

1992

Gary E. Crosland v. Board of Review of the Industrial Commission of Utah: 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,

v.

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

Defendants/Petitioners.

Court of Appeals No. 910291CA

Priority No. 16

920247

PETITION FOR WRIT OF CERTIORARI

Petition for review of the decision of the Utah Court of Appeals

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MAY 20 1992

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UTAH

IN THE UTAH SUPREME COURT

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	:	
Applicant/Respondent,	:	
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v.	:	Court of Appeals No. 910291CA
	:	
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COMPANY; and SMITH	:	
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	:	
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This Petition for Writ of Certiorari hereby incorporates the amicus curiae briefs submitted by the Utah Self-Insurers' Association and The Workers' Compensation Fund of Utah. This Petition refers to the amicus briefs where necessary, but will not repeat the arguments made in the briefs of the Utah Self-Insurers Association and The Workers' Compensation Fund of Utah.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Utah Supreme Court should grant a Writ of Certiorari pursuant to Rule 46(c), Utah Rules of Appellate Procedure, on the grounds that Crosland v. Board of Review of Industrial Commission, 183 Utah Adv. Rep. 35 (Utah App. 1992), radically departed from: (a) the explicit language in the statute and (2) the accepted and usual finding of fact by the Medical Panel that applicant's permanent impairment from developmental abnormalities to the spine contributed to his industrial injury and constituted "any permanent impairment that existed prior to an industrial accident..." within the meaning of § 35-1-66, Utah Code Annotated (1953, as amended).

2. Whether the Utah Supreme Court should grant a Writ of Certiorari pursuant to Rule 46(b) on the grounds that Crosland v. Industrial Commission contravenes the standard of review established in Morton v. Tax Commission, 814 P.2d 581 (Utah 1991) and the analysis of asymptomatic conditions in Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986).

3. Whether the Utah Supreme Court should grant a Writ of Certiorari under Rule 46(a) on the grounds that there is a direct conflict between the decisions Crosland v. Industrial

Commission, 183 Utah Adv. Rep. at 35, and Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990).

4. Whether the Utah Supreme Court should grant a Writ of Certiorari under Rule 46(d) on the grounds that Crosland v. Industrial Commission profoundly disrupts the deep-seated public policy objective 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

Petitioners seek review by Petition for Writ of Certiorari of the Utah Court of Appeals decision Crosland v. Industrial Commission, 183 Utah Adv. Rep. at 35. (See Appendix "A.")

JURISDICTION OF THE SUPREME COURT

The opinion of the Utah Court of Appeals was filed on March 20, 1992. Jurisdiction to consider the Petition for Writ of Certiorari sought by petitioners is conferred upon the Utah Supreme Court by Article VIII, § 3, Utah Constitution; §§ 78-2-2(3) and (5), Utah Code Annotated (1953, as amended); and, Rule 45, Utah Rules of Appellate Procedure.

CONTROLLING STATUTES AND RULES

The following provisions of Utah Code Annotated (1953, as amended) are controlling and attached in Appendix "B":

§ 35-1-44(4) § 35-1-66

§ 35-1-44(6) § 35-1-69

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 is attached in Appendix "C."

STATEMENT OF THE CASE

This claim was filed by applicant for an industrial accident while employed at Young Electric Sign Company. Applicant injured his low back and all physicians agreed that claimant had a preexisting, asymptomatic condition that was aggravated by the industrial injury. Applicant filed a claim before the Industrial Commission of Utah against his employer.

On February 28, 1990, an evidentiary hearing on applicant's claim was held before an Administrative Law Judge ("ALJ") of the Industrial Commission of Utah. (R.36.) On March 30, 1990, the Industrial Commission mailed its Summary of Medical Record and Testimony to the parties. (R.56-61.) No objections were filed by any party to the Summary. On April 27, 1990, the ALJ appointed Drs. Madison Thomas and Wallace Hess as medical panel members to make an impartial evaluation of applicant's claim. (R.56-57.) On June 21, 1990, the Industrial Commission mailed copies of the Report of Medical Panel dated May 8, 1990 to all parties. (R.65.)

On August 24, 1990, the ALJ issued the Findings of Fact, Conclusions of Law, and Order which adopted the Report of Medical Panel and ordered defendants to pay temporary total and permanent partial compensation in excess of \$12,000, interest, and all medical expenses. (R. 77-77.)

On September 11, 1990, applicant filed a Motion for Review and objected to the failure of the ALJ to award an additional ten percent permanent partial compensation for the aggravation of

claimant's preexisting, asymptomatic developmental abnormalities. (R. 79-82.) Defendants responded to the Motion. (R. 86-90). On April 25, 1991, the Commission issued its Order Denying Motion for Review and affirmed the ALJ's Order. (R. 114-117).

On May 24, 1991, applicant filed a Petition For Review with the Utah Court of Appeals. (R. 120.) On March 20, 1992, the Utah Court of Appeals filed its opinion. (See Appendix "A.")

STATEMENT OF FACTS

The Report of Medical Panel found that applicant was stable and had a twenty percent whole person permanent impairment rating with one-half, ten percent, specifically attributed to preexisting, developmental abnormalities in the spine. (R. 183-184.) The Medical Panel explained it was "unlikely that he [applicant] would have had the degree of difficulty had he not had the developmental abnormality." (R. 182.) The Panel explicitly found that the developmental abnormality and the industrial accident were "both . . . contributory" (R. 182-183.)

The Medical Panel described the claimant's injuries as follows:

	% Whole Man	09 Feb 1989	Preexisting Condition(s)
Low back: Spondylolisthesis unoperated with limited range of motion	20%	1/2	1/2

The industrial injury did medically aggravate a pre-existing condition of the applicant. Comment: As indicated previously, this was an asymptomatic condition, but an abnormal status with a present to a sufficient degree to be contributory to his present impaired status. (R. 184-85.)

On February 9, 1989, the claimant and another employee were moving a sign that weighed approximately 200 pounds and he twisted his upper torso to move around a corner and injured his low back. (R. 73.) Applicant finished his work shift that day, but the next day he was directed by his employer to obtain medical treatment. (R. 73.) The claimant's CT scan showed that there was spondylolysis at L-5 and preexisting lumbar disc disease at L3-4 and L5-S1 that were clearly not caused by the injury on the preceding day. (R. 74.) Applicant's treating physician gave the claimant a twenty percent whole person impairment rating on September 28, 1989. (R. 74.) In January 1990, the applicant was rated as having a work capacity to perform medium/light work. (R. 74.)

In the Findings of Fact, applicant was reported to never had any prior back problems and the ALJ concluded as follows:

The panel found that the applicant was medically stable as of the date of examination (May 8, 1990) and that the applicant had a 20% whole person impairment related to the industrial injury, with 1/2 or 10% of that rating attributable to the applicant's asymptomatic pre-existing spondylolisthesis and 10% attributable to the industrial injury.

(R. 74-75.)

In the Motion for Review, claimant objected to the award of permanent partial disability compensation on the grounds that he was entitled to an additional ten percent in permanent partial compensation for the preexisting, asymptomatic developmental abnormalities. (R. 79-82.) In the Order Denying Motion for Review, the Industrial Commission found no evidence that applicant's low

back was symptomatic. (R. 114-115.) However, the Commission ruled that the claimant's preexisting spondylolisthesis (breaking down or dissolution of the body of the vertebrae) and spondylolisthesis (forward movement of the body of one vertebrae on the lower vertebrae below it) caused one-half of applicant's twenty percent whole person impairment rating. (R. 114-115.) The Commission held that the findings of the ALJ had ample support in the evidence. The Commission noted that in the opinion of the ALJ and the Medical Panel the job injury and preexisting conditions were "contributory." (R. 115.) The Commission found that the allocation between the preexisting condition and the industrial injury of ten percent was reasonable. (R. 115.) The Commission held that an identical allocation had been approved in Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah 1990). (R. 115.)

The Utah Court of Appeals reversed the rulings by the ALJ and Commission and awarded applicant compensation for the ten percent impairment that preexisted the industrial accident.

ARGUMENT I

A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 46(c), UTAH RULES OF APPELLATE PROCEDURE, FOR THE REASON THAT THE INTERPRETATION OF § 35-1-66 BY THE UTAH COURT OF APPEALS CONTRAVENES THE EXPLICIT LANGUAGE IN THE STATUTE AND THE GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT

Rule 46(c), Utah Rules of Appellate Procedure, provides that a Writ of Certiorari will be granted when a decision by the Utah Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings or has so sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision." The Crosland v. Board of

Review, 183 Utah Adv. Rep. at 37, opinion is a sweeping change in the accepted and usual course of claims before the Commission.

The Utah Court of Appeals incorrectly interpreted the terms "any physical impairment" in § 35-1-66 to mean "functional 'permanent impairment'" in reliance on the language in the statute, legislative history, and decisions in other states. Id. at 37. The court failed to cite or rely on the usual, accepted, and precise definition of "impairment" in the Guides to the Evaluation of Permanent Impairment 2-3 (A. Engelberg 3rd ed. 1988). Section 35-1-66 does not expressly or impliedly restrict impairment to functional impairment. The legislative history cited by the court only describes compensation "based on physical impairment caused by an industrial accident[,]" without any mention or reference to functional impairment. Id. at 37 (quoting Laws of Utah ch. 116 H.B. no. 218 preamble.) The court was persuaded by authority from states where the terms "impairment" and "disability" were confused. Id. (citations omitted). By contrast, the term "impairment" in § 35-1-66 is not limited or clarified by language that connotes disability or functional diminishment.

The Utah Court of Appeals reversed the ALJ and Commission and found that applicant was entitled to twenty percent permanent partial compensation under § 35-1-66. The court, however, did not disagree with any of the findings of the Medical Panel. Thus, the court affirmed that ten percent of applicant's permanent impairment existed prior to the industrial accident, that ten percent of the impairment was caused by the accident, and that the asymptomatic

developmental abnormalities were contributory to the industrial injury.

The first sentence and the second to the last paragraph of § 35-1-66 are dispositive of this appeal. The first sentence of § 35-1-66 provides that "[a]n employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 35-1-98 may receive a permanent partial disability award from the commission." The requirement that a claimant may receive permanent partial disability benefits only for permanent impairment caused by an industrial accident is made explicit in the second to the last paragraph of § 35-1-66 which provides that "[p]ermanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident."

The language of § 35-1-66 cannot be clearer that permanent partial disability compensation cannot be paid for permanent impairment that preexists the industrial injury. The terms "any permanent impairment" were not defined in the Workers' Compensation Act until recent amendments defined "impairment" and "disability" in §§ 35-1-44(4) and (6), Utah Code Annotated (1991). Impairment is defined as "a purely medical condition reflecting any anatomical or functional abnormality or loss." § 35-1-44(6). "'Disability' means becoming medically impaired as to function." § 35-1-44(4). These amendments were not in effect at the time of applicant's injury, but the definitions in §§ 35-1-44 merely codified the well-settled meanings of the terms "impairment" and "disability."

As with many terms used in the Workers' Compensation Act, the terms "any permanent impairment" are exclusively medical matters for physicians. The parties, counsel, the ALJ, and the Industrial Commission, cannot offer opinions on the existence or amount of permanent "impairment" an injured worker may have. In the present case, the applicant's permanent impairment was determined by the treating and examining physicians, including the Medical Panel, based solely on the standards in the American Medical Association Guides to the Evaluation of Permanent Impairment (A. Engelberg 3rd ed. 1988). This treatise is devoted entirely to the evaluation of "permanent impairment" and is the authoritative publication that physicians rely on to perform impairment ratings.

The Guides to the Evaluation of Permanent Impairment defines "impairment" and "disability" as follows:

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.

Id. at 2-3 (emphasis in original).

The Guides and §§ 35-1-44(4) and (6) have substantially similar definitions of "impairment" and "disability." The Medical Panel assessed applicant's impairment by medical means strictly in accordance with these medical definitions. The ALJ and Commission

were obligated to follow these medical assessments and adopted them when the Report of Medical Panel was incorporated into the rulings. The opinions by the physicians on the extent of permanent impairment are necessarily medical matters. The independent, impartial Medical Panel appointed by the Industrial Commission of Utah concluded that there was a ten percent permanent partial impairment that existed prior to the industrial accident and a ten percent permanent partial impairment that was caused by the accident. Applicant did not object to the Report of Medical Panel or offer evidence in opposition to the Report of Medical Panel on the ten percent preexisting permanent partial impairment. Thus, it is undisputed that applicant received ten percent impairment as a result of the industrial accident and a ten percent permanent impairment that was not a result of the industrial accident within the meaning of the first sentence of § 35-1-66.

The only dispute is whether the applicant is entitled to be paid for the ten percent permanent impairment that existed prior to the industrial accident pursuant to the second to the last paragraph of § 35-1-66 as the statute was amended in 1988. The parties do not disagree with the findings of the Medical Panel that the claimant's preexisting developmental abnormalities in his spine were asymptomatic until aggravated by the industrial accident. The absence of symptoms, however, does not mean that claimant did not have a permanent impairment prior to the industrial accident, it merely means that an expert opinion on the existence of permanent impairment was based on medical evidence other than symptoms.

ARGUMENT II

A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 46(b), UTAH RULES OF APPELLATE PROCEDURE, ON THE GROUNDS THAT THERE IS A CONFLICT WITH DECISIONS BY THE UTAH SUPREME COURT

In the present case, petitioners are entitled to a Writ of Certiorari in accordance with Rule 46(b), Utah Rules of Appellate Procedure, on the grounds that the Crosland decision conflicts with the opinions Morton v. Tax Commission, 814 P.2d at 581 (Utah 1991), and Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986). Petitioners hereby incorporate the arguments in the briefs of the Utah Self-Insurers' Association and The Workers' Compensation Fund.

In Morton v. Tax Commission, 814 P.2d 581, 583 (Utah 1991), this Court noted that administrative cases filed after 1988 would be subject to review by appellate courts under the Utah Administrative Procedure Act. Pursuant to the UAPA, interpretation of statutory terms would be given deference if there was "an explicit or implicit grant of discretion . . . in the governing statute." Id. at 588. Where there is no discernable legislative intent, the choice among interpretations is a policy decision and "[t]he agency that has been granted authority to administer that statute is the body to make such a determination." Id. at 589. Hence, without discernable legislative intent, an appellate court should not substitute its interpretation of an issue for the agency's, since "it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue." Id.

The Crosland opinion cites the proper standard of review, but fails to apply the standard. The court declared that pursuant to Morton it was required to interpret an 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. However, the court was obligated to defer to the Commission's interpretation of "permanent impairment" under Morton, since the court failed to describe any discernable express or implied legislative intent. Moreover, pursuant to the Utah Workers' Compensation Act the Commission has discretion to apply its expertise as discussed in the brief of the Utah Self-Insurers' Association.

In Holloway v. Industrial Commission, 729 P.2d 31, 32 (Utah 1986), Justices Zimmerman and Howe joined in a concurring opinion and specifically rejected the theory that preexisting conditions had to evidence manifest symptoms as a prerequisite to apportionment. Latent, preexisting conditions had important public policy considerations for impaired and disabled employees:

[T]he 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.

Id.

The Utah Court of Appeals accepted the applicant's fallacious argument that the absence of symptoms prior to the industrial accident was tantamount to an absence of permanent impairment. This argument contradicts the undisputed medical evidence in the Report

of Medical Panel and the Guides to the Evaluation of Permanent Impairment that claimant had a ten percent permanent impairment that existed prior to the industrial accident. The Court of Appeals erroneously failed to defer to the Commission's finding that the undisputed medical evidence was that claimant had a ten percent permanent impairment that preexisted the industrial accident under an abuse of discretion standard of review in its interpretation of the terms "any permanent impairment." Consequently, Crosland rejects the public policy concerns in Holloway v. Industrial Commission that asymptomatic, preexisting conditions are the sole responsibility of the employer and cannot be apportioned in a permanent partial disability award.

ARGUMENT III

A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 46(a),
UTAH RULES OF APPELLATE PROCEDURE, SINCE THERE IS A CONFLICT
BETWEEN PANELS OF THE UTAH COURT OF APPEALS

Petitioners are entitled to a Writ of Certiorari on the grounds that the opinions of panels of the Utah Court of Appeals in Crosland v. Board of Review and Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990), directly conflict, within the meaning of Rule 46(a), Utah Rules of Appellate Procedure. In Crosland, the Utah Court of Appeals ruled that the Commission shall not apportion permanent partial disability compensation between asymptomatic, preexisting conditions and an industrial injury. In Nyrehn v. Industrial Commission the Utah Court of Appeals remanded the claim and ordered the Commission to apportion the permanent total disability compensation between the asymptomatic, preexisting

conditions and the industrial injury. Thus, there is a manifest conflict between these decisions by the Utah Court of Appeals.

In Nyrehn the court found that the critical finding of fact in a claim that includes a preexisting permanent impairment is whether the preexisting impairment contributed to the industrial accident, not whether it was asymptomatic. The ALJ awarded permanent total disability benefits to the claimant, but found that the applicant's preexisting, asymptomatic spondylolisthesis caused 25% of her permanent impairment and only the impairment in excess of 25% was compensable. The Industrial Commission overruled the ALJ and denied applicant's claim for failure to meet the higher standard of legal causation required for preexisting injuries by Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The court rejected the Commission's application of a higher legal standard under Allen on the grounds that there was no medical evidence that the asymptomatic, preexisting "condition contributed to the industrial injury." 800 P.2d at 334 (citations omitted).

The court admonished the Commission and the ALJ to make express findings of fact on all material issues, particularly whether the applicant's preexisting condition contributed to her injury and remanded the claim for an award of benefits in accordance with the allocation of permanent impairment between the preexisting and industrial injuries on the grounds that the applicant's claim satisfied the higher standard of legal causation under the Allen decision. Id.

In the present case, the Medical Panel made two distinct findings of fact that the asymptomatic, preexisting condition

contributed to the industrial injury and that the claimant would not have had the degree of difficulty had he not had the developmental abnormality.

Crosland found that § 35-1-66 does not apportion between the employer and the employee for symptoms resulting from one industrial accident. 183 Utah Adv. Rep. at 37. The court noted in a footnote that apportionment was only allowed between the employer and the Employer's Compensation Fund [sic] under § 35-1-69. Id. at n. 6 38. However, the court failed to recognize that in Utah the sole basis for apportionment depends on whether the claim is for permanent total or permanent partial disability. Whether apportionment is between the employee and the Employers' Reinsurance Fund is irrelevant. The 1988 amendments eliminated apportionment between the employer and the Employers' Reinsurance Fund, but had no affect on apportionment. Indeed, the ALJ noted in the conclusions of law that § 35-1-69 required "that the carrier pay only for the impairment that is related to the industrial injury, and unfortunately, the Employers' Reinsurance Fund no longer is required to contribute with respect to impairment aggravated by the industrial injury." Furthermore, the Utah Court of Appeals held that the "amendment does more than to [sic] clarify that an employer is free from liability for an employee's preexisting ratable functional impairment not caused by the industrial accident." The court failed to cite any authority for this principle and the term "functional" is not part of § 35-1-66.

The assessment of permanent impairment is a medical matter reserved exclusively for physicians; not lawyers, judges, or

commissioners. The extent of a claimant's disability is assessed by nonmedical means, but interpretations of disability are entirely different and inapplicable to a statute specifically limited to "any permanent impairment." In the present case, the "impairment" from applicant's preexisting, asymptomatic developmental abnormalities was an express finding of fact by the impartial Medical Panel. Section 35-1-66 mentions "disability," but the statute explicitly states that "compensation may not be paid for any permanent impairment that existed prior to an industrial accident."

ARGUMENT IV

A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 46(d), UTAH RULES OF APPELLATE PROCEDURE, ON THE GROUNDS THAT IT IS AN IMPORTANT STATE LAW QUESTION OF FIRST IMPRESSION

Petitioners seek a Writ of Certiorari pursuant to Rule 46(d), Utah Rules of Appellate Procedure, on the grounds that the Crosland opinion is an issue of first impression to this Court and vitally affects all Utah employers and employees. Petitioners hereby incorporate the arguments in the briefs of the Utah Self-Insurers' Association and The Workers' Compensation Fund of Utah. Indeed, the fact that a majority of the employers in Utah, through their representatives, have filed amicus curiae briefs shows the significant concern that Crosland will adversely impact the traditional exposure for workers' compensation insurers and self-insurers.

The 1988 amendments did not eliminate apportionment between preexisting and industrial injuries in § 35-1-66. The 1988 amendment to § 35-1-66 retained the accepted and usual principle

first mandated in Intermountain Health Care v. Ortega, 562 P.2d 617 (Utah 1977), that an employer is not liable for permanent partial disability compensation attributed to manifested or quiescent preexisting conditions. More recently, in Large v. Industrial Commission, 758 P.2d 954, 957 (Utah App. 1988), the court noted that "where the disability is the result of preexisting conditions and not an industrial accident, a claimant is not entitled to disability benefits."

The legislative intent for amendment of § 35-1-66 was to eliminate the liability of the Second Injury Fund for permanent partial disability compensation, not to transfer liability for preexisting conditions from the Second Injury Fund to the employer. (See affidavit of Stuart L. Poelman attached in Appendix "D.")

The Industrial Commission cannot consistently apply the redefined terms "any permanent impairment" as required by the Crosland decision in the three areas that rely on the identical terms: §§ 35-1-66 and 69, for permanent total and permanent partial disability, and claims under the higher standard of legal causation under Allen v. Industrial Commission, 729 P.2d at 15. After Crosland, the Commission must apply different meanings for "any permanent impairment" for the higher legal causation analysis, and the permanent total and permanent partial disability compensation. Under Crosland, the higher legal causation test cannot be triggered for asymptomatic, preexisting conditions. Similarly, the Employers' Reinsurance Fund may now allege that the definition of "permanent impairment" entitles the Employers' Reinsurance Fund to refuse to reimburse insurers in permanent total

disability claims where there is evidence of any asymptomatic, preexisting condition. These different definitions for the same medical term of art will lead to unnecessary inconsistency, confusion, and litigation. If the Crosland definition is used in these other contexts employers will be inequitably asked to shoulder exorbitant disability awards and the whole nature of how employers do business in Utah will be changed. Utah employers may attempt to hire workers without asymptomatic, preexisting impairments in direct contravention of Holloway v. Industrial Commission and other decisions by the Utah Supreme Court.

CONCLUSION

The Workers' Compensation Act mandates that an employer is only liable for permanent impairment attributed to an industrial accident, not for preexisting permanent impairment. The ALJ and Industrial Commission must merely make findings of fact that any asymptomatic, preexisting impairment was permanent and contributory. In the present case, there were express findings that the preexisting, asymptomatic developmental abnormalities in claimant's spine were permanent and contributory. Section 35-1-66 does not expressly or impliedly require "functional" or "disabling" impairment and the Utah Court of Appeals improperly redefined the statute contrary to the expert medical evidence and the Guides to the Evaluation of Permanent Impairment. Disability is assessed by nonmedical means and the court would have been entitled to interject itself in the interpretation of claimant's disability. However, under the Guides impairment is a medical matter that is assessed exclusively by medical means and the court improperly

substituted its definition of the term "impairment" for the precise meaning used by the Panel. Applicant should have objected to the Report of Medical Panel in the event he disagreed with the Panel's findings.

Pursuant to the Utah Workers' Compensation Act, § 35-1-66, petitioners are only liable for applicant's permanent impairment in excess of the ten percent permanent impairment that the Medical Panel found existed prior to the industrial accident.

Petitioners are entitled to a Writ of Certiorari under Rule 46, Utah Rules of Appellate Procedure, on the grounds that Crosland directly conflicts with decisions by the Utah Supreme Court and the Utah Court of Appeals. In addition, Crosland drastically alters the traditional rule that the employer is not liable for preexisting conditions in accordance with sound public policy to hire impaired workers.

WHEREFORE, petitioners, Young Electric Sign Co. and Smith Administrators, now doing business as Administrative Services, Inc., respectfully request that the decision Crosland v. Industrial Commission be reversed and that the findings of fact and conclusions of law of the ALJ and Industrial Commission of Utah be affirmed.


DATED this 20 day of May, 1992.


J. Angus Edwards
PURSER, OKAZAKI & BERRETT, P.C.

CERTIFICATE OF SERVICE

I, J. Angus Edwards, certify that on May 20, 1992, I served a copy of the attached PETITION FOR WRIT OF CERTIORARI upon Virginus Dabney, counsel for the Applicant in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Virginus Dabney
DABNEY & DABNEY
350 South 400 East
Suite 202
Salt Lake City, Utah 84111



J. Angus Edwards
PURSER, OKAZAKI & BERRETT, P.C.

APPENDIX

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

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 adjuster's examining physician determined that Crosland had preexisting, asymptomatic spondylolysis (breaking down or dissolution of the body of the vertebra) and spondylolisthesis (forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it), adding that all the present symptoms Crosland suffered were related to the industrial injury. Crosland had never had any back problems or required medical treatment for his back prior to this accident.

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

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

STANDARD OF REVIEW

This proceeding is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Ann. §§63-46b-1 to-22 (1989 & Supp. 1991).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 "infirmary" 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 apportions between the employer and the fund under this section and does not address the issue of apportionment between the employer and the employee.

Cite as
183 Utah Adv. Rep. 38

IN THE UTAH COURT OF APPEALS

Louise D. STROLLO,
Plaintiff and Appellant,

v.

David STROLLO,
Defendant and Appellee.

No. 910237-CA
FILED: March 23, 1992

Third District, Tooele County
Honorable David S. Young

ATTORNEYS:

David G. Challed, Salt Lake City, for
Appellant

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

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

BILLINGS, Associate Presiding Judge:

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

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

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

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

not it would need additional employees, would perform the work in the normal course of its trade or business.

(d) Any person who is engaged in constructing, improving, repairing, or remodelling a residence that he owns or is in the process of acquiring as his personal residence may not be considered an employee or employer solely by operation of Subsection (a).

(e) A partner in a partnership or an owner of a sole proprietorship may not be considered an employee under Subsection (a) if:

(i) the person is not included as an employee under Subsection 35-1-43(3)(a); or

(ii) the person is included as an employee under Subsection 35-1-43(3)(a), but his employer fails to insure or otherwise provide adequate payment of direct compensation, which failure is attributable to an act or omission over which the person had or shared control or responsibility.

(f) For purposes of Subsection (e)(ii):

(i) a partner of a partnership and an owner of a sole proprietorship are presumed to have had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation, the burden of proof being on any person seeking to establish the contrary; and

(ii) evidence affirmatively establishing that a partner of a partnership or an owner of a sole proprietorship had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation may only be overcome by clear and convincing evidence to the contrary.

(g) A director or officer of a corporation may not be considered an employee under Subsection (a) if the director or officer is excluded from coverage under Subsection 35-1-43(3)(b). 1988

35-1-43. "Employee," "worker" or "workmen," and "operative" defined — Mining lessees and sublessees — Partners and sole proprietors — Corporate officers and directors — Real estate agents and brokers.

(1) As used in this chapter, "employee," "worker" or "workmen," and "operative" mean:

(a) each elective and appointive officer and any other person, in the service of the state, or of any county, city, town, or school district within the state, serving the state, or any county, city, town, or school district under any election or appointment, or under any contract of hire, express or implied, written or oral, including each officer and employee of the state institutions of learning; and

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

(2) Unless a lessee provides coverage as an employer under this chapter, any lessee in mines or of mining property and each employee and

the lessee shall be covered for compensation by the lessor under this chapter, and shall be subject to this chapter and entitled to its benefits to the same extent as if they were employees of the lessor drawing such wages as are paid employees for substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for that type of work.

(3) (a) A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under this chapter until this notice has been given. For premium rate making, the insurance carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(b) A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes. 1988

35-1-44. Definition of terms.

The following terms as used in this title shall be construed as follows:

(1) "Average weekly earnings" means the average weekly earnings arrived at by the rules provided in Section 35-1-75.

(2) "Award" means the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(3) "Compensation" means the payments and benefits provided for in this title.

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

(5) "General order" means an order applying generally throughout the state to all persons, employments, or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(6) "Impairment" is a purely medical condition

malty or loss. Impairment may be either temporary or permanent, industrial or nonindustrial.

(7) "Order" means any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at, or decision made, by the commission.

(8) (a) "Personal injury by accident arising out of and in the course of employment" includes any injury caused by the willful act of a third person directed against an employee because of his employment.

(b) The term does not include a disease, except as the disease results from the injury.

(9) "Safe" and "safety," as applied to any employment or place of employment, means the freedom from danger to the life, health, or welfare of employees reasonably permitted by the nature of the employment.

(10) "Welfare" means comfort, decency, and moral well-being. 1991

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

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee. 1988

35-1-46. Employers to secure workers' compensation benefits for employees — Methods — Failure — Notice — Injunction — Violation.

(1) Employers, including counties, cities, towns, and school districts, shall secure the payment of workers' compensation benefits for their employees:

(a) by insuring, and keeping insured, the payment of this compensation with the Workers' Compensation Fund of Utah, which payments shall commence within 30 days after any final award by the commission;

(b) by insuring, and keeping insured, the payment of this compensation with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in this state, which payments shall commence within 30 days after any final award by the commission; or

(c) by furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner, and when due as provided for in this title, which payments shall commence within 30 days after any final award by the commission. In these cases the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred, and may at any time change or modify its findings of fact herein provided for, if in its judgment this action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment

of compensation and the furnishing of medical, nurse, and hospital services, medicines, and burial expenses to injured employees and to the dependents of killed employees. The commission may in proper cases revoke any employer's privilege as a self-insurer.

(2) The commission is authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this chapter, from further operation of the employer's business, where the employer has failed to provide for the payment of benefits in one of the three ways provided in this section. Upon a showing of failure to so provide, the court shall enjoin the further operation of the employer's business until the payment of these benefits has been secured by the employer as required by this section. The court may enjoin the employer without requiring bond from the commission.

(3) If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission may give such employer five days' written notice by registered mail of such noncompliance and if the employer within said period does not remedy such default, the commission may file suit as provided in this section and the court is empowered, ex parte, to issue without bond a temporary injunction restraining the further operation of the employer's business. 1989

35-1-46.10. Notice of noncompliance to employer — Enforcement power of commission — Penalty.

(1) In addition to the remedies specified in Section 35-1-46, if the commission has reason to believe that an employer of one or more employees is conducting business without securing the payment of benefits in one of the three ways provided in Section 35-1-46, the commission may give that employer written notice of the noncompliance by certified mail to the last known address of the employer.

(2) If the employer does not remedy the default within 15 days after delivery of this notice, the commission may issue an order requiring the employer to appear before the commission and show cause why the employer should not be ordered to comply with the provisions of Section 35-1-46.

(3) If it is found that the employer has failed to provide for the payment of benefits in one of the three ways provided in Section 35-1-46, the commission may order any employer to comply with the provisions of Section 35-1-46.

(4) The commission may also impose, at the time of the hearing, a penalty against the employer of not more than one and one-half times the amount of the premium the employer would have paid for workers' compensation insurance had that employer been insured by the Workers' Compensation Fund of Utah during the period of noncompliance.

(5) This penalty shall be deposited in the Uninsured Employers' Fund created by Section 35-1-107 and used for the purposes of that fund. 1987

35-1-46.20. Requirements of any order of the commission — Court enforcement.

Any order issued by the commission under authority of Section 35-1-46.10 shall be in writing, shall be sent by registered mail to the last known address of the employer, and shall state the findings and order of the commission. The order shall specify its effective date, which may be immediate or may be at a later

shall also be payable for the first three
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 66⅔% 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 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) 66⅔% 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 35-1-98.

(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. 1990

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

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

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

In the case of the following injuries the compensation shall be 66⅔% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66⅔% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent children, but not to exceed 66⅔% of the state average weekly wage at the time of the injury per week, to be paid in routine pay periods not to exceed four weeks for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability:

For the loss of: Number of Weeks

(A) Upper extremity

(1) Arm

(a) Arm and shoulder (forequarter amputation) 218

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

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

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

(2) Hand

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

(2)(b) All fingers except thumb at metacarpophalangeal joint 101

(3) Thumb

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

(b) At interphalangeal joint 50

(4) Index finger

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

(b) At proximal interphalangeal joint 34

(c) At distal interphalangeal joint .. 18

(5) Middle finger

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

(b) At proximal interphalangeal joint 27

(c) At distal interphalangeal joint .. 15

(6) Ring finger

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

(b) At proximal interphalangeal joint 13

(c) At distal interphalangeal joint ... 8

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

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

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

The amounts specified in this section are all

of 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury for a total of 312 weeks. Compensation be required to be paid.

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

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

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

35-1-66.2. Harmful industrial noise defined.

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

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

(2) Harmful industrial noise is also defined as sound that results in acoustic trauma such as sudden instantaneous temporary noise or impulsive or impact noise exceeding 140 dB peak sound pressure levels.

(3) The Utah Occupational Safety and Health Division of the commission may conduct tests to determine the intensity of noise at places of employment. The administrative law judge may consider such tests, and any other tests taken by authorities in the field of sound engineering, as evidence of harmful industrial noise.

35-1-66.3. Loss of hearing defined.

Loss of hearing is defined as binaural hearing loss measured in decibels with frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (Hertz). If the average decibel loss at 500, 1,000, 2,000, and 3,000 cycles per second (Hertz) is 25 decibels or less, usually no hearing impairment exists.

35-1-66.4. Measuring hearing loss.

(1) The degree of hearing loss shall be established no sooner than six weeks after termination of exposure to the harmful industrial noise, by audiometric determination of hearing threshold level performed by medical or paramedical professionals recognized by the commission, as measured from 0 decibels on an audiometer calibrated to ANSI-S3.6-1969, American National Standard "Specifications for Audiometers" (1969).

(2) In any evaluation of occupational hearing loss,

cerned do not exceed the maximum provided for by law. 1990

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

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

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

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

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

(4) If it is determined that the employee is permanently and totally disabled, the employer or its insurance carrier shall be given credit for all prior payments of temporary total, temporary partial, and permanent partial disability compensation made as a result of the industrial accident. Any overpayment by the employer or its insurance carrier shall be reimbursed by the Employers' Reinsurance Fund under Subsection (6).

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

(6) If, at the time an employee is determined to be permanently and totally disabled, the employee has other actionable workers' compensation claims, the employer or insurance carrier that is liable for the last industrial accident resulting in permanent total disability shall be liable for the benefits payable by the employer as provided in this section. The employee's entitlement to benefits for prior actionable claims shall then be determined separately on the facts of those claims. Any previous permanent partial disability arising out of those claims shall then be considered to be impairments that give rise to Employers' Reinsurance Fund liability under this section. 1988

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

If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a dependent condition, and

under all reasonable circumstances should be entitled to additional benefits, the industrial commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in Subdivision (1) of Section 35-1-68. 1963

35-1-71. Dependents — Presumption.

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) Children under the age of 18 years, or over if physically or mentally incapacitated and dependent upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

(2) For purposes of payments to be made under Subsection 35-1-68(2)(a)(i), a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury or death of such employee, except for purposes of dependency reviews under Subsection 35-1-68(2)(a)(iii). No person shall be considered as a dependent unless he or she is a member of the family of the deceased employee, or bears the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word "child" as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words "brother or sister" as above used. 1967

35-1-72. Alien.

When any alien dependent of the deceased resides outside of the United States of America and any of its dependencies and Canada, such dependent shall be paid not to exceed one-half the amount provided herein. 1963

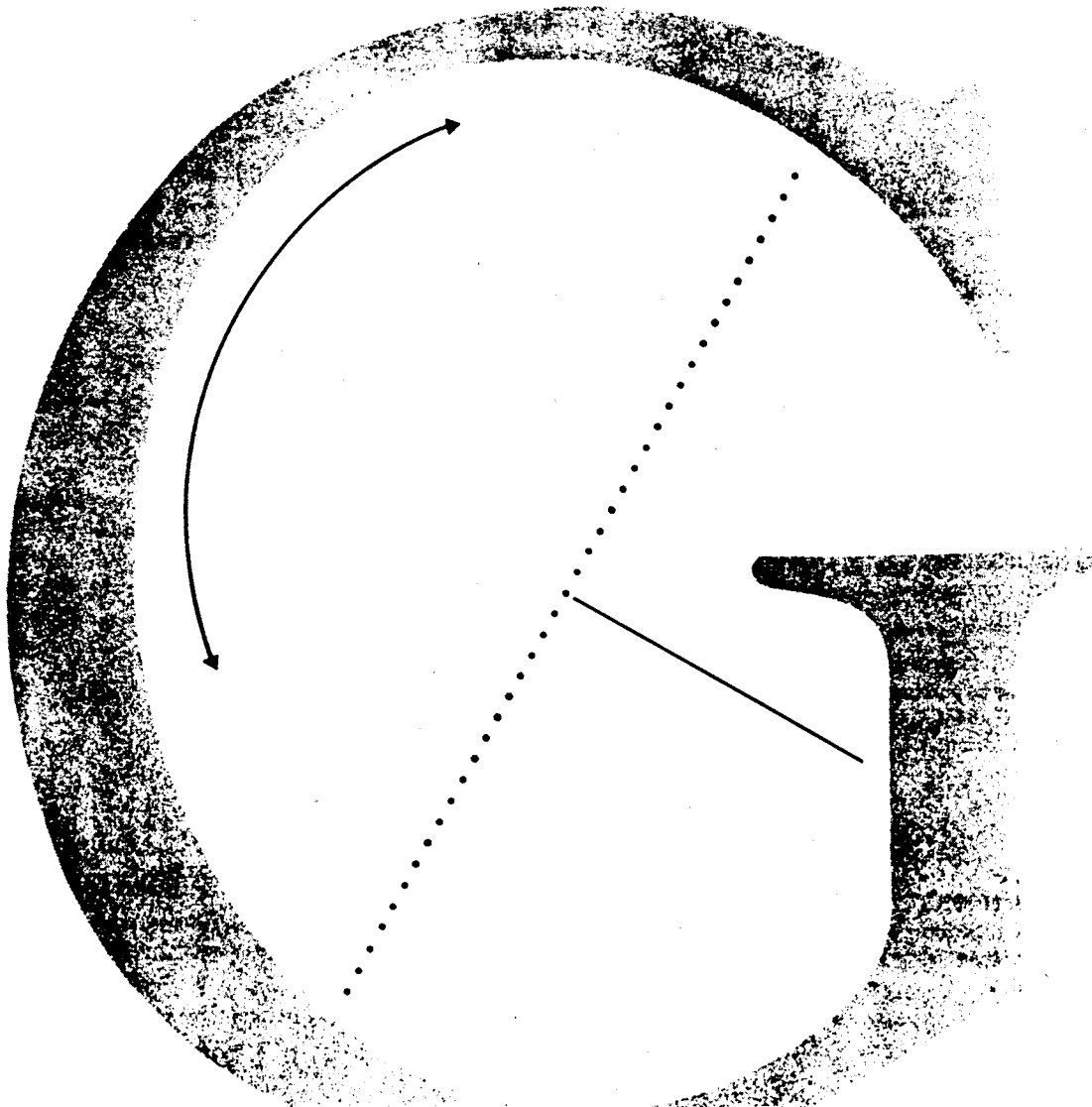
35-1-73. Benefits in case of death — Distribution of award to dependents — Death of dependents — Remarriage of surviving spouse.

The benefits in case of death shall be paid to such one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by the commission, which may apportion the benefits among the dependents in such manner as it deems just and equitable. Payment to a dependent subsequent in right may be made, if the commission deems it proper, and shall operate to discharge all other claims therefor. The dependents, or persons to whom benefits are paid, shall apply the same to the use of the several beneficiaries thereof in compliance with the finding and direction of the commission. In all cases of death where the dependents are a surviving spouse and one or more minor children, it shall be sufficient for the widow or widower to make application to the commission on behalf of that individual and the minor children; and in cases where all of the dependents are minors, the application shall be made by the guardian or next friend of such minor dependents. The commission may, for the purpose of protecting the rights and interests of any minor dependents it deems incapable of doing so, provide a method of safeguarding any payments due them. Should any dependent of a deceased employee die

Guides to the Evaluation of Permanent Impairment

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Editor

Third Edition



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.

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

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

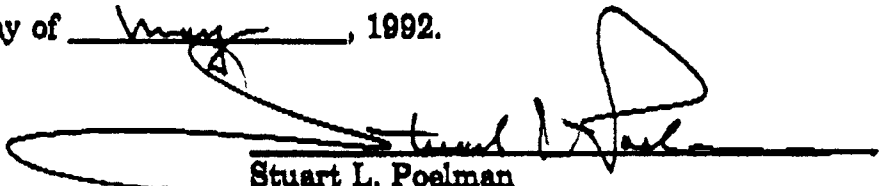
5. The intended purpose of House Bill No. 218 was to enhance the funding of the Second Injury Fund through an employer's premium tax increase and to reduce the liability of the Second Injury Fund for workers' compensation benefits. The bill eliminated benefits which were then being paid to injured employees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

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

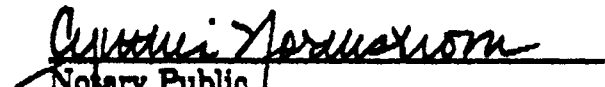
No. 218 to transfer the liability for impairment caused by preexisting conditions from the Second Injury Fund to the employer. Rather, it was the intent of said legislation to eliminate permanent partial disability benefits payable to the injured employee to the extent that permanent partial disability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

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

DATED this 19th day of May, 1992.


Stuart L. Poelman
Attorney at Law

Subscribed and sworn to before me this 19th day of May, 1992


Notary Public
Residing at SLE, UT

My commission expires 9/28/93

Reference Exhibit A

