

1992

Gary E. Crosland v. Board of Review of the Industrial Commission of Utah, Young Electric Sign Company and Smith Administrators : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

IN THE UTAH SUPREME COURT

DOCKET NO. 920247

GARY E. CROSLAND,

Applicant/Respondent,

vs.

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

Defendants/Petitioners.

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Court of Appeals 920247
No. 910291CA

Priority No. 13

UTAH SELF-INSURERS' ASSOCIATION'S BRIEF
IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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FILED

MAY 20 1992

CLERK SUPREME COURT
UTAH

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This brief, submitted by the Utah Self-Insurers' Association¹ in support of Petitioners' request for a Writ of Certiorari, hereby incorporates the briefs submitted by Young Electric Sign Company (the employer) and The Workers Compensation Fund of Utah (an amicus curiae). While the core concern of the employer's and amicus' briefs is the same, slightly different issues are addressed in the respective briefs so that they can be read as a whole without undue repetition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Utah Supreme Court should grant Petitioners' request for a Writ of Certiorari pursuant to Rule 46(a) of the Utah Rules of Appellate Procedure on the grounds that the Utah Court of Appeals' decisions in Crosland v. Industrial Commission 183 Utah Adv. Rep. 35 (Utah App. 1992) ("Crosland") and Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990) directly conflict.

2. Whether the Utah Supreme Court should grant Petitioners' request for a Writ of Certiorari pursuant to Rule 46(b) of the Utah Rules of Appellate Procedure on the grounds that (a) Crosland applies a standard of review contrary to and in

¹The Utah Self-Insurers' Association is a non-profit organization comprised of Utah's major self-insured employers, including (to name a few) AT&T Communications of the Mountain States, Inc.; Church of Jesus Christ of Latter Day Saints; Chevron, U.S.A.; Intermountain Health Care Inc.; Kennecott-Utah Copper Division; Morton International; Roadway Services, Inc.; Thiokol Corporation; US West Communications; and Utah Transit Authority.

conflict with the standard of review established by the Utah Supreme Court in Morton v. Tax Commission, 814 P.2d 581 (Utah 1991), and (b) Crosland treats asymptomatic conditions in a way that directly conflicts with the Utah Supreme Court's analysis of asymptomatic conditions in Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986).

3. Whether the Utah Supreme Court should grant Petitioners' request for a Writ of Certiorari pursuant to Rule 46(c) of the Utah Rules of Appellate Procedure on the grounds that Crosland radically departs from long-standing Industrial Commission practice by defining the term "permanent impairment" in a way that excludes objectively identifiable but asymptomatic medical conditions.

4. Whether the Utah Supreme Court should grant Petitioners' request for a Writ of Certiorari pursuant to Rule 46(d) of the Utah Rules of Appellate Procedure on the grounds that Crosland treats an issue of first impression in this jurisdiction and profoundly disrupts the deep-seated public policy objective (established by the state legislature, the Industrial Commission and the Utah Supreme Court) of encouraging Utah employers to hire workers with disabilities and impairments by establishing a fair basis for apportioning workers compensation disability awards.

OPINION OF THE UTAH COURT OF APPEALS

In filing their briefs supporting the requested Petition for a Writ of Certiorari, petitioners and amicus curiae seek review of the Utah Court of Appeals' March 20, 1992 decision in Crosland v. Industrial Commission, 183 Utah Adv. Rep. 35 (Utah App. 1992). (See Addendum "A.")

JURISDICTION OF THE SUPREME COURT

Jurisdiction to issue the requested Petition for Writ of Certiorari is conferred upon the Utah Supreme Court by Article VIII, § 3 of the Utah Constitution; Utah Code Ann. §§ 78-2-2(3) and 78-2-2(5) (1953 as amended); and, Rule 45, Utah Rules of Appellate Procedure.

CONTROLLING STATUTES AND RULES

Utah Code Ann. § 35-1-66 and § 63-46b-16 (1953 as amended) are controlling and are attached as Addendum "B"

The controlling rule is Rule 46, Utah Rules of Appellate Procedure.

The controlling medical definition of "permanent impairment" from the American Medical Association Guides to the Evaluation of Permanent Impairment (1988) is attached as Addendum "C."

STATEMENT OF THE CASE

This brief incorporates by reference the Case and Fact Statements contained in Young Electric Sign Company's brief.

ARGUMENT

POINT I

**A WRIT OF CERTIORARI SHOULD BE GRANTED
PURSUANT TO RULE 46(a) OF THE UTAH RULES OF APPELLATE PROCEDURE
BECAUSE THE UTAH COURT OF APPEALS' DECISIONS IN CROSLAND AND
NYREHN DIRECTLY CONFLICT.**

Rule 46(a) of the Utah Rules of Appellate Procedure provides that the Utah Supreme Court will grant a petitioning party's request for a Writ of Certiorari when opinions rendered by different panels of the Utah Court of Appeals are in conflict. A Writ of Certiorari should be granted in the present case, pursuant to Rule 46(a), because the Utah Court of Appeals' decisions in Crosland v. Industrial Commission, 183 Utah Adv. Rep. 35 (Utah App. 1992) and Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990) (attached as Addendum "D") directly conflict.

In Crosland, the Utah Court of Appeals held that a worker's asymptomatic preexisting condition cannot be used by the Utah Industrial Commission to apportion a permanent partial disability award between the worker's industrially-caused impairment and any impairment arising from the worker's

asymptomatic preexisting condition. Under Crosland, the worker's employer must compensate the worker for his industrially-caused impairment and for any impairment assignable to the worker's asymptomatic (but objectively identifiable) preexisting condition.

Conversely, in Nyrehn, the Utah Court of Appeals remanded an applicant's claim and expressly directed the Industrial Commission to apportion its disability award between the applicant's industrially caused injury and asymptomatic preexisting condition.² Clearly, the remand order in Nyrehn and the holding in Crosland are at odds.³ The Utah Supreme Court should grant the petitioners' request for a Writ of Certiorari in order to resolve the conflict between the Utah Court of Appeals' apportionment rulings.

²Significantly, the asymptomatic preexisting spondylolysis condition in Nyrehn is exactly the same asymptomatic preexisting condition involved in this case.

³Even though Nyrehn dealt with a permanent total disability claim, whereas Crosland involves a permanent partial disability claim, the two decisions nevertheless fundamentally conflict because they treat the same asymptomatic preexisting condition in diametrically opposite ways.

POINT II

**A WRIT OF CERTIORARI SHOULD BE GRANTED
PURSUANT TO RULE 46(b) OF THE UTAH RULES OF APPELLATE PROCEDURE
BECAUSE THE UTAH COURT OF APPEALS' DECISION IN CROSLAND
DIRECTLY CONFLICTS WITH THE UTAH SUPREME COURT'S RULINGS
IN MORTON AND HOLLOWAY.**

Rule 46(b) of the Utah Rules of Appellate Procedure provides that the Utah Supreme Court will grant a petitioner's request for a Writ of Certiorari 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." In the present case, a Writ of Certiorari should be granted pursuant to Rule 46(b) for two reasons. First, the Writ should be granted because the Utah Court of Appeals' decision in Crosland both misconstrues and misapplies the standard of review criteria set forth by the Utah Supreme Court in Morton v. Tax Commission, 814 P.2d 581 (Utah 1991). Second, the Writ should be granted because the Crosland decision treats asymptomatic conditions in a way that directly conflicts with the Utah Supreme Court's analysis of asymptomatic conditions in Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986).

A. Conflict with Morton.

In Morton v. Tax Commission, 814 P.2d 581 (Utah 1991), this Court held that administrative cases initiated after January 1, 1988 would be subject to review by Utah's appellate courts

under the standards articulated in the Utah Administrative Procedure Act (UAPA), Utah Code Ann. § 63-46b-16 (1988). Id. at 583. Under UAPA, this Court stated that an administrative agency's interpretation of a statutory term--like the term "permanent impairment" contained in Utah's Workers Compensation Act--will be given deference if there exists "an explicit or implicit grant of discretion . . . in the governing statute." Id. at 588. This Court then observed that in determining whether to apply a deferential standard of review:

. . .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.

[Accordingly]. . .in the absence of a discernable 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 body to make such a determination. . . .[A]n appellate court should not substitute its judgment for the agency's judgment concerning the wisdom of the agency's policy. In such a case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue. [Emphasis added.]

Id. at 586, 589.

The Crosland decision wholly fails to apply the foregoing standard of review to the facts of this case. Crosland does properly acknowledge that Morton is the law governing the

standard of review. Crosland even acknowledges, in footnote two of the decision, the implied grant of discretion inquiry (quoted above) pertinent to this case. However, these acknowledgements are mere lipservice. Having made the cursory acknowledgments, Crosland tautologically declares that "[t]his 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." 183 Utah Adv. Rep. at 36. The Crosland panel is clearly mistaken. Crosland should be reviewed and reversed on the grounds that (1) the decision ignores the language from Morton quoted above, and (2) the decision makes no attempt to discern any express or implied legislative grant of authority.

1. Crosland Ignores Morton's Implied Intent Mandate.

In analyzing Utah Code Annotated § 35-1-66 (1988), the Crosland court was apparently unable to discern any express or implied grant of legislative discretion to the Industrial Commission. Given this inability, the Crosland court was obliged to defer to the Industrial Commission's interpretation of "permanent impairment," because, as this Court observed in Morton, "in the absence of a discernable legislative intent concerning the specific question in issue. . . [t]he agency that has been granted authority to administer the statute is the body

to make such a determination. . . .[and] [i]n such a case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue." [Emphasis added.] Id. at 589. The Utah Court of Appeals completely side-stepped this Supreme Court directive in conducting its standard of review analysis. On this basis, Crosland directly conflicts with Morton and should be reversed.

2. Crosland Fails to Discern the Legislative Grant of Discretion to the Industrial Commission.

Crosland should also be reviewed and reversed on the basis that the Utah Workers Compensation statute affords both an express and an implied grant of discretion to the Utah Industrial Commission to arrive at definitions for medical terms of art like "permanent impairment."⁴ When the Utah Workers Compensation Act is read as a whole, the legislature has, at a minimum, granted the Industrial Commission discretion to apply its expertise in:

- a. Determining the amount of permanent partial disability compensation to be

⁴This Court has routinely held that the Utah Industrial Commission and other administrative agencies are afforded deference as they exercise their unique expertise in fairly evaluating the factors that comprise compensable claims. See, e.g., Savage Brothers, Inc. v. Public Service Commission, 723 P.2d 1085 (Utah 1986) (discretion given agency's interpretation of ambiguous or technical terms); Hurley v. Board of Review, 767 P.2d 524 (Utah 1988); Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986) (Commission given discretion to interpret a statute when its expertise gives it the best position from which to view the statute).

"awarded by the commission based on the medical evidence." Utah Code Ann. § 35-1-66.

b. Establishing disability compensation using an average weekly wage method or "such other method" to be determined by the Commission. Utah Code Ann. § 35-1-75(1)(g)(iii);

c. Determining compensability issues utilizing "a medical panel appointed by the Commission." Utah Code Ann. § 35-1-77(1)(a);

d. Adjudicating the medical aspects of a controverted case utilizing a medical director or medical consultants which "the Commission in its sole discretion may employ." Utah Code Ann. § 35-1-77(1)(d);

e. Directing the medical panel appointed by an administrative law judge to render its medical report "in writing to the Commission in a form prescribed by the Commission." Utah Code Ann. § 35-1-77(2)(b); and

f. Rendering its decision on the medical aspects of a controverted case based upon either the findings of the medical panel or other substantial conflicting evidence in the case. Utah Code Ann. § 35-1-77(2)(d).⁵

Based on the overall legislative framework of the Utah Workers Compensation statute and this Court's past recognition of discretion granted to the Commission, the Crosland court erred in

⁵Under Morton, a phrase like "as determined by the Commission" is an indication of an express grant of discretion by the legislature. 814 P.2d at 588 f.n. 40. Crosland fails to even consider the existence of such statutory language contained in Utah's Workers Compensation Act.

failing to defer to the Industrial Commission's interpretation of the medical term "permanent impairment." The court should have applied an abuse of discretion standard of review when assessing how the Industrial Commission should define a medical term of art like "permanent impairment." If the Court of Appeals had properly deferred to the Industrial Commission's expertise, the Court would have affirmed the Commission's disability award without hesitation. This is precisely the result that should now be achieved as the Utah Supreme Court reviews and reverses Crosland.

B. Conflict with Holloway.

The Utah Supreme Court, by virtue of the concurring opinions of Justices Zimmerman and Howe in Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986), has specifically indicated that entirely latent, undetectable, asymptomatic preexisting conditions, when aggravated by an industrial injury, clearly trigger the higher legal causation analysis under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The existence of a latent preexisting condition (which can be discovered by means of objective medical tests) is critical in a legal causation analysis, because, in Justice Zimmerman's words:

. . .the [important] question is whether the worker came to the workplace with a condition that increased his risk of injury. If he did and that condition contributed to the injury,

then Allen's higher standard of legal causation comes into play so as to place that worker on the same footing as one who did not come to work with a preexisting condition.

To rule otherwise would create the strong likelihood that a worker who has a preexisting condition and whose virtually inevitable injury simply happens to occur at work will be able to foist the cost of that injury on his employer when the workplace had little to do with causing the injury.

729 P.2d at 32. The public policy concern underpinning Justice Zimmerman's pronouncement is that Utah employers should be encouraged to hire individuals with preexisting disabilities and impairments. See, Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980).

Ignoring Justice Zimmerman's (and the Utah Supreme Court's) public policy concerns, the Utah Court of Appeals' analysis in Crosland proclaims that asymptomatic preexisting conditions are of no relevance in apportioning a permanent partial disability award. According to Crosland, Utah employers are to be held liable for their employees' medically identifiable asymptomatic preexisting conditions when those conditions directly contribute to the employees' industrial injuries. This holding completely undermines Justice Zimmerman's directive as to how asymptomatic preexisting conditions are to be handled. Crosland should be reviewed by this Court and reversed because it

runs counter to both the legal analysis and the public policy advanced in Holloway.

POINT III

**A WRIT OF CERTIORARI SHOULD BE GRANTED
PURSUANT TO RULE 46(c) OF THE UTAH RULES OF
APPELLATE PROCEDURE BECAUSE CROSLAND RADICALLY ALTERS
LONG-STANDING INDUSTRIAL COMMISSION PRACTICE.**

Rule 46(c) of the Utah Rules of Appellate Procedure provides that the Utah Supreme Court will grant a petitioner's request for Writ of Certiorari 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." A Writ of Certiorari should be granted in the present case pursuant to Rule 46(c) because the Crosland opinion has completely departed from the long-standing and well-accepted practice at the Industrial Commission of apportioning permanent partial disability awards between asymptomatic preexisting conditions and industrially-caused impairments.⁶

⁶The Workers Compensation Fund of Utah, as an amicus curiae, has set forth the historical practice before the Industrial Commission in its Certiorari brief. The Utah Self-Insurers' Association incorporates that section of the Workers Compensation Fund's brief by reference.

As this Court reviews the Workers Compensation Fund's explanation of the historical practice before the Industrial Commission, and the legislative intent underlying the 1988 amendment to § 35-1-66, it is vital for the Court to recognize how far the Crosland opinion has departed from the Industrial Commission's attempt to achieve consistency in analyzing permanent impairment issues in a variety of contexts. To fully understand the Industrial Commission's concern in this regard, the Supreme Court needs to recognize (1) what the term "permanent impairment" has meant to the Industrial Commission, and to all practitioners before the Industrial Commission, prior to Crosland, (b) the three major contexts in which the term "permanent impairment" has been consistently applied by the Industrial Commission, and (c) the explosion of litigation that will result because Crosland's definition of "permanent impairment" completely undermines the Industrial Commission's heretofore consistent and fair application of Utah's Workers Compensation law.

A. Definition of Permanent Impairment.

As discussed in the Certiorari Brief submitted by petitioner Young Electric Sign Company, the term "permanent impairment" is a medical term of art, defined only by qualified medical practitioners. For decades, those practitioners have

concluded that a permanent impairment can be assessed and rated on the basis of either a medical condition which results in impaired functioning or a completely asymptomatic physiological abnormality.⁷ (See the AMA Guides definition attached as Addendum "C.") Clearly, the Crosland panel overstepped the bounds of judicial restraint in attempting to redefine a medical term of art which (1) they are not qualified to define, and (2) which has already been defined by the American Medical Association, and followed by the Utah Industrial Commission for many years. On this basis alone the Crosland decision can and should be reversed.

B. Consistent Application of the Term "Permanent Impairment."

Using the medically established definition for "permanent impairment" (outlined above), the Utah Industrial Commission is daily faced with the task of consistently applying the term in three primary arenas -- (1) the assessment of whether an applicant's claim meets the higher standard of legal causation

⁷The Crosland court fails to distinguish the term "impairment" from the term "disability" when the court equates "permanent impairment" with "some deterioration or diminishment in function." 183 Utah Adv. Rep. at 37. As the AMA Guides (Addendum "C") explain, "'impairment' means an alteration of an individual's health status that is assessed by medical means. . . . Impairment gives rise to [functional] disability only when the medical condition limits the individual's capacity to meet demands that pertain to non-medical fields and activities." Guides, p. 2.

under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), (2) permanent partial disability claims under Utah Code Ann. § 35-1-66, and (3) permanent total disability claims under Utah Code Ann. § 35-1-69. In all three areas, the Industrial Commission has, for years, consistently applied the term "permanent impairment" to include both functional preexisting impairments, and latent asymptomatic preexisting conditions. (See footnote 6, supra.) The Crosland opinion completely disrupts the Industrial Commission's heretofore consistent application of the term.

After Crosland, the Industrial Commission is left with the prospect of applying one meaning of "permanent impairment" (and "asymptomatic condition") to the higher legal causation analysis (pursuant to Holloway, supra), while applying a completely different definition of "permanent impairment" in its analysis of a **permanent partial disability claim**. An application of different definitions for the same medical term of art makes absolutely no sense and will lead to burgeoning confusion and inconsistency in Industrial Commission adjudication of workers compensation claims.

The inconsistency and confusion in Industrial Commission practice spawned by Crosland will be increased when the Commission is faced with the question of whether the

Holloway analysis of asymptomatic conditions or the Crosland asymptomatic condition analysis applies in the context of **permanent total disability claims.**⁸ Again, the same treatment of asymptomatic conditions (and the same definition of "permanent impairment") should apply across the board, whether a claim qualifies as a permanent partial disability claim or permanent total disability claim. The confusion arising from inconsistent definitions applicable to the same medical term of art cannot be allowed to stand. Crosland should be taken up on certiorari and reversed.

C. The Explosion of Litigation.

As noted above, the Crosland decision has now opened the floodgates for an invidious form of Industrial Commission litigation which has previously been prevented by a unified definition of "permanent impairment." Following Crosland, counsel for injured employees will argue that the higher legal causation standard under Allen cannot be triggered by the existence of an asymptomatic preexisting condition because our very own Utah Court of Appeals has held that such a condition

⁸Under Utah Code Ann. § 35-1-69, the Employers Reinsurance Fund shares liability with the employer in permanent total disability cases provided the claimant has "at least a 10% whole person permanent impairment from any cause or origin" The Industrial Commission must now puzzle over whether a Holloway or Crosland analysis of asymptomatic preexisting conditions should apply to § 35-1-69.

cannot be the basis for apportionment of a permanent partial disability claim.

The explosion in Industrial Commission litigation will also be fueled by the Employers' Reinsurance Fund's assertion that the Crosland definition of "permanent impairment" must apply in permanent total disability cases as well as in permanent partial disability cases. Prior to Crosland, the administrator of the Employers' Reinsurance Fund routinely accepted apportionment on the basis of an injured employee's asymptomatic preexisting condition. Crosland has changed this practice. Employers will be now responsible for the payment of all of an employee's permanent total disability claim despite the existence of a profound (and often "eggshell") asymptomatic preexisting condition. Crosland's likely effect on the volume and intensity of Industrial Commission litigation, not to mention its impact on the appeals from that litigation to Utah's higher courts, is a frightful prospect. The Utah Supreme Court should take immediate action to shut the floodgates.

POINT IV

A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 46(d) OF THE UTAH RULES OF APPELLATE PROCEDURE BECAUSE CASE DEFINITION OF "PERMANENT IMPAIRMENT" IS AN ISSUE OF FIRST IMPRESSION FRAUGHT WITH PROFOUND PUBLIC POLICY RAMIFICATIONS.

Rule 46(d) of the Utah Rules of Appellate Procedure provides that the Utah Supreme Court will grant a petitioner's request for a Writ of Certiorari 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." Pursuant to Rule 46(d), the Utah Supreme Court should grant the requested Writ of Certiorari and should review the Crosland panel's attempt to redefine "permanent impairment," an issue of first impression for Utah's appellate courts. This redefinition has extremely profound and wide-sweeping public policy implications.

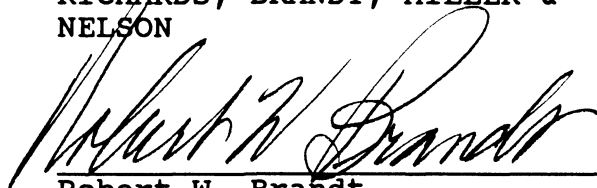
As discussed in Point III above, the Utah Court of Appeals redefinition of "permanent impairment" will not only spawn needless litigation, but it will likely have an extremely adverse impact on Utah employers. If the Crosland definition of "permanent impairment" is used within the context of the higher legal causation analysis under Allen, or for the purpose of apportioning liability to the Employers' Reinsurance Fund in the context of permanent total disability claims, employers will be forced to shoulder the burden of potentially exorbitant

disability awards based on medical conditions not caused by their employees' industrial injuries. The whole nature of how employers do business in Utah will be fundamentally changed by Crosland. Utah employers may attempt to screen out employees who have objectively definable (but nevertheless asymptomatic) preexisting conditions. This effort on the part of Utah employers flies directly in the face of the public policy traditionally advanced by Utah's Workers Compensation statutes and Utah Supreme Court decisions like Capitano, *supra*, and Holloway, *supra*. Prior to Crosland, the express public policy has been to encourage employers to hire workers who have preexisting conditions--asymptomatic or otherwise--by ensuring those employers that they will not be left economically responsible for astronomical workers compensation disability awards which relate entirely to preexisting conditions. See, Intermountain Health Care v. Ortega, 562 P.2d 617 (Utah 1977) (Utah employers are not responsible for the payment of permanent partial disability compensation either for manifested or quiescent preexisting conditions). In a nutshell, Crosland completely undermines the well-established public policy of Utah's workers compensation scheme.

For this reason, and the reasons set forth above, Crosland should be reviewed on Certiorari and reversed.

Dated this 20th day of May, 1992.

RICHARDS, BRANDT, MILLER &
NELSON

A large, stylized handwritten signature in dark ink, appearing to read "Robert W. Brandt", is written over a horizontal line.

Robert W. Brandt
Michael E. Dyer
Brad C. Betebenner
Michael A. Peterson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 20 day of May, 1992, to the following counsel of record:

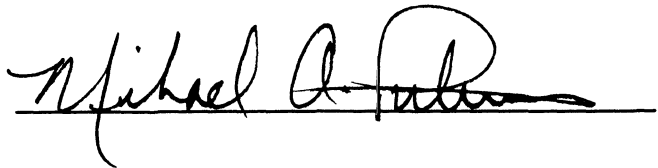
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Industrial Commission of Utah
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Salt Lake City, Utah 84111

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

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ADDENDA

ADDENDUM A

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:

Virginius 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 pre-existing asymptomatic defect and that the industrial accident caused the defect to become acute and symptomatic. The insurance adjustor'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).¹ 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."² *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).³ 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*.⁴ 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.⁵ 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.⁶ 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 apportioned 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

ADDENDUM B

porary disability lasts more than fourteen days, compensation shall also be payable for the first three days after the injury is received. 1973

35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive $66\frac{2}{3}\%$ of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% 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, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in Chapters 1 and 2 of this title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom. 1981

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

(1) If the injury causes temporary partial disability for work, the employee shall receive weekly compensation equal to:

(a) $66\frac{2}{3}\%$ of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of injury; 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 exceed 100% of the state average weekly wage at the time of injury.

(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. 1988

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 |

(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 |

For the loss of	Number of Weeks
(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 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 $1\frac{1}{2}\%$ 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 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 total of 312 weeks in compensation be required to be paid.

35-1-67. Permanent total disability — Amount of payments — Rehabilitation.

(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 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 $66\frac{2}{3}\%$ 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 each 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 (a) shall be 50% 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.

(viii) a statement of the reasons why the petitioner is entitled to relief

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings

(b) The Utah Rules of Evidence apply in judicial proceedings under this section 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 [Rules of the Utah Supreme Court], 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 dem-

onstrate a fair and rational basis for the inconsistency, or

(iv) otherwise arbitrary or capricious

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 1987

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that

(a) the agency violated its own rules in denying the stay, or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter,

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief,

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings, and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances 1987

63-46b-19. Civil enforcement.

(1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts

(b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement

(c) Venue for an action seeking civil enforcement of an agency's order shall be determined by

ADDENDUM C

Guides to the Evaluation of Permanent Impairment

Third Edition

Alan L. Engelberg, M.D., M.P.H.
Editor

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Chapter 1

Concepts of Impairment Evaluation

1.0 Introduction

The *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.¹ 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,² 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.³ 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,⁴ 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

⁴ 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.⁵ 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.⁶

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 disabilities⁷...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 impairment⁸ 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...⁹ (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.

ADDENDUM D

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. Betenbender, 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 CONDER¹, 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."

This
opinion
is
affirmed
(see
p. 3)

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*.²

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.³ 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.⁴

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).

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 Hilde 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).⁵

"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 25.⁶

Therefore, the only two issues⁷ 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.⁸ 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

"[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.⁹ "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.