

2005

IHC Bryner Clinic and/or ICH Risk Management v. Utah Labor Commission, Karen Wood and/or Workers Compensation Fund : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IHC BRYNER CLINIC and/or IHC RISK MANAGEMENT)	UTAH COURT OF APPEALS
)	BRIEF
)	UTAH
)	DOCUMENT
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)	50
v.)	.A10
)	DOCKET NO. 20050197-CA
UTAH LABOR COMMISSION,)	Case No.: 20050197-CA
KAREN WOOD and/or WORKERS)	
COMPENSATION FUND)	
)	
Respondents.)	
)	

BRIEF OF RESPONDENT WORKERS COMPENSATION FUND

PETITION FOR REVIEW OF AN ORDER OF THE UTAH LABOR COMMISSION

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IN THE UTAH COURT OF APPEALS

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MANAGEMENT)

Petitioner,)

v.)

UTAH LABOR COMMISSION,)
KAREN WOOD and/or WORKERS)
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JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 34A-2-801(8)(a), Utah Code Ann. § 63-46b-16 and Utah Code Ann. § 78-2a-3(2)(a).

ISSUES AND STANDARD OF REVIEW

The issues and standard of appellate review are satisfactorily presented in Petitioner's brief. Workers Compensation Fund submits this brief solely in response to Petitioner's argument that Workers Compensation Fund should be responsible for a portion of Ms. Wood's permanent partial impairment and medical expenses.

DETERMINATIVE LAW

Utah Code Ann. § 34A-2-412(6)(c)(ii):

Permanent partial disability compensationh may not be paid for any permanent impairment that existed prior to an industrial accident.

Utah Code Ann. § 34A-3-102(2):

Subject to the limitations provided in this chapter and unless otherwise noted, all provisions of Chapter 2, Workers' Compensation Act, and Chapter 8, Utah Injured Worker Reemployment Act, are incorporated into this chapter and shall be applied to occupational disease claims.

Utah Code Ann. § 34A-3-103:

For purposes of this chapter, a compensable occupational disease

means any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment.

Utah Code Ann. § 34A-3-108(2)(b):

The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment..

Utah Code Ann. § 34A-3-105:

See Appendix B

Utah Code Ann. § 34A-3-110:

See Appendix B

STATEMENT OF THE CASE

The nature of the case, course of proceedings and relevant facts are satisfactorily set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

Workers Compensation Fund (WCF) concurs in Bryner Clinic / IHC Risk Management's (BC/IHC) argument that the Labor Commission incorrectly interpreted and applied Utah Code Ann. § 34A-3-110(1) to the facts of this case. The Labor Commission did not err, however, in holding BC/IHC solely liable for workers compensation benefits attributable to Ms. Wood's occupational exposure to latex while employed at the Bryner Clinic.

ARGUMENT

Utah law places the entire workers compensation liability for an occupational disease on the entity insuring the employer during the injured worker's "last injurious exposure" to the hazards of the disease. IHC Risk Management continuously insured Ms. Wood's employer (Bryner Clinic) during the last three years of her harmful occupational exposure to latex. Did the Commission err in holding BC/IHC solely responsible for workers compensation benefits attributable to Ms. Woods latex induced medical conditions?

BC/IHC contends that WCF should be required to pay a proportionate share of the workers compensation benefits awarded to Ms. Woods for her exposure to latex while employed at the Bryner Clinic since WCF insured Bryner Clinic during the first two years and five months of that exposure. The Commission correctly rejected that contention and held BC/IHC solely liable for the benefits. This result is clearly mandated by Utah law.

In *Pacific Employers Ins. Co. v. Industrial Commission of Utah*,¹ the Utah Supreme Court held that the "last injurious exposure" rule applies to occupational disease cases involving a single employer with multiple insurance carriers. The court determined that the carrier insuring the risk at the time of the injured worker's last injurious exposure to the hazards of the disease was solely liable for workers compensation benefits payable as a result of the disease. The Labor Commission has followed *Pacific Employers* in assigning liability in similar situations.² As noted in the Commission's Order on Motion for Review in the instant case, the only exception to the "last injurious exposure" rule is found in

¹ 157 P.2d 800 (Utah 1945)

² *Ballatore v. Buehner Block*, Labor Comm'n. Case No. 02-0124 (5-18-04) in Appendix B.

Utah Code Ann. §34-3-105 which provides for apportionment of liability where the last injurious exposure is less than twelve months in duration.³ The Commission correctly observed that the facts of this case cause it to fall squarely within the coverage of the general rule, rather than the exception. Ms. Wood was last exposed to latex for nearly three years while IHC provided the Bryner Clinic's workers compensation insurance.⁴

BC/IHC argues that Utah Code Ann. §34A-2-412(6)(c)(ii) by operation of Utah Code Ann. §34A-3-102 prohibits the Commission from requiring it to pay compensation for the permanent impairment attributable to Ms. Wood's latex exposure at the Bryner Clinic prior to IHC's coverage period.⁵ This argument, however, confounds the distinction between a workers compensation occupational disease claim and one that arises from an industrial accident. The legislature has purposefully chosen to apply different legal principles to injuries caused by singular events (accidents) and those brought on by gradual, sustained exposures to harmful agents over the process of time (occupational diseases). Hence the reason for two separate statutes: The Workers Compensation Act and the Occupational Disease Act.⁶

³ Order on Motion for Review, pp. 3 – 4. See Appendix A.

⁴ Record, at 141.

⁵ Brief of Appellants, p. 17

⁶ Utah Code Ann. § 34A-2-101 et. seq. and 34A-3-101 et. seq. respectively.

The reasons for this differentiation are clear. Once an accident has occurred, there is no compelling reason, either of substance or procedure, to relieve the employer/carrier of liability for the ongoing effects of that accident upon the injured party. A subsequent accident does not necessarily break the causal connection between an injured worker's current medical condition and the earlier accident.⁷ Impairment arising from the prior event can be evaluated at any time after the event and attributed to it because a medical record exists, or can be constructed, from the time of the occurrence forward.

Occupational diseases are substantively different. In many cases, as in this one, an employer and/or its insurer "presides" over a period of exposure to a harmful substance or workplace condition, but is not the employer or carrier when the disease finally appears and gives rise to disability, impairment and the need for medical treatment. When the disease is discovered, and if additional harmful exposure has occurred after the "departure" of the earlier employer or insurer, it is impossible to know if there was an actual injury at the time the previous employment or coverage ended. No medical records would exist documenting the nature and extent of an injury at that moment in time. Thus, by definition, Utah Code Ann. § 34A-2-412(6)(c)(ii) cannot apply. Prior to the actual manifestation of the disease, there is no impairment. In the instant case, the medical panel apportioned Ms. Wood's impairment on the basis of causal factors. Nowhere in

⁷ *United States Fidelity & Guaranty Co. V Industrial Comm'n*, 657 P 2d 764 (Utah 1983)

its report, however, did the panel ever state that any of that impairment actually existed prior to the time that Ms. Wood's disease became symptomatic in 1997.⁸

As noted in BC/IHC's brief,⁹ some states have made attempts to apportion liability for occupational diseases among employers or sureties based on exposure periods. As noted, however, that is not the law in Utah,¹⁰ nor is it in most other jurisdictions.¹¹ The substantive difference between industrial accidents and occupational diseases gives rise to the need for a different means of administering occupational disease claims. Professor Larson observes:

The last injurious exposure rule is particularly useful for allocating liability in occupational disease cases, which often involve a multitude of insurers.... [The] initial task of discovering even the names of all of the insurers at risk during the claimant's working life might consume months of the Board's time before it could even begin to assess the proportion of exposure that occurred while each insurer was at risk.¹²

Succinctly stated, sequential industrial accidents give rise to two or more, distinct causes of action. Sequential harmful exposures, on the other hand, give rise to only one cause of action.¹³ The insurer affording coverage at the time that one cause of action arises is the only insurer liable for the benefits payable by reason of the occupational disease.¹⁴ Thus, the flaw in BC/IHC's argument is that it does not distinguish between the multiple causes of action that arise from

⁸ Record, pp. 61-77

⁹ Brief of Appellants, p. 8

¹⁰ Subject to the one exception provided for in Utah Code Ann. § 34A-3-105(2)

¹¹ Larson lists 19 states that have recognized some form of apportionment to modify the application of the last injurious exposure rule. See Larson, *Larson's Worker's Compensation* D153-81 to 87 (2004)

¹² Larson, § 153.02[5] at 153-10.

¹³ When the disease becomes known and disabling. See Utah Code Ann. § 34A-3-108(2)(b)

¹⁴ See Utah Code Ann. § 34A-3-105(1). As noted above, subsection (2) does not apply to this case.

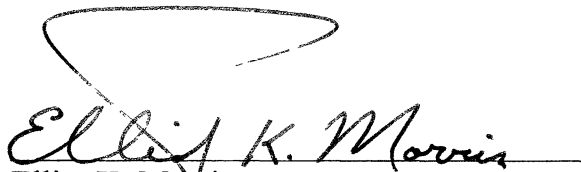
sequential industrial accidents and the single cause of action that arises from injurious exposures spanning the coverage periods of multiple insurers and/or employers.

CONCLUSION

Based on the forgoing, WCF respectfully asks the Court of Appeals to uphold the Utah Labor Commission's order requiring Bryner Clinic and/or IHC Risk Management to be solely responsible for the permanent partial disability compensation and medical benefits attributable to Ms. Wood's occupational disease. WCF does agree with BC/IHC that the Commission's impairment rating calculations should be corrected to conform to the requirements of Utah Code Ann. § 34A-3-110.

Respectfully submitted this 30th day of June, 2005.

WORKERS COMPENSATION FUND

A handwritten signature in cursive script, reading "Elliot K. Morris", is written over a horizontal line. Above the signature is a large, loopy, handwritten flourish.

Elliot K. Morris
Attorney for Respondent Workers
Compensation Fund

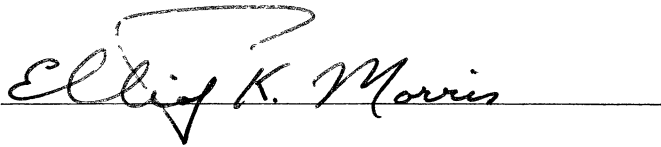
CERTIFICATE OF SERVICE

I certify that on this 30th day of June 2005 I mailed two true and correct copies of the foregoing Brief of Respondent Workers Compensation Fund, first class, postage prepaid to:

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Handwritten signature of Elliot K. Morris, written in black ink over a horizontal line.

APPENDIX A

Utah Labor Commission:

- **Findings of Fact, Conclusions of Law, and Order, June 21, 2004**
- **Order on Motion for Review, February 14, 2005**

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UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
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JUN 21 2004]

Workers Compensation Fund
Legal Department

KAREN S WOOD, Petitioner, vs. IHC BRYNER CLINIC, IHC RISK MANAGEMENT, WORKERS' COMPENSATION FUND, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20011138 Judge Sharon J Eblen
---	--

STATEMENT OF THE CASE

The petitioner filed an application for hearing on November 2, 2001 seeking the payment of occupational disease benefits for latex allergy as a result of exposure to latex in the course and scope of her employment with IHC Bryner Clinic for the period from September 1992 to December 1997. A hearing was scheduled for October 18, 2002, but on October 17, 2002, the parties requested that they be allowed to submit stipulated facts for a direct medical panel referral. Accordingly, on the request of the parties, the hearing in this matter was canceled.

The parties submitted a Fact Stipulation for a direct medical panel referral on December 11, 2002. However, the fact stipulation failed to detail the petitioner specific job duties and the manner in which she was exposed latex in her employment and private life. Accordingly, the petitioner submitted the additional information requested by the administrative law judge on March 26, 2003. On May 19, 2003, respondent submitted a letter agreeing to the exposure information submitted by the petitioner in March 26, 2003, but added additional information about the petitioner's use of latex and non latex gloves in her employment with respondents. On July 22, 2003, the petitioner notified the commission that she did not object to the additional information provided in Respondents letter dated May 16, 2003.

The administrative law judge prepared supplemental facts based upon the information provided by the parties on September 10, 2003. This matter was forwarded to a medical panel appointed by the Labor Commission on September 10, 2003. On January 20, 2004, the medical panel report was received by the commission and forwarded to the parties on January 20, 2004. Petitioner filed an objection to the medical panel report that was received by the commission on February 9, 2004.

STIPULATED FACTS

1. Petitioner was born on November 12, 1962. Her social security number is 004-74-9550. At the time of the alleged occupational disease, the claimant was married and had four children under the age of 18.
2. Petitioner was hired to work for the Bryner Clinic on September 1 1992, as a medical lab technician. Petitioner's shifts regularly lasted eight hours per day, working approximately five days each week. At the time of the alleged occupational disease, she was earning wages of approximately \$428.40 per week. She was married and had four dependent children.
3. On about October 31, 2001, petitioner filed an occupational disease claim, alleging that she sustained a latex allergy as a result of the exposure to latex in the course of per employment with the Bryner Clinic from the period of September 1992 through December 1997.
4. From January 1 1991 through January 16, 1995, the Bryner clinic was insured by the Workers' Compensation Fund of Utah.
5. Since January 16, 1995, Bryner Clinic has been self insured with claims managed by IHC Risk Management.
6. The Employers First Report of Injury states that petitioner sustained an injury or illness on September 2, 1997 at approximately 12:45 p.m. when she had an allergic reaction when inhaling latex allergens. The Employers First Report of Injury also states that she notified Bryner Clinic of her latex allergy on May 20, 1997.
7. Petitioner smoked for made 17 (1979) through 1982. She smoked again from 1992 to 1997. She smoked again from 1998 to 1999. She began smoking again in 2001, but is no longer smoking. She has never smoked more than half a pack daily.
8. The course of medical treatment and petitioner's medical history are contained in the medical records. The 62 page medical records exhibit prepared IHC Risk Management (referred herein as " IHC's M R E "), and the 339 page medical records exhibit prepared by the Workers' Compensation Fund (referred herein as " WCF's M R E "), should be admitted into evidence. There is some duplication between the medical records.
9. In accordance with the recent request of the Labor Commission for chronological summary as of medical records, attached as Exhibit A is a chronological summary of the medical records submitted by Mr. Chai Citations to records (column labeled " PG ") contained in the IHC M R E are included in the summary. Records without a page number referred to records found only in the WCF's M R E. The parties do not stipulate that this chronological summary is evidence in this case. Rather it is submitted so that the administrative law judge is able to better locate the medical records and place them in some chronological context.

10. Petitioner seeks the following benefits:

a. She is entitled to a 44% permanent partial impairment rating for her respiratory system and skin caused by or are (sic) directly related to her exposure to latex at the Bryner Clinic from September 1992 through December 1997.

b. On going medical care for her respiratory system and skin caused by or are (SIC) directly related to her exposure to latex at the Bryner Clinic from September 1992 through December 1997.

Petitioner does not claim benefits for any unpaid temporary disability benefits. Nor does she claim that any prior medical expenses related to her claims remain unpaid.

11. Respondents denies (sic) that they are liable for any permanent partial impairment rating. Respondents also denied that they remains (sic) responsible for ongoing medical care.

12. The parties agree that the medical evidence is controverted thus requiring a direct medical panel referral on the medical issues in this case.

13. The parties waive their rights to an evidentiary hearing (but not any medical panel hearing).

14. In medical panel should determine:

a. What permanent impairment, if any, petitioner has for her latex exposure while working for Bryner Clinic? Any permanent partial impairment fish identified specifically and apportion as appropriate to contributing factors unrelated to her work for Bryner Clinic, her work at Bryner Clinic from September 1992 to January 16, 1995 (during coverage of WCF's) and; her work at Bryner Clinic from January 16, 1995 through December 1997 (during coverage under IHC Risk Management).

b. if your medical care, if any, petitioner requires for her latex exposure while working for Bryner Clinic? Any future medical care should be identified specifically and apportioned as appropriate to contributing factors unrelated to her work for Bryner Clinic, her work at Bryner clinic from September 1992 to January 16, 1995 (during coverage of WCF) and; her work at Bryner Clinic from January 16, 1995 through December 1997 (during coverage under a IHC Risk Management).

SUPPLEMENTAL FACTS

15. The parties submitted stipulated facts on December 11, 2002. On February 18, 2003, the administrative law judge requested that the parties provide additional information describing the petitioner's job duties, including how she was exposed latex in her employment and any exposures outside the employment. The parties submitted the supplemental information in letter form and all parties either specifically agreed that the additional information was correct or provided no response contesting the additional information. Accordingly, the administrative law judge sets forth herein the additional facts 15 through 22, provided by the parties in this matter:

16. While Karen Wood was employed with the Bryner Clinic from September 1992 to December 1997, she consistently worked in four separate areas of the clinic. For each we have provided a basic description of her job duties and the exposure to latex that occurred while performing that job.

17. a. Upstairs Laboratory: Ms. Wood was required to draw blood from patients and the basic testing such as urinalysis, hematocrits and blood sugars. She usually work between 16 to 24 hours a week in the upstairs lab and would go through between 20 and 40 pair of latex gloves per day. She was exposed latex by both wearing, taking on and taking off her gloves, as well as being exposed to the latex from other individuals doing the same sort of tasks and there were usually two to four people working in the upstairs lab.

b. Hematology: Ms. Wood processed blood for CBC's, sedimentary testing requiring pipetting and red blood smears. Ms. Wood wore between eight to 25 pair of gloves a day in this department and spent between 8 and 16 hours a week in hematology. There were usually four to seven people working in the downstairs labs which included hematology, chemistry and the special chemistry area.

c. Chemistry. Ms. Wood processed blood for routine chemistry panels. She used between two to weight pair of gloves a day in this area and spent about eight hours per week performing such tasks.

d. Special Chemistry Area: Ms. Wood processed many different chemistry tests quite relation studies, and and in studies and was required to wear gloves while she was performing such tests. As her hours in this area ranged from 0 to 8 a week, the number of gloves that she would be required to wear would vary.

18. Ms. Wood's exposure to latex was by both wearing the gloves herself and by having the latex particulates in the air when she would put on or remove a pair of gloves. She was also in close proximity to between two and seven other co-workers who were also performing the same types of tasks and putting latex particulates in the air by putting on and taking off gloves in the same work area.

19. Ms. Wood's latex exposure outside of work was the same as any other average person and was not exposed to any significant latex presence outside of work.

20. Ms. Wood used latex gloves with cornstarch powder until September 1997.

21. Ms. Wood began using non latex gloves in September 1997.

22. The clinic stopped using cornstarch powdered latex gloves near the end of 1997.

23. The petitioner's application for hearing indicates that she worked for first medical care in Union City, Georgia from April 1985 to August 1991. The application for hearing indicates that the petitioner worked for clinical laboratories in Cheyenne, Wyoming from August 1991 to August 1992. The application for hearing indicates that the petitioner worked for I H C Bryner Clinic in Salt Lake City, Utah from September 1992 to

December 1997. To the application for hearing indicates that the petitioner worked for Cheyenne radiology in Cheyenne Wyoming from April 1998 to August 2001.

24. The petitioner's average weekly wage was \$428.40. This translates to a weekly compensation rate of \$285.61. She was married with four dependent children under the age of 18, which adds \$25 per week to the compensation rate for a total of \$311 per week rounded to the nearest dollar. However, the maximum compensation rate for permanent partial disability compensation in December 1997 was \$310 per week.

25. The petitioner was medically stable or at maximum medical improvement on February 27, 1998 .

PRINCIPLES OF LAW

Utah applies the last injurious exposure rule to insurance carriers. *Pacific Employers Insurance Co. vs. Industrial Commission*, 157 P. 2 d 800 (Utah 1945); *Ballatore vs. Buehner Block et al.* , L C Case No. 02-0124, 5/18/04.

Utah Code Section 34 A-3-110 provides:

The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of disability or death when the occupational disease, or any part of the disease:

- (1) is causally related to employment with a non-Utah employer not subject to commission jurisdiction;
- (2) is of a character to which the employee may have had substantial exposure outside of employment or to which the general public is commonly exposed;
- (3) is aggravated by any other disease or infirmity not itself compensable;
- or
- (4) when disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

ANALYSIS

The parties submitted stipulated facts for direct medical panel referral regarding the extent of the petitioner's permanent partial impairment and the relative causal contributions of occupational and non-occupational factors to her latex allergy. The medical panel appointed a medical panel to review the medical aspects of this case. Although the parties failed to include specific information about the petitioner's exposures to latex in employment prior to her employment with Bryner Clinic, the medical panel took a medical and occupational history from the petitioner as part of the medical panel's evaluation of this case. The medical panel noted that the petitioner

began working in the medical field on the military in 1981. She worked for Med First Humana Primecare as a laboratory and X-ray technician from 1983 to 1989 on in Georgia; and from 1990 to 1991 in Cheyenne, Wyoming as a laboratory worker. Accordingly, the medical panel noted that the petitioner was exposed to latex for 5 of her 15 occupational latex exposure years in Utah.

Utah's Occupational Disease Act, Section 34A-3-110, provides for apportionment of benefits based upon the relative occupational and non-occupational causal contributions. Under *Pacific Employers*, the last insurance carrier during the employment that was the last injurious exposure is responsible pay all compensation and medical expenses attributable to the compensable occupational exposure under the Utah Occupational Disease Act. However, the act provides that the Utah employer is only responsible to pay compensation that is causally related to the Utah employment.

The evidence in the record shows of the petitioner worked five years in Utah in employment that causally contributed to the onset of her latex allergy symptoms. Accordingly, the Utah employer, Bryner Clinic is responsible to pay one-third of the occupationally-related condition. The medical panel opined that the petitioner's pulmonary condition was 70 percent related to her employment and 30% related to non-industrial allergies, including exposures to latex outside of employment, and her genetic predisposition to allergy. The medical panel noted that the petitioner is allergic to some environmental allergens as well as some foods in addition to her allergy to latex.

The medical panel concluded that the petitioner has 11% permanent partial impairment attributable to her pulmonary and skin conditions. The medical panel attributed 70 percent of this impairment to the petitioner's latex allergy, yielding an 8% whole person permanent partial impairment due to latex allergy. The panel went on to apportion 90 percent of the petitioner's latex allergy to her industrial exposures and 10% to non-occupational factors. This yields a permanent partial impairment of 7.2% whole person attributable to the petitioner's industrial latex allergy.

The medical panel then proceeded to apportion causation for the petitioner's five years of Utah employment latex exposures from her 15 year overall employment exposure to latex. The petitioner's Utah employment contributed one-third of the petitioner's total occupational exposure to latex. Thus, the petitioner's Utah employment exposures to latex contributed a 2.4% permanent impairment ($7.2 \times 33.3\% = 2.397\%$). Under *Pacific Employers*, the responsibility for the entire Utah employment related permanent partial impairment lies with IHC Risk Management, the last insurance carrier during petitioner's harmful exposure.

The medical panel calculated the percentage of Bryner Clinic's share of future medical expenses for the industrial contribution to petitioner's latex allergy. However, under *Pacific Employers*, the responsibility for payment for the causal contribution of petitioner's Utah employment to her future medical care lies with the last insurance carrier, IHC Risk Management.

CONCLUSIONS OF LAW

The petitioner's Utah employment contributed one-third to the petitioner's permanent partial impairment and future medical care for her occupationally caused latex allergy. The responsibility to pay the contribution for petitioner's Utah employment-related occupational disease lies with the last insurance carrier for Bryner Clinic during petitioner's injurious exposure, IHC Risk Management.

ORDER

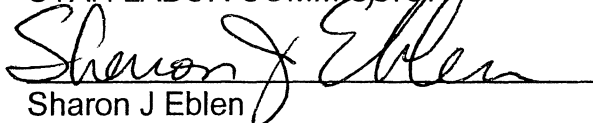
IT IS THEREFORE ORDERED that Bryner Clinic and IHC Risk Management shall pay the petitioner, Karen S. Wood, permanent partial disability compensation for a 2.4% permanent impairment or 7.49 weeks at the rate of \$310 per week for a total of \$2,321.90, plus interest at 8 percent per annum from February 28, 1998.

IT IS FURTHER ORDERED that Bryner Clinic and I. H. C. Risk Management shall pay one-third of the medical expenses necessary to treat petitioner's industrial latex allergy in accordance with the relative value schedule of the Labor Commission.

IT IS FURTHER ORDERED that Bryner Clinic and IHC Risk Management shall pay James E. Seaman, Attorney at Law an attorney's fee in the amount of \$464.38, plus 20 percent of the interest generated on the above award, for his services to the petitioner in this matter. Said attorneys' fees shall be deducted from the above award and remitted directly to the office of James E Seaman, Attorney at Law.

DATED THIS 21 day of June, 2004.

UTAH LABOR COMMISSION


Sharon J Eblen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on June 21, 2004, to the persons/parties at the following addresses:

Karen S Wood
Box 313
Hancock ME 04640

Ihc Bryner Clinic
745 E 300 S
Salt Lake City UT 84102

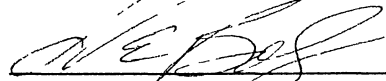
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UTAH LABOR COMMISSION



Nancy E Boling, Clerk
Adjudication Division

FEB 15 2005

UTAH LABOR COMMISSION

Workers Compensation Fund
Legal Department

KAREN S WOOD,

Petitioner,

vs.

IHC BRYNER CLINIC,

Respondent.

ORDER ON MOTION
FOR REVIEW

Claim No.: 2001-57219
Case No. 01-1138

Scan Into Legal

Document Type: Orders

IHC asks the Utah Labor Commission to review Administrative Law Judge Eblen's award of benefits to Karen S. Wood under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Ms. Wood filed an application for hearing on November 2, 2001, to compel IHC to pay occupational disease benefits for latex allergy caused by her employment at IHC. Ms. Wood and IHC waived their right to a hearing, submitted stipulated facts, and agreed that a medical panel should consider the medical aspects of Ms. Wood's claim. The medical panel submitted its report on January 20, 2004. In a decision issued June 21, 2004, Judge Eblen accepted the medical panel's report, held IHC liable for a part of Ms. Wood's latex allergy and awarded benefits accordingly. IHC then requested Commission review of Judge Eblen's decision on the grounds that the decision incorrectly applied various provisions of the Act in computing IHC's liability.

FINDINGS OF FACT

As relevant to the issues raised in IHC's motion for review, the Commission makes the following findings of fact, based on the parties' stipulated facts and the medical panel's report. The Commission also adopts Judge Eblen's findings of fact to the extent they are consistent with this decision.

Ms. Wood suffers from an 11% whole person impairment. Of this 11% impairment, 8% is from work-related latex allergies. The remainder is from Ms. Wood's underlying asthmatic/allergic condition which is not work-related. Ms. Wood has limited her occupational disease claim to disability and medical expenses for her latex allergy.

Ms. Wood's work-related latex allergy arose during a 15 year period when Ms. Wood was injuriously exposed to latex products while employed at various health care facilities. This

ORDER DENYING MOTION FOR REVIEW

Karen S Wood

PAGE 2

employment included clinics in Georgia and Wyoming and ended with her employment by IHC from September 1992 until December 1997. In addition to her work-related exposure to latex, Ms. Wood also experienced some exposure from her non-work environment.

Prior to January 16, 1995, IHC was insured for occupational disease liability by the Workers Compensation Fund. After that date, IHC was self-insured.

DISCUSSION AND CONCLUSION OF LAW

Because IHC contends that Judge Eblen erred in application of the Occupational Disease Act's provisions for assessing and computing liability in this matter, the Commission will apply the relevant provisions of the Occupational Disease Act on a step-by-step basis.

Section 34A-3-103 of the Occupational Disease Act defines "compensable occupational disease" as "any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." The undisputed facts establish that Ms. Wood's employment brought her into contact with latex and that this exposure medically caused or aggravated her latex allergy. Ms. Wood's latex allergy is, therefore, a compensable occupational disease.

Section 34A-3-110 of the Act¹ establishes an apportionment formula that must be applied to

¹ Section 34A-3-110, "Occupational Disease Aggravated By Other Diseases" provides as follows:

The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or death when the occupational disease, or any part of the disease:

(1) is causally related to employment with a non-Utah employer not subject to commission jurisdiction;

(2) is of a character to which the employee may have had substantial exposure outside of employment or to which the general public is commonly exposed;

(3) is aggravated by any other disease or infirmity not itself compensable; or

ORDER DENYING MOTION FOR REVIEW

Karen S Wood

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occupational disease claims when any one of four criteria set out as §34A-3-110(1) through (4) is met. The Commission notes that §34A-3-110 is poorly drafted and difficult to apply. Nevertheless, Ms. Wood's claim meets subsections (1) and (2), in that her latex allergy is causally related to employment with non-Utah employers and is causally related to non-work exposures to latex. Therefore, under the operative provisions of §34A-3-110, Ms. Wood's compensation must be limited to the proportion that "the occupational disease as a causative factor bears to all the causes of the disability. . . ."

In applying this formula, it is important to note that Ms. Wood's claim is limited to her latex allergy. By the same token, it is only Ms. Wood's latex allergy which is the "occupational disease" under consideration. Therefore, applying the statutory language of §110 to the circumstances of this case, the Commission concludes that Ms. Wood's occupational disease (latex allergy) is the **entire** cause of the disability at issue. Consequently, §34A-3-110 imposes no reduction to Ms. Wood's occupational disease benefits for her latex allergy and she is entitled to permanent partial disability compensation for the entire 8% latex allergy impairment, as well as medical expenses necessary to treat that allergy.

Having concluded that Ms. Wood is entitled to medical benefits and disability compensation based on an 8% impairment, the Commission now turns to the question of whether IHC is liable for the full amount of those benefits. That question is controlled by §34A-3-105 of the Occupational Disease Act:

(1) To the extent compensation is payable under this chapter for an occupational disease which arises out of and in the course of an employee's employment for more than one employer, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of the disease if:

(a) the employee's exposure in the course of employment with that employer was a substantial contributing medical cause of the alleged occupational disease; and

(b) the employee was employed by that employer for at least 12 consecutive months.

(2) Should the conditions of Subsection (1) not be met, liability for disability, death, and medical benefits shall be apportioned between employers

(4) when disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

ORDER DENYING MOTION FOR REVIEW

Karen S Wood

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Applying the foregoing statute to the facts of this case, Ms. Wood's latex allergy arose during her employment in several health care facilities over a period of 15 years. The last of these facilities was IHC, where she worked for approximately 5 years. Her employment at IHC, with the exposure to latex that went with it, was a substantial contributing cause of her latex allergy. Consequently, under the provisions of §105, IHC, as a self-insured entity, is liable for the entire amount of Ms. Wood's compensation and medical care.

ORDER

In light of the foregoing, the Commission modifies Judge Eblen's Order as follows:


Commencing February 28, 1998, IHC shall pay to Karen S. Wood permanent partial disability compensation at the rate of \$310 per week for 25 weeks, based upon Ms. Wood's 8% whole person impairment from latex allergy. IHC shall also pay Ms. Wood interest at 8% per annum on any of the foregoing disability payments that were not paid when due.

IHC shall also pay the reasonable expense of medical care necessary to treat Ms. Wood's latex allergy, in accordance with the Labor Commission's medical fee schedule.

From the total amount of disability compensation and interest due Ms. Wood, IHC shall withhold 20% and pay that amount directly to James E. Seaman as his fee for serving as Ms. Wood's attorney in this matter.

It is so ordered.

Dated this 14th day of February, 2005.


R. Lee Ellertson
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW

Karen S Wood

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Karen S Wood, Case No. 20011138, was mailed first class postage prepaid this 14th day of February, 2005, to the following:


KAREN S WOOD
BOX 313
HANCOCK ME 04640

IHC BRYNER CLINIC
745 E 300 S
SALT LAKE CITY UT 84102

RICHARD C HENRIKSEN JR, ESQ
320 S 500 E
SALT LAKE CITY UT 84102

MARK D. DEAN ESQ
257 E 200 S STE 800
SALT LAKE CITY UT 84111

ELLIOT K MORRIS ESQ
P O BOX 57929
SALT LAKE CITY UT 84107

A handwritten signature in cursive script, appearing to read "Sara Danielson", written over a horizontal line.

Sara Danielson
Utah Labor Commission

APPENDIX B

- **Utah Code Ann. § 34A-3-105**
- **Utah Code Ann. § 34A-3-110**

U.C.A. 1953 § 34A-3-105

**WEST'S UTAH CODE ANNOTATED
TITLE 34A. UTAH LABOR CODE
CHAPTER 3. UTAH OCCUPATIONAL DISEASE ACT**

Current through Nov. 2, 2004 general election.

§ 34A-3-105. Last employer liable--Exception

(1) To the extent compensation is payable under this chapter for an occupational disease which arises out of and in the course of an employee's employment for more than one employer, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of the disease if:

(a) the employee's exposure in the course of employment with that employer was a substantial contributing medical cause of the alleged occupational disease; and

(b) the employee was employed by that employer for at least 12 consecutive months.

(2) Should the conditions of Subsection (1) not be met, liability for disability, death, and medical benefits shall be apportioned between employers based on the involved employers' causal contribution to the occupational disease.

Laws 1991, c. 136, § 18; Laws 1996, c. 240, § 195, eff. July 1, 1997; Laws 1997, c. 375, § 153, eff. July 1, 1997.

Codifications C. 1953, §§ 35-2-105, 35A-3a-105.

<General Materials (GM) - References, Annotations, or Tables>

REFERENCES

LIBRARY REFERENCES

Workers' Compensation ☞ 201, 551.
Westlaw Key Number Searches: 413k201; 413k551.
C.J.S. Workers' Compensation §§ 120, 125 to 127, 322 to 323.

ANNOTATIONS

NOTES OF DECISIONS

Computation of period of limitations 4
Construction and application 1
Length of employment or exposure 2
Successive insurers 3
***19220 Sufficiency of evidence 5**

1. Construction and application

Occupational Disease and Disability Act does not implicitly grant Industrial Commission discretion to interpret 1988 Last Injurious Exposure Rule. U.C.A.1953, 35-2-1 et seq., 35-2-14. Luckau v. Board of Review of Indus. Com'n of Utah, 1992, 840 P.2d 811, certiorari denied 853 P.2d 897. Statutes ☞ 219(9.1)

Amendment to Occupational Disease Disability Act, providing that exposure to hazardous substance must be substantial contributing medical cause of disease and that employee must have been employed at least 12 consecutive months by employer in order to be compensated, was not merely explanatory clarifying amendment, but rather substantively changed Last Injurious Exposure Rule U C A 1953, 35-2-14, 35-2-105 Luckau v Board of Review of Indus Com'n of Utah, 1992, 840 P 2d 811, certiorari denied 853 P 2d 897 Workers' Compensation ☞73

2. Length of employment or exposure

Prior version of Last Injurious Exposure Rule encompasses all situations in which employee is exposed to material or substances which contribute to illness from which employee suffers or which caused employee's death, in amount sufficient to have caused or contributed to any degree to that condition, any exposure which did contribute or could have contributed to condition is sufficient U C A 1953, 35-2-13(b), 35-2-14 Luckau v Board of Review of Indus Com'n of Utah, 1992, 840 P 2d 811, certiorari denied 853 P 2d 897 Workers' Compensation ☞201

Statute limiting liability for silicosis to employer in whose employment employee was last exposed to harmful quantities of dust during period of 30 days requires only employment throughout 30-day period with harmful exposure during period, but does not require actual working or actual exposure each day of period U C A 1953, 35-2-14 State Ins Fund v Industrial Commission, 1964, 16 Utah 2d 50, 395 P 2d 541 Workers' Compensation ☞201

*19221 3. Successive insurers

Where miner's employer was self-insured during miner's employment and exposure to silicon dioxide until December, 1961, when Insurance Fund took over, and miner who had been laid off in June, 1961, was recalled by same employer for seven days until February 8, 1962, during which he was subject to same exposure, the employer and hence the Insurance Fund were liable under statute providing that only employer liable should be employer in whose employment employee was last exposed during period of 30 days or more U C A 1953, 35-2-14 State Ins Fund v Industrial Commission, 1965, 16 Utah 2d 269, 399 P 2d 208 Workers' Compensation ☞1074

Under Occupational Disease Act providing that in case of silicosis only employer liable shall be the employer in whose employment employee was last exposed to harmful quantities of silicon dioxide dust, the insurance carrier at time of employee's last exposure to silicon dioxide dust was required to pay the compensation award, notwithstanding such carrier was no longer carrier at time of employee's disability from silico-tuberculosis Utah Code 1943, 42-1a-1 et seq, 42-1a-12, 42-1a-29, 42-1a-13(a) (3), 42-1a-14, 42-1a-49(a) Pacific Emp Ins Co v Industrial Commission of Utah, 1945, 108 Utah 123, 157 P 2d 800 Workers' Compensation ☞1074

4. Computation of period of limitations

Widow of insulation mechanic who died more than three years from last date on which he actually worked for employer with whom he was injuriously exposed to asbestos was not entitled to death benefits under Occupational Disease Disability Law U C A 1953, 35-2-13, 35-2-13(b)(4), 35-2-14 Tisco Intermountain v Industrial Com'n of Utah, 1987, 744 P 2d 1340 Workers' Compensation ☞1280

5. Sufficiency of evidence

*19222 Evidence in proceeding for compensation for silicosis and tuberculosis supported findings that claimant had been exposed to harmful quantities of silicon dioxide dust in state for five of last fifteen years preceding disablement, had been exposed to harmful quantities of dust after State Insurance Fund policy became effective, and had been exposed to harmful quantities for thirty separate days during month when policy was effective U C A 1953, 35-2-1 et seq, 35-2-13(a)(3) State Ins Fund v Industrial Commission, 1964, 16 Utah 2d 50, 395 P 2d 541 Workers' Compensation ☞1509

In proceedings by underground miner under the Occupational Disease Statute to recover compensation for silicosis, evidence sustained finding of Industrial Commission that miner was injuriously exposed to silicon dioxide dust for statutory period while working for mining company U C A 1943, 42-1a-14 Commission of Finance v Industrial Commission, 1952, 121 Utah 83, 239 P 2d 185 Workers' Compensation ☞1509

Evidence supported findings that claimant was exposed to harmful quantities of silicon dioxide dust for period of five years between September, 1935, and July, 1946, that exposure occurred while employed by objecting employer, and that claimant left employment in 1946 in consequence of total disability from silicosis, so as to justify award under the occupational disease disability compensation law U C A 1943, 42-1a-13a(3), 42-1a-14 Kennecott Copper Corp, Utah Copper Division v Industrial Commission, 1949, 115 Utah 451, 205 P 2d 829 Workers' Compensation ☞1530

Current through Nov. 2, 2004 general election.

Search this disc for cases citing this section.

U.C.A. 1953 § 34A-3-110

**WEST'S UTAH CODE ANNOTATED
TITLE 34A. UTAH LABOR CODE
CHAPTER 3. UTAH OCCUPATIONAL DISEASE ACT**

Current through Nov 2, 2004 general election

§ 34A-3-110. Occupational disease aggravated by other diseases

The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or death when the occupational disease, or any part of the disease:

- (1) is causally related to employment with a non-Utah employer not subject to commission jurisdiction;
- (2) is of a character to which the employee may have had substantial exposure outside of employment or to which the general public is commonly exposed;
- (3) is aggravated by any other disease or infirmity not itself compensable; or
- (4) when disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

Laws 1991, c 136, § 22, Laws 1996, c 240, § 200, eff July 1, 1997, Laws 1997, c 375, § 158, eff July 1 1997

Codifications C 1953, §§ 35 2-109, 35A-3a-110

<General Materials (GM) - References, Annotations, or Tables>

REFERENCES

LIBRARY REFERENCES

Workers' Compensation ☞ 547, 552 to 566, 845
Westlaw Key Number Searches 413k547, 413k552 to 413k566, 413k845
C J S Workers' Compensation §§ 315 to 316, 320 to 321, 324 to 337, 549 to 551
Current through Nov 2, 2004 general election

Search this disc for cases citing this section.

APPENDIX C

- *Pacific Employers Ins. Co. v. Industrial Commission*, 157 P. 2d 800 (Utah 1945)
- *Ballatore v. Buehner Block, et. al.* Labor Commission Case No. 02-0124 (05/18/04).

*800 157 P 2d 800

108 Utah 123

Supreme Court of Utah

PACIFIC EMPLOYERS INS. CO. et al.
v
INDUSTRIAL COMMISSION OF UTAH et al.
No 6768
April 17, 1945

Original proceeding in certiorari by the Pacific Employers Insurance Company and the National Tunnel & Mines Company to review an award of compensation to John Deza by the Industrial Commission of Utah, wherein the State Insurance Fund was made a defendant

Award against the National Tunnel & Mines Company, employer, affirmed, and award against Pacific Employers Insurance Company annulled

West Headnotes

Workers' Compensation ☞ 1074

413 ----

413XI Insurance and Public Funds

413XI(D) Private Insurance

413k1074 Successive Insurers

Under Occupational Disease Act providing that in case of silicosis only employer liable shall be the employer in whose employment employee was last exposed to harmful quantities of silicon dioxide dust, the insurance carrier at time of employee's last exposure to silicon dioxide dust was required to pay the compensation award, notwithstanding such carrier was no longer carrier at time of employee's disability from silico-tuberculosis Utah Code 1943, 42-1a-1 et seq, 42-1a-12, 42-1a-29, 42-1a-13(a) (3), 42-1a-14, 42-1a-49(a)

*801 Charles Welch, Jr, of Salt Lake City, for plaintiffs

Grover A Giles, Atty Gen, and F A Trottier, of Salt Lake City, for defendants

TURNER, Justice

Certiorari to the Industrial Commission to review an award of compensation to John Deza who became totally disabled to work on March 25, 1944, after contracting silico-tuberculosis, within the meaning of the Occupational Disease Disability Compensation Act

(Sec 42-1a-1 et seq, U C A 1943), which act took effect July 1, 1941 The facts, [108 Utah 124] established without dispute in the record, are that Deza for 27 1/2 years during the period from 1914 to March, 1944, was employed by the National Tunnel & Mines Company and its predecessor in interest, Utah-Apex Mining Company Continuous employment by the mining companies named as an actual underground miner up to June 7, 1943, was interrupted by approximately 2 1/2 years' employment from 1920 to 1923 by the Park-Utah Mines at Park City, Utah, and the Utah Copper Mining Company at Bingham Utah Testimony of Dr Paul S Richards, one of the applicant's several attending physicians, shows that the first record on the applicant dates back to 1932, that the first positive diagnosis of silicosis was made March 10, 1937, on clinical findings, and the first positive X-ray findings were made December 28, 1939, resulting in a diagnosis of silico-tuberculosis Applicant's progressive condition, shown by these diagnoses, did not result in actual disability to perform his work, except an occasional lay-off on account of sickness On advice from the doctor, however, Deza left underground mining on June 7, 1943, and remained in the Company's employ as a watchman above the ground from then until March 25, 1944, on which date he definitely ceased working and was later confined as a continued bed patient in the hospital On April 20, 1944, stereoscopic X-rays were again taken when a confirmed diagnosis of silico-tuberculosis was made and from an X-ray standpoint the tuberculosis was considered as active The first positive sputum was found on May 19, 1944

From the foregoing statement of facts, it is seen that the last actual exposure to silicon dioxide dust was June 7, 1943 The significant importance of this date will become apparent immediately Prior to July 1, 1943, the workmen's compensation and occupational disease insurance was carried by the National Tunnel & Mines Company with the State Insurance Fund On and after July 1, 1943, the Mines Company insurance carrier was the Pacific Employers Insurance [108 Utah 125] Company for liability under both acts, and by Provision VII of its policy of insurance it was provided that 'This agreement shall apply only to such injuries so sustained by reason of accidents occurring during the Policy Period limited and defined as such in Item 2 of said Declarations' Item 2 of the Declaration sets out that the policy period 'shall be from July 1, 1943, to July 1, 1944 '

We here quote a few pertinent provisions of the state (U C A 1943)

Sec 42-1a-29

Silicosis--Defined 'For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (SiO_2) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations '

Sec 42-1a-12

'The following terms as used in this act shall be construed as follows

'(a) 'Disablement' means the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit *Silicosis, as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement*

'Disability,' 'disabled,' 'total disability' or 'totally disabled' shall be synonymous with 'disablement '

Sec 42-1a-14

'Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, *provided that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO_2) dust during a period of *802 sixty days or more after the effective date of this act* '

Sec 42-1a-13

'(a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled[108 Utah 126] by reason of an occupational disease subject to the following conditions * * *

'(3) No compensation shall be paid in case of silicosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide (SiO_2) dust for a total period of not less than five years in this state and unless total disability results within two years from the last day upon which the employee actually worked for the employer-against when compensation is claimed '

Sec 42-1a-49

'The right to compensation under this act for disability or death from an occupational disease shall be forever barred unless written claim is filed with the commission within the time as in this section hereinafter provided

'(a) If the claim is made by an employee and based upon silicosis it must be filed within one year after the cause of action arises * * *

On May 22, 1944, Deza filed application with the Commission setting forth the nature of his total disability and its cause as hereinbefore stated Upon this application and the answer of the Pacific Employers Insurance Company denying liability, and after the State Insurance Fund was made a party to the proceeding, the case was duly heard before the Commission and a decision was made and filed July 11, 1944 In its decision, the Commission found the facts to be substantially as set out at the beginning of this opinion, and held the National Tunnel & Mines Company and the Pacific Employers Insurance Company liable for the statutory compensation, hospital and medical expense, and dismissed the application as against the State Insurance Fund

In the course of its decision, the Commission holds 'We cannot give any weight to the argument of defendant, Pacific Employers Insurance Company that applicant was not exposed to harmful quantities of free silicon dioxide dust since July 1, 1943, the date when Pacific Employers Insurance Company became the insurance carrier We think the record shows conclusively that applicant[108 Utah 127] was exposed to harmful quantities of free silicon dioxide dust for not less than five years out of the last ten years immediately preceding his disablement, and that he was likewise exposed for more than sixty days since the effective date of the act, July 1, 1941 If this is true, then regardless of the fact that the disability occurred after Pacific Employers Insurance Company became the insurance carrier, the same employer is involved throughout the entire period from 1934 to March 25, 1944, *and therefore the question of insurance carrier is immaterial* The National Tunnel and Mines Company was the first and last employer so far as we are concerned, and since the claim of applicant was filed will within the time specified by the statute of limitations the employer is unquestionably liable, and the insurance carrier which happens to be the insurer at the time the total disability occurs must assume liability, although the exposure occurred prior to the effective date of the policy, and although the

disease which finally caused total disablement existed prior to the date of the said policy' (Italics added)

The Commission's findings and award of compensation in favor of Deza against the National Tunnel & Mines Company as employer are amply supported by the record and there can be no dispute as to this portion of the Commission's decision. The questions raised with merit in this court on review relate solely to whether the Pacific Employers Insurance Company or the State Insurance Fund is liable as insurance carrier under the peculiar facts of this case.

It is our opinion that the Commission erred in holding the Pacific Employers Insurance Company liable. It is true that the applicant's total disability did not occur until March 25, 1944, but the cause of his ultimate disability had been in operation for many years prior to that date. The statute plainly provides 'that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (*SiO₂*) dust during a period of sixty days or more after the effective date of this act [July 1, 1941]' Under the facts, the statutory requirements *803 were all clearly met and render the National Tunnel & Mines Company [108 Utah 128] liable as such last employer. As has been pointed out, however, June 7, 1943, was the date of the last exposure of the applicant to harmful quantities of silicon dioxide dust, and from that date until his employment ceased because of total disability on March 25, 1944, he continued in the employ of the Mines Company but in the capacity of a watchman above ground on the property of the Company. The insurance carrier at the time of such last exposure was the State Insurance Fund, this is the date which fixes the liability of the employer, and consequently also attaches the liability to the employer's insurance carrier as of that date, and upon the whole record and from the clear wording of the statute, the decision of the Commission should have held the State Insurance Fund liable for the payment of the compensation awarded.

Many cases are cited by both parties, none directly in point but many helpful in principle, and we deem it only necessary in support of our decision to quote the following from Case of Anderson, 288 Mass 96, 192 NE 520, 521, cited in plaintiff's brief: 'The fact that the employee continued to work for a short time after the cause of his incapacity became complete did not as matter of law require a finding that his injury did not occur until, because of incapacity, he ceased working. Personal injury and incapacity for work are not

equivalent terms and incapacity for work which is the final result of injury does not necessarily begin when the injury occurs. Case of Carroll, 225 Mass 203, 207, 114 NE 285. Cases in which it has been held that the board was warranted in taking the date incapacity began as the date of the injury are cases where there was no finding of the exact date of the injury (Atamian's Case, 295 Mass 12, 16, 163 NE 194) or where there was evidence that the cause of the injury was cumulative, as here, and, furthermore, that the employment continued to be a contributing cause of such injury up to the date incapacity began. See In re Johnson, 217 Mass 388, 104 NE 735, Case of Bergerson, 243 Mass 366, 137 NE 739, Case of Johnson, 279 Mass 481, 181 NE 761. *Where, in the case of a cumulative cause of injury there has been a change of insurer, it has been deemed essential that the employee, in order to establish the liability of the later insurer to pay compensation, prove the existence of a causal relation between the [108 Utah 129] employment during the period covered by its policy and the employee's injury.* Case of Fabrizio, 274 Mass 352, 174 NE 720, Case of Langford, 278 Mass 461, 463, 180 NE 228, Case of De Filippo, 284 Mass 531, 534 [188 NE 245]. *The implication is that where no such causal relation exists the employee's injury which results in his incapacity is to be regarded as having occurred prior to that period and not at the date incapacity began'* (Italics added)

Applying this reasoning to the instant case, it cannot be said that there was any causal relation between applicant's disability due to silico-tuberculosis and his employment during the policy period of the Pacific Employers Insurance Company as insurance carrier.

The award of the Commission as against the employer, National Tunnel & Mines Company, is affirmed, and as against the Pacific Employers Insurance Company the award is annulled.

LARSON, C J , and McDONOUGH and WADE, JJ

WOLFE, Justice

I concur. I desire, however, to refer to the case of Continental Casualty Company v Industrial Commission, 63 Utah 59, 221 P 852. The case involved a dispute between two insurance companies as to which of them should pay a compensation award entered by the Industrial Commission. The facts showed that one Sabey, while employed by Royal Coal Company, was injured on July 18, 1922. The

insurance carrier for the employer at the time of this injury was the Aetna Life Insurance Company. While still employed by Royal Coal Company on December 4, 1922, the employee, Sabey, was again disabled. At the date of the December disability the employer's insurance carrier was the Continental Casualty Company. Upon the record made we concluded that the December disability was a recurrence of the July injury. The Commission had ordered the Continental Casualty Company, the insurance carrier at the time of last disability, to pay the award. We reversed holding that the Commission exceeded its authority *804. in so

ordering, even though the same employer was primarily liable for both disabilities.

While this case is not directly in point, it does hold that in workmen's compensation cases, it is the insurance carrier at the time of the accidental injury which must pay the award even though said carrier did not carry the insurance at the time of the disability. This is partly analogous to our holding that the insurance carrier at the time of the last exposure must pay the award even though it is not the carrier at the time of the disability.

Workers Compensation Fund ("WCF") and Fremont Insurance Group, workers' compensation insurance carriers at different times for the Buehner companies, ask the Utah Labor Commission to review Administrative Law Judge Hann's award of benefits to S. H. B. under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. '63-46b-12, Utah Code Ann. '34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

Mr. B. suffers from silicosis,¹ caused by exposure to silica dust. He filed applications for hearing during February and March 2002 to compel Buehner and two of its insurance carriers, WCF and Fremont, to pay occupational disease benefits for his illness. On May 20, 2003, Judge Hann held an evidentiary hearing on Mr. B.'s claim. On November 24, 2003, Judge Hann granted benefits to Mr. B.. Judge Hann declined to rule on WCF's and Fremont's relative liability for those benefits.

Fremont and WCF now request Commission review of Judge Hann's decision. Fremont does not contest Mr. B.'s right to benefits, but contends the benefits should be paid by WCF, Buehner's insurance carrier during the last period that that Mr. B. was exposed to silica dust while employed by Buehner. For its part, WCF disputes Mr. B.'s right to payment of future medical care. Alternatively, WCF argues that a medical panel should be appointed to consider the medical aspects of Mr. B.'s claim.

FINDINGS OF FACT

The Commission affirms and adopts Judge Hann's findings of fact, summarized below. The Commission augments Judge Hann's decision with additional findings regarding 1) the source and duration of Mr. B.'s exposure to silica dust and 2) WCF's insurance coverage of Buehner.

For most of the time between 1967 and 2002, Mr. B. worked for Buehner as a sandblaster. During that same period, Mr. B. occasionally held other jobs. He was in the army from 1967 to 1970, worked as a salesman from 1995 to 1999 and was self-employed between September 2000 and September 2001. Mr. B. returned to Buehner a final time during September 2001 and worked until January 11, 2002, when the company went out of business.

Mr. B. was exposed to silica dust throughout his many years working Buehner. He was not exposed to any significant silica dust from any other source. On January 22, 2002, only eleven days after his work at Buehner ended, Mr. B. underwent a lung biopsy that showed he had silicosis. Mr. B.'s silicosis was caused entirely by exposure to silica dust at Buehner.

WCF provided workers' compensation insurance coverage for Buehner from 1998 through January 2002.

DISCUSSION AND CONCLUSION OF LAW

The Commission will first address Fremont's argument that WCF, rather than Fremont, is liable for Mr. B.'s occupational disease benefits.

Fremont and WCF each provided workers' compensation coverage for Buehner during times when Mr. B. was exposed to silica dust at Buehner. However, Fremont contends that, because WCF was the insurance carrier when Mr. B. was last exposed to silica dust, liability for Mr. B.'s silicosis falls entirely to WCF by virtue of the "last injurious exposure" rule.

The last injurious exposure rule places full liability on the insurance carrier covering an employer at the time of the last injury or exposure that is causally related to the disability. See *Larson's Workers' Compensation Law*, §153.02(1). With some limitations, § 34A-3-105 of the Utah Occupational Disease Act² adopts the last injurious exposure rule, at least with respect to employers. The question before the Commission is whether the last injurious exposure rule should also apply to insurance carriers. On this question, the Commission sees no reason to deviate from the precedent of Pacific Employers Insurance Co. v. Industrial Commission, 157 P.2d 800 (Utah 1945).

The facts of Pacific Employers are similar to the facts of Mr. B.'s case. Mr. Deza worked as an underground miner for National Tunnel over a period of 27 years. He was diagnosed with silicosis in 1937. He continued working underground, where he was exposed to silica dust, until June 7, 1943, when National Tunnel moved him to an above-ground position that did not expose him to silica dust. Three weeks later, on July 1, 1943, National Tunnel transferred its workers' compensation insurance coverage from the State Insurance Fund to Pacific Employers Insurance Co. On March 25, 1944, Mr. Deza became disabled from his silicosis and filed an application for occupational disease benefits.

All parties conceded that Mr. Deza was entitled to occupational disease benefits, but each of the two insurance companies that had provided occupational disease insurance coverage for National Tunnel argued that the other was liable for payment of Mr. Deza's benefits. After citing § 42-1a-14 of the Utah Occupation Disease Act (corresponding to the current § 34A-3-105 of the Act), the Supreme Court concluded that the date on which Mr. Deza was last exposed to harmful quantities of silica dust "attaches the liability to the employer's insurance carrier as of that date. . . ." Because the State Insurance Fund was the insurance carrier on June 7, 1943, when Mr. Deza left the underground mine and was no longer exposed to silica dust, the State Insurance Fund, rather than Pacific Employers Insurance Co., was liable for all of Mr. Deza's occupational disease benefits.

While the Commission recognizes that the formulation of the last injurious exposure rule now found in §34A-3-105 varies in some details from the version of the rule addressed in Pacific Employers, those differences are not significant under the facts of Mr. B.'s case and do not undercut the logic of the Pacific Employers holding.³ Therefore, having determined that Mr. B.'s last injurious exposure to silica occurred at Buehner on January 11, 2002, and that WCF was Buehner's insurance carrier on that date, the Commission concludes that WCF is liable for all benefits due Mr. B. and that Fremont has no liability.⁴

Turning to WCF's motion for review, its primary argument is that WCF should have no liability for future treatment of Mr. B.'s silicosis because any such future treatment will be necessitated by his exposure to silica from sources other than his work at Buehner's. WCF's argument lacks any evidentiary basis, but is instead based on conjecture. Of course, whether WCF is required to pay future medical expenses will always depend on whether the then-available medical evidence establishes that the medical care in question is necessary to treat Mr. B.'s work-related silicosis. Subject to that clarification, the Commission finds no error in Judge Hann's award of future medical care necessary to treat Mr. B.'s work-related silicosis.

WCF also contends a medical panel should be appointed to consider various aspects of Mr. B.'s claim. WCF's argument is once again based on speculation, without reference to any statute or rule that would require appointment of a medical panel under the facts of this case. Consequently, the Commission declines to require appointment of a medical panel in this matter.

ORDER

The Commission affirms Judge Hann's award of occupational disease benefits to Mr. B.. The Commission releases Fremont from any liability for such benefits and hereby orders WCF to pay all disability compensation and medical expense due Mr. B. by virtue of Judge Hann's order. It is so ordered.

Dated this 18th day of May, 2004.

R. Lee Ellertson
Utah Labor Commissioner

1. Silicosis is defined by Dorland's Illustrated Medical Dictionary, 27th ed., as: pneumoconiosis due to the inhalation of the dust of stone, sand, or flint containing silicon dioxide, with formation of generalized nodular fibrotic changes in both lungs.
2. Section 34A-3-105 of the Utah Occupational Disease Act sets forth Utah's version of the last injurious exposure rule as follows:
 - (1) To the extent compensation is payable under this chapter for an occupational disease which arises out of and in the course of an employee's employment for more than one employer, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of the disease if:
 - (a) the employee's exposure in the course of employment with that employer was a substantial contributing medical cause of the alleged occupational disease; and
 - (b) the employee was employed by that employer for at least 12 consecutive months.
 - (2) Should the conditions of Subsection (1) not be met, liability for disability,

death, and medical benefits shall be apportioned between employers based on the involved employers' causal contribution to the occupational disease.

3. The Commission also notes Professor Larson's comments regarding the continuing usefulness of the last injurious exposure rule: "This rule . . . is the majority rule in successive insurer cases, either by judicial adoption or by express statutory provisions." *Larson's Workers' Compensation Law*, §153.02(1). "The last injurious exposure rule is also utilized in occupational disease cases, including those involving . . . silicosis The . . . rule is particularly useful for allocating liability in occupational disease cases, which often involve a number of insurers." *Larson's* at §153.02(5)

4. In light of the Commission's conclusion that the last injurious exposure rule is applicable and that WCF is the only insurance carrier liable for Mr. B.'s benefits, the Commission finds it unnecessary to address Freemont's request to join other defendants.