

1992

# Mark King v. Board of Review of the Industrial Commission of Utah, Superior Roofing Company and Workers Compensation Fund of Utah : Brief of Respondent

Utah Court of Appeals

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Benjamin J. Sims; Richard G. Sumsion; Attorneys for Respondents.

Robert Breeze; Attorney for Appellant.

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## Recommended Citation

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## BEFORE THE UTAH COURT OF APPEALS

MARK KING

Applicant/Petitioner,

v.

BOARD OF REVIEW of the  
Industrial Commission of Utah;  
SUPERIOR ROOFING COMPANY, INC.  
and  
WORKERS COMPENSATION FUND OF  
UTAH,

Defendants/Respondents.

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Priority No. 7

Case No. 920464-CA

## BRIEF OF RESPONDENTS

Response to petition for review of an Order of the  
Industrial Commission of Utah denying Petitioner's  
claim for an extended period of temporary total disability  
caused by a delay in obtaining surgery due to reasons  
unrelated to his industrial accident.

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211 East Broadway #215  
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Appellant.

Richard G. Sumsion (3156)  
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Superior Roofing Company and  
Workers Compensation Fund of Utah

Industrial Commission of Utah  
Benjamin J. Simms, Attorney at Law  
160 East 300 South  
Salt Lake City, UT 84111

NOV 24 1992

BEFORE THE UTAH COURT OF APPEALS

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MARK KING

Applicant/Petitioner,

v.

BOARD OF REVIEW of the  
Industrial Commission of Utah;  
SUPERIOR ROOFING COMPANY, INC.  
and  
WORKERS COMPENSATION FUND OF  
UTAH,

Defendants/Respondents.

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Priority No. 7

Case No. 920464-CA

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BRIEF OF RESPONDENTS

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Industrial Commission of Utah denying Petitioner's  
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Robert Breeze (4278)  
Attorney at Law  
211 East Broadway #215  
Salt Lake City, UT 84111  
Appellant.

Richard G. Sumsion (3156)  
560 South 300 East  
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Superior Roofing Company and  
Workers Compensation Fund of Utah

Industrial Commission of Utah  
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IN THE UTAH COURT OF APPEALS

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MARK KING	*	
	*	
Applicant/Petitioner	*	
	*	
v.	*	
	*	Priority No. 7
	*	
BOARD OF REVIEW of the	*	Case No. 920464-CA
Industrial Commission of Utah;	*	
SUPERIOR ROOFING COMPANY, INC.	*	
and,	*	
WORKERS COMPENSATION FUND OF	*	
UTAH,	*	
	*	
Defendant.	*	

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BRIEF OF RESPONDENTS

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STATEMENT OF JURISDICTION

This court has jurisdiction to hear this matter under Utah Code Ann. §35-1-82.53 (2), 35-1-86 and 63-46b-16.

STATEMENT OF THE ISSUES

Whether the Petitioner is entitled to additional compensation for temporary total disability because of his incarceration after his accident which delayed necessary surgical treatment.

STANDARD OF REVIEW

Intermediate standard of reasonableness and rationality with appropriate deference to the decision of the administrative agency pursuant to Utah Code Ann., §63-46b-16 (4). Pro Benefit Staffing, Inc. v. Board of Review, 775 P.2d 439 (Utah Ct. App. 1989); Grace Drilling v. Board of Review, 776 P.2d 63 (Utah Ct. of App. 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUES

The applicable versions of Utah Code Ann. §35-1-65:

35-1-65 Temporary disability (1) In case of temporary disability, the employee shall receive sixty-six and two-thirds percent of that employees' weekly wages at the time of injury so long as such disability is total, but not more than a maximum of 100 percent of the State average weekly wage at the time of the injury per week, and not less than a minimum of \$45.00 per week plus \$5.00 for a dependant spouse and \$5.00 for each dependant child under the age of the eighteen years, up to a maximum of four such dependant children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100 percent of the State average weekly wage at the time of the injury per week.

STATEMENT OF THE CASE

A. Nature of the Case. This case involves a Petition for Review of an Industrial Commission Order affirming the Administrative Law Judge's denial of a claim for protracted temporary total disability benefits because of the Petitioner's incarceration.

B. Course of proceedings below. Petitioner suffered an on-the-job injury to his wrist for which he has been fully compensated under the Workers' Compensation Act except for the period of time between his incarceration at the Utah State Prison on May 22, 1990 and his surgery on January 30, 1991. The applicant was scheduled for surgery prior to his incarceration. The surgery was postponed because of his incarceration. Following his release from prison, the surgery was rescheduled and temporary total disability benefits were paid following surgery during the period of recovery.

Petitioner sought additional temporary total disability compensation from May 22, 1990 to January 29, 1991.

The Administrative Law Judge denied the Applicant's claim for the additional period of time and the Order was affirmed by the Industrial Commission on June 24, 1992. (R. 57).

#### STATEMENT OF THE FACTS

1. Petitioner suffered an on-the-job injury to his wrist on or about November 20, 1989. (R. 3, 11).

2. The Petitioner received temporary total disability benefits from the Workers Compensation Fund from November 21, 1989 through May 22, 1990, and again from January 29, 1991 through July 14, 1991 in the sum of \$7,963.68 at which time Petitioner returned to work. (R. 3, 11, 12).

3. The Petitioner was scheduled for surgery on May 30, 1990 but was not performed because Petitioner was incarcerated on May 22, 1990 for a parole violation. (R. 11).

4. The Petitioner was released from prison on October 13, 1990, and surgery was eventually performed on January 30, 1991. (R. 11).

5. Petitioner claims additional temporary total disability compensation during the period of his incarceration from May 22, 1990 through October 13, 1990, and for the period from October 14, 1990 until his surgery on January 30, 1991. (R. 43).

6. Petitioner's claim for additional temporary total disability benefits was denied by the Administrative Law Judge. The Order of Denial was affirmed by the Commission sitting en banc from which Order this appeal was taken. (R. 12, 13, 57).



### SUMMARY OF ARGUMENT

An injured worker is not entitled to protracted temporary total disability benefits when surgery is delayed due to circumstances over which the insurance carrier has no control.

### ARGUMENT

#### POINT I

An injured worker cannot unilaterally extend a period of temporary total disability for non-medical reasons unrelated to the industrial accident and over which the insurance carrier has no control.

The determination of temporary total disability is a medical determination. Stabilization is strictly a medical question that is appropriately decided on the basis of medical evidence. Booms v. Rapp Construction Company, 720 P.2d 1363 (Utah 1986).

If the applicant had undergone surgery on May 30, 1990 as scheduled, he would have received all compensation due him in due course. He now seeks, however, to extend his entitlement by nearly eight months because of his incarceration and unavailability of medical care, circumstances over which the Defendants had no control whatsoever. It is uncontroverted that all medical expenses and compensation have been paid except for the interim period in question.

In his Order of July 9, 1991, the Administrative Law Judge reasoned that, "To allow the Applicant to receive temporary total disability while he was incarcerated, would in effect be saying

that the Applicant, for whatever reason, may prolong the receipt of definitive surgical treatment, for whatever reason, and the carrier will be required to pay benefits during that prolonged period. Such a result is clearly not mandated by the Workers' Compensation Act, nor by common sense or reason." (R. 12).

Although not precisely in point, the decision of the Administrative Law Judge is supported by the case of Griffith v. Industrial Commission, 754 P. 2d 981, in which the Utah Court of Appeals was confronted with a similar issue in which surgery was delayed due to reasons unrelated to the industrial accident. In the Griffith Case, the Applicant required surgery, but an internist evaluated his hypertension and asthma and advised that his ankle surgery should be postponed until the hypertension and asthma were controlled. The Administrative Law Judge determined that Defendants should not be liable for the period of time which Plaintiff's hypertension and asthma had to be stabilized so as to allow surgery to be safely performed.

We are not here confronted with whether or not an injured worker can continue to receive compensation benefits for an industrial accident during a period of incarceration. Here, the issue is whether the insurance carrier can be held liable for an additional eight months of temporary total disability caused by a delay in obtaining surgery, a circumstance over which it had no control. In the instant case, the surgery was delayed because of the applicant's incarceration and because his treating physician was called up in the Desert Storm operation. Had the surgery taken

place as scheduled, there would have been no claim for additional compensation. Here, the delay was due to Petitioner's incarceration, but it could have been due to any number of reasons. The Petitioner could have developed anxiety about the scheduled surgery and refused surgery on the date scheduled. The result would have been the same. Surely it can not logically be argued that the Fund's liability can be extended by circumstances unrelated to the industrial accident.

Applicant claims that he has been denied a full and fair hearing in this matter because no testimony was taken with respect to the reasons for his parole violation resulting in his incarceration. These reasons are wholly immaterial. A hearing would provide no additional probative information relative to the issue at hand. The original Order of the Administrative Law Judge was remanded by the Industrial Commission for the purpose of obtaining information relative to the date he was released from jail. In the Order Upon Remand entered by the Administrative Law Judge on March 20, 1992, he specifically noted the Applicant's incarceration was from May 22, 1990 through October 13, 1990 but he found no causal connection between the claimed period of disability and the industrial accident. Rather, he found the claimed period of disability was causally related to his incarceration and not to the industrial accident.

In its second review of this matter, the Industrial Commission noted the Administrative Law Judge's statement that, "Had the Applicant not been incarcerated, he would have received the

scheduled surgery, and would not have incurred a period of temporary disability that he did." The Commission noted that the Applicant had received the amount of temporary disability that he would have received had he not been incarcerated and there was no justification for extending the period for which the carrier was liable because of a period of incarceration or for any other reason over which the carrier had no control. (R. 57).

#### POINT II

The Petitioner's argument that he was punished due to the unavailability of medical treatment is without merit.

Petitioner seeks to impute all of the circumstances leading to his incarceration and all of the difficulties he encountered while incarcerated to the Workers Compensation Fund. The Fund had nothing to do with the delay in the accomplishment of the Applicant's surgery. A claim that he was punished is groundless.

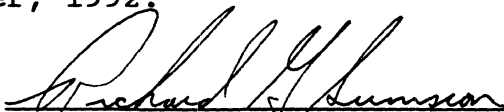
#### CONCLUSION

Petitioner's argument that the Utah Workers' Compensation Act does not empower the Industrial Commission to withhold workers' compensation benefits from incarcerated claimants misstates the issue in this case. By arguing that the Act is not a fault based system also misstates the issue in this case. The denial of the additional benefits claimed was not based upon Petitioner's incarceration or upon his fault. The denial was based upon the fact that the conditions and circumstances causing the delay in surgery were conditions and circumstances over which the Fund had

no control and it would be manifestly unfair to causally attribute such an extended period of time to the industrial accident. Fault is immaterial except as to the circumstances relative to the industrial accident itself. Fault on the part of the Petitioner regarding other matters is an entirely different matter. Here, the Commission correctly concluded the Fund's liability for additional compensation could not be extended by the actions of others over whom the Fund had no control.

WHEREFORE, Respondents move this Court for an Order denying the Petitioner's appeal and affirming the Order of the Industrial Commission.

DATED this 24 day of November, 1992.

  
Richard G. Sumsion  
Attorney for Respondents,  
Superior Roofing Company and  
Workers Compensation Fund  
of Utah

CERTIFICATE OF MAILING

I certify I mailed four copies of the foregoing Brief of Respondents to:

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

Benjamin J. Sims  
Industrial Commission of Utah  
160 East 300 South  
Salt Lake City, UT 84111

DATED this 24 day of November, 1992.

  
Attorney for Respondents

## ADDENDUM

Order dated July 9, 1991

Order for Remand dated October 17, 1991

Order Upon Remand dated March 20, 1992

Denial of Motion for Review (MFR Denial) dated June 24, 1992

Section 35-1-65

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 91000307

MARK KING,

Applicant,

vs.

SUPERIOR ROOFING COMPANY and/or  
WORKERS COMPENSATION FUND  
OF UTAH,

Defendants.

\* \* \* \* \*

89-40151-86

ORDER

This case involves an issue of first impression, namely, may an applicant receive temporary total disability compensation while incarcerated. A careful review of the Utah Workers Compensation Act indicate that the Act is silent on this particular issue. Further, there is no reported Utah case law on the issue.

The applicant herein, Mark King, sustained a compensable industrial accident on November 20, 1989, when he fell off a roof while during the course and scope of his employment. The applicant was paid temporary total disability benefits at the rate of \$183.00 per week commencing effective November 21, 1989 through July 13, 1990. The applicant was scheduled for wrist surgery on May 30, 1990. Unfortunately, on May 22, 1990, the applicant was incarcerated in the Salt Lake County Jail. The defendants terminated temporary total compensation benefits as of July 13, 1990. The applicant apparently was admitted for his surgery on January 29, 1991, and the surgery itself was performed on January 30, 1991. It would appear from the file then, that the applicant was incarcerated for the period May 22, 1990 through January 28, 1991.

The applicant, by and through counsel, has taken the position that "Compensation benefits are a property right and an insurance benefit." By contrast, the Workers Compensation Fund of Utah, by and through counsel, indicates that "Claimant's loss of wages while incarcerated was not the result of his disability, but of his acts resulting in his incarceration. He effectively removed

MARK KING  
ORDER  
PAGE TWO

himself from the labor market by his incarceration." Considering the novel nature of the question, and considering the purpose of the Workers Compensation Act, I conclude that the position of the Workers Compensation Fund of Utah appears to be the more rational and reasonable position. The applicant, by and through his voluntary act of being incarcerated, should not be allowed by that act to postpone definitive surgical treatment indefinitely, and receive compensation benefits for his voluntary act which resulted in the delay of receiving definitive treatment. In other words, once definitive treatment has been recommended for an applicant, if the applicant because of some voluntary act, or some voluntary decision, decides that surgery will not be received at that time, then it is not fair nor reasonable to expect the workers compensation carrier to pay the applicant temporary total compensation benefits during the entire period of time that the applicant is either deciding to have the treatment, or has voluntarily made himself unavailable for the treatment. To require such a result, clearly abuses the nature and purpose of the workers compensation system. The workers compensation system is for the purpose of compensating lost wages, resulting from disability due to the industrial accident. However, in this case, the applicant's loss of wages for the period May 22, 1990 through January 28, 1991, is not directly related to the industrial accident whatsoever. Rather, the applicant's loss of wages for that period of time was solely due to his actions or conduct resulting in his being incarcerated for that period of time.

Put differently, to allow the applicant to receive temporary total disability while he was incarcerated, would in effect be saying that applicants, for whatever reason, may prolong the receipt of definitive surgical treatment, for whatever reason, and the carrier will be required to pay benefits during that prolonged period. Such a result is clearly not mandated by the Workers Compensation Act, nor by common sense or reason. Therefore, for the period while the applicant was incarcerated, he is not entitled to temporary total compensation benefits. However, once the applicant was released from jail and presented himself for medical treatment on January 29, 1991, his entitlement to temporary total compensation benefits commenced anew.

ORDER:

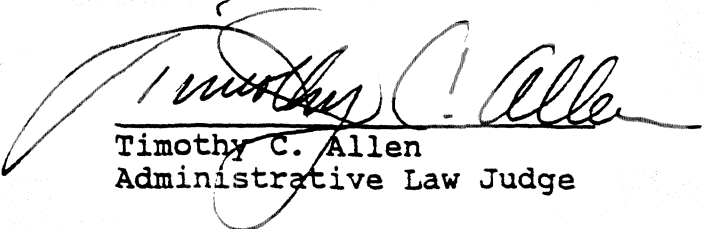
IT IS THEREFORE ORDERED that the applicant's claim for temporary total compensation benefits during the period May 22, 1990 through January 28, 1991, should be, and the same is hereby dismissed with prejudice.



MARK KING  
ORDER  
PAGE THREE

IT IS FURTHER ORDERED that the Workers Compensation Fund shall be entitled to a credit for any temporary total compensation paid to the applicant after May 22, 1990, and before January 29, 1991, as against their liability for temporary total compensation for the period after January 28, 1991.

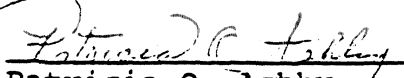
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

  
Timothy C. Allen  
Administrative Law Judge

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

9th day of July, 1991.

ATTEST:

  
Patricia O. Ashby  
Commission Secretary

THE INDUSTRIAL COMMISSION OF UTAH  
Case No. 91000307

MARK KING	*	
	*	
	*	
Applicant,	*	ORDER FOR
	*	
vs.	*	REMAND
	*	
SUPERIOR ROOFING COMPANY and/ WORKERS COMPENSATION FUND OF UTAH	*	
	*	
Defendants.	*	
	*	
*****		

The Industrial Commission of Utah on Motion of the Applicant, Mark King, reviews the Order of the Administrative Law Judge in the above-entitled matter dated July 9, 1991, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

On July 9, 1991, the Industrial Commission received a Motion for Review from the Applicant in which it was argued that the applicant was prejudiced because he was unable to provide testimony regarding the date he was released from jail.

Thereafter, the matter was referred to the entire Commission for review. The Commission has reviewed the file in the above entitled case and is of the opinion that the issues presented for review are whether the applicant was prejudiced because he was unable to provide testimony regarding the date he was released from jail, as well as whether the applicant was incarcerated as the result of a conviction or other adjudged misconduct.

The Administrative Law Judge stated that he assumed that the applicant was incarcerated from May 22, 1990, through January 28, 1991, since surgery was scheduled on January 30, 1991. Subsequently, the applicant has submitted evidence that he was released from jail on October 13, 1990.

Thus, this issue should be remanded to the Administrative Law Judge to reconsider the additional evidence.

For the foregoing reasons it is the opinion of the Commission that the Administrative Law Judge's Order should be remanded for further consideration.

MARK KING  
ORDER  
PAGE TWO

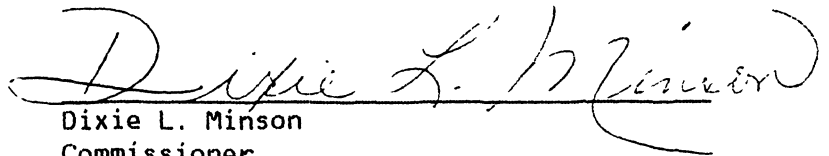
ORDER:

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of June 14, 1991, is hereby remanded for further consideration.

Stephen M. Hadley  
Chairman



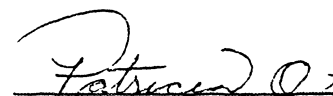
Thomas R. Carlson  
Commissioner



Dixie L. Minson  
Commissioner

Certified this 18th day of ~~September~~ October 1991.

ATTEST:



Patricia O. Ashby  
Commissioner Secretary



THE INDUSTRIAL COMMISSION OF UTAH

Case No. 91000307

RECEIVED  
MAR 23 1992  
Workers Compensation  
Legal Department

MARK KING,

Applicant,

vs.

SUPERIOR ROOFING and/or  
WORKERS COMPENSATION FUND  
OF UTAH,

Defendants.

ORDER UPON REMAND

89-40151-86

\* \* \* \* \*

On July 9, 1991, the Administrative Law Judge entered an Order in this matter finding that the applicant was not entitled to temporary total compensation for the period of his incarceration in what was presumed to be the Salt Lake County Jail. The Administrative Law Judge found that the applicant was incarcerated for the period May 22, 1990 through January 28, 1991. Subsequent to the issuance of that Order, the applicant caused an Affidavit to be filed with the Commission indicating that he, in fact, was released from the Utah State Prison on October 13, 1990. The applicant, by and through counsel, takes the position that he is entitled to temporary total disability benefits for the entire period of his incarceration of May 22, 1990 through October 13, 1990, and that, in addition, the claimant is also entitled to temporary total compensation for the period October 14, 1990 until he actually received surgery on January 30, 1991.

As the reader may recall, the applicant sustained a compensable industrial injury on November 20, 1989, and was scheduled for right wrist on surgery on May 30, 1990. However, the applicant was returned to the Utah State Prison for a probation violation on May 22, 1990. The Administrative Law Judge previously found that the applicant's loss of wages for the claimed period was not related to the industrial accident whatsoever, but, rather, was solely due to the actions or conduct of the applicant which resulted in his being incarcerated. The file was remanded to the Administrative Law Judge for consideration of the additional evidence, which I can only presume was the evidence that the applicant was, in fact, released from the Utah State Prison on October 13, 1990. However, that additional evidence, if you will, does not change the underlying basis for my decision. In other words, put differently, I also find that the applicant misreads the purpose of workers compensation benefits in the state of Utah. He also has failed to satisfy the causation requirement which is

MARK KING  
ORDER UPON REMAND  
PAGE TWO

mandated in every workers compensation case. Specifically, in this case, the applicants industrial accident was not the cause of the applicant's disability for the period May 22, 1990 through October 13, 1990, the period of incarceration. Rather, as a result of the applicant's incarceration, the applicant's period of disability was rendered greater or was permitted to continue. This period of disability is caused by the voluntary actions of the applicant and cannot fairly be attributed causally to the industrial accident. This same reasoning might be said to apply to the period of temporary total disability sought for the period October 14, 1990 through January 29, 1991. The industrial injury did not cause this period of temporary disability, but, rather, this period of temporary disability was also causally related to the applicant's incarceration of May 22, 1990 through October 13, 1990. Had the applicant not been incarcerated, he would have received the scheduled surgery and would not have incurred a period of temporary disability that he did. Although the applicant contends that it was not his fault, the applicant misperceives the underlying basis of the workers compensation system. The workers compensation system is not a fault system but, rather, is a system which is characterized by causation, both legal and medical causation. Therefore, the fault or absence of fault of a party is irrelevant. Rather, the more probative inquiry must necessarily focus on whether or not there is a causal connection between the injury and the benefits claimed. In this case, there is no causal connection, because the incarceration caused the period of temporary total disability and caused it to be rendered greater and allowed or permitted it to continue far beyond its normal duration.

To reiterate, I find there is no causal connection between the claimed period of disability and the industrial accident. Rather, I find that the applicant's claimed period of disability is causally related to his incarceration and not the industrial accident. I hereby also adopt my prior opinion in this matter and the same is hereby incorporated by reference as if set forth fully hereinabove.

SUPPLEMENTAL ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for additional temporary total compensation is hereby, dismissed with prejudice.

MARK KING  
ORDER UPON REMAND  
PAGE THREE

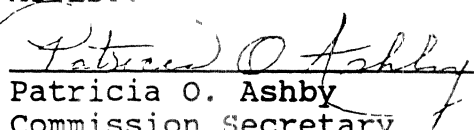
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

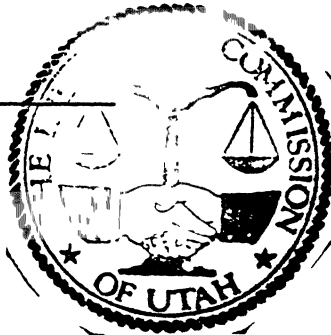
  
\_\_\_\_\_  
Timothy C. Allen  
Presiding Administrative Law Judge

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

30th day of March, 1992.

ATTEST:

  
\_\_\_\_\_  
Patricia O. Ashby  
Commission Secretary



10 Mark King  
Jorge Swanson  
RECEIVED  
JUN 25 1992  
Compensation Fund  
Legal Department

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

Mark King,

Applicant,

vs.

Superior Roofing Co.,  
and Workers Compensation Fund  
of Utah,

Respondent.

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DENIAL OF MOTION  
FOR REVIEW

Case No. 91000307

89-40151-861

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

The applicant asks that we review his Motion for Review of the administrative law judge's (ALJ) Order Upon Remand issued March 23, 1992. We had remanded this case to the ALJ because the applicant had submitted an affidavit to the Commission subsequent to the issuance of the ALJ's original order in this case, and the ALJ had not seen this affidavit.

The applicant asserts that he is entitled to temporary total compensation (TTC) benefits for the entire period of his incarceration from May 22, 1990 through October 13, 1990, as well as TTC for the period October 14, 1990 until the date of surgery on January 30, 1991.

The applicant had incurred an industrial injury on November 20, 1989, and surgery was scheduled for his right wrist on May 30, 1990. Because of a probation violation, the applicant was returned to the Utah State Prison on May 22, 1990. He was apparently released on October 13, 1990. As a result it appears that the applicant's surgery was rescheduled to January 30, 1991.

The ALJ found in his Order Upon Remand that the applicant's industrial accident was not the cause of the disability for the period May 22, 1990 through October 13, 1990, the period of incarceration. The ALJ's order reads in pertinent part:

...[A]s a result of the applicant's incarceration, the applicant's period of disability was rendered greater or was permitted to continue. This period of disability is caused by the voluntary actions of the applicant and cannot fairly be attributed causally to the industrial accident.

Order Upon Remand, at 2.

KING  
ORDER  
PAGE TWO

The ALJ also concluded that the same logic applied to the period October 14, 1990 through January 29, 1991. The ALJ states, "Had the applicant not been incarcerated, he would have received the scheduled surgery, and would not have incurred a period of temporary disability that he did." Id.

The applicant has received the amount of temporary total disability that he would have received had he not been incarcerated. The applicant desires his employer or insurance carrier to extend that period by seven months for a period of incarceration over which they had no control. We conclude that a period of incarceration under the facts of this case do not extend the period for which employers or insurance carriers are responsible.

The applicant also complains that he has not been accorded a fair and full hearing. Again, we conclude that this allegation is without merit since there is no dispute of the facts, only the legal significance of them. The ALJ assumed all the material and relevant facts asserted by the applicant to be true. Although the applicant alleges that the ALJ improperly determined that his incarceration was due to the applicant's misconduct, we find that the applicant's admission in his affidavit of August 16, 1991 that he was in the Utah State Prison until October 13, 1990 was sufficient evidence on which the ALJ could conclude that the applicant was incarcerated.

We can take judicial notice of the fact that people who are incarcerated in the Utah State Prison are there due to their misconduct, and that this fact is common knowledge in the community. Cf. Utah Fuel Co. v. Ind. Comm'n, 67 Utah 25, 245 P. 381, 45 A.L.R. 882 (1926). Since people who are incarcerated in the Utah State Prison are there due to misconduct, we conclude that the ALJ's findings are not erroneous especially since the applicant has provided us no information in his Motion for Review or in his affidavit of August 16, 1991 which would allow us to conclude differently.

For all the above reasons, the Order Upon Remand of the ALJ is based upon substantial evidence in light of our review of the entire record, and we must therefore affirm.

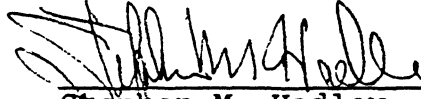
ORDER:

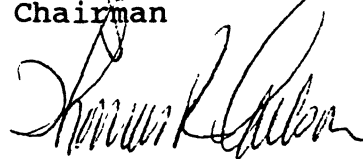
IT IS ORDERED that the Order Upon Remand of the administrative law judge issued on March 23, 1991 is affirmed.

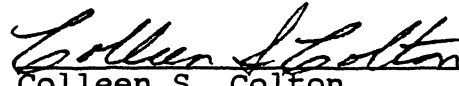


KING  
ORDER  
PAGE THREE

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

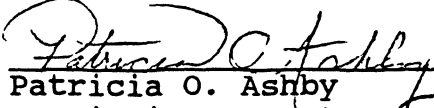
  
Stephen M. Hadley  
Chairman

  
Thomas R. Carlson  
Commissioner

  
Colleen S. Colton  
Commissioner

Certified this 24th day of June 1992.

ATTEST:

  
Patricia O. Ashby  
Commission Secretary



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

(1) In case of temporary disability, the employee shall receive  $66\frac{2}{3}\%$  of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

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

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