

1983

**American Coal Co., Emery Mining Corp., And State Insurance Fund
v. Terry W. Sandstrom, Industrial Commission of Utah, And
Second Injury Fund : Writ Of Review From An Order of the
Industrial Commission Of Utah**

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IN THE SUPREME COURT
OF THE STATE OF UTAH

AMERICAN COAL CO., :
EMERY MINING CORP., :
and STATE INSURANCE FUND, :

Plaintiff/appellant, :

vs. :

TERRY W. SANDSTROM, :
INDUSTRIAL COMMISSION OF :
UTAH, and SECOND INJURY FUND, :

Defendant/respondent. :

Case No. 19134

WRIT OF REVIEW FROM AN ORDER
OF THE INDUSTRIAL COMMISSION
OF UTAH

BRIEF OF DEFENDANT
SECOND INJURY FUND

Frank Nelson
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Gilbert Martinez
Administrator, Second Injury
Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
Attorneys for the Second Injury
Fund

Virginius Dabney, Atty.
136 So. Main, #412
Salt Lake City, Utah 84101

Fred R. Silvester
BLACK AND MOORE
#500, Ten Broadway Building
Salt Lake City, Utah 84101

FILED

OCT 12 1983

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BLACK AND MOORE
#500, Ten Broadway Building
Salt Lake City, Utah 84101

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	:	
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BRIEF OF DEFENDANT
SECOND INJURY FUND

NATURE OF THE CASE

This is a writ of review from an order of the Industrial Commission.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The defendant Second Injury Fund concurs in the statement of the disposition by the Industrial Commission contained in the briefs of the plaintiffs and the defendant Industrial Commission.

RELIEF SOUGHT ON APPEAL

The defendant Second Injury Fund respectfully requests that this court affirm the order of the Industrial Commission.

STATEMENT OF FACTS

The defendant Second Injury Fund concurs in the statement of facts contained in the briefs of the plaintiffs and the defendant Industrial Commission. This defendant notes additionally that it has paid to the defendant Sandstrom the permanent partial disability benefits for which the Industrial Commission held it liable.

ISSUE ON APPEAL

The issue on appeal is whether the State Insurance Fund is entitled to reimbursement from the Second Injury Fund for medical expenses and temporary disability benefits paid by the State Insurance Fund to the applicant during his initial period of temporary disability.

ARGUMENT

THE INDUSTRIAL COMMISSION CORRECTLY APPLIED THE RECENTLY AMENDED PROVISIONS OF UTAH CODE ANNOTATED §35-1-69 TO HOLD THE PLAINTIFFS LIABLE FOR COMPENSATION AND MEDICAL EXPENSES PAYABLE TO THE APPLICANT UP TO THE DATE OF HIS STABILIZATION

The Industrial Commission has ruled that since the applicant's cause of action arose after the effective date of recent amendments of Utah Code Anno. §35-1-69, payment of his temporary total disability benefits and medical expenses up to date of his stabilization is the exclusive responsibility of the employer and its carrier. The Commission concluded that the Second Injury Fund is not liable for a portion of those initial

payments as it might have been before the statute was amended. The plaintiffs contend the amendment did not change the rights of an employer to reimbursement from the Second Injury Fund. At issue is the correct construction of the following paragraph added to §35-1-69 as part of the several amendments by the Legislature in 1981: (A copy of the entire provision is included as Appendix "A").

Where the payment of temporary total disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the second injury fund as provided for herein, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made hereunder.

As noted previously, the plaintiff State Insurance Fund and the defendant Second Injury Fund stipulated before the Commission that the applicant had a 20% permanent partial disability of the back, 10% of which was caused by an industrial injury of November 23, 1981 and 10% of which was due to pre-existing conditions. (R.195,212). Benefits for his permanent partial disability have been paid. The applicant incurred

medical expenses and was totally disabled for a period of time after the accident. Though the record does not reflect the period of his temporary total disability, the State Insurance Fund paid all amounts owing during this period and submitted to the Industrial Commission the question whether the Second Injury Fund should reimburse it for 50% of these expenses. (R.194,197).

The Industrial Commission interpreted the amended portion of Section 69 cited above to mean that during a period of temporary total disability which follows an industrial accident that has aggravated a pre-existing condition, the employer is liable for the full amount of temporary total disability and medical expenses up to the end of that period, even if the applicant's permanent partial disability is in part attributable to pre-existing conditions. The Commission ruled that after this period ends, his benefits are subject to apportionment between those parties and entered its order based upon this construction of the statute. (R.213,216).

The question raised by the plaintiffs about the proper application of the amended provision of Utah Code Anno. §35-1-69 is one of first impression. This Court should affirm the order of the Industrial Commission because its construction of the statute is clearly correct in view of the obvious meaning of the language used and the purpose of the Legislature in amending the statute.

The plaintiffs correctly note in their brief that prior to enactment of the 1981 amendments, this Court construed

Section 69 of the Workers Compensation Act to mean that whenever a worker sustained a permanent disability as a result of an industrial accident that was substantially greater because it combined with a pre-existing disability, the Second Injury Fund was liable for a proportionate share of temporary total disability compensation and medical expenses as well as permanent disability benefits. This construction was first announced in the case of Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977) and continued to be applied in later cases, i.e. Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980).

The plaintiffs incorrectly assert, however, that the cases of Paoli v. Cottonwood Hospital, 656 P.2d 430 (Utah 1982) and U.S. Fid. & Guar. Co. v. Industrial Comm'n. of Utah, 657 P.2d 764 (Utah 1983) are cases arising under the amended statutes which demonstrate that this Court construes the amendment to have made no change in the law. Though these cases were decided after the 1981 amendments were enacted, they arose out of industrial accidents which occurred before the amendments; the Paoli accident in 1979, Paoli v. Cottonwood Hospital, supra, 656 P.2d at 420; and the most recent of Anderton's accidents in the U.S. Fid. & Guar. case was in July, 1975, U.S. Fed. Guar. Co. v. Industrial Comm'n. of Utah, supra, 657 P.2d at 764. In neither case did the Court apply or construe the amendment whose meaning is disputed in this case.

This court has held that its fundamental responsibility when interpreting a statute is to ascertain the intention of the Legislature, Johnson v. State Tax Commission, 17 Utah 2d 337, 411 P.2d 831 (1966). The first step in statutory construction is to examine the plain and ordinary meaning of the language employed to determine whether the intention of the Legislature is apparant, Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971); Spangenberg v. Cheney School Dist., No. 30, 97 Wash. 2d 118, 641 P.2d 163 (1983).

The defendant Second Injury Fund contends that in this instance the intention of the Legislature is apparant from the clear meaning of the language used. With reference to medical expenses and temporary disability benefits the statute provides that,

. . . the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the injury.

With reference to obligations arising after the initial period, it provides that

Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the second injury fund provided for herein . . .

The plaintiff State Insurance Fund argues that since the Legislature provided that employers would be "responsible" for

temporary benefits, it did not mean to make them "liable" for temporary benefits. It contends that even though the statute refers to allocations of benefits "following" the initial period of temporary disability, the Legislature really intended to allocate benefits which arise during the initial period, exactly as it had been done before the amendment, without substantive change in the relative liabilities of employers and the Second Injury Fund.

The word "responsible" is defined at p.1476 in Black's Law Dictionary, (Revised 4th Ed., 1968) as follows:

"Liable, legally accountable, or answerable."

In accordance is Webster's Third New International Dictionary (1966), p.1935 which lists "liable" as a synonym of "responsible".

The State Insurance Fund advocates a construction of the statute which is inconsistent with it's plain meaning. Giving the words used their ordinary effect, it is apparant that the Legislature intended to distinguish between temporary benefits accruing before the initial period of temporary disability ends and other benefits which may accrue later. The first category of benefits is one for which the employer and its carrier are soley liable and the second category is one which is to be apportioned with the Second Injury Fund if the other requirements of Section 69 are satisfied.

Even if this statute is regarded as ambiguous, the rules of construction which must then be applied resolve the ambiguity in the defendant's favor. One presumption which

arises in construing an amendment to a statute is that the legislature was aware of the construction given to a statute by the Supreme Court before it was amended, Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975); Lekan v. P&L Fire Protection Co., 609 P.2d 1289 (Okla. 1980); Woodson v. State, 95 Wash. 2d 257, 623 P.2d 683 (1980). A second presumption is that when a statute is amended, the Legislature is presumed to intend a change in the law by amendment. Lincoln County v. Fidelity and Deposit Co. of Maryland, 102 Idaho 489, 632 P.2d 678 (1981); State v. Turpin, 94 Wash. 2d 820, 620 P.2d 990 (1980). The State Insurance Fund contends that the Legislature did not intend to change the liability of the Second Injury Fund for temporary benefits whereas the plain language used as well as the presumption which applies strongly suggest the contrary.

Another common rule of construction is that courts should construe a statute so that it's effect is sensible and in keeping with the purpose of the statute. Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967), Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965). In a real sense, the need for medical treatment and the initial period of disability from work arise because a worker is injured and not because he had a pre-existing condition which until the accident had not prevented him from working. It is consistent with the purpose of Section 69 and the Worker's Compensation Act

as a whole to make these immediate post-injury expenses the exclusive responsibility of the employer and his carrier and to limit the liability of the Second Injury Fund to permanent disability benefits attributable to pre-existing conditions and to medical expenses and total disability benefits which arise after the effects of the accident itself have resolved.

When application of the rules of construction does not completely resolve a dispute about the meaning of a statute, courts are entitled to examine the legislative history of the enactment in question. Parker v. Rampton, 28 Utah 2d 36, 497 P.2d 848 (1972); State v. Winkle, 528 P.2d 467 (Utah 1974) reh.den 535 P.2d 82. More specifically, this Court may take judicial notice of legislative proceedings, including discussions and debates about the meaning of proposed legislation by members of the Legislature prior to its enactment, whether reflected in a legislative journal or by an official transcript. State ex rel. Blankenship v. Freeman, 440 P.2d 744 (Okla. 1968); Industrial Commission v. Milka, 159 Colo. 114, 410 P.2d 181 (1966); Knight v. Employment Security Agency, 88 Idaho 262, 398 P.2d 643 (1965).

Included as Appendix B to this brief is a copy of an official transcript of the proceedings in the Utah State Senate of March 5, 1981 relating to S.B. 187 which contained the 1981 amendments to Utah Code Anno. §35-1-69. Senator K.S. Cornaby, Majority Leader and sponsor of the bill, introduced it to the Senate with an explanation that he was a member of the Industrial

Commission Advisory Board which had drafted the legislation.
With reference to its purpose he said,

The Bill before you, Senate Bill 187,
is a bill which comes out of that
Advisory Committee to take care of
three or four items. One is a number
of housekeeping items, two is to
address a couple of issues which have
arisen concerning the Second Injury
Fund, and to more equitably allocate
the compensation for workmen's
injuries between the Fund and the
insurance companies.
(emphasis supplied)

Transcript of Senate proceedings, page 2, (Appendix B). Following
this explanation, the bill was adopted without amendment or
negative vote.

Senator Cornaby's remarks remove any doubt about the
purpose of the amended provision. The Legislature intended
to change the relative liability of the Second Injury Fund and
workmen's compensation carriers and to accomplish a "more
equitable allocation of compensation" between them. The more
equitable allocation was accomplished by the elimination of
the Second Injury Fund's liability for temporary benefits.

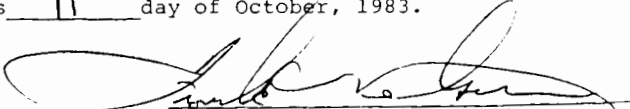
The Ortega case, supra, and its progeny resulted in
a huge increase in claims filed against the Second Injury Fund
and particularly in payments made to carriers for temporary
total disability compensation and medical expenses. In the
Capitano case, supra, 610 P.2d at 337, this Court noted the
prevailing view of members of the Industrial Commission and their
representatives that the effect of the Ortega decision was unfair to

the Second Injury Fund and advised those persons to address their concerns to the legislature "whose function and prerogative it is to make changes or clarifications with law". The State Insurance Fund may dispute the wisdom of the Legislature's decision to adjust the balance between the Second Injury Fund and the workmen's compensation insurance carriers, but there can be no serious doubt that it intended to do so.

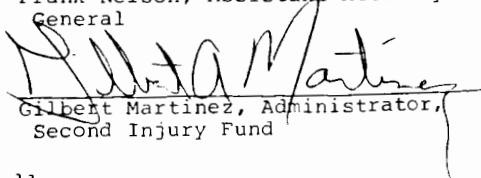
Finally, it should also be noted that the Industrial Commission, as the agency which is charged by law with the administration of the Worker's Compensation Act, is entitled to have its administrative construction of a statutory provision given weight by this Court. *Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217 (1973).

The Second Injury Fund respectfully submits that the Industrial Commission correctly construed and applied the law to the facts of this case. Its construction of a recent amendment to Utah Code Anno. §35-1-69 is consistent with its plain meaning, the purpose of the Act, and the legislative history of the amendment. The Industrial Commission's decision on this issue should, therefore, be affirmed.

DATED this 11th day of October, 1983.



Frank Nelson, Assistant Attorney
General



Gilbert Martinez, Administrator,
Second Injury Fund

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed this 12th day of October, 1983, to the following:

Virginus Dabney, Atty.
136 So. Main, #412
Salt Lake City, Utah 84101

Fred R. Silvester
BLACK AND MOORE
#500, Ten Broadway Building
Salt Lake City, Utah 84101

Dickie L. Walker

APPENDIX A

35-1-69. Combined injuries resulting in permanent incapacity - Payment out of second injury fund - Training of employee. (1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation and or medical care, or both, is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation and, medical care, which-medical-care and other related items are as outlined in section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation and medical care, and other related items shall be for the industrial injury only and the remainder shall be paid out of the special second injury fund provided for in section 35-1-68(1) hereinafter referred to as the "special-fund".

For purposes of this section, (a) any aggravation of a pre-existing injury, disease or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided above, provided, however, that (b) where there is no such aggravation, no award for combined injuries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. Where the pre-existing incapacity referred to in subsection (1) (b) of this section previously has been compensated for, in whole or in part, as a permanent partial disability under this act or the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the second injury fund under this paragraph.

Where the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made

between the employer or its insurer and the second injury fund as provided for herein, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made hereunder.

A medical panel having the qualifications of the medical panel set forth in section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition or conditions, whether due to accidental injury, disease or congenital causes. The industrial commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder any amounts remaining to be paid hereunder shall be payable out of the said special second injury fund; provided, however, that medical expenses shall be paid in the first instance by the employer of its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of said special the second injury fund upon written request and verification of amounts so expended.

(2) In addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used for the rehabilitation and training of any employee coming within the provisions of this chapter as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for rehabilitation and training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of \$1,000.

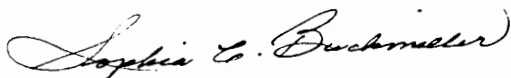
S.B. No. 187, WORKMEN'S COMPENSATION MODIFICATIONS

Sponsors: K.S. Cornaby, Fred Finlinson and Arthur Kimball

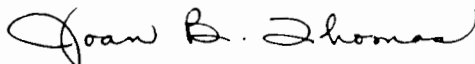
1981 GENERAL SESSION, FORTY-FOURTH LEGISLATURE

VERBATIM TRANSCRIPT

We hereby certify that the following transcript is a verbatim and accurate reflection of the discussion regarding S.B. No. 187, WORKMEN'S COMPENSATION MODIFICATIONS, occurring in the Senate Chamber, March 5, 1981 (Day 53), and as recorded on Senate Recording Disc. No. 247.



Sophia C. Buckmiller
Secretary of the Senate



Joan B. Thomas
Minute Clerk, Utah State Senate

1 TRANSCRIPT OF SENATE FLOOR DEBATE ON

2 SENATE BILL (SB 187)

3
4 SPONSORED BY: Senator K. S. Cornaby, Senator Fred Finlinson, and
5 Senator Arthur Kimball.

6 DATE OF DEBATE: March 5, 1981.

7 SECRETARY OF SENATE: Bill number 187, Workmen's Compensation
8 modifications by Senator Cornaby, the report Mr. President. Business,
9 Labor and Economic Development to which was referred Senate Bill 187,
10 Workmen's Compensation modifications by Senator Cornaby and others has
11 carefully considered this bill, reports it out of Committee with a
12 favorable recommendation.

13 Respectfully,

14
15 Arnold Christensen
16 Committee Chairman

17 SENATOR CHRISTENSEN: Mr. President, I move we adopt the
18 Committee report.

19 PRESIDENT FERRY: Motion to adopt the Committee report.
20 Discussion, all in favor of the motion say "aye".

21 CHAMBER: Aye.

22 PRESIDENT FERRY: Opposed "no".

23 CHAMBER: No.

24 PRESIDENT FERRY: Motion carries. Senator Cornaby.
25

1 DOCKET CLERK: About thirty-five. Thirty-five.

2 SENATOR CORNABY: The bill before us Mr. President,... I have
3 the privilege of serving as an exofficio member of the Advisory Council
4 for the Industrial Commission, and part of the work of that Advisory
5 Council which is comprised of both labor and management representatives
6 is to determine needed changes and modifications in the Workmen's
7 Compensation Act. The Bill before you, Senate Bill 187 is a bill which
8 comes out of that Advisory Committee to take care of three or four
9 items. One is a number of housekeeping items, two is to address a couple
10 of issues which have arisen concerning the Second Injury Fund, and to
11 more equitably allocate the compensation for workmen's injuries between
12 the Fund and the insurance companies. It's a fairly technical item, but
13 I think it is fairly straight forward. If there are any questions, I
14 would be glad to try to respond to them, if not I'd call for the
15 question.

16 PRESIDENT FERRY: Questions, _____ and Matheson.

17 SENATOR MATHESON: Excuse me, does this change in the bill in
18 any way change the payment structure to individuals?

19 SENATOR CORNABY: Would you repeat that question?

20 SENATOR MATHESON: Does the provision of this bill change the
21 payment structure to individuals under the compensation in any way?

22 SENATOR CORNABY: No. It does not.

23 PRESIDENT FERRY: Are there other questions Senator Cornaby?

24 SENATOR BLACK: Only this, Mr. President, was there any
25 amendments made in your Committee?

1 SENATOR CORNABY: No amendments made in the Standing Committee.
2 PRESIDENT FERRY: Senator Wayment,
3 SENATOR SHERMAN WAYMENT: Senator Cornaby could you just give
4 a little more rational of why you think it's important that just those
5 injured who now have light duties or could come back to work under light
6 duty conditions now or if work is not available to them that they are
7 given full benefits for up to eight years?
8 SENATOR CORNABY: It is not an eight year period, Senator
9 Wayment, what it is is that if a person cannot find work again at his
10 place of employment or elsewhere and is still under the doctor's care,
11 compensation continues until the doctor releases him, and it is not then
12 not necessarily an eight year period.
13 SENATOR SHERMAN WAYMENT: But that person is partially recovered
14 but is not fully recovered. Is that.....
15 SENATOR CORNABY: That's correct. And that applies only if he
16 cannot find work in his field. Call for the question Mr. President.
17 PRESIDENT FERRY: Senator Cornaby, it seems to be not too much
18 discussion do you want to go further than just the.....?
19 SENATOR CORNABY: Yes, if there doesn't seem to be any
20 questions, I suppose in view of the shortness of time....
21 SENATOR BUNNELL: Mr. President.
22 PRESIDENT FERRY: Yes Senator.
23 SENATOR BUNNELL: As you know because the industrial nature of
24 my area, we are always very concerned with Workmen's Compensation. We
25 feel like this bill is a very appropriate bill and I want to support it.

1 bill in every respect. It is a good piece of legislation and we need it
2 on the books.

3 SENATOR CORNABY: Mr. President under suspension of the rules, I
4 would move that we consider the bill as having been read for the second
5 and third time and up for final passage.

6 PRESIDENT FERRY: The motion by Senator Cornaby that we suspend
7 rules and consider Senate Bill 187 as being read for the second and third
8 time and up for final passage. Discussion on that motion, all in favor
9 of the motion say "aye".

10 CHAMBER: Aye.

11 PRESIDENT FERRY: Opposed "no".

12 CHAMBER: No.

13 PRESIDENT FERRY: Motion carried. Now we will have a roll call
14 vote on Senate Bill number 187, under suspension of the rules third
15 reading calendar, the question is shall the bill pass. Roll call vote.

16 DOCKET CLERK: Assay.

17
18 DOCKET CLERK: Assay.

19
20 DOCKET CLERK: Bangerter.

21 SENATOR BANGERTER: Aye.

22 DOCKET CLERK: Barlow.

23 SENATOR BARLOW: Aye.

24 DOCKET CLERK: Barton.

25 SENATOR BARTON: Aye.

1 DOCKET CLERK: Bennett.
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3 DOCKET CLERK: Black.
4 SENATOR BLACK: Aye.
5 DOCKET CLERK: Bullen.
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7 DOCKET CLERK: Bunnell.
8 SENATOR BUNNELL: Aye.
9 DOCKET CLERK: Carling.
10 SENATOR CARLING: Aye.
11 DOCKET CLERK: Christensen.
12 SENATOR CHRISTENSEN: Aye.
13 DOCKET CLERK: Cornaby.
14 SENATOR CORNABY: Aye.
15 DOCKET CLERK: Farley.
16 SENATOR FARLEY: Aye.
17 DOCKET CLERK: Finlinson.
18 SENATOR FINLINSON: Aye.
19 DOCKET CLERK: Flamm.
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21 DOCKET CLERK: Halverson.
22 SENATOR HALVERSON: Aye.
23 DOCKET CLERK: Jeffs.
24 SENATOR JEFFS: Aye.
25 DOCKET CLERK: Jones.

1 SENATOR JONES: Pass.

2 DOCKET CLERK: Kimball.

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4 DOCKET CLERK: Matheson.

5 SENATOR MATHESON: Aye.

6 DOCKET CLERK: Money.

7 SENATOR MONEY: Aye.

8 DOCKET CLERK: Cary Peterson.

9 SENATOR PETERSON: Aye.

10 DOCKET CLERK: Lowell Peterson.

11 SENATOR PETERSON: Aye.

12 DOCKET CLERK: Pugh.

13 SENATOR PUGH: Aye.

14 DOCKET CLERK: Sandberg.

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16 DOCKET CLERK: Snow.

17 SENATOR SNOW: Aye.

18 DOCKET CLERK: Sowards.

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20 DOCKET CLERK: Swan.

21 SENATOR SWAN: Aye.

22 DOCKET CLERK: Wayment.

23 SENATOR WAYMENT: Aye.

24 DOCKET CLERK: Mr. President.

25 PRESIDENT FERRY: Aye.

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DOCKET CLERK: Jones.

SENATOR JONES: Aye.

PRESIDENT FERRY: Senate 187 under suspension rules final passage with total 21 ayes, 1 nay and 7 being absent receives the constitutional majority, bill passes and referred to the House for further action.

Senate Bill 209.