; *Utah Dep't of Admin. Serv.*, 658 P.2d at 611.

49. Utah Code Ann. § 59-12-104(15) (emphasis added).

50. See *infra* notes 51-56 and accompanying text.

gard to the present issue. Therefore, its interpretation will not be given deference.

[6] Morton's interpretation of section 59-12-104(15) is based on the well-established rule of statutory construction that a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute.<sup>51</sup> It is argued that the usual meaning of the term "synthetic," as defined by *Webster's New Collegiate Dictionary*, is "relating to or involving synthesis; produced artificially; man-made." The usual meaning of the term "fuel," according to *Webster's*, is a "material used to produce heat or power by burning." Morton then combines these definitions to produce an interpretation of the term "synthetic fuel" as "a man-made fuel that could be combusted or consumed to produce heat or light." Under such an interpretation of section 59-12-104(15), the sodium azide pellets would qualify as a synthetic fuel.

While the analysis used in reaching this point ignores other relevant and well-established rules of statutory construction, it is not necessary to rely on other rules of construction to conclude that Morton's interpretation is erroneous. This is because the rule cited for Morton's interpretation does not support its position. First, it is apparent from the record that there is no usual and accepted meaning of the term "synthetic fuel." Testimony at the hearing established that there is conflict within the scientific community concerning the accepted meaning of the term. Indeed, in several points in its brief, Morton claims that there is confusion concerning the accepted meaning of the term "synthetic fuel." Though we have relied on dictionary definitions to determine the usual meaning of statutory terms, the term "synthetic fuel" is not de-

fined in the dictionary. When it is admitted that there is no accepted meaning of the statutory term at issue, a method of construction which is based solely on one of many possible definitions is inappropriate.

Second, even assuming that Morton's definition is appropriate, the argument necessarily fails because Morton misapplies the rule. Morton argues that despite the confusion as to the meaning of "synthetic fuel," the term should be defined by combining the strict dictionary definitions of "synthetic" and "fuel." Under such a definition, any man-made material capable of burning would qualify as a synthetic fuel. Taking Morton's analysis one step further, any facility that produces a material capable of burning would qualify as a "synthetic fuel processing and upgrading plant." Morton attempts to avoid such a result by arguing that a requirement not found in the definition of either "synthetic" or "fuel"—the requirement that it must be economical to produce heat or energy from a man-made material—should be read into the definition of "synthetic fuel." Morton claims that such an interpretation is justified in order to avoid absurd results. This argument, however, is a misstatement of the very rule upon which Morton relies. When the use of an ordinary meaning of a statutory term results in a statute that is "confused beyond reason,"<sup>52</sup> the court does not resolve the confusion by modifying the ordinary meaning of the term. Rather, in such cases the method of construction urged by Morton is not employed.<sup>53</sup>

[7] However, other methods of construction can be used to determine the application of the phrase "synthetic fuel processing and upgrading plant" when the meaning of the phrase cannot be arrived at through use of the usual meaning of the term. One such method of statutory construction is the rule of *noscitur a sociis*, which provides that the meaning of ques-

51. *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982); see also *Board of Educ. of Granite School Dist. v. Salt Lake City*, 659 P.2d 1030, 1035 (Utah 1983); *Gord v. Salt Lake City*, 20 Utah 2d 138, 434 P.2d 449, 451 (Utah 1967).

52. *Gord*, 434 P.2d at 451.

53. See *Board of Educ. of Granite School Dist.*, 659 P.2d at 1035; *Morrison*, 656 P.2d at 446; *Gord*, 434 P.2d at 451.

ionable words and phrases in a statute be ascertained by reference to words or phrases associated with them.<sup>54</sup> The terms surrounding "synthetic fuel processing and upgrading plant" all relate to different aspects of the mining or material reclamation operations. This suggests that the term "synthetic fuel processing and upgrading plant" should be interpreted in accordance with the term's relationship to the mining industry. Such an approach is also consistent with the legislative history of section 59-12-104(15). Both Morton and the Commission assert that the legislative history reveals that section 59-12-104(15) was enacted to aid Utah's ailing mining industry.

At the hearing, Dr. Wiser, a professor of chemical engineering at the University of Utah, offered a definition of "synthetic fuel processing and upgrading plant" that is consistent with the language and legislative history of section 59-12-104(15). Dr. Wiser

stated that in the synthetic fuel industry, the term "synthetic fuel processing and upgrading plant" refers to a plant which produces a liquid material that can

further refined into a synthetic fuel by removing the impurities from raw materials other than petroleum and natural gas, such as coal, tar sands, oil shale, and organic waste. Dr. Wiser further testified that a synthetic fuel is a liquid or gaseous material produced from such raw materials used in combustion primarily for the production of energy. The requirement that a synthetic fuel be gaseous or liquid is linked to the purpose of developing synthetic fuel, which is to take the pressure off of petroleum and natural gas and to reduce dependence on foreign oil.

8] This definition, to the extent that it uses on mined materials such as coal, sands, and oil shale, is consistent with language and legislative history of sec-

*See Heathman v. Giles*, 13 Utah 2d 368, 374 P.2d 839, 840 (1962); *W.S. Hatch Co. v. Public Serv. Comm'n*, 3 Utah 2d 7, 277 P.2d 809, 812 (1954); *Perris v. Perris*, 115 Utah 128, 202 P.2d 11, 733 (1949); *see also Dole*, 494 U.S. at —, 10 S.Ct. at 935.

*Clover v. Snowbird*, 808 P.2d 1037, 1045 (Utah 1991); *Peay v. Board of Educ. of Provo*

tion 59-12-104(15). Because the definition offered by Dr. Wiser focuses on "processing and upgrading plant" as well as "synthetic fuel," it is also consistent with the rule of statutory construction which provides that terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.<sup>55</sup> It should also be noted that this narrow definition limits the exception granted under section 59-12-104(15). Therefore, the approach suggested by Dr. Wiser is consistent with the well-established principle that tax exemption statutes are to be strictly construed against the party claiming the exemption and all ambiguities are to be resolved in favor of taxation.<sup>56</sup>

There is ample support from the wording of the statute, the statute's legislative history, and other methods of statutory construction to conclude that the legislature, in enacting section 59-12-104(15), intended to grant an exemption for materials used in the construction of the type of plant Dr. Wiser described: that is, a plant which removes impurities from natural resources such as coal, oil shale, and tar sands to produce a liquid or gaseous material meant to be used in combustion for the production of energy. It is also clear that given this construction, Morton's production facilities do not qualify as a synthetic fuel processing and upgrading plant. The Commission, therefore, did not err in determining that the materials used in the construction of Morton's facilities do not qualify for an exemption under section 59-12-104(15).

### C. Section 59-12-104(16)

[9] Morton argues that the shells of its production facilities, i.e., the foundations, walls, floors, and ceilings, constitute equipment. Therefore, the construction of the facilities constitutes a purchase of equipment under 59-12-104(16), which provides:

*City Schools*, 14 Utah 2d 63, 377 P.2d 490, 492 (1962).

56. *Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980); *Great Salt Lake Minerals v. State Tax Comm'n*, 573 P.2d 337, 340 (Utah 1977); *Salt Lake County v. Tax Comm'n, Utah ex rel. Good Shepherd Lutheran Church*, 548 P.2d 630, 631 (Utah 1976).

The following sales and uses are exempt from taxes imposed by the chapter:

....  
 (16) sales or leases of machinery and *equipment* purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission) in any manufacturing facility in Utah.<sup>57</sup>

Morton's argument is based on the assertion that the shells of its production facilities function as equipment by preventing, localizing, and directing accidental explosions, preventing toxic exposure to workers and the environment, providing structural support for specialized pieces of machinery, and providing access to machinery. The Commission rejected this argument, determining that the facilities constitute real property not subject to an exemption under section 59-12-104(16).

The specific issue presented on appeal, therefore, is whether the term "equipment," as used in section 59-12-104(16), refers to structures that have characteristics of improvements to real property, but also have characteristics of equipment in that they provide safety features, support for machinery, and access to machinery. This is a question of statutory construction or application and absent a grant of discretion, the Commission's decision will be reviewed for correctness.<sup>58</sup>

There is no explicit grant of authority regarding the question of what constitutes "equipment" under section 59-12-104(16). It is also true that the precise question at issue cannot be resolved using traditional

methods of statutory construction. The usual meaning of the term "equipment" is fixed assets of a business enterprise not including real property and buildings.<sup>59</sup> This, however, does not resolve the issue. Morton does not claim that buildings should qualify as an exemption under section 59-12-104(16). Rather, Morton's argument is that the shells of its production facilities are so specialized and so intricately connected to the function of the machinery that they do not constitute buildings, in the traditional sense, but are essentially equipment. The other terms of the statute are not helpful, and the legislative history is not, as in the case of section 59-12-104(15), specific enough to provide much guidance.<sup>60</sup>

Indeed, it seems that the legislature left unresolved the more general question of whether structures having characteristics of real property as well as characteristics of equipment can qualify for an exemption under section 59-12-104(16), let alone the more specific issue asserted in this appeal. It should also be noted that the classification of a structure as real property or equipment is the type of determination the Commission routinely performs. Thus, it is reasonable to assume that the legislature granted the Commission discretion in this area. Given these facts, we conclude that the Commission has been granted discretion in interpreting the term "equipment." The decision of the Commission, therefore, will only be overturned if it is unreasonable.<sup>61</sup>

In determining whether the Commission's decision is reasonable, it must be noted that the Commission has promulgated a rule that expressly excludes real property and improvements to real property from the definition of equipment, as that

57. Utah Code Ann. § 59-12-104(16) (emphasis added).

58. See Utah Code Ann. § 63-46b-16(4).

59. See *Webster's New Third International Dictionary* 768 (14th ed. 1961).

60. The legislative history of section 59-12-104(16) suggests that the section was enacted to provide incentives for the expansion of manufacturing plants. Morton claims that since the act was meant to provide incentives to manufac-

turers, the term "equipment" should be given an expansive interpretation; such an assertion is controverted by the rule that tax exemption statutes are to be strictly construed. See *Parson Asphalt Prods. Inc.*, 617 P.2d at 398; *Great Salt Lake Minerals*, 573 P.2d at 340; *Salt Lake County*, 548 P.2d at 631.

61. See *supra* notes 36-39 and accompanying text.

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rm is used in section 59-12-104(16). Rule 865-19-85S provides:

2. "Equipment" means any independent device separated from any machinery but essential to an integrated or continuous manufacturing or assembling process or any sub unit thereof....

....

#### B. Application of Exemption:

1. The machinery and equipment exemption applies only to tangible personal property. It does not apply to real property or to tangible personal property which is purchased and becomes an improvement to real property.

Morton does not challenge the propriety of rule 865-19-85S. In fact, Morton's argument relies heavily on the language of the rule.<sup>62</sup>

Morton argues that because the term "equipment" is not defined in the tax code or Utah case law, this court should look to other jurisdictions for guidance. Specifically, Morton cites cases from Wisconsin<sup>63</sup> and the federal bench<sup>64</sup> that have focused on the function that the particular structure performs in determining if the structure should be considered equipment.<sup>65</sup> It is argued that we should adopt this approach because it was developed under

statutes that are similar to rule 865-19-85S, that is, tax statutes granting exemptions for machinery and equipment but not for building or building structures.<sup>66</sup> Implicit in Morton's argument is the assertion that under a functional analysis, the facilities in question would qualify as equipment.

There are, however, many difficulties with Morton's argument. It is rule 865-19-85S, not section 59-12-104(16), that is similar to the statutes cited by Morton. Yet Morton has cited no cases where this court has looked to another jurisdiction's statutes to aid in the interpretation of an agency's rule. In situations like the instant case, where the Commission has been granted discretion to interpret the term "equipment" and therefore discretion in interpreting rule 865-19-85S,<sup>67</sup> other jurisdictions' rulings are not as salient as they may be in situations dealing with strict statutory construction. Furthermore, though there are similarities between rule 865-19-85S and the statutes Morton cites, the statutes and rule 865-19-85S are not identical. None of the statutes upon which Morton relies involve sales and use tax. Moreover, under rule 865-19-85S, the tax exemption does not apply to real property and improvements to real property, while

62. Because Morton asserts that the Commission erred in interpreting section 59-12-104(16), the Commission's determination must be reviewed under section 64-46b-16(4)(d) of the Administrative Procedure Act. Morton's argument, however, relies more on the wording of rule 865-19-85S than on the language of section 59-12-104(16). The instant case, therefore, may present a situation more appropriately reviewed under section 63-46b-16(4)(h)(ii) of the Administrative Procedure Act, i.e., the agency's action is "contrary to a rule of the agency," rather than under section 64-46b-16(4)(d). Morton has not asserted this claim. In any event, since we have already held that the Commission has been granted discretion in interpreting the term "equipment," as used in section 59-12-104(16), and rule 865-19-85S defines the term at issue, it is clear that in this case a reasonableness standard should be used under either section of the Administrative Procedure Act. See *supra* notes 18-20, 36-37, and accompanying text. See generally *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629, 633 (Utah 1982); *Utah Hotel Co. v. Industrial Comm'n*, 107 Utah 24, 151 P.2d 467, 470 (1944).

63. *Pabst Brewing Co. v. City of Milwaukee*, 125 Wis.2d 437, 373 N.W.2d 680, 687-89 (Ct.App. 1985); *Ladish Malting Co. v. Wisconsin Dep't of Revenue*, 98 Wis.2d 496, 297 N.W.2d 56, 62 (Ct.App.1980).

64. *Thirup v. Commissioner of Internal Revenue*, 508 F.2d 915, 918 (9th Cir.1974).

65. Morton asserts that under the functional analysis the determination of whether property is equipment or real property is made using a three-step approach: first, annexation (how is the property attached?); second, adaptation (what is the function or purpose of the property?); and third, intent (did the owner intend the property to remain tangible personal property permanently attached to real estate, or did the owner intend the property to be real property?).

66. See *Thirup*, 508 F.2d at 917; *Pabst Brewing Co.*, 373 N.W.2d at 684; *Ladish Malting Co.*, 297 N.W.2d at 56.

67. See generally *Concerned Parents of Stepchildren*, 645 P.2d at 633; *Utah Hotel Co.*, 151 P.2d at 470.



under the statutes Morton cites the tax exemption does not apply to the arguably narrower term of buildings and building structures.<sup>68</sup>

We also note that the case law from other jurisdictions is at best conflicting in this area.<sup>69</sup> There are jurisdictions that have not followed a functional approach in interpreting similar statutes.<sup>70</sup> Furthermore, the jurisdictions that have adopted a functional approach have reached conflicting conclusions.<sup>71</sup> Therefore, even if we held that section 59-12-104(16) contemplates a functional approach in determining whether a structure was equipment or real property, it would not necessarily follow that Morton's facilities would constitute equipment. It was established at the hearing that the functional analysis urged by Morton is often "very nebulous." Indeed, it is entirely possible that the Commission agreed with Morton's approach but disagreed with Morton's conclusion.

Given the language of rule 865-19-85S, the discrepancies between rule 865-19-85S and the statutes Morton cites, and the conflicting case law, the Commission's determination that the shells of Morton's facilities do not constitute equipment is not unreasonable. Therefore, the Commission's determination will not be disturbed.

68. See *Thirup*, 508 F.2d at 917; *Pabst Brewing Co.*, 373 N.W.2d at 684; *Ladish Malting Co.*, 297 N.W.2d at 56.

69. The Commission cites several cases which define the term "real property." Under these definitions, it is clear that Morton's facilities would qualify as real property. Thus, they would not qualify for an exemption under rule 865-19-85S. See *National Lead Co. v. Borough of Sayerville*, 132 N.J.Super. 30, 331 A.2d 633, 637 (1975); *Strobel v. Northwest G.F. Mut. Ins.*, 152 N.W.2d 794, 796 (N.D.1967); *In re Inglis*, 69 Okla. 64, 169 P. 1083, 1084 (1917); *Sanchez v. Brandt*, 567 S.W.2d 254, 258 (Tex.1978).

70. See *Green Circle Growers Inc. v. Lorain County Bd. of Revision*, 35 Ohio St.3d 38, 517 N.E.2d 899, 900 (1988).

71. Compare *Thirup*, 508 F.2d at 920 (under functional approach, greenhouse constitutes equipment) with *Busch v. County of Hennepin*, 380 N.W.2d 813, 816 (Minn.1986) (under functional approach greenhouse does not constitute equipment). See also *Crown Coco Inc. v. Com-*

### III. SECTION 63-46b-16(4)(h)(iii)

[10] Morton also claims that it is entitled to relief under section 63-46b-16(4)(h)(iii), which provides for judicial relief when the "agency action is . . . contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Neither Morton nor the Commission has cited any case law relating to section 63-46b-16(4)(h)(iii). Indeed, it appears that there is no Utah case law that follows an approach analogous to the approach set out in this section. Moreover, the legislative history concerning this section is confused and therefore not helpful in interpreting the section.<sup>72</sup> Given these facts, we do not engage in an in-depth analysis of the section.

Morton claims that the Commission, in determining that the shells of its production facilities are real property, took action that was contrary to its prior practice of characterizing similar structures as tangible personal property. This allegation is based on the testimony of Mr. Anderson, an auditor who had formerly worked for the tax Commission who testified that he was aware of various instances where

*missioner of Revenue*, 336 N.W.2d 272, 274 (Minn.1983) (metal canopy over gasoline pumps does not constitute equipment).

72. The comments of the Utah Administrative Law Advisory Committee state that section 63-46b-16(4)(h)(iii) is patterned after section 5-116(8)(iii) of the MSAPA. See Advisory Committee at 15. The comment to section 5-116(8)(iii) provides that section 5-116(8)(iii) is related to section 2-103, which requires agencies to make an index of their final orders and to make this index available for public inspection and copying. Under the MSAPA's scheme, a "party may invoke the indexing and public access requirement of Section 2-102, for the purpose of ascertaining the agency's prior practice, so as to reveal the inconsistency between the challenged agency action and prior agency practice." See MSAPA § 5-116, comments, 15 U.L.A. at 129. Utah, however, has not enacted a provision similar to section 2-102. Due to the conflict between this legislative history and Utah's statutory scheme, legislative history cannot be relied on to a great extent in interpreting section 63-46b-16(4)(h)(iii).

walls, flooring, and roofs of automatic storage facilities and large oil storage tanks were treated as tangible personal property. The Commission, in determining that the facilities in question are real property, did not distinguish the instant case from situations involving automatic storage facilities or oil storage tanks. The question presented, therefore, is whether Mr. Anderson's testimony establishes prior inconsistent agency practice for the purpose of section 63-46b-16(4)(h)(iii). If the testimony establishes prior inconsistent agency practice, Morton would be entitled to relief under this section due to the Commission's failure to provide a "rational basis for the inconsistency."

In approaching this issue, it is important to note the exact nature of the evidence presented at the hearing. Mr. Anderson did not testify that the Commission, in a formal or informal hearing, classified oil storage tanks and automatic storage facilities as tangible personal property. Rather, it is apparent from the record that Mr. Anderson was referring to individual audits.<sup>73</sup> Indeed, he testified that the method used in determining that the tanks and storage facilities were tangible personal property was "not an official guideline." Furthermore, the auditing division did not consistently classify such structures as equipment, but also classified such structures as real property. This inconsistency was due to the fact that there was no well-established policy regarding the classification of these structures.

[11] Although there is limited law on point,<sup>74</sup> it is clear that in the absence of an official guideline or a well-established policy, the decisions of auditors do not constitute "agency practice" for the purpose of section 63-46b-16(4)(h)(iii).<sup>75</sup> To hold other-

wise would be to bind the Commission by the unappealed decisions of its subordinates. It is the Commission that has been granted authority to administer the tax code.<sup>76</sup> Morton has provided no evidence that the Commission itself has acted contrary to the position it has taken in the instant case. Under Morton's approach, the mere fact that there is conflict within an agency on a particular question would be sufficient to justify judicial relief under section 63-46b-16(4)(h)(iii). Due to the presence of a conflict, no matter how the issue is finally resolved, the decision will be inconsistent with some of the decisions of the agency's lower level employees. In recognizing the Commission's authority to administer the tax code, section 63-46b-16 recognizes the Commission's authority over its own employees. Since Morton failed to establish prior agency practice contrary to the agency's action, the Commission's determination cannot be overturned on the basis of section 63-46b-16(4)(h)(iii).

#### IV. SECTION 63-46b-16(4)(h)(iv)

[12] Morton's remaining contention is that the Commission's determination that the shells of its production facilities do not constitute equipment is not supported by the record and is therefore arbitrary and capricious. It is argued that for this reason Morton is entitled to relief under section 63-46b-16(4)(h)(iv).<sup>77</sup> However, an analysis of the section is unnecessary because it is clear that the record supports the Commission's determination.

It is argued that because Morton produced a witness who testified that in his opinion the shells of the facilities in question constituted equipment and no other witness contradicted this testimony, the Commission is not free to disagree with this opin-

73. Although it is not clear, it appears from the record that the classification of these structures as tangible personal property occurred in audits concerning Utah Code Ann. § 59-12-103, not Utah Code Ann. § 59-12-104(16).

74. See *supra* note 72 and accompanying text.

75. It may be important to note that we are not deciding whether the classification of oil storage tanks and walls, ceilings, and floors of automat-

ic storage facilities as tangible personal property is inconsistent with the classification of shells of Morton's facilities as real property.

76. See generally Utah Code Ann. §§ 59-1-201 to -210.

77. Section 63-46b-16(4)(h)(iv) provides for judicial relief when an agency's actions are "otherwise arbitrary or capricious."

ion. Morton's witness formed his opinion by applying his interpretation of rule 865-19-85S and section 59-12-104(16) to the undisputed facts. Since the facts are indeed undisputed, his opinion is simply a legal conclusion. While the Commission is not free to make findings of fact outside the scope of the evidence presented at the hearing,<sup>78</sup> the Commission is free to disagree with the legal conclusions offered by witnesses, even when those conclusions are uncontroverted. It is undisputed that sufficient factual evidence was presented at the hearing, and it has been established that the Commission did not abuse its discretion in dealing with section 59-12-104(16). The Commission's decision, therefore, is supported by the record.

For the reasons stated above, we hold that the Commission did not err in determining that expenditures made in the construction of Morton's sodium azide pellets facilities do not qualify for an exemption under section 59-12-104(15) and (16).

Affirmed.

HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., concurs in the result.



STATE of Utah, Plaintiff and Appellee,

v.

Josafat TRUJILLO-MARTINEZ,  
Defendant and Appellant.

No. 900464-CA.

Court of Appeals of Utah.

June 7, 1991.

Defendant appealed from order of the Third District Court, Salt Lake County, Homer F. Wilkinson, J., denying his motion to

withdraw his guilty plea. The Court of Appeals, Russon, J., held that: (1) guilty plea colloquy as well as defendant's affidavit regarding plea bargain were required to be considered in concert in determining whether defendant knowingly and voluntarily consented to plea; (2) defendant's testimony at guilty plea colloquy, together with testimony of his attorney at hearing to withdraw the plea, established that defendant understood plea bargain affidavit when he signed it; and (3) trial court did not abuse its discretion in failing to question defendant at guilty plea colloquy about defendant's understanding of nature and elements of his charge, or whether he understood minimum and maximum sentences which could be imposed.

Affirmed.

#### 1. Criminal Law ⚡1149

Court of Appeals will not disturb trial court's determination that defendant has failed to show good cause for withdrawal of guilty plea unless it clearly appears that trial court abused its discretion.

#### 2. Criminal Law ⚡274(2, 3)

It is abuse of discretion to refuse to allow defendant to withdraw guilty plea which was not made in strict compliance with rule governing acceptance of guilty pleas. U.C.A.1953, 77-35-11 (Repealed).

#### 3. Criminal Law ⚡273.1(5)

Guilty plea colloquy as well as defendant's affidavit regarding plea bargain were required to be considered in concert in determining whether defendant knowingly and voluntarily consented to plea. U.C.A. 1953, 77-35-11 (Repealed).

#### 4. Criminal Law ⚡273.1(5)

Defendant's testimony at guilty plea colloquy, together with testimony of his attorney at hearing to withdraw the plea, established that defendant understood plea bargain affidavit when he signed it; defendant testified that he understood he was pleading guilty by signing affidavit and that he wished to sign it, and attorney

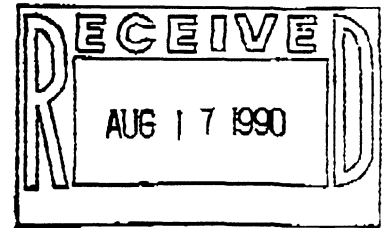
78. *First Nat'l Bank of Boston v. County Bd. of*

*Equalization*, 799 P.2d 1163, 1166 (Utah 1990)

Tab 4

## **Appendix 4**

Findings of Fact,  
Conclusions of Law and  
Order of the  
Industrial Commission of Utah,  
dated September 4, 1990



**THE INDUSTRIAL COMMISSION OF UTAH**

Case No. 89000824

**GARY CROSLAND,**

Applicant,

**VS.**

YOUNG ELECTRIC SIGN COMPANY  
and/or SMITH ADMINISTRATORS,

**Defendants.**

### FINDINGS OF FACT

## CONCLUSIONS OF LAW

**AND ORDER**

\*\*\*\*\*

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on February 28, 1990 at 10:00 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge..

APPEARANCES: The applicant was present and was represented by  
Virginus Dabney, Attorney.

The defendants were represented by J. Angus Edwards, Attorney.

The applicant in this matter is claiming additional compensation benefits and medical expenses in relation to a February 9, 1989 industrial back injury. The defendants have contested the relatedness and necessity of the fusion surgery that has been recommended by the applicant's treating physician, Dr. R. Horne. Due to conflicting medical opinions with respect to the treatment recommended for the applicant's industrial injury, the matter was referred to a medical panel on April 17, 1990. The medical panel report was received at the Industrial Commission on June 8, 1990 and was distributed to the parties on June 21, 1990. On July 9, 1990, counsel for the applicant submitted a letter commenting on how he interpreted the medical panel report. Counsel for the defendants filed a response on July 17, 1990. On July 20, 1990 counsel for the applicant replied and requested clarification be obtained from the medical panel regarding whether the applicant's pre-existing condition was symptomatic or not. It has been determined that there is no need to obtain medical panel clarification and as the medical panel report is well supported, it is adopted by the Administrative Law Judge.

ORDER  
RE: GARY CROSLAND  
PAGE TWO

FINDINGS OF FACT:

The applicant is a male who was 28 years old on the date of injury and was then, and is now, single with no dependents. At the time of his injury, the applicant was working 40 hours per week and was earning a wage of \$10.17 per hour. The applicant's position was that of a sheet metal fabricator and welder. On the morning of the date of injury, February 9, 1989, the applicant and another employee, James Brown, were moving a sign weighing approximately 200 pounds over to the paint booth so that it could be painted. The applicant estimated the dimensions of the sign to be twelve feet by three feet. The sign was made of sheet metal and angle iron. The angle iron stuck out from the end of the sign and the applicant was holding onto this angle iron to carry the sign. He had his hands palm up and about shoulder width apart as he carried the sign. He was walking forward with the sign when he came to a corner which required some maneuvering. It was necessary for him to twist his upper torso to the left to get around the corner. As he went around the corner, he felt instant and sudden pain about two inches below his belt line and to the right in his lower back. He also felt numbness in his buttocks and down the back of his legs. He proceeded to set the sign down on some sawhorses and recalls complaining of the pain in his back at that time. He finished the shift that day, but could not sit or lift for the rest of the day. He reported to work the next day, February 10, 1989, but he could barely walk and his employer refused to allow him to work. The applicant was driven to WORKMEX by another employee at the employer's direction. X-rays were taken there and he was immediately referred to Dr. R. Horne, an orthopedist, for further evaluation. The applicant was driven back to his employer's and his girlfriend picked him up there and drove him to see Dr. Horne that same day.

Dr. Horne had a CT scan done at Fort Union Imaging on February 13, 1989, which was read to show findings--at L5-S1--with possible problems at L3-4. Ansaids, hyphen and robaxin were prescribed and the applicant was referred for physical therapy which began at Cottonwood Hospital approximately February 23, 1989. Physical therapy with monthly visits to Dr. Horne continued through June 1989. On June 22, 1989, a second CT scan was done at the request of Dr. Horne. This revealed much the same findings except that it was noted that there was increased focal protrusion at L5-S1. On June 27, 1989, Dr. Horne wrote the adjustor, Smith Administrators. In that letter, Dr. Horne indicates that there was spondylolisthesis at the L-5 level. He notes that there was continued back pain at that time in spite of the time off work, the physical therapy, the anti-inflammatory medication and the muscle relaxants and pain relievers. Because there had been no clinical improvement with these conservative measures, Dr. Horne suggests in that letter that a fusion, L-4 through the sacrum, might be required. As noted in the letter, Dr. Horne referred the applicant that same day to Alta View Hospital for a discogram to determine whether a "disc was involved."

ORDER  
RE: GARY CROSLAND  
PAGE THREE

With the applicant continuing to see Dr. Horne on a monthly basis, the applicant was also referred by the insurance adjustor to see Dr. J. Lily. Dr. Lily saw the applicant in August of 1989, and in a letter to the applicant dated August 24, 1989, he notes that the February 10, 1989 CT scan shows that there was a "non-acute" spondylolysis at L-5 that was clearly not caused by the injury the day before. He notes in that letter that, based on that CT scan, he felt there was no compression of the S-1 nerve roots. He read the scan to show L3-4 facet joint marked degenerative changes bilaterally. Dr. Lily concluded that the applicant had pre-existing lumbar disc disease at L3-4 and L5-S1 and that he needed to learn lumbar stabilization exercises if he wanted to avoid surgery. In a later letter to the applicant dated September 19, 1989, Dr. Lily clarifies his analysis somewhat and indicates that the applicant had asymptomatic spondylolysis and spondylolisthesis prior to the industrial injury. However, Dr. Lily indicates that all the present symptoms suffered by the applicant were related to the industrial injury of February 9, 1989.

Responding to concerns expressed by the insurance adjustor regarding the pre-existing nature of the applicant's back condition, Dr. Horne wrote the adjustor on September 28, 1989. In that letter, Dr. Horne explains that even though the applicant had a pre-existing condition (spondylolisthesis), the injury on February 9, 1989 was an "acute" incident which caused a slip of the pre-existing spondylitic defect. He rated the applicant as having 20% whole person impairment per the A.M.A. Guides to the Evaluation of Permanent Impairment. A second independent medical examination was scheduled by the insurance adjustor with Dr. R. Hansen in December of 1989. In his report dated December 1, 1989, Dr. Hansen notes that "I would be very cautious about any surgical treatment." This is apparently based on the fact that Dr. Hansen sees no strong evidence of any neurological deficits or impairment. Nonetheless, Dr. Hansen recommended future limitation of heavy lifting, bending, stooping and twisting. ←

In January of 1990, the insurance adjustor referred the applicant to the Utah Work Capacity and Rehabilitation Center for a job analysis and functional capacity evaluation. The conclusion from that analysis was that the applicant's job as a sheetmetal fabricator was a medium/heavy job requiring frequent bending and lifting. The applicant was rated as having a work capacity to perform medium/light work only and was described as not being feasible for competitive employment based on his workplace tolerances noted in the evaluation. However, it was noted that the applicant demonstrated appropriate motivation and it was felt that he would be a good candidate for a structured work hardening program.

The applicant testified that he never had any back problems or treatment prior to the February 9, 1989 industrial injury. He does recall one fall at work several years ago where the wind got knocked out of him, but he stated he got no treatment for this and had no continuing problems as a result



ORDER

RE: GARY CROSLAND

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of the incident. Currently, the applicant continues to have numbness and shooting pains down his legs and his feet burn. The pain in his back has remained the same, while the numbness problems have gotten worse. The applicant is desirous of having the surgery recommended by Dr. Horne.

The medical panel report received at the Industrial Commission on June 8, 1990 indicates that the surgery recommended by Dr. R. Horne is reasonably medically necessary as a result of the industrial injury. The panel found that the applicant was medically stable as of the date of examination (May 8, 1990) and that the applicant had 20% whole person impairment related to the industrial injury, with 1/2 or 10% of that rating attributable to the applicant's asymptomatic pre-existing spondylolisthesis and 10% attributable to the industrial injury. The panel found that this rating would most likely remain the same even after the surgery proposed by Dr. Horne.

#### CONCLUSIONS OF LAW:

As the defendants filed no objection to the medical panel report, that report is adopted and the defendants will be ordered to pay benefits in line with the findings of the medical panel. This would include additional temporary total compensation from January 1, 1990 through May 8, 1990 (benefits may have already been paid through the end of January by the carrier/adjuster, but this is not completely clear from the current record), and permanent impairment benefits based on the 10% whole person rating that the panel attributes to the February 9, 1989 industrial injury. When and if the applicant is scheduled for surgery, he will be entitled to additional medical expenses and additional temporary total compensation for the period of recovery associated with that surgery.

Counsel for the applicant has argued that the defendants should be liable for the entire 20% of back impairment that the panel has rated. Counsel for the applicant's argument is as follows:

Specifically, it is our view that an aggravated pre-existing asymptomatic condition must be paid by an employer along with that portion of permanent partial impairment attributable to the industrial accident. The Holloway case supports our position with regard to that since only two of the five Justices expressed the opinion that the pre-existing condition could be either symptomatic or asymptomatic. Noticeably, the three Judges who wrote the majority decision did not agree with the two concurring Justices on this particular point. It is our position that the Holloway case requires a ruling in Mr. Crosland's favor requiring that the full 20% permanent impairment be paid for by the employer.

ORDER  
RE: GARY CROSLAND  
PAGE FIVE

Counsel for the applicant also requests that the matter be referred back to the panel for a finding as to whether the pre-existing condition was asymptomatic or not. This is not necessary. The panel clearly states that the pre-existing condition was asymptomatic. Also, whether the condition was asymptomatic or symptomatic is irrelevant. As pointed out by counsel for the defendant in his response to counsel for the applicant's argument set forth above, the case cited by counsel for the applicant, Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986), does not conclude anything regarding symptomatic or asymptomatic conditions. The concurring opinion discusses this, concluding the exact opposite of what counsel for the applicant argues, but the concurring opinion presumably does not set precedent. Holloway does cite Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) with approval. The focus of Allen is whether a pre-existing condition contributes to the injury sustained on the job, not whether the pre-existing condition is symptomatic or asymptomatic. In this case, the panel states that both the pre-existing condition and the job injury "are contributory." Thus, there is no justification for finding that the full impairment is the responsibility of the carrier. Had the panel found that the pre-existing condition was merely an X-ray finding, with no causal contribution to the final injury and with no rating associated with it, then counsel for the applicant's argument would be more persuasive. As it stands, the statute (U.C.A. 35-1-69) requires that the carrier pay only for that impairment that is related to the industrial injury, and unfortunately, the Employers Reinsurance Fund no longer is required to contribute with respect to impairment aggravated by the industrial injury. There being no statutory nor case law justification for finding the carrier liable for the full impairment, the carrier is required to pay only the 10% attributable to the industrial injury.

As not all the permanent impairment benefits will be accrued, part of the impairment award will be paid out on a periodic basis. If surgery is scheduled during the period that the remaining permanent impairment benefits are being paid periodically, the benefit rate should be changed back to the temporary total compensation rate of \$271.00 per week until the applicant stabilizes from the surgery. During the payment of the additional temporary total compensation benefits, 20% of the benefits should be withheld to be finally paid over to the applicant's attorney as his fee once the applicant stabilizes. Any remaining balance for permanent impairment should be paid to the applicant at that point without discount for attorney fees.

ORDER:

IT IS THEREFORE ORDERED that the defendants, Young Electric Sign Company/Smith Administrators, pay the applicant, Gary Crosland, temporary total compensation at the rate of \$271.00 per week for 18.286 weeks (January 1, 1990 through May 8, 1990) or a total of \$4,955.51, less amounts paid to date for this period. This amount is to be paid in a lump sum plus interest at 8% per annum per U.C.A. 35-1-78, and less the attorney fees to be awarded below.

ORDER

RE: GARY CROSLAND

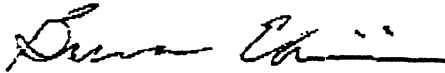
PAGE SIX

IT IS FURTHER ORDERED that the defendants, Young Electric Sign Company/Smith Administrators, pay the applicant, Gary Crosland, permanent partial impairment benefits at the rate of \$229.00 per week for 31.2 weeks or a total of \$7,144.80. Accrued amounts are payable in a lump sum plus interest at 8% per annum per U.C.A. 35-1-78.

IT IS FURTHER ORDERED that the defendants, Young Electric Sign Company/Smith Administrators, pay Virginius Dabney, attorney for the applicant, the sum of \$2,420.06, as attorney's fees in this matter, said amount to be deducted from the accrued temporary total compensation award of the applicant and remitted directly to Virginius Dabney. This amount should be adjusted downward by an amount equal to 20% of any benefits paid to date for the period of January 1, 1990 through May 8, 1990.

IT IS FURTHER ORDERED that the defendants, Young Electric Sign Company/Smith Administrators, pay all medical expenses incurred as the result of the February 9, 1989 industrial injury, said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of this Commission.

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.

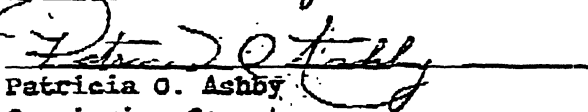


Barbara Elicerio  
Administrative Law Judge

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

14th day of August, 1990.

ATTEST:



Patricia O. Ashby  
Commission Secretary

CERTIFICATE OF MAILING

I certify that on August 15<sup>th</sup>, 1990, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Gary Crosland, was mailed to the following persons at the following addresses, postage paid:

Gary Crosland, 540 East 3745 South, SLC, UT 84106

Virginus Dabney, Atty., 350 South 400 East, Suite 202, SLC, UT 84111

✓ J. Angus Edwards, Atty., 39 Post Office Place, 3rd Floor, SLC, UT 84101

Administrative Services, P. O. Box 526411, SLC, UT 84152-6411

THE INDUSTRIAL COMMISSION OF UTAH

By *Wilma Burrows*  
Wilma Burrows

Tab 5

## **Appendix 5**

Section 63-46b-16, Utah Code Annotated  
(Standard of Review)

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

**History:** C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### **Function of district court.**

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the dis-

trict court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

#### **63-46b-17. Judicial review — Type of relief.**

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

**History:** C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

**Effective Dates.** — Laws 1987, ch. 161,

§ 315 makes the act effective on January 1, 1988.



(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25; 1990, ch. 132, § 1.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, added the exception at the end of Subsection (1)(a).

#### NOTES TO DECISIONS

##### Function of district court.

The only appellate jurisdiction statutorily delegated to the district court is to review in-

formal agency adjudicative proceedings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990).

### 63-46b-16. Judicial review — Formal adjudicative proceedings.

#### NOTES TO DECISIONS

##### ANALYSIS

Conflicting evidence.

Factual findings.

Standard of review.

Substantial evidence test.

Substantial prejudice.

Whole record test.

Cited.

##### Conflicting evidence.

In undertaking a review, the appellate court will not substitute its judgment as between two reasonably conflicting views, even though the court might have come to a different conclusion had the case come before it for de novo review. It is the province of the board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the board to draw the inferences. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

##### Factual findings.

Under Subsection (4)(d), the appellate court will not disturb the board's application of its actual findings to the law unless its determination exceeds the bounds of reasonableness and rationality. *Pro-Benefit Staffing, Inc. v. Board of Review*, 775 P.2d 439 (Utah Ct. App. 1989); *Nelson v. Dep't of Emp. Sec.*, 801 P.2d 58 (Utah Ct. App. 1990).

##### Standard of review.

Under Subsection (4)(d), it is appropriate for a court to review an agency's interpretation of its statutorily granted powers and authority as a question of law, with no deference to the agency's view of the law. The correction-of-error standard will be applied to such an issue and the agency's statutory interpretation will be upheld only if it is concluded to be not erro-

neous. *Bevans v. Industrial Comm'n*, 131 Utah Adv. Rep. 99 (Ct. App. 1990).

##### Substantial evidence test.

In applying the "substantial evidence test," the appellate court reviews the "whole record" before the court, and this review is distinguishable from both a de novo review and the "any competent evidence" standard of review. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

The "substantial evidence test" of Subsection (4)(g) grants appellate courts greater latitude in reviewing the record than was previously granted under the Utah Employment Security Act's "any evidence of substance test." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

"Substantial evidence" is more than a mere "scintilla" of evidence, though something less than the weight of the evidence. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

"Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163 (Utah 1990).

The party challenging the findings must marshal all of the evidence supporting the findings and show that despite the supporting facts, the agency's findings are not supported by substantial evidence. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163 (Utah 1990).

##### Substantial prejudice.

Agency decision revoking social worker's license was reversed and his case was remanded for a new hearing, where the failure to afford

him an opportunity to cross-examine the witnesses against him resulted in "substantial prejudice." *D.B. v. Division of Occupational & Professional Licensing*, 779 P.2d 1145 (Utah Ct. App. 1989).

**Whole record test.**

The "whole record test" necessarily requires that a party challenging the board's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

Under the "whole record test," a court must consider not only the evidence supporting the board's factual findings, but also the evidence that fairly detracts from the weight of the board's evidence. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

Cited in *Law Offices of David Paul White & Assocs. v. Board of Review*, 778 P.2d 20 (Utah Ct. App. 1989); *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127 (Utah Ct. App. 1989); *Nyrehn v. Industrial Comm'n*, 800 P.2d 330 (Utah Ct. App. 1990); *Fred Meyer v. Industrial Comm'n*, 800 P.2d 825 (Utah Ct. App. 1990).

## 63-46b-17. Judicial review — Type of relief.

### NOTES TO DECISIONS

**Scope of review.**

The agency's factual findings will be upheld if they are supported by substantial evidence when viewed in light of the whole record before the court. *Johnson v. Department of Emp. Sec.*, 782 P.2d 965 (Utah Ct. App. 1989).

The agency's application of law to its factual findings will not be disturbed unless its determination exceeds the bounds of reasonableness and rationality. *Johnson v. Department of Emp. Sec.*, 782 P.2d 965 (Utah Ct. App. 1989).

## 63-46b-22. Transition procedures.

(1) The procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on or after January 1, 1988.

(2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

**History:** C. 1953, 63-46b-22, enacted by L. 1987 (1st S.S.), ch. 5, § 1; 1991, ch. 5, § 69. **Amendment Notes.** — The 1991 amend-

ment, effective February 11, 1991, substituted "or" for "and" before "after January 1, 1988" in Subsection (1).

### NOTES TO DECISIONS

Cited in *USX Corp. v. Industrial Comm'n*, 781 P.2d 883 (Utah Ct. App. 1989).

Tab 6

## **Appendix 6**

Section 35-1-66, Utah Code Annotated  
(Permanent Partial Disability)

(2) The commission may make an award for temporary partial disability for work at any time prior to eight years after the date of the injury to an employee:

(a) whose physical condition resulting from the injury is not finally healed and fixed eight years after the date of injury; and

(b) who files an application for hearing under Section 35-1-99.

(3) The duration of weekly payments may not exceed 312 weeks nor continue more than eight years after the date of the injury. Payments shall terminate when the disability ends or the injured employee dies.

**History:** C. 1953, 35-1-65.1, enacted by L. 1981, ch. 287, § 2; 1988, ch. 116, § 2.

**Amendment Notes.** — The 1988 amendment, effective July 1, 1988, designated the previously undesignated first two paragraphs as Subsections (1) and (2); in Subsection (1), divided the formerly undivided language into an introductory paragraph and Paragraphs (a) and (b), rewriting the contents thereof; in Subsection (2), divided the formerly undivided language into an introductory paragraph and

Paragraphs (a) and (b), substituted "hearing under § 35-1-99" for "such purpose prior to the expiration of such eight-year period" in Paragraph (b) and, in Paragraph (a), substituted "the injury" for "such injury" and made a minor punctuation change; deleted the former last undesignated paragraph, which read "In no case shall the weekly payments continue after the disability ends or the death of the injured employee"; and added Subsection (3).

### 35-1-66. Permanent partial disability — Scale of payments.

An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 35-1-99 may receive a permanent partial disability award from the commission.

Weekly payments may not in any case continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be  $66\frac{2}{3}\%$  of that employee's average weekly wages at the time of the injury, but not more than a maximum of  $66\frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed  $66\frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, to wit:

For the loss of:	Number of Weeks
(A) Upper extremity	
(1) Arm	
(a) Arm and shoulder (forequarter amputation) .....	218
(b) Arm at shoulder joint, or above deltoid insertion .....	187
(c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon .....	178
(d) Forearm below elbow joint distal to insertion of biceps tendon ..	168
(2) Hand	
(a) At wrist or midcarpal or midmetacarpal amputation .....	168
(b) All fingers except thumb at metacarpophalangeal joints .....	101

For the loss of:	Number of Weeks
(3) Thumb	
(a) At metacarpophalangeal joint or with resection of carpometacarpal bone .....	67
(b) At interphalangeal joint .....	50
(4) Index finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone .....	42
(b) At proximal interphalangeal joint .....	34
(c) At distal interphalangeal joint .....	18
(5) Middle finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone .....	34
(b) At proximal interphalangeal joint .....	27
(c) At distal interphalangeal joint .....	15
(6) Ring finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone .....	17
(b) At proximal interphalangeal joint .....	13
(c) At distal interphalangeal joint .....	8
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone .....	8
(b) At proximal interphalangeal joint .....	6
(c) At distal interphalangeal joint .....	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis) .....	156
(b) Leg at hip joint or three inches or less below tuberosity of is- chium .....	125
(c) Leg above knee with functional stump, at knee joint or Gritti- Stokes amputation or below knee with short stump (three inches or less below intercondylar notch) .....	112
(d) Leg below knee with functional stump .....	88
(2) Foot	
(a) Foot at ankle .....	88
(b) Foot partial amputation (Chopart's) .....	66
(c) Foot midmetatarsal amputation .....	44
(3) Toes	
(a) Great toe	
(i) With resection of metatarsal bone .....	26
(ii) At metatarsophalangeal joint .....	16
(iii) At interphalangeal joint .....	12
(b) Lesser toe (2nd — 5th)	
(i) With resection of metatarsal bone .....	4
(ii) At metatarsophalangeal joint .....	3
(iii) At proximal interphalangeal joint .....	2

For the loss of:	Number of Weeks
(iv) At distal interphalangeal joint .....	1
(c) All toes at metatarsophalangeal joints .....	26
(4) Miscellaneous	
(a) One eye by enucleation .....	120
(b) Total blindness of one eye .....	100
(c) Total loss of binaural hearing .....	100
(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed [in] (B) (4).	

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000, 2000, and 3000 cycles per second (cps) using pure tone air conduction audiometric instruments (ANSI 1969) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 3000 cycles per second shall not be considered in determining compensable disability. If the average decibel loss at 500, 1000, 2000, and 3000 cycles per second is 25 decibels or less, usually no hearing impairment exists.

In measuring hearing loss, a medical panel of medical and paramedical professionals appointed by the commission shall measure the loss in each ear at the four frequencies 500, 1000, 2000, and 3000 cycles per second which shall be added together and divided by four to determine the average decibel loss. To determine the percentage of hearing loss in each ear, the average decibel loss for each decibel of loss exceeding 25 decibels shall be multiplied by 1½% up to the maximum of 100% which is reached at 92 decibels.

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence. Compensation for any such impairment shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section. Permanent partial disability compensation may not in any case exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function. Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no

event shall more than a maximum of 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

**History:** L. 1917, ch. 100, § 77; C.L. 1917, § 3138; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-62; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-62; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 4; 1971, ch. 76, § 5; 1973, ch. 67, § 3; 1977, ch. 151, § 2; 1977, ch. 156, § 5; 1981, ch. 287, § 3; 1983, ch. 357, § 1; 1988, ch. 116, § 3.

**Amendment Notes.** — The 1988 amendment, effective July 1, 1988, rewrote the first

paragraph, substituted "Weekly payments may not in any case" for "In no case shall the weekly payments" in the second paragraph, deleted the former sixth paragraph, which defined "presbycusis," and substituted the present next-to-last paragraph for the former next-to-last paragraph, relating to other disfigurements or losses of bodily function not otherwise provided for.

**Cross-References.** — Change of award for willful misconduct of employer or employee, §§ 35-1-12, 35-1-14.

## NOTES TO DECISIONS

### ANALYSIS

Back injuries.  
Blindness of one eye.  
Common-law measure of damages.  
Disfigurement.  
Effect of voluntary payments.  
Eye injuries.  
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Hearing loss.  
Jurisdiction of federal courts.  
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Loss of bodily function.  
Maximum benefits.  
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Mental impairment.  
Offsetting amount because of overpayment for temporary total disability.  
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Review of findings.  
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Test of total disability.  
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#### Back injuries.

The words "in proportion as near as may be to compensation for specific loss as set forth in the schedule," which are authorized for disfigurements or losses of bodily function which are not scheduled in the act, does not relate to an injured back because there are no scheduled injuries in the statute that have any relationship to an injured back. What the legislature apparently had in mind when it used the quoted words was losses of bodily function of similar nature to those scheduled, such as an injury to an arm, short of amputation, the impairment of eyesight, short of blindness, and

the like. *Markus v. Industrial Comm'n*, 5 Utah 2d 347, 301 P.2d 1084 (1956).

Industrial Commission did not abuse its discretion in refusing to award miner with back injury full compensation from the time he left his job until rehired since compensation during total disability does not necessarily mean until the employee is able to do his former work. *Wilstead v. Industrial Comm'n*, 17 Utah 2d 214, 407 P.2d 692 (1965).

#### Blindness of one eye.

Award of Industrial Commission of 100 weeks' compensation for total blindness of one eye, a substantial function of which was re-



stored by use of optical lens, was not capricious, arbitrary, or unreasonable where the commission determined, within its prerogative, that the injury resulted in the blindness to the eye. *Western Contracting Corp. v. Industrial Comm'n*, 15 Utah 2d 208, 390 P.2d 125 (1964).

#### **Common-law measure of damages.**

Since proceeding before Industrial Commission is not an action for damages, rules respecting measure of damages must be disregarded and statutory regulations applied in computing compensation. *Broderick v. Industrial Comm'n*, 63 Utah 210, 224 P. 876 (1924).

Payment of compensation for an accidental injury arising out of or in course of industrial employment is in no sense a payment for damages, and rules respecting the measure of damages in law actions do not apply. *Spencer v. Industrial Comm'n*, 87 Utah 336, 40 P.2d 188, *aff'd*, 87 Utah 358, 48 P.2d 1120 (1935).

#### **Disfigurement.**

Injury to vision of employee from electric flash was not case of "any other disfigurement, or loss of bodily function not otherwise provided for herein," within this provision. *Moray v. Industrial Comm'n*, 58 Utah 404, 199 P. 1023 (1921) (decided prior to 1988 amendment).

First part of this section, providing that "Where injury causes partial disability for work," referred to injuries specifically enumerated in this section, so compensation for injury consisting of the crushing together of three vertebrae interfering with motion of spine was properly computed under provision dealing with "any other disfigurement or loss of bodily function not otherwise provided for herein." *Vukelich v. Industrial Comm'n*, 62 Utah 486, 220 P. 1073 (1923) (decided prior to 1988 amendment).

Words, "other disfigurement" do not seem to have any practical significance. *Denver & R.G.W.R.R. v. Industrial Comm'n*, 73 Utah 86, 272 P. 239 (1928) (decided prior to 1988 amendment).

Loss sustained by the employee because of the extraction of his teeth is a "disfigurement" within the meaning of this section. *Gunnison Sugar Co. v. Industrial Comm'n*, 73 Utah 535, 275 P. 777 (1929) (decided prior to 1988 amendment).

The words "any other disfigurement" in this section warrant an award for loss of one front tooth and fracturing of another, for "loss of bodily function" need not impair present earning capacity. *Amalgamated Sugar Co. v. Industrial Comm'n*, 75 Utah 556, 286 P. 959 (1930) (decided prior to 1988 amendment).

#### **Effect of voluntary payments.**

Award was not prejudicial to employer in al-

legedly failing to take into account payments voluntarily made by employer prior to entry of award where employee was entitled to 200 weeks' compensation for loss of arm under this section, as well as compensation for temporary total disability under § 35-1-65, and award was for 200 weeks' compensation; commission considered payments as compensation due for temporary disability under § 35-1-65. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

#### **Eye injuries.**

Commission's award to claimant for loss of vision due to injury to eye muscles causing double vision was affirmed despite contention that claimant did not suffer "total blindness of one eye" within meaning of statute since each of claimant's eyes considered alone had substantial vision and only when they worked together as visual system was effect of injury manifest, and despite further contention that because commission had previously ordered award for only one-half amount subsequently awarded, subsequent award was arbitrary and capricious. *Goodyear Serv. Store v. Industrial Comm'n*, 21 Utah 2d 249, 444 P.2d 119 (1968).

In proceeding for compensation, wherein it appeared that employee suffered injury to vision of eye from electric flash equal to 10% in one and 5% in other eye, an allowance of \$16 a week for fifteen weeks, or an amount equal to 15% of allowance of 100 weeks for total permanent loss of vision in one eye, was sufficient. *Moray v. Industrial Comm'n*, 58 Utah 404, 199 P. 1023 (1921).

#### **Hand injury.**

Injury to employee's hand, disabling him from working, is a compensable injury. *Katsanos v. Industrial Comm'n*, 71 Utah 479, 267 P. 781 (1928).

If employee lost by amputation the third, fourth, and fifth digits of hand and part of palm or surface thereof, he should receive compensation as if hand were entirely lost. The words "other disfigurement" appearing in this section do not seem to have any practical significance. *Denver & R.G.W.R.R. v. Industrial Comm'n*, 73 Utah 86, 279 P. 239 (1928) (decided prior to 1988 amendment).

#### **Hearing loss.**

This section does not make any provision for compensation for loss of hearing associated with advanced age, presbycusis. *Wayman v. Western Coal Carrier Corp.*, 665 P.2d 1294 (Utah 1983) (decided prior to 1988 amendment).

#### **Jurisdiction of federal courts.**

Where state Industrial Commission mistakenly awarded injured employee award of total disability for only partial loss of vision, equity powers of federal court could not be invoked to

enjoin enforcement of award since commission acted mistakenly, yet legally, and within, but not beyond, its jurisdiction. *United States Smelting, Ref. & Mining Co. v. Evans*, 35 F.2d 459 (8th Cir. 1929), cert. denied, 281 U.S. 744, 74 L. Ed. 1157, 50 S. Ct. 350 (1930).

#### **Limitations on supplemental claims.**

This section rather than § 35-1-78 governs filing of supplemental claims for recurrence of an injury; § 35-1-78 does not abrogate or create an exception to the limitation imposed by this section. Claimant who requested and accepted lump-sum settlement for his injury was not entitled to supplemental compensation when partial paralysis resulted from surgery thirteen years later. *United States Smelting, Ref. & Mining Co. v. Nielson*, 19 Utah 2d 239, 430 P.2d 162 (1967), aff'd, 20 Utah 2d 271, 437 P.2d 199 (1968).

#### **Loss of bodily function.**

Where injury to miner resulted in amputation of first three fingers of right hand at proximal joint, removal of chip from head of metacarpal bone of index finger, and amputation of little finger at junction of second and third phalanges, award made on basis of 50% loss of use of right hand on theory that where several fingers are lost it is the loss of a "bodily function not otherwise provided for" in schedule of this section, was proper, as against contention that it was intended by statute to compensate for loss of all fingers by adding scheduled benefits for loss of each finger. *North Beck Mining Co. v. Industrial Comm'n.* 58 Utah 486, 200 P. 111 (1921) (decided prior to 1988 amendment).

Where ultimate question is not one of loss of bodily function but actual partial or total disability economically and industrially, the loss of bodily function is only an aid to such ultimate question, and doctors should testify only as to such loss and not to the ultimate question of industrial and economic disability; except where the doctor qualified in addition to his medical knowledge that he has sufficient knowledge of what physical or mental abilities a certain occupation or vocation calls for, or where such testimony is as to certain common industrial, economic, or household functions, such as climbing ladders, sweeping or digging, in which case the doctor may testify. *Silver King Coalition Mines Co. v. Industrial Comm'n.* 92 Utah 511, 69 P.2d 608 (1937).

Contention of corporation, seeking reduction in award, that compensation awards were created only as a compensation for loss of bodily functions which reduce earning capacity, is not correct. Under this section the scheduled awards for loss of bodily parts and functions are in addition to the compensation provided for temporary total disability. *Western Contracting Corp. v. Industrial Comm'n.* 15 Utah 2d 208, 390 P.2d 125 (1964).

#### **Maximum benefits.**

Plaintiff, who received temporary total disability compensation commencing with the date of his injury and later was paid permanent total disability benefits prior to his return to work, was not entitled to maximum compensation for both temporary total and permanent partial disability but was entitled only to permanent partial disability benefits subject to the limitations set forth in the last paragraph of § 35-1-67. *Johnson v. Harsco/Heckett*, 737 P.2d 986 (Utah 1987).

#### **Medical expenses.**

The period of limitations in this section also applied to claim under § 35-1-81 for medical expenses arising from injury compensated by this section. *United States Steel Corp. v. Industrial Comm'n.* 27 Utah 2d 145, 493 P.2d 986 (1972).

Medical and hospital care benefits are not subject to same limitations as compensation for wages lost or disability rating; claimant was entitled to continued medical expenses where the orders for payment of original medical expenses were not definitely limited, were interpretable as being "open end" and employer had been aware that the claimant's injuries were such that he would never fully and permanently recover but would need future medical care. *Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217 (1973).

#### **Mental impairment.**

Regardless of whether loss of ability to earn such wages as applicant was receiving at time of accident is by reason of either a physical or mental impairment, he is entitled to compensation. *Utah-Idaho Cent. R.R. v. Industrial Comm'n.* 71 Utah 490, 267 P. 785 (1928).

#### **Offsetting amount because of overpayment for temporary total disability.**

Industrial commission did not act contrary to law or unreasonably in ordering that amount owed employee for permanent partial disability be offset by a prior overpayment of amount paid to employee for temporary total disability pertaining to the same injury, with the balance of the overpayment being credited against any future compensation the employer might owe the employee because of the industrial accident. *Hudson v. Kaiser Steel Corp.*, 662 P.2d 29 (Utah 1983).

#### **Operation and effect.**

There is no conflict between this section and § 35-1-67. *Spring Canyon Coal Co. v. Industrial Comm'n.* 74 Utah 103, 277 P. 206 (1929).

#### **Other or additional compensation.**

In proceeding by employee for additional compensation, whether disability from which applicant was suffering at time of application arose from accident or from old hernia of long

standing was a question which industrial commission had power to determine without judicial review. *Littsos v. Industrial Comm'n*, 57 Utah 259, 194 P. 338 (1920).

Award of compensation for temporary total disability in addition to compensation for loss of limb cannot be allowed generally, but such award was properly allowed where unexpected complications arose making it impossible for injured employee to use artificial limb until another amputation could be performed. *Spring Canyon Coal Co. v. Industrial Comm'n*, 60 Utah 553, 210 P. 611 (1922).

Other or additional compensation for a temporary disability to which an applicant may be entitled by reason of an industrial accident is not to be considered in reduction of the definite amount provided for the loss of an arm. *Katsanos v. Industrial Comm'n*, 71 Utah 479, 267 P. 781 (1928).

Whether condition of permanent partial disability resulted from accident in question or resulted from aggravation of pre-existing condition, applicant is entitled to compensation. If a latent disease or trouble is accelerated or lighted up by an industrial accident and a more serious injury results by reason of the existence of such latent ailment than otherwise would have resulted, the injured employee is entitled to additional compensation. *Utah-Idaho Cent. R.R. v. Industrial Comm'n*, 71 Utah 490, 267 P. 785 (1928).

If the insurance carrier acquiesces in an additional award of compensation and pays it, it thereby waives its right to set up the original settlement as a bar against that award. *Aetna Life Ins. Co. v. Industrial Comm'n*, 73 Utah 366, 274 P. 139 (1929).

#### **Permanent total disability claims.**

This section does not impose any limitation on the time within which application for permanent total disability benefits must be filed. *Buxton v. Industrial Comm'n*, 587 P.2d 121 (Utah 1978).

#### **Review of findings.**

If there is any evidence to sustain commission's finding of permanent partial disability,

it will not be disturbed on appeal. *Utah-Idaho Cent. R.R. v. Industrial Comm'n*, 71 Utah 490, 267 P. 785 (1928).

#### **Scope of judicial review.**

When factual findings of commission as to source and extent of applicant's injuries are based upon substantial and competent evidence, they will not be disturbed by court. *Goodyear Serv. Store v. Industrial Comm'n*, 21 Utah 2d 249, 444 P.2d 119 (1900).

#### **Statute of limitations.**

Where claim arose when section had a six-year statute of limitations, and the claim was still alive under that statute of limitations when the 1973 amendment increased the statute of limitations from six to eight years, claimant had eight years from the time of the injury in which to file a supplemental claim. *Del Monte Corp. v. Moore*, 580 P.2d 224 (Utah 1978).

Where employee suffered an injury in November of 1975 and notice of injury and claim was properly given and filed in accordance with requirements of §§ 35-1-99 and 35-1-100, and employee was paid temporary total disability benefits through August of 1978, employee's claim for permanent partial disability based on 1975 injury and filed in January of 1983 was not barred by three-year statute of limitations in § 35-1-99, but was subject to eight-year statute of limitations in this section, and was therefore filed within applicable statute of limitations period. *Dean Evans Chrysler Plymouth v. Morse*, 692 P.2d 779 (Utah 1984) (decided prior to 1988 amendment).

#### **Test of total disability.**

Employee who had only partial loss of vision which was subject to correction by use of glasses did not sustain total disability; the test of such disability being whether it prevents employee from doing work for which he is adapted, and not that in which he was injured. *United States Smelting, Ref. & Mining Co. v. Evans*, 35 F.2d 459 (8th Cir. 1929).

Cited in *Booms v. Rapp Constr. Co.*, 720 P.2d 1363 (Utah 1986).

### **COLLATERAL REFERENCES**

**C.J.S.** — 99 C.J.S. Workmen's Compensation § 302.

**Key Numbers.** — Workers' Compensation ⇨ 1641.

### 35-1-66. Permanent partial disability — Scale of payments.

An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 35-1-98 may receive a permanent partial disability award from the commission.

Weekly payments may not in any case continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be  $66\frac{2}{3}\%$  of that employee's average weekly wages at the time of the injury, but not more than a maximum of  $66\frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent children, but not to exceed  $66\frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week, to be paid in routine pay periods not to exceed four weeks for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability:

For the loss of:

Number of Weeks

(A) Upper extremity

(1) Arm

- (a) Arm and shoulder (forequarter amputation) .....218
- (b) Arm at shoulder joint, or above deltoid insertion .....187
- (c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon .....178
- (d) Forearm below elbow joint distal to insertion of biceps tendon .....168

(2) Hand

- (2)(a) At wrist or midcarpal or midmetacarpal amputation .....168
- (2)(b) All fingers except thumb at metacarpophalangeal joint ..101

(3) Thumb

- (a) At metacarpophalangeal joint or with resection of carpometacarpal bone ..... 67
- (b) At interphalangeal joint ..... 50

(4) Index finger

- (a) At metacarpophalangeal joint or with resection of metacarpal bone ..... 42
- (b) At proximal interphalangeal joint ..... 34
- (c) At distal interphalangeal joint ..... 18

(5) Middle finger

- (a) At metacarpophalangeal joint or with resection of metacarpal bone ..... 34
- (b) At proximal interphalangeal joint ..... 27
- (c) At distal interphalangeal joint ..... 15

(6) Ring finger

- (a) At interphalangeal joint or with resection of metacarpal bone ..... 17
- (b) At proximal interphalangeal joint ..... 13
- (c) At distal interphalangeal joint ..... 8

(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone .....	8
(b) At proximal interphalangeal joint .....	6
(c) At distal interphalangeal joint .....	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis) .....	156
(b) Leg at hip joint or three inches or less below tuberosity of ischium .....	125
(c) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch) .....	112
(d) Leg below knee with functional stump .....	88
(2) Foot	
(a) Foot at ankle .....	88
(b) Foot partial amputation (Chopart's) .....	66
(c) Foot midmetatarsal amputation .....	44
(3) Toes	
(a) Great toe	
(i) With resection of metatarsal bone .....	26
(ii) At metatarsophalangeal joint .....	16
(iii) At interphalangeal joint .....	12
(b) Lesser toe (2nd — 5th)	
(i) With resection of metatarsal bone .....	4
(ii) At metatarsophalangeal joint .....	3
(iii) At proximal interphalangeal joint .....	2
(iv) At distal interphalangeal joint .....	1
(c) All toes at metatarsophalangeal joint .....	26
(4) Miscellaneous	
(a) One eye by enucleation .....	120
(b) Total blindness of one eye .....	100
(c) Total loss of binaural hearing .....	109

(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed in (B)(4).

For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence. Compensation for any such impairment shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section. Permanent partial disability compensation may not in any case exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function. Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of  $66\frac{2}{3}\%$  of the state average

weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

**History:** L. 1917, ch. 100, § 77; C.L. 1917, § 3138; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-62; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-62; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 4; 1971, ch. 76, § 5; 1973, ch. 67, § 3; 1977, ch. 151, § 2; 1977, ch. 156, § 5; 1981, ch. 287, § 3; 1983, ch. 357, § 1; 1988, ch. 116, § 3; 1990, ch. 69, § 3; 1990, ch. 109, § 2; 1991, ch. 136, § 4.

**Amendment Notes.** — The 1990 amendment by ch. 69, effective April 23, 1990, substituted "Section 35-1-98" for "Section 35-1-99" in

the first undesignated paragraph and "in routine pay periods not to exceed four weeks" for "weekly" in the third undesignated paragraph and inserted "in" in the last sentence in Subsection (C).

The 1990 amendment by ch. 109, effective April 23, 1990, substituted "in routine pay periods not to exceed four weeks" for "weekly" near the end of the third paragraph and made three minor stylistic changes.

The 1991 amendment, effective April 29, 1991, substituted "109" for "100" at item (B)(4)(c) and deleted several undesignated paragraphs relating to hearing loss.

### **35-1-66.1. Loss of hearing — Occupational hearing loss due to noise to be compensated.**

(1) Permanent hearing loss caused by exposure to harmful industrial noise or by direct head injury shall be compensated according to the terms and conditions of this chapter.

(2) No claim for compensation for hearing loss for harmful industrial noise shall be paid under this chapter unless it can be demonstrated by a professionally controlled sound test that the employee has been exposed to harmful industrial noise as defined in Section 35-1-66.2 while employed by the employer against whom the claim is made.

**History:** C. 1953, 35-2-58, enacted by L. 1969, ch. 87, § 5; 1991, ch. 136, § 5.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, renumbered this section, which formerly appeared as

§ 35-2-58; added the Subsection (1) designation, inserted "or by direct head injury," and substituted "chapter" for "act" in that Subsection; and added Subsection (2).

### **35-1-66.2. Harmful industrial noise defined.**

(1) Harmful industrial noise is defined as the sound emanating from equipment and machines during employment exceeding the following permissible sound levels, dBA slow response, and corresponding durations per day, in hours:

Sound Level	Duration
90	8
92	6
95	4
97	3
100	2
102	1.4
105	1.0
110	0.5
115	0.25 or less

Tab 7

## **Appendix 7**

Section 35-1-69, Utah Code Annotated  
(Apportionment with Employers' Reinsurance Fund  
in Cases of Permanent Total Disability)



**Procedure.**

The statutes do not require the Second Injury Fund (now the Employers' Reinsurance Fund) to be a participant or even a party in every proceeding before the commission, but once the prospect of fund liability appears, the fund is an "interested party" or a "party in interest" under the statutes and is entitled to receive, in its own right and through its own authorized representative rather than through the commission generally, a notice of the hearing, a copy of the administrative law judge's findings, notice of entry of the commission's order, and it is entitled to file a motion for review with the commission. *Paoli v. Cottonwood Hosp.*, 656 P.2d 420 (Utah 1982).

Where the Second Injury Fund (now the Employers' Reinsurance Fund) has elected not to participate and its presence has not been directed in a hearing before an administrative law judge and an order against the fund has been entered, the fund should be allowed to reopen the case upon motion for review under § 35-1-82.53 in order to submit further evidence bearing on the special interest and liability of the fund. *Paoli v. Cottonwood Hosp.*, 656 P.2d 420 (Utah 1982).

**Reimbursement.**

The payment made under former Subsection (2)(a), providing for the payment of death benefits to the uninsured employers fund when a decedent leaves no dependents, was not "compensation" within the meaning of § 35-1-62, which provides for reimbursement for compensation payments in wrongful death recoveries, and where the decedent's parents sued the tortfeasor and its insurer, the insurance fund could neither invade the parents' recovery nor pursue a separate claim against the insurer in order to recover the amount paid into the Second Injury Fund. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

**Rights of administrator.**

Where employee without dependents was injured, and industrial commission had decided he was entitled to compensation for certain number of weeks, but employee subsequently died from other causes prior to award, administrator was not entitled to compensation. *Heiselt Constr. Co. v. Industrial Comm'n*, 58 Utah 59, 197 P. 589, 15 A.L.R. 799 (1921).

## COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law — Judicial Decisions — Labor, 1987 Utah L. Rev. 227.

**C.J.S.** — 99 C.J.S. Workmen's Compensation § 321 et seq.

**A.L.R.** — Workmen's compensation: posthumous children and children born after accident as dependents, 18 A.L.R.3d 900.

**Key Numbers.** — Workers' Compensation ⇨ 1673.

**35-1-69. Payments from Employers' Reinsurance Fund.**

If an employee, who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by an accident arising out of and in the course of the employee's employment, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employers' Reinsurance Fund are liable for the payment of benefits as follows:

(1) The employer or its insurance carrier is liable for the first \$20,000 of medical benefits and the initial three years of permanent total disability compensation as provided in this title.

(2) Reasonable medical benefits in excess of the first \$20,000 shall be paid in the first instance by the employer or its insurance carrier. Then, as provided in Subsection (5), the Employers' Reinsurance Fund shall reimburse the employer or its insurance carrier for 50% of those expenses.

(3) After the initial three-year period under Subsection (1) permanent total disability compensation payable to an employee under this title becomes the liability of and shall be paid by the Employers' Reinsurance Fund.

(4) If it is determined that the employee is permanently and totally disabled, the employer or its insurance carrier shall be given credit for all

prior payments of temporary total, temporary partial, and permanent partial disability compensation made as a result of the industrial accident. Any overpayment by the employer or its insurance carrier shall be reimbursed by the Employers' Reinsurance Fund under Subsection (6).

(5) Upon receipt of a duly verified petition, the Employers' Reinsurance Fund shall reimburse the employer or its insurance carrier for the Employers' Reinsurance Fund's share of medical benefits and compensation paid to or on behalf of an employee. A request for Employers' Reinsurance Fund reimbursements shall be accompanied by satisfactory evidence of payment of the medical or disability compensation for which the reimbursement is requested. Each request is subject to review as to reasonableness by the commission. The commission may determine the manner of reimbursement.

(6) If, at the time an employee is determined to be permanently and totally disabled, the employee has other actionable workers' compensation claims, the employer or insurance carrier that is liable for the last industrial accident resulting in permanent total disability shall be liable for the benefits payable by the employer as provided in this section. The employee's entitlement to benefits for prior actionable claims shall then be determined separately on the facts of those claims. Any previous permanent partial disability arising out of those claims shall then be considered to be impairments that give rise to Employers' Reinsurance Fund liability under this section.

**History:** C. 1953, 35-1-69, enacted by L. 1988, ch. 116, § 6.

**Repeals and Reenactments.** — Laws 1988, ch. 116, § 6 repeals former § 35-1-69, as last

amended by Laws 1984, ch. 79, § 1, relating to combined injuries resulting in permanent incapacity, effective July 1, 1988, and enacts the present section.

## NOTES TO DECISIONS

### ANALYSIS

Amount of award.  
 —Liability of second employer.  
 —Percentage of impairment.  
 Application.  
 Apportionment of liability.  
 Definitions.  
 Employee completely compensated.  
 Findings of commission.  
 Liability for benefits attributable to nonphysical unemployability factors.  
 Medical panel determination.  
 Medical testimony.  
 No apportionment of insurer's liability.  
 Preexisting condition previously compensated.  
 Preexisting contributing condition.  
 —Substantially greater incapacity following industrial injury.  
 Presbycusis.  
 Prior injury in military service.  
 Purposes.  
 Recovery from fund denied.  
 Remainder paid out of fund.  
 Serial consideration of separate accidents.  
 Special Fund.  
 Strict application.  
 Temporary disability benefits.

**Amount of award.****—Liability of second employer.**

This section makes the second employer liable only for the medical expenses and temporary total disability benefits in proportion to the disability sustained by the worker in the second accident. *Day's Mkt., Inc. v. Muir*, 719 P.2d 528 (Utah 1986).

**—Percentage of impairment.**

An injured employee is entitled to an award of compensation from his employer based upon the percentage of impairment to the whole man, and is not restricted to partial man ratings, although the employer's proportion of liability for compensation is equal to the percentage of total impairment attributable to the industrial injury. *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1985).

**Application.**

This section neither expressly nor impliedly limits its application to only multiple-employer circumstances, nor to cases where the previous incapacitating injury was nonindustrial. *United States Fid. & Guar. Co. v. Industrial Comm'n*, 657 P.2d 764 (Utah 1983).

In order to determine if Second Injury Fund had application, the commission was required to determine if the current impairment was substantially greater than it would have been in the absence of preexisting incapacity. *Day's Mkt., Inc. v. Muir*, 669 P.2d 440 (Utah 1983) (based on statute prior to 1981 amendment).

**Apportionment of liability.**

Where injured employee had one preexisting whole man impairment of 25%, and a second preexisting whole man impairment of 10%, the injury caused by the present industrial accident was equal to a whole man impairment of 50%, and these impairments combined equaled a total physical impairment of 67%, this 67% total impairment figure was a combined partial man figure, and in apportioning liability between the employer and the fund the whole man impairment ratings had to be reduced to their partial man equivalents; in this case, the combined preexisting whole man impairment ratings, 25% and 10%, had an equivalent of a 33% partial man impairment, making the correct assessment of liability to the fund of  $\frac{33}{67}$ ths or 49%, and the 50% whole man impairment rating had an equivalent of a 34% partial man impairment, making the employer liable for  $\frac{34}{67}$ ths or 51%. *Jacobsen Constr v. Hair*, 667 P.2d 25 (Utah 1983).

In apportioning total disability award between employer and his insurer and the fund, the commission correctly held fund liable for the proportion that the preexisting impairment

bore to the total combined impairment. *Second Injury Fund v. Perry's Mill & Cabinet Shop*, 684 P.2d 1269 (Utah 1983).

An employer and its insurer should be allowed to recover from the fund, for their payment of medical expenses and disability payments, an amount equal to the proportion of the employee's disability that is attributable to his preexisting impairments, even though no portion of the medical expenses or the time off from work that resulted in the disability award is caused by the employee's preexisting impairments. *Veyo Concrete Prods., Inc. v. Industrial Comm'n*, 710 P.2d 172 (Utah 1985).

All that is needed to bring about fund liability for those portions of a worker's incapacity attributable to prior degenerative diseases and other preexisting conditions is a showing that the preexisting impairment and the industrial injury cumulatively result in a substantially greater degree of disability than there would have been without the preexisting impairment, and it is not necessary that a causal connection be shown between the preexisting impairment and the industrial injury. *Hall v. Industrial Comm'n*, 710 P.2d 175 (Utah 1985).

**Definitions.**

Word "employer" is used in this section to encompass an employer in a situation where the employment status is localized in Utah. *United Airlines Transp. Corp. v. Industrial Comm'n*, 110 Utah 590, 175 P.2d 752 (1946).

**Employee completely compensated.**

Employee was not entitled to additional compensation from the second injury fund where he had been completely compensated for both his prior incapacities and impairments resulting from a prior industrial accident and for his current incapacities and impairments resulting from the present industrial accident. *David v. Industrial Comm'n*, 649 P.2d 82 (Utah 1982).

**Findings of commission.**

The finding of the commission upon sufficient evidence that the employee would be totally and permanently disabled will not be disturbed where he had previously lost vision in one eye and subsequently lost one-half vision in remaining eye, together with other injuries. *Brown, Terry & Woodruff Co. v. Industrial Comm'n*, 78 Utah 15, 300 P. 945 (1931).

**Liability for benefits attributable to non-physical unemployability factors.**

The fund should bear the cost of disability payments to the extent that the preexisting impairment, acting in combination with factors such as age, mental abilities and lack of rehabilitative prospects, contributed to the employee's total disability; thus, a proper assess-

ment of responsibility for nonphysical factors should be determined by the proportion which the preexisting physical impairment bears to the additional physical impairment resulting from the instant industrial accident. *Northwest Carriers Inc v Industrial Comm'n* 639 P 2d 138 (Utah 1981)

#### **Medical panel determination.**

This section is explicit in its requirement that the commission shall appoint a medical panel to review all medical aspects of the case and to determine the percentage of impairment attributable to the various accidents. *United States Fid & Guar Co v Industrial Comm'n*, 657 P 2d 764 (Utah 1983)

Where the commission without the assistance of a medical panel determined that the total percentage of partial impairment was 15%, 10% from the prior injury and 5% from the combined subsequent injury, the 10% disability measurement was correctly utilized by the commission since it had been determined by a medical panel in a prior proceeding regarding the establishment of liability for the initial injury, however, the 5% determination representing the effects of the subsequent injury was made by a lone doctor and therefore did not satisfy the requirement of a medical panel determination. *United States Fid & Guar Co v Industrial Comm'n*, 657 P 2d 764 (Utah 1983)

#### **Medical testimony.**

Where the ultimate question is not one of loss of bodily function but actual partial or total disability economically and industrially, as provided in this section, the loss of bodily function is only an aid to such ultimate question and doctors should testify only as to such loss and not to the ultimate question of industrial and economic disability, except where the doctor qualified, in addition to his medical knowledge, has sufficient knowledge of what physical or mental abilities a certain occupation or vocation calls for or where such testimony is as to certain common industrial, economic, or household functions such as climbing ladders, sweeping or digging, in which case the doctor may testify. *Silver King Coalition Mines Co v Industrial Comm'n*, 92 Utah 511, 69 P 2d 608 (1937)

#### **No apportionment of insurer's liability.**

Where employee suffered aggravation of back injuries when involved in three separate accidents while working for two different employers insured by three different insurance carriers, commission properly required last carrier to pay compensation for all permanent disability, medical expenses and temporary disability, in absence of statutory authority for apportionment. *Mountain States Steel Co v*

*Industrial Comm'n*, 535 P 2d 1249 (Utah 1975)

#### **Preexisting condition previously compensated.**

To the extent that his preexisting condition was attributable to a prior railroad accident, for which claimant had been rated and compensated in Arkansas, claimant was not entitled to recover additional compensation from the fund order denying compensation from fund was set aside where there was no evidentiary support in the record that the preexisting condition was entirely attributable to the previously compensated injury. *Paoli v Cottonwood Hosp* 656 P 2d 420 (Utah 1982)

#### **Preexisting contributing condition.**

Industrial Commission's finding that claimant was totally and permanently disabled was justified despite fact that claimant had previously existing heart and lung trouble which contributed to his present condition. *Halvorson Inc v Williams*, 19 Utah 2d 113, 426 P 2d 1019 (1967)

Although the claimant may have had a preexisting disability, the commission findings, which are based on reasonable evidence that the injury complained of is the sole cause of the disability for which the award is made, do not exceed its authority or indicate a capricious, arbitrary or unreasonable act. *Hafer's, Inc v Industrial Comm'n*, 526 P 2d 1188 (Utah 1974)

Where preexisting condition required no treatment prior to accident, but increased the resultant disability by one-third, employer was obligated to pay only two-thirds of claimant's medical bills while the special fund would pay the remaining third, the fact that the preexisting condition was quiescent prior to the injury did not render it "insubstantial" so as to make the employer liable for all costs incurred. *Intermountain Health Care, Inc v Ortega*, 562 P 2d 617 (Utah 1977)

Where preexisting condition increased the disability resulting from an industrial injury, the employer was obligated only to pay the portion of expense and disability attributable to the industrial injury and the fund was obligated to pay the portion attributable to the preexisting condition. *Intermountain Health Care, Inc v Ortega*, 562 P 2d 617 (Utah 1977), *White v Industrial Comm'n*, 604 P 2d 478 (Utah 1979) *Intermountain Smelting Corp v Capitano* 610 P 2d 334 (Utah 1980)

Employer is responsible only for the percentage of compensation and medical care equal to the percentage of applicant's total disability attributable to the industrial injury and the remainder shall be paid out of the fund. *Intermountain Smelting Corp v Capitano*, 610 P 2d 334 (Utah 1980)

**—Substantially greater incapacity following industrial injury.**

When a worker's total incapacity following a second injury is "substantially greater" than it would have been but for the preexisting incapacity, fund liability is imposed, and it is not necessary that the second injury itself causes "substantially greater" incapacity. *Kaiser Steel Corp. v. Industrial Comm'n*, 709 P.2d 1168 (Utah 1985) (decided under prior law).

Under this section, preexisting impairments which are not aggravated by an industrial injury are to be compensated for when the industrial injury produces an impairment "substantially greater" than it would have been absent the preexisting condition, regardless of any causal or functional relationship between the industrial injury and the preexisting condition. *Second Injury Fund v. Streater Chevrolet*, 709 P.2d 1176 (Utah 1985).

For determining the 10 and 20 percent threshold degrees of impairment, a whole-man (percentage impaired) basis is used, not a partial-man (percentage unimpaired) basis. *Second Injury Fund v. Streater Chevrolet*, 709 P.2d 1176 (Utah 1985).

The degree of increased incapacity statutorily required by the words "substantially greater" is satisfied if the contribution of the preexisting impairment to the total combined impairments is definite and measurable. It is enough if the two impairments cumulatively result in a greater degree of disability. *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1985).

To meet the "substantially greater" test of this section, a claimant need not prove a physical or causal relationship between the pre-existing incapacity and the industrial injury. Rather, it is sufficient if the claimant's incapacity resulting from the industrial injury is "substantially greater than he would have incurred if he had not had the pre-existing incapacity." Resulting incapacity is "substantially greater than he would have incurred if he had not had the pre-existing incapacity" if the resulting incapacity from all causes combined is substantially greater than that resulting solely from the industrial injury. *Rex E. Lantham Co. v. Industrial Comm'n*, 717 P.2d 255 (Utah 1986).

**Presbycusis.**

Loss of hearing associated with advanced age, presbycusis, is not compensable by the fund. *Wayman v. Western Coal Carrier Corp.*, 665 P.2d 1294 (Utah 1983).

**Prior injury in military service.**

The commission erred in denying claimant compensation from the fund for part of his prior disability resulting from injuries sustained while he was in the military service for which the military continued to compensate

him. *Shepherd v. Diversa-Cycle Prods., Inc.*, 725 P.2d 1317 (Utah 1986).

**Purposes.**

This section had two purposes: first, to encourage the employment of handicapped workers by requiring the special fund to assume responsibility should the employee receive industrial injuries rendering him totally disabled, and second, to establish a broader base of responsibility for preexisting conditions. *McPhie v. United States Steel Corp.*, 551 P.2d 504 (Utah 1976).

This section has several purposes; one of them is to make it easier for persons who have previous injuries or disabilities to obtain employment; another is that the objective just stated is served by conferring a benefit upon employers by minimizing the risks to them in hiring such persons. *Intermountain Smelting Corp. v. Capitano*, 610 P.2d 334 (Utah 1980).

**Recovery from fund denied.**

Where law judge found that assessment of permanent incapacity in the medical evaluation was merely a restatement of the disability rating given after a 1974 Nebraska accident from which plaintiff had satisfactorily recovered, and was not an independent, impartial review of plaintiff's condition at the time, it was reasonable for law judge to conclude that plaintiff did not sustain permanent incapacity which is substantially greater than he would have incurred if he had not had the preexisting incapacity; therefore, the fund had no application. *Kincheloe v. Coca-Cola Bottling Co.*, 656 P.2d 440 (Utah 1982).

**Remainder paid out of fund.**

"Remainder" means whatever remains to be paid after the employer has discharged its liability, and where employee has in fact been rendered permanently and totally disabled, lifetime benefits would become the "remainder" and payable out of the fund. *McPhie v. Industrial Comm'n*, 567 P.2d 153 (Utah 1977).

**Serial consideration of separate accidents.**

The commission must consider separate accidents serially in order to determine the percentage of impairment attributable to each accident and the proportion the preexisting impairment bears to the total combined impairment. *Richfield Care Center v. Torgerson*, 733 P.2d 178 (Utah 1987).

**Special Fund.**

Employer is liable for permanent total disability resulting from last of a series of injuries, and no resort can be had to special fund (now Employers' Reinsurance Fund) under provisions of § 35-1-68(1). *Standard Coal Co. v. Industrial Comm'n*, 69 Utah 83, 252 P. 292 (1926).

Coal miner who lost sight in eye before

Workmen's Compensation Act was effective and who thereafter lost use of leg was entitled to compensation from special fund (now Employers' Reinsurance Fund) as provided by this section notwithstanding that first injury was incurred before act became effective. *Marker v. Industrial Comm'n.* 84 Utah 587, 37 P.2d 785, 98 A.L.R. 722 (1934).

This chapter does not evidence legislative intent to require an employer whose employee is killed while temporarily engaged in employment in Utah, although hired and regularly employed elsewhere, to pay into the Special Fund (now Employers' Reinsurance Fund), provided by this section and § 35-1-70, the amount provided by § 35-1-68, if she leaves no dependents. *United Airlines Transp. Corp. v. Industrial Comm'n.* 110 Utah 590, 175 P.2d 752 (1946).

#### Strict application.

Since Workmen's Compensation Act imposes liability upon employer regardless of fault, employer is entitled to rely on a strict application of the statute as to the extent of his responsibility. *Intermountain Smelting Corp. v. Capitano.* 610 P.2d 334 (Utah 1980).

#### Temporary disability benefits.

Employer and its insurance carrier are responsible for paying all medical expenses and temporary disability benefits up until period of that disability ends; however, fund must reimburse carrier for that percentage of temporary disability expenses attributable to preexisting disability once determination of combined disability is made. *American Coal Co. v. Sandstrom.* 689 P.2d 1 (Utah 1984).

### COLLATERAL REFERENCES

**Utah Law Review.** — Utah Legislative Survey — 1981, 1982 Utah L. Rev. 125, 212.

**C.J.S.** — 99 C.J.S. Workmen's Compensation § 304.

**Key Numbers.** — Workers' Compensation ⇨ 867.

## 35-1-70. Additional benefits in special cases.

If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances should be entitled to additional benefits, the industrial commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in Subdivision (1) of Section 35-1-68.

**History:** L. 1917, ch. 100, § 79; C.L. 1917, § 3140, subsec. 7; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-66.

### NOTES TO DECISIONS

#### ANALYSIS

##### Definitions.

Duty to pay into fund.

##### Definitions.

Word "employer" is used in this section to encompass an employer in a situation where the employment status is localized in Utah. *United Airlines Transp. Corp. v. Industrial Comm'n.* 110 Utah 590, 175 P.2d 752 (1946).

##### Duty to pay into fund.

This chapter does not evidence legislative intent to require an employer whose employee is

killed while temporarily engaged in employment in Utah, although hired and regularly employed elsewhere, to pay into the fund, provided by § 35-1-69 and by this section, the amount provided by § 35-1-68, if she leaves no dependents. *United Airlines Transp. Corp. v. Industrial Comm'n.* 110 Utah 590, 175 P.2d 752 (1946).

"payment" near the beginning of Subsection (2)(a)(ii); substituted "an amount" for "a weekly amount" and "persons" for "person" in Subsection (2)(b)(ii); and deleted former Subsection (2)(d) providing that if the total award

to dependents did not exceed \$30,000, the employer or its insurance carrier was to pay the difference between the award and \$30,000 into the Employers' Reinsurance Fund.

## 35-1-69. Payments from Employers' Reinsurance Fund.

### NOTES TO DECISIONS

#### ANALYSIS

Apportionment of liability.

— Prerequisite.

Impairment not meeting 10% minimum.  
Cited.

#### Apportionment of liability.

The purpose of this section is to apportion liability only where an industrial injury measurably contributes to a permanent disability caused in part by a pre-existing condition, not simply to impose liability on the Employer's Reinsurance Fund any time a worker's disability is caused by a pre-existing condition. *Virgin v. Board of Review*, 803 P.2d 1284 (Utah Ct. App. 1990).

#### — Prerequisite.

Entitlement to benefits is a prerequisite to consideration of apportionment. Where the disability is the result of preexisting conditions

and not an industrial accident, a claimant is not entitled to disability benefits. *Large v. Industrial Comm'n*, 758 P.2d 954 (Utah Ct. App. 1988).

#### Impairment not meeting 10% minimum.

Where claimant's industrially-caused 5% impairment of the back did not meet the 10% threshold minimum requirement, he could not combine the permanent impairment resulting from separate industrial injuries with the same employer in order to reach the threshold necessary for compensation of preexisting conditions, neither caused nor aggravated by any of the industrial injuries. *Otvos v. Industrial Comm'n*, 751 P.2d 263 (Utah Ct. App. 1988).

Cited in *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912 (Utah Ct. App. 1988); *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127 (Utah Ct. App. 1989).

## 35-1-75. Average weekly wage — Basis of computation.

### NOTES TO DECISIONS

Hourly employees.

#### — Minimum hours.

The fact that an employee voluntarily limited his work hours to 13 per week did not make it unfair to award him compensation benefits for 20 hours. If the Legislature had intended to limit an hourly employee to the

actual number of hours he or she worked per week in calculating the compensation rate, the Legislature would not have included a statutory minimum of 20 hours in Subsection (1)(e). *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912 (Utah Ct. App. 1988).

## 35-1-77. Medical panel — Medical director or medical consultants — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses.

(1) (a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of and in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission.

(b) When a claim for compensation based upon disability or death due to an occupational disease is filed with the commission, the commission

Tab 8



## **Appendix 8**

Rule 46, Utah Rules of Appellate Procedure  
(Considerations Governing Review of Certiorari)

decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

#### **Rule 46. Considerations governing review of certiorari.**

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

#### **Rule 47. Certification and transmission of record; filing; parties.**

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 48, pay the certiorari docketing fee and file ten copies of a petition which shall comply in all respects with Rule 49. The case then will be placed on the certiorari docket. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21.

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

(c) **Cross-petition of respondent.** Counsel for a respondent wishing to file a cross-petition shall, within the time provided by Rule 48(d), pay the certiorari docketing fee and file ten copies of a cross-petition for a writ of certiorari which shall comply in all respects with Rule 49. The cross-petition will then be placed on the certiorari docket. Counsel for the cross-petitioner shall serve four copies of the cross-petition on counsel for each party separately represented. It shall be the duty of counsel for the cross-petitioner to notify all parties in the case of the date of the filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21. A cross-

Tab 9

## **Appendix 9**

Definition of "Permanent Impairment"  
Guides to the Evaluation of Permanent Impairment  
American Medical Association

# Chapter 1

## Concepts of Impairment Evaluation

### 1.0 Introduction

**T**he *AMA Guides to the Evaluation of Permanent Impairment* (the *Guides*) provides a reference framework within which physicians may evaluate and report medical impairment and within which nonmedical recipients of information about impairment may understand and make appropriate use of the medical information they receive.

The unique value of the *Guides* as the technical reference of choice for evaluation of medical impairment, which goes well beyond its broad scope of coverage (all body parts and systems), arises from the precise application of fundamental medical and scientific concepts; the systematic analysis that introduces each of the clinical chapters; the detail of the medical evaluation protocols; and the thorough state-of-the-art analyses that underlie the rating tables. In addition, a format for reports is described in Chapter 2 and summarized at the beginning of each clinical chapter to provide straightforward and well-structured guidelines so that reports about the same individual from different observers are likely to be of comparable content and completeness and may, therefore, be more easily analyzed and compared.

As is true of any other technical process, knowing the “rules,” which in the case of the *Guides* are the specific procedures described in the clinical chapters, is not enough. The user of the *Guides*, both physicians and nonphysicians alike, must understand the concepts under which the “rules” have been developed and the intended approach for using them to achieve objective,

accurate, fair, and reproducible evaluations of individuals with medical impairment. This chapter and Chapter 2 will enable the user to become familiar with the techniques and approach to evaluation of impairment embodied in the *Guides*.

### 1.1 Basic Considerations

#### **Impairment–Disability–Handicap**

Various terms used in the *Guides*, such as “impairment,” “disability” and “handicap,” appear in laws, regulations and policies of diverse origin without prior coordination of the ways in which they are used. It is no wonder, then, that there is uncertainty, if not controversy, about their meaning. The definitions used in the *Guides* seek to remedy this confusion through detailed description and delineation of the domain in which each term is applied, for it is the characteristics of the domain that are important, not the word used as the label. Accordingly, even when the terminology of the *Guides* may differ from or appear to be in conflict with that of a particular law, regulation or administrative system, analysis of the context in accordance with the following discussion should reveal how the principles embodied in the *Guides* may be interpreted and applied within the provisions of a particular disability system.

The accurate and proper use of medical information to assess impairment in connection with disability determinations depends on the recognition that, whereas

impairment is a medical matter, disability arises out of the interaction between impairment and external demands. Consequently, as used in the *Guides*, "impairment" means an alteration of an individual's health status that is *assessed by medical means*; "disability," which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands or to meet statutory or regulatory requirements. Simply stated, "impairment" is what is wrong with the health of an individual, "disability" is the gap between what the individual can do and what the individual needs or wants to do.

An individual who is "impaired" is not necessarily "disabled." Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet demands that pertain to nonmedical fields and activities.<sup>1</sup> On the other hand, if the individual is able to meet a particular set of demands, the individual is *not* "disabled" with respect to those demands, even though a medical evaluation may reveal impairment.

The concept of "handicap" is related to, yet independent of, both "impairment" and "disability," although it is sometimes used interchangeably with either of these terms. Under the provisions of Federal law,<sup>2</sup> an individual is identified as "handicapped" if that individual has an impairment that substantially limits one or more life activities, including work, has a record of such impairment, or is regarded as having such an impairment.<sup>3</sup> The terms of this definition are so indefinite and broad that, technically, almost any person who desires to do so might be included in the class of the handicapped under the law.

As a matter of practicality, however, a "handicap" may be operationally understood as being manifest in association with a "barrier" or obstacle to functional activity. An individual with limited functional capacity is handicapped if there are barriers to accomplishment of tasks or life activities that can be overcome only by compensating in some way for the effects of an impairment. Such compensation, or, more technically, "accommodation," normally entails the use of assistive devices (such as crutches, wheel chairs, hearing aids, optical magnifiers, prostheses, special tools or equipment), modification of the environment, and/or modification of tasks or activities (such as increased time for task completion, or special segmentation of tasks). Any

one these modalities, or all in combination, may be invoked to enable a handicapped person to overcome a barrier to an objective. If the individual is not able to accomplish a task or activity despite accommodation or if there is no accommodation that will enable the accomplishment, then, in addition to being handicapped, the individual is also disabled. On the other hand, an impaired individual who is able to accomplish a task or activity without accommodation is, with respect to that task or activity, neither handicapped nor disabled.

For these reasons, it is difficult to overstate the importance of examining the context in which the terms "impairment," "disability," or "handicap" appear to avoid being misled by imprecise usage. For example, reference to a physician's evaluation of "disability" must be understood as a reference to a *medical* evaluation of an individual's health status, or, in the terms of the *Guides*, an evaluation of impairment. The physician does not determine industrial loss of use or economic loss for the purpose of paying a disability benefit.

## Employability—Management/ Administrative Considerations

The concept of "employability" deserves special attention, for in an occupational setting, if an individual, within the boundaries of the medical condition, has the capacity with or without accommodation to meet the job demands and conditions of employment as defined by the employer, the individual is employable, and, consequently, not disabled. As an operational matter, employability is critically related to an individual's capacity to travel to and from work, to be at work, and to perform assigned tasks and duties for which the employer is willing to pay wages. If the individual has those capacities, even in the presence of impairment, then the individual is not disabled for that job. When these capacities are called into question, for whatever reason, the employer must carry out an "employability determination."

As in determination of disability, there are both administrative and medical components to the employability determination, the process by which an employer initially assesses an individual's qualifications and suitability for employment. On the administrative side, management will specifically assess performance capability to estimate the likelihood of a performance failure.

1 The commonly used example of the impact of the loss of the fifth finger of the left hand illustrates the point. If the individual is a bank president, the occupational impact is likely to be negligible. On the other hand, a concert pianist is likely to be totally disabled.

2 The Rehabilitation Act of 1973.

3 The law does not make clear by whom the individual must be regarded as being handicapped. There are cases on record in which an employer "accommodated" the individual even though there was no clear evidence or record of medical impairment. In these cases, it was determined that the individual was protected as handicapped under the law because the employer, by offering accommodation, had regarded the individual as handicapped.

as well as the likelihood of incurring a future liability in case of human failure. If neither likelihood of failure is too great, then the individual is considered to be employable in a particular job. This represents a fundamental "go" or "no go" determination that there is or is not a sufficient match between an individual and the job requirements to give further consideration to employment. It is different from a "desirability" determination, which would rank and compare the individuals who are employable.

During the course of employment, there is on-going reassessment of an individual's employability through monitoring of performance, conduct, and attendance. Employment continues until the employee leaves voluntarily or until a change gives rise to a deficiency in performance, conduct, or attendance so that retention in the job can no longer be justified. When an individual claims to be no longer employable, or disabled, because of a change in health, or alleges that a medical condition has caused a service deficiency, the employer has little choice but to conduct an employability determination and to assess the individual's capacity to travel to and from work, to be at work and to perform assigned tasks and duties. Disability, then, is the default result when it is determined that the individual lacks employability.

### Employability—Medical Considerations

As noted above, an employable individual has the capacity to travel to and from work, to be at work, and to perform assigned tasks and duties. On the other hand, an individual who does not have the capacity, or who is unwilling, to travel to and from work, to be at work, and to perform assigned tasks and duties is not employable. The issue of disability arises from the critical questions of whether or not the service deficiency can be explained by a medical condition and whether or not the medical condition precludes, or warrants restriction from, traveling to and from work, being at work, or performing assigned tasks and duties. The answer is found in a "medical determination related to employability."

The first critical task in carrying out a medical determination related to employability is to learn about the job, specifically the expectations of the incumbent with respect to performance, physical activity, reliability, availability, productivity, expected duration of useful service life and any other criteria associated with qualification and suitability. Sufficiently detailed information from a job analysis will provide a basis upon which a physician determines exactly what kinds of medical information are needed, and to what degree of

detail, to assess an individual's health with respect to demand criteria. Once the medical information needs are known, it is possible to develop a medical evaluation protocol, a set of instructions for performance of a medical evaluation designed to acquire that information.

However, a special medical evaluation may not be necessary, for, presumably, an individual who alleges disability would already be under the care of a personal physician, and if not, should be if the medical condition is interfering with life activities on or off the job. And, since a claimant bears the initial burden of proof, the place to start, then, is with review of medical information *already* available in the form of medical office and hospital records. Through this medium, the physician making the determination of employability may communicate with the personal physician to learn whatever is known about that individual's health so that, in accordance with established medical diagnostic criteria and generally accepted medical principles and practice, the two physicians may come to agreement about what is and is not known medically about the patient and determine what other information is necessary to resolve areas of medical uncertainty. This is nothing more or less than physicians do in the course of cooperative management of their patients. The practice of medicine is not an adversary process, and, consequently, by relying on communications and decisionmaking procedures ordinarily used by physicians, evaluations of impairment and medical determinations related to employability may be managed without confrontation between them. With respect to employability, then, the medical questions to be answered are whether or not medical documentation supports a conclusion that the individual's medical condition precludes travel to and from work, being at work, or performing assigned tasks and duties,<sup>4</sup> and, in the case of a service deficiency, whether or not the documentation provides reason to believe that the medical condition has either caused or contributed to the deficiency.

If review of the documentation does not show that the individual has met the required burden of proof, the employer or insurance company must decide whether or not acquisition of additional medical information is likely to enable the individual to do so. Or, there may be a need to verify clinical findings contained in the documentation provided. If so, the medical evaluation protocol will serve as a basis for a medical evaluation by *any* physician, for, in general, two

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<sup>4</sup> If the medical condition does not, for example, preclude daily travel to and from a physical therapy clinic, then it would be unlikely for the medical condition to preclude travel to and from place of work. Or, if an individual has not been restricted from shopping for and carrying groceries, from doing chores around the house, or from going to the movies, then there is little defense for a conclusion that the medical condition would warrant restriction from a similar level of activities in the workplace.

physicians examining the same patient under the same protocol will have approximately the same set of findings. Taken with the prior information, the results of this evaluation may be reviewed to reach conclusions that can then be compared with the demand criteria for the job. This can always be done with credibility and confidence, since the specifications for the medical evaluation are based on the demand criteria to begin with.

When approached in this way, the medical input into the employability determination will be quite independent of the individual's motivation to work, or lack of it. Moreover, because this process provides medical justification for the decision, a dispute over conflicting opinions of physicians about nonmedical matters need never occur.

## 1.2 Structure and Use of the *Guides*

Since any person has only one health status and only one life situation, given enough information about each, it is possible to understand the relationship and interaction between them. Moreover, because the evaluation of permanent impairment is not an isolated event but culminates the evolution of changes in health that result from injury or disease, the design of the *Guides* requires integration of already existing medical and nonmedical information with the results of a current clinical evaluation, carried out in accordance with the protocols of the *Guides*, to characterize fully and assess medical impairment. Accomplishment of this objective is based on utilization of three powerful tools that make up the fundamental components of the *Guides*.

First, Chapter 2 details with great precision the kinds of information needed to document the nature of an impairment and its consequences, specifies procedures for acquiring the information, and defines a structured format for analyzing, recording, and reporting the information. A summary of these requirements and procedures appears at the beginning of each clinical chapter.

Second, the clinical chapters contain definitive medical evaluation protocols, descriptions of specific procedures for evaluating a particular body part, function, or system, each developed by recognized medical specialty consultants. These protocols are defined in specific detail to ensure the acquisition of sufficient information to describe fully and characterize the current clinical status of a medical impairment.

Third, the clinical chapters contain reference tables specifically keyed to the evaluation protocols. If

the protocols and tables have been followed, the clinical findings may be compared directly to the criteria and related to a percentage of impairment with confidence in the validity and acceptability of the determination.

Operationally, the key to effective and reliable evaluation of impairment is initially a review of clinical medical office and hospital records maintained by the physicians who have provided care and treatment since the onset of the medical condition. Such records comprise clinical notes of office visits, medical specialty consultation reports, hospital admission and discharge summaries, operative notes, pathology reports, laboratory test reports and the results of special tests and diagnostic procedures. Before formal evaluation is carried out under the *Guides*, analysis of the history and course of the medical condition, beginning with the circumstances of onset, and including findings on previous examinations, the course of treatment, responses to treatment, and the impact of the medical condition on life activities, must support a conclusion that an impairment is permanent and well stabilized.

This information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain all clinical information necessary to characterize fully the medical condition in accordance with requirements of the *Guides*; an incomplete or partial evaluation is not acceptable. Once this task is accomplished, the clinical findings may be compared to the clinical information already contained in the records about the individual. If the current findings are found to be consistent with the results of previous clinical evaluations performed by other observers, then, with complete confidence, they may be compared, as appropriate or required, with the reference tables to determine the percentage rating of the impairment. However, if the findings are not in substantial accordance with the information of record, then, until further clinical evaluation resolves the disparities, the rating step is meaningless and cannot be carried out.

This approach takes advantage of the fact that physicians normally communicate cooperatively with each other orally and in writing to determine what they do and do not know about a patient, and to determine further what additional information they need to resolve areas of medical uncertainty. It does not make sense, therefore, to manage cases in which there are differing "opinions" among physicians about the nature and degree of medical impairment by asking a nonmedical third party to adjudicate an issue of medical fact! Such



differences are best handled through the ordinary process of everyday patient management. Then, with reference to the past medical documentation, the medical evaluation protocols contained in the clinical chapters and the reporting specifications of Chapter 2, the physician and nonphysician users of the *Guides* may verify that sufficient medical information has been assembled and reported to permit an assessment of an impairment, to justify any conclusions that are drawn, and to support a rating in accordance with the tables. At that point, it is a straightforward matter to verify whether or not a numerical rating of impairment is substantiated in accordance with the criteria contained in the *Guides*.

### 1.3 Medical Impairment and Workers' Compensation

In general, state and Federal workers' compensation laws are based on the concept that a worker who either sustains an injury or incurs an illness arising in the course of and out of employment is entitled to protection against financial loss without being required to sue the employer. In exchange for their having lost the right to sue, the workers' compensation system guarantees benefits to all workers who are covered under the law and who meet the criteria for award of benefits.

The types of payments that may be made when a claim is approved fall into three categories:

- payments to the claimant to compensate for lost wages due to temporary total disability,
- payment of medical bills, and
- payment to the claimant of an award for permanent disability, partial or total.

Up to this point, we have looked at disability as being related to functional capability or the lack of it. However, in the arena of disability benefits, disability, whether temporary or permanent, partial or total, is equivalent to economic loss for which the individual is to be compensated monetarily.

Payments are made for temporary total disability when the individual is unable to earn wages, return to work is expected, and the medical condition has not stabilized.<sup>5</sup> Temporary disability is partial when the individual returns to work but is not earning at the prior level.

5 In accordance with the earlier discussion "temporary total disability" occurs when the medical condition precludes the individual from traveling to and from work, being at work and performing assigned tasks and duties.

A permanent disability award is normally independent of the individual's capacity to work and is formulated in terms of expected or presumed long-term or permanent economic loss associated with a permanent medical impairment, such as an amputation. Such an award may be paid according to a schedule that specifically associates impairment with certain body parts, functions, or systems, examples are amputations, loss of sight, and loss of hearing, and a schedule is defined in the workers' compensation law to equate the disability with a maximum number of weeks for which benefits are to be paid at a rate based on average weekly wages.

Rating of partial disability is necessary when a law, in recognition that the "loss of" or "loss of use of" the body part, function, or system may be less than total, requires determination of the proportion or percentage of loss. For example, in Maryland, the law says:

In all cases where there has been an amputation of a part of any member of the body herein specified, or the *loss of use of* (emphasis added) any part thereof the Commission shall allow compensation for such proportion of the total number of weeks allowed for the amputation or loss of use of the entire member as the affected or amputated portion bears to the whole.<sup>6</sup>

Moreover, because not all conditions that can arise out of an injury are accounted for in a schedule, back injuries, for example, there is likely to be a provision of the law similar to the following:

In all other cases of disability other than those specifically enumerated disabilities<sup>7</sup> which disability is partial in character, but permanent in quality, the Commission shall determine the portion or percentage by which the *industrial use* of the employee's body was *impaired* as a result of the injury and in determining such portion or percentage of impairment<sup>8</sup> resulting in industrial loss, the Commission shall take into consideration, among other things, the nature of the physical injury, the occupation, experience, training, and age of the injured employee, and shall award compensation in such proportion as the determined loss bears to 500 weeks.<sup>9</sup> (emphasis added)

6 Workmen's Compensation Law of Maryland Annotated 1983 Art. 101 §36(3)

7 Note the context with which "disability" and "disabilities" are used. Clearly the terms should be read as "impairment" and "impairments."

8 Should this read "disability"?

9 *Ibid.* Art. 101 §36(4)(a)

While medical information is necessary for the decision process, a critical problem arises in the use of that information. Neither in this example nor in general is there a formula under which knowledge of the medical condition may be combined with knowledge of the other factors to calculate the percentage by which the industrial use of the employee's body is impaired. Accordingly, each commissioner or hearing official must come to a conclusion based on his or her own assessment of the available medical and nonmedical information.

It is evident that the *Guides* does not offer a solution for this problem, nor is it the intention that it do so. Each administrative or legal system that uses permanent impairment as a basis for disability rating needs to define its own process for translating knowledge of a medical condition into an estimate of the degree to which the individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements, is limited by the impairment. We encourage each system not to make a "one-to-one" translation of impairment to disability, in essence creating a use of the *Guides* which is not intended.

Chapter 2 will emphasize that it is essential for the physician to provide the recipient of the medical information with more than a number that represents a percentage of impairment. To the extent that the physician provides a comprehensive medical picture in the form of a report formulated in accordance with (Figure 1), the user of the information will be able to determine how the medical information fits with all the other nonmedical information, thereby to reach a true understanding of the impact of the medical impairment on the claimant's future employability.

Tab 10

## **Appendix 10**

Affidavit of Stuart L. Poelman  
with House Bill 218  
attached as Exhibit A thereto.

**Dennis V. Lloyd, #1984**  
**Attorney at Law**  
**560 South 300 East**  
**Salt Lake City, UT 84111**  
**Telephone: (801) 538-8149**

1. That he is an attorney practicing law in the State of Utah and specializing in workers' compensation cases.
2. That in 1988 and in years prior thereto he was a member of the Industrial Commission's Advisory Council and actively participated in the consideration of legislative changes to be proposed by said Council.

3. That in 1987 and 1988, management and labor factions serving on the Advisory Council were unable to agree on legislation regarding the Second Injury Fund. As a result, an ad hoc committee was formed by certain members of the Council, including the affiant, as well as attorneys practicing workers' compensation law and industry representatives. This committee proposed, drafted, sponsored and lobbied through passage by the legislature House Bill No. 218, a copy of which is attached hereto as Exhibit A.

4. The main problem which House Bill No. 218 addressed was maintenance of the fiscal integrity of the Second Injury Fund which bore the responsibility for the payment of certain benefits under the Utah Worker's Compensation Act. Of concern was the fact that the Second Injury Fund was predicted by consulting actuaries to become insolvent unless remedial measures were taken.

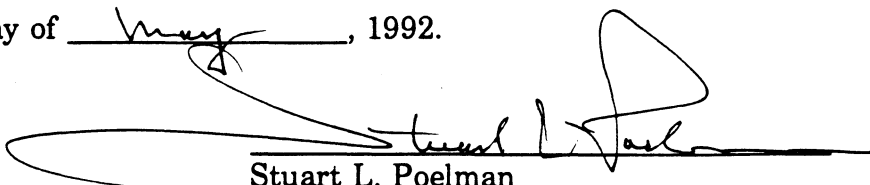
5. The intended purpose of House Bill No. 218 was to enhance the funding of the Second Injury Fund through an employer's premium tax increase and to reduce the liability of the Second Injury Fund for workers' compensation benefits. The bill eliminated benefits which were then being paid to injured employees for permanent partial disability compensation resulting from permanent partial impairment caused by preexisting conditions. The bill also served to reduce certain reimbursements made to employers by the Second Injury Fund. Prior to the passage of House Bill No. 218, the Second Injury Fund had been held liable for permanent partial impairment which had been caused by preexisting conditions. It was the intent of House Bill No. 218 to eliminate that liability.

6. Prior to the passage of House Bill No. 218, the employer responsible for a particular industrial accident was shielded from liability for that portion of permanent partial impairment caused by preexisting conditions. It was never the intent of House Bill

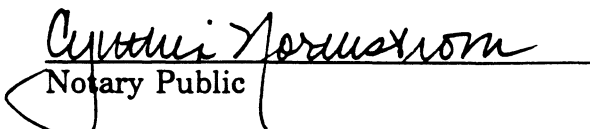
No. 218 to transfer the liability for impairment caused by preexisting conditions from the Second Injury Fund to the employer. Rather, it was the intent of said legislation to eliminate permanent partial disability benefits payable to the injured employee to the extent that permanent partial disability compensation related to permanent partial impairment resulting from preexisting conditions.

7. It was never the intent of House Bill 218 to make an employer liable for compensation relating to asymptomatic preexisting conditions. All preexisting conditions related to asymptomatic or symptomatic preexisting permanent partial impairment were to go uncompensated.

DATED this 19<sup>th</sup> day of May, 1992.

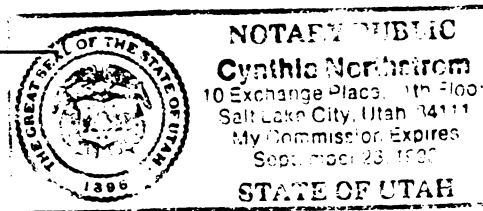
  
Stuart L. Poelman  
Attorney at Law

Subscribed and sworn to before me this 19<sup>th</sup> day of May, 1992

  
Notary Public  
Residing at SLC, UT

My commission expires 9/28/93

Reference Exhibit A



Tab A



**EXHIBIT A**

- (g) Nephi, Juab County;
- (h) Fillmore, Millard County;
- (i) Beaver, Beaver County;
- (j) Manti, Sanpete County;
- (k) Junction, Piute County;
- (l) Loa, Wayne County;
- (m) Panguitch, Garfield County;
- (n) Kanab, Kane County;
- (o) Castle Dale, Emery County; and
- (p) Monticello, San Juan County.

[(b)] (3) Existing courtrooms and auxiliary space in secondary locations shall be made available to the circuit court by counties on a shared basis with the district court and juvenile court.

#### Section 8. Sections Repealed.

Section 78-3-1, Utah Code Annotated 1953, as last amended by Chapter 21, Laws of Utah 1982, Section 78-3-2, Utah Code Annotated 1953, as last amended by Chapter 21, Laws of Utah 1982, Section 78-3a-4, Utah Code Annotated 1953, as last amended by Chapter 11, Laws of Utah 1986, Second Special Session, Section 78-3a-5, Utah Code Annotated 1953, as last amended by Chapter 47, Laws of Utah 1986, and Section 78-4-10, Utah Code Annotated 1953, as last amended by Chapter 47, Laws of Utah 1986, are repealed.

#### CHAPTER 116

##### H. B. No. 218

Passed February 24, 1988

Approved March 14, 1988

Effective July 1, 1988

#### SECOND INJURY FUND ELIGIBILITY AMENDMENTS

By Franklin W. Knowlton

**AN ACT RELATING TO WORKERS' COMPENSATION; CHANGING THE NAME OF THE SECOND INJURY FUND; CLARIFYING THAT PERMANENT PARTIAL DISABILITY COMPENSATION ENTITLEMENTS ARE BASED ON PHYSICAL IMPAIRMENT CAUSED BY AN INDUSTRIAL ACCIDENT; ESTABLISHING A STATUTE OF LIMITATIONS ON PERMANENT TOTAL DISABILITY CLAIMS AND PROVIDING AN OFFSET BASED ON CERTAIN OTHER INCOME; MODIFYING PROVISIONS REGARDING AWARDS FROM THE SECOND INJURY FUND; MODIFYING PROVISIONS REGARDING THE CONTINUING JURISDICTION OF THE COMMISSION AS IT RELATES TO STATUTES OF LIMITATION;**

**CLARIFYING THE INDUSTRIAL COMMISSION'S AUTHORITY TO CONTROL MEDICAL CARE OF INJURED EMPLOYEES; AMENDING THE PREMIUM TAX IN SUPPORT OF THE SECOND INJURY FUND; PROVIDING AN ALTERNATIVE METHOD FOR EVALUATING MEDICAL ASPECTS OF ACCIDENTS; AMENDING STATUTES OF LIMITATIONS; MAKING TECHNICAL CORRECTIONS; AND PROVIDING AN EFFECTIVE DATE.**

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

#### AMENDS:

- 35-1-45, AS LAST AMENDED BY CHAPTER 75, LAWS OF UTAH 1984
- 35-1-65.1, AS ENACTED BY CHAPTER 287, LAWS OF UTAH 1981
- 35-1-66, AS LAST AMENDED BY CHAPTER 357, LAWS OF UTAH 1983
- 35-1-68, AS LAST AMENDED BY CHAPTER 126, LAWS OF UTAH 1987
- 35-1-77, AS LAST AMENDED BY CHAPTER 41, LAWS OF UTAH 1982
- 35-1-78, AS LAST AMENDED BY CHAPTER 287, LAWS OF UTAH 1981
- 35-1-99, AS LAST AMENDED BY CHAPTER 211, LAWS OF UTAH 1986
- 35-2-56, AS LAST AMENDED BY CHAPTER 161, LAWS OF UTAH 1987
- 59-9-101, AS LAST AMENDED BY CHAPTER 12, LAWS OF UTAH 1987, FIRST SPECIAL SESSION

#### REPEALS AND REENACTS:

- 35-1-67, AS LAST AMENDED BY CHAPTER 160, LAWS OF UTAH 1985
- 35-1-69, AS LAST AMENDED BY CHAPTER 79, LAWS OF UTAH 1984

#### REPEALS:

- 35-1-100, AS LAST AMENDED BY CHAPTER 287, LAWS OF UTAH 1981

*Be it enacted by the Legislature of the state of Utah:*

#### Section 1. Section Amended.

Section 35-1-45, Utah Code Annotated 1953, as last amended by Chapter 75, Laws of Utah 1984, is amended to read:

#### 35-1-45. Compensation for industrial accidents to be paid.

[Every] Each employee mentioned in Section 35-1-43 who is injured[;] and the dependents of [every] each such employee who is killed, by accident arising out of [or] 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.

### Section 2. Section Amended.

Section 35-1-65.1, Utah Code Annotated 1953, as enacted by Chapter 287, Laws of Utah 1981, is amended to read:

#### 35-1-65.1. Temporary partial disability — Amount of payments.

~~(Where)~~ (1) If the injury causes temporary partial disability for work, the employee shall receive ~~(, during such disability for not to exceed 312 weeks over a period of not to exceed eight years from the date of the injury;)~~ weekly compensation equal to:

(a) 66-2/3% of the difference between ~~(that)~~ the employee's average weekly wages before the accident and the weekly wages ~~(that)~~ the employee is able to earn ~~(thereafter)~~ after the accident, but not more than ~~(a maximum of)~~ 100% of the state average weekly wage at the time of injury ~~(per week and in addition thereto); plus~~

(b) \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but only up to a total weekly compensation that does not ~~(to)~~ exceed 100% of the state average weekly wage at the time of injury (per week).

(2) The commission may make an award for temporary partial disability for work at any time prior to eight years after the date of the injury to an employee:

(a) whose physical condition resulting from ~~(such)~~ the injury is not finally healed and fixed eight years after the date of injury; and

(b) who files an application for ~~(such purpose prior to the expiration of such eight-year period)~~ hearing under Section 35-1-99.

~~(In no case shall the weekly payments continue after the disability ends or the death of the injured employee.)~~

(3) The duration of weekly payments may not exceed 312 weeks nor continue more than eight years after the date of the injury. Payments shall terminate when the disability ends or the injured employee dies.

### Section 3. Section Amended.

Section 35-1-66, Utah Code Annotated 1953, as last amended by Chapter 357, Laws of Utah 1983, is amended to read:

#### 35-1-66. Permanent partial disability — Scale of payments.

~~(The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury.)~~ An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for (such purpose prior to the ex-

piration of such eight-year period) hearing under Section 35-1-99 may receive a permanent partial disability award from the commission.

~~(In no case shall the weekly)~~ Weekly payments may not in any case continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 66-2/3% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed 66-2/3% of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, to wit:

For the loss of: Number of Weeks

#### (A) Upper extremity

##### (1) Arm

(a) Arm and shoulder  
(forequarter amputation) . . . . . 218

(b) Arm at shoulder joint,  
or above deltoid insertion . . . . . 187

(c) Arm between deltoid insertion and  
elbow joint, at elbow joint, or below  
elbow joint proximal to insertion of  
biceps tendon . . . . . 178

(d) Forearm below elbow joint  
distal to insertion of  
biceps tendon . . . . . 168

##### (2) Hand

(a) At wrist or midcarpal or  
midmetacarpal amputation . . . . . 168

(b) All fingers except thumb at  
metacarpophalangeal joints . . . . . 101

##### (3) Thumb

(a) At metacarpophalangeal joint  
or with resection of  
carpometacarpal bone . . . . . 67

(b) At interphalangeal joint . . . . . 50

##### (4) Index finger

(a) At metacarpophalangeal joint  
or with resection of  
metacarpal bone . . . . . 42

(b) At proximal  
interphalangeal joint . . . . . 34

(c) At distal interphalangeal joint . . . . . 18

##### (5) Middle finger

(a) At metacarpophalangeal joint  
or with resection of  
metacarpal bone . . . . . 34

(b) At proximal interphalangeal  
joint . . . . . 27

(c) At distal interphalangeal joint . . . . . 15

##### (6) Ring finger

(a) At metacarpophalangeal  
joint or with resection  
of metacarpal bone . . . . . 17

(b) At proximal  
interphalangeal joint . . . . . 13

(c) At distal interphalangeal joint . . .	8
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone . . . . .	8
(b) At proximal interphalangeal joint . . . . .	6
(c) At distal interphalangeal joint . . .	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis) . . . . .	156
(b) Leg at hip joint or three inches or less below tuberosity of ischium . . . . .	125
(c) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch) . . . . .	112
(d) Leg below knee with functional stump . . . . .	88
(2) Foot	
(a) Foot at ankle . . . . .	88
(b) Foot partial amputation (Chopart's) . . . . .	66
(c) Foot midmetatarsal amputation . . . . .	44
(3) Toes	
(a) Great toe	
(i) With resection of metatarsal bone . . . . .	26
(ii) At metatarsophalangeal joint . . . . .	16
(iii) At interphalangeal joint . . . . .	12
(b) Lesser toe (2nd — 5th)	
(i) With resection of metatarsal bone . . . . .	4
(ii) At metatarsophalangeal joint . . . . .	3
(iii) At proximal interphalangeal joint . . . . .	2
(iv) At distal interphalangeal joint . . . . .	1
(c) All toes at metatarsophalangeal joints . . . . .	26
(4) Miscellaneous	
(a) One eye by enucleation . . . . .	120
(b) Total blindness of one eye . . . . .	100
(c) Total loss of binaural hearing . . . . .	100

(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed (B) (4).

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000, 2000, and 3000 cycles per second (cps) using pure tone air conduction audiometric instruments (ANSI 1969) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 3000 cycles per second shall not be considered in determining compensable disability.

ity. If the average decibel loss at 500, 1000, 2000, and 3000 cycles per second is 25 decibels or less, usually no hearing impairment exists.

~~["Presbycusis" is defined as hearing loss common to persons of advanced age and is considered to be due to general environment rather than industrial conditions.]~~

In measuring hearing loss, a medical panel of medical and paramedical professionals appointed by the commission shall measure the loss in each ear at the four frequencies 500, 1000, 2000, and 3000 cycles per second which shall be added together and divided by four to determine the average decibel loss. To determine the percentage of hearing loss in each ear, the average decibel loss for each decibel of loss exceeding 25 decibels shall be multiplied by 1-1/2% up to the maximum of 100% which is reached at 92 decibels.

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

~~[For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function.]~~

For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence. Compensation for any such impairment shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section. Permanent partial disability compensation may not in any case exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function. Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the in-

jury for a total of 312 weeks in compensation be required to be paid.

#### Section 4. Section Repealed and Reenacted.

Section 35-1-67, Utah Code Annotated 1953, as last amended by Chapter 160, Laws of Utah 1985, is repealed and reenacted to read:

#### 35-1-67. Permanent total disability — Amount of payments.

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f) (1) and (2), as revised.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

(c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, and 35-1-66, in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensa-

tion at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:

(a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the vocational rehabilitation agency under the State Board of Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68 (1), for use in the rehabilitation and training of the employee.

(b) If the vocational rehabilitation agency under the State Board of Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

(6) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members, constitutes total and permanent disability, to be compensated according to this section. No tentative finding of permanent total disability is required in any such instance.

#### Section 5. Section Amended.

Section 35-1-68, Utah Code Annotated 1953, as last amended by Chapter 126, Laws of Utah 1987, is amended to read:

**35-1-68. Employers' Reinsurance Fund —  
Injury causing death — Burial expenses —  
Payments to dependents.**

(1) There is created ~~[a Second Injury Fund]~~ an Employers' Reinsurance Fund for the purpose of making payments in accordance with Chapters 1 and 2, Title 35. This fund shall succeed to all monies ~~[heretofore]~~ previously held in ~~[that fund designated as]~~ the "Special Fund," ~~[or]~~ the "Combined Injury Fund," ~~[and whenever reference is made elsewhere in]~~ or the "Second Injury Fund." Whenever this code refers to the "Special Fund," ~~[or]~~ the "Combined Injury Fund," or the "Second Injury Fund" that reference ~~[shall be deemed]~~ is considered to be ~~[to]~~ the ~~[Second Injury Fund]~~ Employers' Reinsurance Fund. The state treasurer shall be the custodian of the ~~[Second Injury Fund]~~ Employers' Reinsurance Fund, and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of ~~[that]~~ the fund. The attorney general shall appoint a member of his staff to represent the ~~[Second Injury Fund]~~ Employers' Reinsurance Fund in all proceedings brought to enforce claims against it.

(2) If injury causes death within ~~[the]~~ a period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in Section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or its insurance carrier shall be 66-2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, plus \$5 for a dependent spouse ~~[and]~~, plus \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not ~~[to exceed]~~ exceeding the average weekly wage of the employee at the time of the injury, ~~[but]~~ and not ~~[to exceed]~~ exceeding 85% of the state average weekly wage at the time of the injury per week; ~~[to]~~. Compensation shall continue during dependency for the remainder of the period between the date of the death and ~~[not to exceed]~~ the expiration of six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in Subsection (2) (a) (i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal Social Security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or nondependent person and shall be paid such bene-

fits as the commission may determine under Subsection (2) (b) (ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal Social Security death benefits received by that surviving spouse.

(b) (i) If there are partly dependent persons at the time of the death, the payment shall be 66-2/3% of the decedent's average weekly ~~[wages]~~ wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week ~~[to]~~. Compensation shall continue during dependency for the remainder of the period between the date of death and ~~[not to exceed]~~ the expiration of six years or 312 weeks after the date of injury as the commission in each case may determine ~~[and shall]~~. Compensation may not amount to more than a maximum of \$30,000. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection ~~[must]~~ shall be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent under Subsection (2) (a) (iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or its insurance carrier.

(c) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it ~~[deems]~~ considers just and equitable; provided, that the total benefits awarded to all parties concerned ~~[shall]~~ do not exceed the maximum provided for by law.

(d) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed \$30,000, the employer or its insurance carrier shall pay the difference between the amount paid and \$30,000 into the ~~[Second Injury Fund]~~ Employers' Reinsurance Fund provided for in Subsection (1).

**Section 6. Section Repealed and Reenacted.**

Section 35-1-69, Utah Code Annotated 1953, as last amended by Chapter 79, Laws of Utah 1984, is

repealed and reenacted to read.

**35-1-69. Payments from Employers - Reinsurance Fund.**

(1) If an employee who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by an accident arising out of and in the course of the employee's employment, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employers' Reinsurance Fund are liable for the payment of benefits as follows:

(2) The employer or its insurance carrier is liable for the first \$20,000 of medical benefits and the initial three years of permanent total disability compensation as provided in this title.

(3) Reasonable medical benefits in excess of the first \$20,000 shall be paid in the first instance by the employer or its insurance carrier. Then, as provided in Subsection (6), the Employers' Reinsurance Fund shall reimburse the employer or its insurance carrier for 50% of those expenses.

(4) After the initial three-year period under Subsection (1), permanent total disability compensation payable to an employee under this title becomes the liability of and shall be paid by the Employers' Reinsurance Fund.

(5) If it is determined that the employee is permanently and totally disabled, the employer or its insurance carrier shall be given credit for all prior payments of temporary total, temporary partial, and permanent partial disability compensation made as a result of the industrial accident. Any overpayment by the employer or its insurance carrier shall be reimbursed by the Employers' Reinsurance Fund under Subsection (6).

(6) Upon receipt of a duly verified petition, the Employers' Reinsurance Fund shall reimburse the employer or its insurance carrier for the Employers' Reinsurance Fund's share of medical benefits and compensation paid to or on behalf of an employee. A request for Employers' Reinsurance Fund reimbursements shall be accompanied by satisfactory evidence of payment of the medical or disability compensation for which the reimbursement is requested. Each request is subject to review as to reasonableness by the commission. The commission may determine the manner of reimbursement.

(7) If, at the time an employee is determined to be permanently and totally disabled, the employee has other actionable workers' compensation claims, the employer or insurance carrier that is liable for the last industrial accident resulting in permanent total disability shall be liable for the benefits payable by the employer as provided in this section. The employee's entitlement to benefits for prior actionable claims shall then be determined separately on the facts of those claims. Any previous permanent partial disability arising out of those claims shall then be considered to be impairments that give rise to Employers' Reinsurance Fund liability under this section.

**Section 7. Section Amended.**

Section 35-1-77, Utah Code Annotated 1953, as last amended by Chapter 41, Laws of Utah 1982, is amended to read:

**35-1-77. Medical panel — Medical director or medical consultants — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses.**

(1)(a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and [where] if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission [and having]. The panel shall have the qualifications generally applicable to the medical panel [set forth in] under Section 35-2-56

(b) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the commission in its sole discretion may employ a medical director or medical consultants on a full-time or part-time basis for the purpose of evaluating the medical evidence and advising the commission with respect to its ultimate fact-finding responsibility. If all parties agree to the use of a medical director or medical consultants, they shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) The medical panel, medical director, or medical consultants shall [then] make such study, take such X-rays, and perform such tests, including post-mortem examinations [where] if authorized by the commission, as it may determine [and thereafter] to be necessary or desirable.

(b) The medical panel, medical director, or medical consultants shall make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require.

(c) The commission shall promptly distribute full copies of the report [of the panel] to the applicant, the employer, and [the] its insurance carrier by registered mail with return receipt requested. Within [fifteen] 15 days after [such] the report is deposited in the United States post office, the applicant, the employer, or [the] its insurance carrier may file with the commission written objections [in writing thereto] to the report. If no written objections are [so] filed within [such] that period, the report [shall be deemed] is considered admitted in evidence [and the].

(d) The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but [shall] is not [be] bound by [such] the report if [there is] other substantial conflicting evidence in the case [which] supports a contrary finding [by the commission].

(e) If objections to [such] the report are filed, the commission may set the case for hearing to determine the facts and issues involved[, and at such] At

the hearing, any party so desiring may request the commission to have the chairman of the medical panel, the medical director, or the medical consultants present at the hearing for examination and cross-examination. For good cause shown, the commission may order other members of the panel, with or without the chairman or the medical director or medical consultants, to be present at the hearing for examination and cross-examination. Upon such hearing the

(f) The written report of the panel, medical director, or medical consultants may be received as an exhibit at the hearing, but ~~shall~~ may not be considered as evidence in the case except as far as it is sustained by the testimony admitted.

(g) The expenses of ~~such~~ the study and report ~~by~~ of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the ~~fund provided for by section 35-1-68~~ Employers' Reinsurance Fund.

#### Section 8. Section Amended.

Section 35-1-78, Utah Code Annotated 1953, as last amended by Chapter 287, Laws of Utah 1981, is amended to read:

#### 35-1-78. Continuing jurisdiction of commission to modify award — Authority to destroy records — Interest on award — No authority to change statutes of limitation.

(1) The powers and jurisdiction of the commission over each case shall be continuing~~[-and-]~~. The commission, after notice and hearing, may from time to time ~~make such modification~~ modify or change ~~with respect to~~ its former findings~~[-or]~~ and orders ~~with respect thereto, as in its opinion may be justified, provided, however, that records~~. Records pertaining to cases that have been closed and inactive for ten years, other than ~~those~~ cases of total permanent disability or ~~where~~ cases in which a claim has been filed as in Section 35-1-99~~[-which have been closed and inactive for a period of 10 years]~~, may be destroyed at the discretion of the commission.

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

(3) (a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Compensation Act.

(b) The commission has no power to change the statutes of limitation referred to in Subsection (a) in any respect.

#### Section 9. Section Amended.

Section 35-1-99, Utah Code Annotated 1953, as last amended by Chapter 211, Laws of Utah 1986, is amended to read:

#### 35-1-99. Notice of injury and claim for com-

#### pensation — Limitations of action.

(When) (1) If an employee claiming to have suffered an ~~injury~~ industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission of the time and place where the accident and injury occurred, and of the nature of the accident and injury, ~~within 48 hours, when possible, or fails to report for medical treatment within that time, the compensation provided for herein shall be reduced 15%; provided, that knowledge of the injury obtained from any source on the part of the employer, his managing agent, superintendent, foreman, or other person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment is equivalent to this notice; and no defect or inaccuracy in the notice subjects the claimant to this reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced. If no notice of the accident and injury is given to the employer within one year after the date of the accident, the right to compensation is wholly barred. If no claim for compensation is filed with the Industrial Commission within three years after the date of the accident or the date of the last payment of compensation, the right to compensation is wholly barred. However, the filing of a report or notice of accident or injury with the Industrial Commission, the employer, or its insurance carrier, together with the payment of any compensation benefit or the furnishing of medical treatment by the employer or an insurance carrier, tolls the period for filing the claim until the employer or its carrier notifies the employee, in writing, of its denial of liability or further liability for the industrial accident or injury, with instructions upon the notification of denial to the employee to contact the Industrial Commission for further advice or assistance to preserve or protect the employee's rights. The claim for compensation in any event shall be filed within 8 years after the date of the accident~~ the employee's claim for benefits under this chapter is wholly barred. If, for any reason, an employee is himself unable to provide this written notice, the employee's next-of-kin or attorney may file it within the required 180-day period. Receipt of written notice is presumed if the employer complies with the terms of Section 35-1-97 by filing with the commission an accident report, or if the employer or its insurance carrier pays disability or medical benefits to or on behalf of the injured employee.

(2) In nonpermanent total disability cases, an employee's medical benefit entitlement, except with respect to prosthetic devices, ceases if the employee does not incur, and submit to his employer or insurance carrier for payment, for a period of three consecutive years, medical expenses reasonably related to the industrial accident.

(3) A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the In-



dustrial Commission within six years after the date of the accident.

(4) A claim for death benefits is wholly barred, unless an application for hearing is filed within one year of the date of death of the employee.

#### Section 10. Section Amended.

Section 35-2-56, Utah Code Annotated 1953, as last amended by Chapter 161, Laws of Utah 1987, is amended to read:

#### **35-2-56. Partial permanent disability from occupational disease or industrial injury — Imposition of liability — Determination of disability — Medical panel — Rehabilitation — Benefits.**

(1) There is imposed upon the employer a liability for the payment of benefits, as hereinafter provided, to every employee who becomes partially and permanently disabled and such disability is primarily caused or contributed to by a disease or injury to health arising out of or in the course of employment, subject, however, to the following conditions:

(a) No compensation shall be paid when the last day of injurious exposure of the employee to the hazards of the occupational disease shall have occurred prior to July 1, 1941.

(b) No compensation shall be paid unless such partial disability results within two years prior to the day upon which claim for such compensation was filed with the Industrial Commission of Utah.

(c) No compensation shall be paid unless the partial disability results within two years of the last day in which the employee was exposed to the occupational disease.

(d) The time limit prescribed by Subsections (1) (b) and (c) shall not apply in the case of an employee whose disablement was due to occupational exposure to ionizing radiation; provided, that a claim for such compensation shall be filed within one year after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment.

(2) It is recognized that the measurement of partial permanent disability is a highly technical and difficult task and should be placed in the hands of physicians specially trained for the care and treatment of the occupational disease involved, and that, particularly in cases of silicosis, such determination should be by physicians limiting largely their practice to diseases of the chest; that the measurement of the extent of such disability should not be determined by physicians in general practice nor by laymen. Where a claim for compensation based upon partial permanent disability due to an occupational disease or industrial injury is filed with the commission, the commission shall appoint an impartial medical panel to consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim, and such medical panel shall make such study, take such X-rays and per-

form such tests as the panel may determine and certify to the commission the extent, if any, of the permanent disability of the claimant from performing work for remuneration or profit, and whether the sole cause of such partial permanent disability, in the opinion of the panel, results from the occupational disease and whether any other cause or causes have aggravated, prolonged, accelerated, or in anywise contributed to the disability, and if so, the extent (in percentage) to which such other cause or causes has so contributed to the disability. The report of the panel shall be made to the commission in writing and shall be in substantially the following form:

#### REPORT OF MEDICAL PANEL

##### Partial Permanent Disability Cases

To the Industrial Commission of Utah

State Capitol Building

Salt Lake City, Utah

Re: \_\_\_\_\_, Claimant

Claim No. \_\_\_\_\_

The medical panel, composed of the undersigned physicians, has completed its study and examination of the above named claimant with respect to the measurement of the ability of the claimant to perform physical labor\* (but without regard to the education, experience or training of the claimant) and on the assumption that the normal person functions at 100%, finds as follows:

	Percentage	Percentage
1. Extent of Permanent Partial Disability from all causes (if any)	_____	
**2. Specific causes of such disability:		
a. Occupational Disease (if any)	_____	
Name of Occupational disease	_____	
b. Other diseases or injuries	_____	
Names of such diseases or injuries	_____	
c. Other contributing factors	_____	
TOTAL	_____	_____
Dated _____, 19__		

(Medical Panel)

\*Subsection 35-2-12 (e)(i) defines partial permanent disability as: "Partial permanent disability," as herein used, is defined as that pathological condi-

tion directly resulting from an occupational disease and causing substantial physical impairment, evidenced by objective medical and clinical findings readily demonstrable, and which has reduced the earning capacity of the employee, excluding, however, total disability cases.

\*\*The sum of the percentages under [Subsections] Paragraphs (1)(2)(3) a, b, and c should equal the percentage of [Subsections] Paragraph 1 and the commission shall promptly distribute by mail full copies of such report to the claimant, employer against whom compensation is claimed and the insurance carrier. Thereafter any such party shall have ten days to object, in writing, to such report, and if no objections are filed with the commission within such period, the percentage of partial disability caused solely by the occupational disease and so certified by the medical panel shall be deemed accepted. The expense of such study and certification shall be paid out of the fund provided for by Section 35-1-68 (1) and such study and certification shall be a part of the record. If objections to such report are filed, then it shall be the duty of the commission to determine the percentage of such partial permanent disability after formal hearing, and at such formal hearing the party objecting must show by the weight of the evidence the extent of such claimed partial permanent disability and on appeal the evidence shall be reviewed as in equity cases.

(3) Where an employee has been found to be partially and permanently disabled by reason of an occupational disease, as provided in Subsections (1), (2), (3), and (4) [provided], and the commission further finds that the employee is unable to obtain employment in his usual trade or occupation, or on application of either the employee or employer the commission finds that it is to the best interest of the employee so partially and permanently disabled by reason of an occupational disease that he no longer works at his usual trade or occupation, then it shall be the duty of the commission to order that there be paid to the division of vocational rehabilitation of the State Board of Education out of the [second-injury] Employers' Reinsurance Fund provided for by Subsection 35-1-68 (1), not to exceed \$1,000 for use in the rehabilitation and training of such employee, such rehabilitation to be directed and controlled by such division of rehabilitation acting in conjunction with the Industrial Commission of Utah and shall generally follow the practice applicable under Section [35-1-69] 35-1-67 and relating to the rehabilitation of employees [having combined injuries].

(4) The benefits imposed upon the employer and to which an employee found, as in this section above provided, to be partially permanently disabled, shall be entitled under this act, are limited to the following:

During those weeks in which the employee is actively in training under the division of rehabilitation, as in this section above referred to, the employee shall receive 66-2/3% of his average weekly wages at the time the disability commenced, but not more than a maximum of 66-2/3% of the state average weekly wage at the time the disability commenced per week and not less than a minimum of

\$45 per week, for not to exceed twenty weeks, such payment to be made at four-week intervals and upon the filing with the commission at two-week intervals of a certificate by the division of rehabilitation that the employee is cooperating with such division in his rehabilitation training.

At the termination of such training in rehabilitation, the employee shall be paid one-half of his weekly compensation rate as determined in this section per week at four-week intervals until such time as the total payments so made, plus the weekly payments received by the employee during rehabilitation training, equals a sum equivalent to that amount determined under the following formula:

Multiply the percentage of partial permanent disability resulting from the occupational disease, as determined by the medical panel (or in case of formal hearing, then by the commission), by 104 weeks times the employee's compensation rate per week as previously determined.

For example: Assume a finding by the medical panel that the employee has sustained partial permanent disability from an occupational disease to the extent of 25% loss of bodily function and his compensation rate has been determined to be \$80 per week. The total amount payable would therefore be:

.25 x \$80 x 104 weeks = \$2,080 payable as follows:	
20 weeks rehabilitation .....	\$1,600
Balance at intervals of 4 weeks .....	480
TOTAL PAYABLE .....	2,080

Payments made for partial permanent disability shall be credited to the employer and deducted from any award which might ultimately be made should the employee subsequently become totally and permanently disabled.

#### Section 11. Section Amended.

Section 59-9-101, Utah Code Annotated 1953, as last amended by Chapter 12, Laws of Utah 1987, First Special Session, is amended to read:

#### 59-9-101. Tax Basis — Rates — Exemptions.

(1) Except for annuity considerations, insurance premiums paid by institutions within the state system of higher education as specified in Section 53B-1-102, and ocean marine insurance, every admitted insurer shall pay to the commission [for deposit in the General Fund;] on or before March 31 in each year, a tax of 2-1/4% of the total premiums received by it during the preceding calendar year from insurance covering property or risks located in this state. This subsection does not apply to workers' compensation and title insurance premiums, which are taxed under Subsections (2) and (3). The taxable premium under this subsection shall be reduced by:

- (a) all premiums returned or credited to policyholders on direct business subject to tax in this state;
- (b) all premiums received for reinsurance of property or risks located in this state; and
- (c) the dividends, including premium reduction

benefits maturing within the year, paid or credited to policyholders in this state or applied in abatement or reduction of premiums due during the preceding calendar year.

(2) (a) Every admitted insurer writing workers' compensation insurance in this state, including the Workers' Compensation Fund of Utah under Chapter 3, Title 35, shall pay to the tax commission, on or before March 31 in each year, a ~~(tax)~~ premium of between ~~(3-1/4%)~~ 1% and ~~(3-3/4%)~~ 8% of the total ~~(premiums)~~ premium income received by ~~(it)~~ the insurer from workers' compensation insurance in this state during the preceding calendar year. The percentage of premium applicable in any given year shall be determined by the Industrial Commission ~~(at least 90 days prior to the payment date, and any percentage of premium over 3-1/4% shall reflect the reasonable reserves necessary to maintain the Uninsured Employers' Fund provided for in Section 35-1-107 in an actuarially sound financial condition)~~ under Subsection (b). ~~(This taxable)~~ The total premium income shall be reduced in the same manner as provided in Subsections (1) (a) and (1) (b), but not as provided in Subsection (1) (c). The tax commission shall remit from the ~~(tax)~~ premium collected under this subsection an amount ~~(equal)~~ of up to ~~(3%)~~ 7.15% of the premium income to the ~~(Second Injury)~~ Employers' Reinsurance Fund created under Subsection 35-1-68 (1), an amount equal to 1/4% of the premium income to the General Fund, an amount of up to 1/2% and any remaining ~~(applicable)~~ assessed percentage of the premium income to the Uninsured Employers' Fund created under Section 35-1-107, and an amount equal to .1% of the premium income to the Industrial Commission's Division of Industrial Accidents. ~~(No tax)~~ This .1% is a one-time charge applicable to premiums received for calendar year 1988, for the purpose of funding the development, operation, maintenance, and improvements of the Division of Industrial Accidents' computer system. After 1988, this .1% shall be added to the 7.15% remitted to the Employers' Reinsurance Fund.

(b) The Industrial Commission shall determine the amount of the premium to be assessed each year on or before each October 1. The Industrial Commission shall make this determination following a public hearing. The determination shall be based upon the recommendations of a qualified actuary. The actuary shall recommend a premium rate sufficient to provide payments of benefits and expenses from these funds on a positive cash flow basis from year to year, and sufficient to provide cash reserves at the the beginning of each fiscal year of approximately \$5,000,000 in the Employers' Reinsurance Fund and \$500,000 in the Uninsured Employers' Fund.

(c) A premium that is to be transferred into the General Fund may be collected on premiums received from Utah public agencies or on premiums collected by public agency insurance mutuals.

(3) Every admitted insurer writing title insurance in this state shall pay to the commission, on or before March 31 in each year, a tax of .45% of the total premium received by either the insurer or by its

agents during the preceding calendar year from title insurance concerning property located in this state. In calculating this tax, "premium" includes the charges made to an insured under or to an applicant for a policy or contract of title insurance for:

(a) the assumption by the title insurer of the risks assumed by the issuance of the policy or contract of title insurance; and

(b) abstracting title, title searching, examining title, or determining the insurability of title, and every other activity, exclusive of escrow, settlement, or closing charges, whether denominated premium or otherwise, made by a title insurer, an agent of a title insurer, a title insurance agent, or any of them.

(4) Beginning July 1, 1986, former county mutuals and former mutual benefit associations shall pay the premium tax due under this chapter. All premiums received after July 1, 1986, shall be considered in determining this tax.

(5) The following insurers are not subject to the premium tax on health care insurance which would otherwise be applicable under Subsection (1):

- (a) insurers licensed under Chapter 5, Title 31A;
- (b) insurers licensed under Chapter 7, Title 31A;
- (c) insurers licensed under Chapter 8, Title 31A;
- (d) insurers licensed under Chapter 9, Title 31A;
- (e) insurers licensed under Chapter 11, Title 31A;
- (f) insurers licensed under Chapter 13, Title 31A;
- and
- (g) insurers licensed under Chapter 14, Title 31A.

(6) No insurer issuing multiple policies to an insured may artificially allocate the premiums among the policies for purposes of reducing the aggregate premium tax applicable to the policies.

#### Section 12. Section Repealed.

Section 35-1-100, as last amended by Chapter 287, Laws of Utah 1981, is repealed.

#### Section 13. Effective Date.

This act, except for Section 59-9-101, takes effect on July 1, 1988. Section 59-9-101 has retrospective operation to taxable years beginning on or after January 1, 1988.

#### CHAPTER 117 H. B. No. 228

Passed February 23, 1988

Approved March 14, 1988

Effective April 25, 1988

#### MOTOR VEHICLE LICENSE PLATES

Tab 11

## **Appendix 11**

Nyrehn v. Industrial Commission  
800 P.2d 330 (Utah 1990)

that the parties agreed to purchase and sell parcel one based on the physical boundaries of the parcel and decided on a price for that parcel without regard to the acreage of parcel one.

BENCH and GREENWOOD, JJ.,  
concur.



Kathleen NYREHN, Petitioner,

v.

INDUSTRIAL COMMISSION OF UTAH,  
Employers' Reinsurance Fund, Fred  
Meyer Stores and/or Liberty Mutual  
Insurance, Respondents.

No. 900010-CA.

Utah Court of Appeals.

Oct. 25, 1990.

Worker sought review of denial of workers' compensation benefits. The Court of Appeals, Bench, J., held that: (1) worker who did not appeal from administrative law judge's order in her favor could raise claims of error with respect to his findings which were adverse to her when her employer appeals, and (2) worker established legal causation with respect to back injury, notwithstanding her preexisting injury.

Reversed and remanded.

#### 1. Workers' Compensation Ⓒ1846

Worker was not required to appeal from adverse rulings of administrative law judge who entered an order in her favor in order to assert as appellee on appeal that those findings were erroneous.

#### 2. Workers' Compensation Ⓒ1939.7

Court is not required to give deference to conclusions of Industrial Commission on grounds that Commission has expertise and familiarity with the work environment, al-

though there may be some complex work activities which require deference to the Commission's evaluation of whether work-related exertion exceeds the exertion of nonemployment life.

#### 3. Workers' Compensation Ⓒ554

Administrative law judge may not simply presume that finding of preexisting condition warrants application of the *Allen* test for determining whether there is a causal relation between work and injury.

#### 4. Workers' Compensation Ⓒ554

Finding that worker's preexisting condition contributed to injury may not be implied.

#### 5. Administrative Law and Procedure Ⓒ763

Failure of agency to make adequate findings of fact on material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted, and capable of only one conclusion.

#### 6. Workers' Compensation Ⓒ552

Legal causation test to be applied to workers who suffer from preexisting condition is not meant to prevent workers with preexisting conditions from recovering benefits; higher standard of legal causation is intended to offset the preexisting condition of the employee as a likely cause of injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work.

#### 7. Workers' Compensation Ⓒ517

When accident is climax of repeated exertions, the work-related exertion is, for purposes of proving legal causation, the aggregate exertion of the repetitive exertions that established the accident; in determining whether there is causation, court must consider the whole burden on the camel, and not just the straw that breaks the camel's back.

#### 8. Workers' Compensation Ⓒ1542

Although worker suffered from preexisting back condition, evidence that, for two and one-half months, she was required to lift tubs of merchandise 30 to 36 times a day showed that she engaged in activity

which was not typical of nonemployment activity and thus showed causation with respect to her back injury.

William W. Downes, Jr., David Eckersley (argued), Salt Lake City, for petitioner.

Michael E. Dyer (argued), Brad C. Bete-benner, Richards, Brandt, Miller & Nelson, Salt Lake City, for Fred Meyer Stores.

Erie V. Boorman, Administrator (argued), Salt Lake City, for Employers Reinsurance Fund.

Before BENCH, GARFF and CONDER<sup>1</sup>, JJ.

# OPINION

BENCH, Judge:

Kathleen Nyrehn petitions this court for review of the Industrial Commission's denial of workers' compensation benefits. We reverse.

Nyrehn worked as a stock room clerk for Fred Meyer Stores. Her duties included pricing and sorting merchandise contained in tubs which were approximately 2½ feet wide, 2½ feet long, and 1½ to 2 feet tall. The tubs weighed between fifteen and forty pounds each, depending on the contents, and were stacked upon each other. Nyrehn would lift and carry the tubs to and from a sorting area approximately thirty to thirty-six times a day. In addition to lifting the tubs, Nyrehn was involved in constant bending and stooping to sort merchandise into different tubs. On January 23, 1985, at approximately 11:00 a.m., Nyrehn felt a gradual onset of pain in her lower back while performing her duties at work. Despite the pain she continued to

work. The pain worsened until she finally had to leave work early at approximately 4:00 p.m. After three back operations, Nyrehn's pain persisted and she was still unable to work. She therefore sought permanent disability benefits.

After a hearing, an Administrative Law Judge (A.L.J.) made the following relevant findings of fact: (1) Nyrehn's pain of January 23, 1985 was not the result of a certain incident or activity, but rather the result of "two and [a] half months of lifting tubs of merchandise 30 to 36 times a day;" (2) Nyrehn had an asymptomatic preexisting condition, spondylolysis (disintegration or dissolution of a vertebra); and (3) 75% of Nyrehn's total permanent impairment existing at examination was "caused by the industrial accident of January 23, 1985," and 25% was due to "preexisting incapacity of spondylolysis."

The A.L.J. also made the following relevant conclusions of law: (1) Nyrehn injured her lower back "by accident" in that her injury was neither planned nor foreseen; (2) there was a direct medical causal relationship between the industrial accident and Nyrehn's back problems; (3) due to her preexisting condition, Nyrehn was required to prove legal causation under *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986); and (4) Nyrehn's job duties of lifting tubs of merchandise weighing between fifteen and forty pounds did not amount to unusual or extraordinary exertion in excess of the normally expected level of nonemployment activity for men and women in the latter half of the twentieth century as required in *Allen*.<sup>2</sup>

Despite his conclusion that Nyrehn failed to satisfy the *Allen* test, the A.L.J. awarded Nyrehn permanent total disability bene-

1. Dean E. Conder, Senior District Court Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp.1990).

2. In concluding that Nyrehn had not satisfied the *Allen* test, the A.L.J. stated that he followed the "legal doctrine" of *Smith & Edwards v. Industrial Commission*, 770 P.2d 1016 (Utah Ct. App.1989) (lifting 47½ pounds by itself did not constitute an unusual exertion). Nyrehn argues that this statement indicates that the A.L.J. based his conclusion on weight alone, which is inappropriate. *American Roofing Co. v. Indus.*

*Comm'n*, 752 P.2d 912, 915 (Utah Ct.App.1988). Fred Meyer, on the other hand, argues that the A.L.J. considered the total circumstances since at the conclusion of the hearing he referred to various factors besides the weight of the tubs, including the repetitive nature of the lifting. Since we base our decision on other grounds, we need not determine whether the A.L.J. erroneously applied a bright-line test rather than consider the totality of the circumstances as required by *Smith & Edwards*.

fits. He refused to apply *Allen* because he felt that the test was at odds with other Utah Supreme Court cases indicating that handicapped workers should not be placed in a hardship in receiving compensation benefits. He also indicated that he believed the *Allen* test to be unconstitutional because it set a different standard for such handicapped workers.

Fred Meyer Stores and Liberty Mutual Insurance (referred to collectively as Fred Meyer) filed a motion with the Industrial Commission to review the A.L.J.'s award. On review, the Commission adopted the factual findings of the A.L.J. and his conclusion that Nyrehn failed to prove legal causation as required under *Allen*. The Commission then reversed the A.L.J.'s award of benefits, indicating that despite the A.L.J.'s concerns over the constitutionality of the *Allen* test, the Commission was required to apply the test. The Commission concluded that inasmuch as Nyrehn failed to satisfy the *Allen* test she was not entitled to benefits. Nyrehn then petitioned this court to review the Industrial Commission's order.

#### WAIVER OF APPEAL

[1] Fred Meyer argues that Nyrehn has waived her right to challenge the A.L.J.'s finding that she did not prove legal causation because she did not file her own motion for review of that finding with the Commission.<sup>3</sup> Fred Meyer erroneously relies on *Pease v. Industrial Commission*, 694 P.2d 613 (Utah 1984). In *Pease*, the Utah Supreme Court interpreted the following provision: "(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge or the commission *may* file a motion for review of

such order." Utah Code Ann. § 35-1-82.53(1) (Supp.1983) (emphasis added). The supreme court concluded that when an applicant files for review under this section, he must raise all possible issues or the issues not raised would be considered waived. *Id.* at 616. There is no indication in *Pease* that a prevailing party has an affirmative duty to seek review from faulty findings. Nor do we perceive any such duty in the language of the statute which is clearly permissive.

Although the conclusion of the A.L.J. regarding legal causation may have been faulty, any such error was rendered harmless to Nyrehn by the subsequent award of benefits. If Fred Meyer had not filed for review, she would have had her benefits. Nyrehn simply did not have any reason to appeal until the Commission denied her benefits. *Cf. Halladay v. Cluff*, 739 P.2d 643, 645 (Utah Ct.App.1987) ("Cross-appeals are properly limited to grievances a party has with the judgment as it was entered—not grievances it might acquire depending on the outcome of the appeal."). In petitioning this court to review the denial of benefits, Nyrehn is seeking review of the Commission's conclusion that she did not prove legal causation. She is not seeking review of the A.L.J.'s conclusion. The issue of whether Nyrehn proved legal causation is therefore properly before us.

#### STANDARD OF REVIEW

Inasmuch as these proceedings were commenced prior to January 1, 1988, the effective date of the Utah Administrative Procedure Act (UAPA), we look to the prior case law to determine the proper standard of review.<sup>4</sup>

3. In essence, Fred Meyer urges us to adopt the following rule: If an A.L.J. makes a *possibly* erroneous finding of fact or conclusion of law that is contrary to the prevailing party, but which did not prevent the party from prevailing, that party must nevertheless seek review in order to preserve any challenge of the possibly erroneous finding/conclusion in the event the losing party moves for review.

4. Utah Code Ann. § 63-46b-22(2) (Supp.1990) provides:

(2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

For a discussion of UAPA's effect on our review of agency findings of fact, see *Grace Drilling Co. v. Bd. of Review of the Industrial Commission*, 776 P.2d 63, 66-68 (Utah Ct.App.1989).



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As to findings of fact, our review is deferential. "[T]he reviewing court's inquiry is whether the Commission's findings are 'arbitrary or capricious,' or 'wholly without cause' or contrary to the 'one [inevitable] conclusion from the evidence' or without 'any substantial evidence' to support them. Only then should the Commission's findings be displaced." *Kaiser Steel Corp. v. Monfredi*, 631 P.2d 888, 890 (Utah 1981).

As to the Commission's conclusion that Nyrehn's work-related exertion did not satisfy the *Allen* test, our review is more searching:

The question of whether the employment activities of a given employee are sufficient to satisfy the legal standard of unusual or extraordinary effort involves two steps. First the agency must determine as a matter of fact exactly what were the employment-related activities of the injured employee. Second, the agency must decide whether those activities amounted to unusual or extraordinary exertion. This second determination is a mixed question of law and fact.

*Price River Coal Co. v. Indus. Comm'n*, 731 P.2d 1079, 1082 (Utah 1986).

[2] Our standard of review of mixed questions of law and fact is an intermediate review for reasonableness and rationality. "The degree of deference extended to the decisions of the Commission on these intermediate types of issues has been given various expressions, but all are variations of the idea that the Commission's decisions must fall within the limits of reasonableness or rationality." *Sisco Hilte v. Indus.*

For a discussion of UAPA's effect on our review of mixed questions of law and fact, see *Pro-Benefit Staffing, Inc. v. Bd. of Review of the Industrial Commission*, 775 P.2d 439, 441-42 (Utah Ct.App.1989).

5. Fred Meyer urges us to give considerable deference to the conclusions of the Commission because of its "expertise in and familiarity with the work environment." *Price River Coal*, 731 P.2d at 1084. The deference we accord an agency's disposition under intermediate review fluctuates with the importance of the agency's expertise in determining the issue at hand:

The more likely it is that agency expertise will assist in resolving an issue, the more deference courts should give to the agency's resolu-

*Comm'n*, 766 P.2d 1089, 1091 (Utah Ct. App.1988) (quoting *Utah Dept. of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 610 (Utah 1983)).

"[R]easonableness must be determined with reference to the specific terms of the underlying legislation, interpreted in light of its evident purpose as revealed in the legislative history and in light of the public policy sought to be served." This standard appears to give us some flexibility in reviewing the otherwise objective standard that must be applied by the Commission.

*Smith & Edwards Co. v. Indus. Comm'n*, 770 P.2d 1016, 1018 n. 2 (Utah Ct.App.1989) (quoting *Utah Dep't of Admin. Servs.*, 658 P.2d at 611).<sup>5</sup>

"Furthermore, to facilitate the purposes of the legislation, the Workers' Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant." *USX Corp. v. Indus. Comm'n*, 781 P.2d 883, 886 (Utah Ct.App.1989); *Kaiser Steel Corp.*, 631 P.2d at 892; *McPhie v. Indus. Comm'n*, 567 P.2d 153, 155 (Utah 1977).

Guided by these standards we must determine whether there was sufficient evidence to warrant application of the higher *Allen* test for legal causation and whether the Commission's conclusion that Nyrehn failed to prove legal causation was a reasonable and rational conclusion.

## RECOVERY OF BENEFITS

In order to recover workers' compensation benefits, an employee must prove that she was injured "by accident arising out of

tion. The less pertinent agency insight is—or the more likely it is that judicial expertise will be most helpful—the less deference need be paid by reviewing courts to the agency's disposition.

*Taylor v. Utah State Training School*, 775 P.2d 432, 434 (Utah Ct.App.1989).

We recognize that there may be some complex work activities that require deference to the Commission's evaluation of whether the work-related exertion exceeds the exertion of nonemployment life, but in general the Commission is no better suited to compare simple forms of work-related exertion than are we since "normal nonemployment life" is not within the Commission's area of expertise.

or in the course of [her] employment." Utah Code Ann. § 35-1-45 (1988). "This statutory language creates two prerequisites for a finding of compensable injury. First, the injury must be 'by accident.' Second, the language 'arising out of or in the course of employment' requires that there be a causal connection between the injury and the employment." *Allen*, 729 P.2d at 18. The Utah Supreme Court held in *Allen* that a claimant must supply proof of both "legal" and "medical" causation. "Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment' ... [then] the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury]." *Larson, Workmen's Compensation* § 38.83(a), at 7-276 to 277 (1986) quoted in *Allen*, 729 P.2d at 25.

To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk [she] already faced in everyday life because of [her] condition. This additional element of risk in the work-place is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work.

*Allen*, 729 P.2d at 25.<sup>6</sup>

Therefore, the only two issues<sup>7</sup> before us are (1) whether Nyrehn was "suffering

from a preexisting condition which contribute[d] to the injury," *Allen*, 729 P.2d at 26, and (2) did the work-related exertion which caused Nyrehn's injury exceed the "usual wear and tear and exertions of nonemployment life." *Id.* "If such a finding is made, then the requirement of legal cause is satisfied because it is presumed that the employment increased the risk of injury to which that worker was otherwise subject in [her] nonemployment life." *Price River Coal Co.*, 731 P.2d at 1082.

### Preexisting Condition

[3] An A.L.J. may not simply presume that the finding of a preexisting condition warrants application of the *Allen* test. An employer must prove medically that the claimant "suffers from a preexisting condition which contributes to the injury." *Allen*, 729 P.2d at 26. See, e.g., *Price River Coal Co.*, 731 P.2d at 1082 (evidence proved that preexisting conditions "contributed greatly" to heart attack); *Worker's Compensation Fund v. Indus. Comm'n*, 761 P.2d 572 (Utah Ct.App.1988) (claimant suffered from narcolepsy and emphysema and had a 36-year smoking habit, but no prior history of heart disease, *Allen* test therefore did not apply when claimant died of heart attack).

[4, 5] The **factual findings** of the Commission are silent as to whether Nyrehn's preexisting back condition contributed to the industrial injury.<sup>8</sup> The A.L.J. had merely concluded as a matter of law that

6. This standard is often referred to as the higher standard of *Allen* since, "[w]here there is no preexisting condition, a usual or ordinary exertion is sufficient [to prove legal causation]." *Allen*, 729 P.2d at 26. Compare *Hone v. J.F. Shea Co.*, 728 P.2d 1008 (Utah 1986) (exertion of putting on heavy pair of coveralls was sufficient when claimant did not have any preexisting back problems).

7. Fred Meyer does not challenge the A.L.J.'s finding that Nyrehn was injured "by accident." Nor does it challenge the conclusion of the A.L.J. that the industrial accident was the medical cause of Nyrehn's disability.

8. The A.L.J. did find—for purposes of allocating liability between the employer and the Employ-

ers' Reinsurance Fund—that 75% of the total **permanent** impairment existing at the time of the examination was "caused by the industrial accident of January 23, 1985," and 25% was due to "pre-existing incapacity." Such an allocation, however, is not proof that the preexisting condition somehow contributed to the injury of January 23, 1985, it only addresses the end result, i.e., the total disability at the time of the examination. See, e.g., *Richfield Care Center v. Torgerson*, 733 P.2d 178, 180 (Utah 1987) (5% impairment existed prior to accident, 7½% impairment existed following accident, therefore only 2½% attributed to the accident); cf. *Zimmerman v. Indus. Comm'n*, 785 P.2d 1127, 1130 (Utah Ct.App.1989) (permanent impairment resulted solely from the preexisting conditions and not from the industrial accident or any

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"[s]ince Ms. Nyrehn brought a pre-existing low back condition to the workplace," the *Allen* test applied. Implicit in such a legal conclusion is the critical factual finding that Nyrehn's preexisting condition contributed to her injury. Such material findings, however, may not be implied. In order for us to meaningfully review the findings of the Commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Rucker v. Dalton*, 598 P.2d 1336 (Utah 1979)). The failure of a trial court to make adequate findings is reversible error. *Id.* Likewise, the failure of an agency to make adequate findings of fact on material issues renders its findings "arbitrary and capricious" unless the evidence is "clear, uncontroverted and capable of only one conclusion." *Id.* (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)).

Since we conclude that Nyrehn's work-related exertion satisfied even the higher standard for proving legal causation, the Commission's failure to make adequate findings of fact was harmless. We therefore need not address whether there was sufficient evidence to sustain the Commission's implied finding.

#### Legal Causation

[6] The legal causation test adopted in *Allen* is not meant to prevent workers with preexisting conditions from recovering benefits.<sup>9</sup> "Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that 'the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable . . .'" *Allen*, 729 P.2d at 25 (quoting *Powers v. Indus. Comm'n*, 19 Utah 2d 140, 143-44, 427 P.2d 740, 743 (1967) (footnote omitted)).

combination of the accident with the preexisting conditions).

9. "It is the duty of the courts and the commission to construe the Workers' Compensation Act

The higher standard of legal causation adopted in *Allen* is intended to "offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a *personal risk* rather than *exertions at work*." *Allen*, 729 P.2d at 25 (emphasis added). See also *Price River Coal Co.*, 731 P.2d at 1082 (legal causation test "is designed to screen out those injuries that result from a personal condition . . . rather than from exertions required of the employee in the workplace"); *Hone v. J.F. Shea Co.*, 728 P.2d 1008, 1011 (Utah 1986) (legal causation test is to distinguish between an injury which is "*more likely than not* produced by a risk related to the employment from one that is caused by a personal risk" (emphasis added)); *Lancaster v. Gilbert Dev.*, 736 P.2d 237 (Utah 1987) (the fact that heart attack occurred at work was a mere coincidence).

"[T]he key question in determining causation is whether, given this body and this exertion, the exertion in fact contributed to the injury." *Allen*, 729 P.2d at 24. In order to answer this inquiry, we must first determine what "exertion" is at issue: the simple lifting of one tub of merchandise, or the repetitive lifting of many such tubs over an extended period of time.

The Commission found that Nyrehn's pain resulted from "two and a half months of lifting tubs of merchandise 30 to 36 times a day." The industrial accident, therefore, was not a single incident of lifting one tub of merchandise; it was the climax of repetitive lifting. The Utah Supreme Court has broadly defined "accident" to include injuries which are the result of repetitive exertion.

[An accident] connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. . . . [T]his is not necessarily restricted to some single incident which happened suddenly at one particular time and does not

liberally and in favor of employee coverage when statutory terms reasonably admit such a construction." *Heaton v. Second Injury Fund*, 796 P.2d 676 (1990).

preclude the possibility that *due to exertion, stress or other repetitive cause, a climax might be reached in such a manner as to properly fall within the definition of an accident as just stated above.*

*Carling v. Indus. Comm'n.*, 16 Utah 2d 260, 261-62, 399 P.2d 202, 203 (1965) *quoted with approval in Allen*, 729 P.2d at 18.

[7] When an accident is the climax of repeated exertions, as in Nyrehn's case, work-related "exertion," for purposes of proving legal causation, is the aggregate exertion of the repetitive exertions that establish the accident. *See Miera v. Indus. Comm'n.*, 728 P.2d 1023, 1024 (Utah 1986) (claimant's repetitive "jumps into an eight-foot hole [by way of] a four-foot platform at thirty-minute intervals constitute a considerably greater exertion than that encountered in non-employment life"). In other words, we must consider the whole burden on the camel and not just the straw that breaks the camel's back. *See Smith & Edwards*, 770 P.2d at 1018 (must consider all factors related to exertion); *Workers' Compensation Fund*, 761 P.2d at 575 (comparing cumulative effect of several factors, including driver's fatigue, anxiety, and the stress of driving through a snow storm, with the exertion of nonemployment life).

In *Allen*, the supreme court listed the following examples of typical nonemployment activities: "taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings." *Allen*, 729 P.2d at 26. While lifting a tub of merchandise weighing between 15 and 40 pounds once or twice could likewise fit into the list of examples above, lifting such a tub 30 to 36 times a day for two and a half months is not a typical nonemployment activity. The foregoing moderately strenuous activities which may not be considered unusual when performed once or twice may nevertheless amount to unusual exertion when performed repeatedly. Otherwise, garbage collectors, baggage handlers, auto mechanics, childcare provid-

ers, etc., would be barred by the foregoing examples.

[8] In the case before us it is unquestionable that two and a half months of lifting tubs of merchandise 30 to 36 times a day would cause unusual and extraordinary wear and tear on a body when compared with the "usual wear and tear and exertions of nonemployment life." *Allen*, 729 P.2d at 26. The test is not whether the type of exertion which caused the injury is unknown in nonemployment life, but rather whether the cumulative work-related exertion exceeds the normal level of exertion in nonemployment life. We doubt that there are many physical activities outside of the workplace where this type of effort is being repeated so often over such a significant period of time.

The Commission's finding that Nyrehn's work-related exertion was not an unusual exertion was comparable to a conclusion that the typical nonemployment activities of people in today's society includes lifting a full garbage can 30 to 36 times per day each working day for two and a half months. Merely stating the comparison shows the fallacy of the Commission's finding. Nyrehn's back injury was not a coincidental injury which appeared at work without any enhancement from the workplace. "[Her] employment contributed something substantial to increase the risk [she] already faced in everyday life because of [her] condition." *Allen*, 729 P.2d at 25. The Commission's conclusion that Nyrehn failed to prove legal causation was therefore not reasonable and rational.

## CONCLUSION

Nyrehn's repetitive lifting of the tubs over an extended period of time was an unusual exertion as compared with the "usual wear and tear and exertions of nonemployment life." *Allen*, 729 P.2d at 26. We therefore conclude that Nyrehn proved legal causation. The Commission's order

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denying Nyrehn her workers' compensation benefits is reversed and the case is remanded with instructions to grant Nyrehn benefits for total permanent disability as calculated by the A.L.J. Costs on review to petitioner.

GARFF and CONDER, JJ., concur.