

1994

Keith v. Industrial Commission of Utah : Brief of Petitioner

Utah Court of Appeals

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DUCKET NO.

940346

IN THE UTAH STATE COURT OF APPEALS

CHARLES KEITH,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,
R.P. SCHERER CORPORATION and
FIREMEN'S FUND,

Respondents

:

:

Case No. 940346-CA

:

:

Priority No. 7

:

BRIEF OF PETITIONER

PETITION FOR REVIEW FROM A FINAL ORDER
OF THE INDUSTRIAL COMMISSION OF UTAH

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Utah Court of Appeals
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CHARLES KEITH,	:	
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vs.	:	Case No. 940346-CA
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STATEMENT OF JURISDICTION

This Petition for Review is from a final Order of the Industrial Commission, State of Utah dated May 12, 1994. This Court has jurisdiction pursuant to Section 35-1-86 UCA, as amended, Section 63-46b-14, 16 & 17 UCA 1953, as amended and Section 78-2a-3(2)(a) UCA 1953, as amended.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

I. Whether the Industrial Commission erred in finding no medical causation between the surgery of July 27, 1989 and the industrial accident of September 15, 1982? Substantial Evidence Test. Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989).

II. Whether the Industrial Commission erred in ignoring competent, uncontroverted medical evidence, i.e. Dr. Charles R. Smith's finding, and that of the consulting medical panel in the Medicaid consideration, that the problem related to the original 1982 problem? Correction of Error Test. Morton Int'l, Inc. v. Utah State Tax Commission, 814 P.2d 581 (Utah 1991)

III. Whether the Industrial Commission, in the circumstances of the present case, erroneously concluded the activity of Moving the 'parking block' was unusual and extraordinary exertion? Substantial Evidence Test. Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989).

IV. Whether the Industrial Commission failed to interpret and apply the law and resolve doubt in accordance with the mandate of the Appellate Courts of this State to do so liberally in favor of the employee? Correction of Error Test. Morton Int'l, Inc. v. Utah State Tax Commission, 814 P.2d 581 (Utah 1991)

CONTROLLING STATUTES, RULES AND REGULATIONS

35-1-45 UCA, 1953, as amended. Provides for compensation of Industrial injuries.

35-1-65 UCA, 1953, as amended. Provides for payment of temporary total disability benefits.

35-1-81 UCA, 1953, as amended. Provides for payment of medical expenses related to an industrial injury.

Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). Provides for both legal and medical causation effects of an injury.

Intermountain Health Care v. Industrial Commission, 839 P.2d 841 (Utah Ct. App. 1992). Where the industrial injury is the significant contributing event a subsequent aggravation by a non-industrial event will not prevent recovery.

Large v. Industrial Commission, 758 P.2d 954 (Utah Ct. App. 1988). Provides the effect must be significantly connected to the event.

Baker v. California Packing Corp., 244 P.2d 640 (Utah 1952). Provides the Commission cannot ignore competent, credible, uncontested evidence.

Ogden City v. Industrial Commission of Utah, 193 P. 857 (Utah 1920). The law should be liberally construed in favor of the injured workman and in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee.

STATEMENT OF THE CASE

This is an action for workers' compensation benefits. Petitioner seeks review of the Industrial Commission's denial of Motion for Review which was filed July 26, 1993 and ruled upon by the Commission on May 12, 1994 sustaining the administrative Law Judge's Findings of Fact, Conclusions of Law and Order of June 28, 1993.

STATEMENT OF FACTS

Charles Keith was injured in an industrial accident on September 15, 1982 during the course of his employment with R. P. Scherer Corporation. He received medical benefits, temporary total benefits and permanent partial benefits based on an impairment of 15% whole man. These were paid by the employer's insurer, Fireman's Fund.

On June 11, 1985 Mr. Keith had a second industrial accident while in the employ of Salt Lake County. After hearing before an Administrative Law Judge and referral, evaluation and report by a medical panel, it was determined that the June 11, 1985 accident temporally aggravated the 1982 injury, but caused no additional permanent injury or aggravation of his 1982 injuries. He received temporary total disability benefits and limited medical benefits.

The foregoing facts are uncontested and records and documents supporting them were not included by the Industrial Commission in the Record on appeal.

In July, 1988 Mr. Keith assisted his mother in moving and later assisted his two teenage sons in moving a concrete parking bumper. (Tr. page 20, lines 9-21 - Record page 208; Tr pages 38 & 39 - Record 226 & 227 line 25 on page 226 - line 4 on page 227) His activity consisted of placing a bar under the block and 'scooting' it into position. (Tr. page 20, lines 9-21 - Record page 208) The next day he began to experience an exacerbation of his back pain. (Record page 10 - "He did not have acute, immediate pain then but he did have pain the following day at which time he went in to the Emergency Room and was seen by Dr. Hooker....") He was diagnosed by Dr. Charles M. Smith with a bulging disc at L5-S1 and a mild bulging of the disc at L4-5. This was the same area of his 1982 industrial injury. (Record page 10 and 114).

The Employer and it's industrial carrier denied benefits based on the 1982 injury. An attempt was made to obtain authorization for surgery through the Medicaid program. In response to inquiry, Dr. Charles M. Smith wrote to the State of Utah Dept. of Health on October 14, 1988 stating: "Having reviewed this patient's history, this appears to be secondary to the original problem". (Record pages 9, 108 and 251) The State Department of Health, Division of Health Care Financing then requested an Independent Medical Examination by Dr. Creig MacArthur. (Tr. page 30 - Record page 218 - lines 16-19.) This was performed on October 26, 1988. (Tr. page 118 and 248.) Thereafter on October 28, 1988 the State Department of Health, Division of Health Care Financing, wrote to Mr. Keith stating:

"On October 27, 1988 our panel of consulting physicians reviewed this request. It is their decision since this injury is secondary to the original problem it is the Industrial Commission's responsibility for payment.

"Therefore, this request for Medicaid payment authorization has been denied." (Record page 17)

No independent medical evaluation was requested or obtained by the Employer, it's Insurance Company or their attorneys. No medical evidence or statement was filed or entered into the record contrary to Dr. Charles M. Smith's conclusions or the conclusions of the panel of consulting physicians used by the State Department of Health, which, since he did the IME for the State must surely have included Dr. MacArthur.

Mr. Keith had not returned to work after the flare-up of his back in July, 1988 as of the date of the hearing. (Tr. page 34 - Record page 222, lines 1 - 9) Surgery was eventually performed on July 27, 1989 (Tr page 31 - Record page 219 lines 3-5) and Mr. Keith was given a projected return to work date of June 1, 1991. (Tr. 34 line 25 and page 35 line 1 - record 222 & 223).

During the surgery, Dr. Smith noted extensive adhesions around the prior surgery site (Record pages 112 and 246) and after the surgery changed his primary diagnosis to Adhesive Radiculitis. (Record pages 4, 111, 113, 256 and 273).

Application for additional industrial benefits based on the original September 15, 1982 accident was filed on September 7th, 1990 and an answer was duly filed. (Record pages 1 - 21 and 25 - 28). Hearing was held before an ALJ on this application on May 9, 1991. The issue to be determined at the hearing was as stated by the first ALJ in the original Summary of Testimony, Findings of Fact, Conclusion of Law and Order:

"The primary issue to be resolved by the Administrative Law Judge is whether there is a causal relationship between the industrial accident and the surgery on September (sic), 1989, and if answered in the affirmative, the secondary issues of medical expenses and temporary total disability through September 15, 1990, the statutory cut off date, eight years after the industrial accident." (Record page 39).

On November 6, 1991 (over a year after the hearing) the ALJ made Findings of Fact, Conclusions of Law and an Order stating the Applicant, Mr. Charles Keith, was not credible and concluded:

"In accordance with the foregoing Findings of Fact, the ALJ hereby rules that the applicant, Charles S. Keith, has failed to demonstrate by a preponderance of credible evidence that there is a causal connection between the industrial accident of September 15, 1982 and the medical treatment received and the applicant's unavailability for work." (Record page 41).

Mr. Keith's Counsel filed a Motion for Review December 6, 1991. (Record page 42) On May 21, 1992 the Industrial Commission issued an Order of Remand directing the ALJ to review the record of the case in accordance with the decision in Adams v. Board of Review, 821 P 2d 1 (Utah App. 1991). (Record page 60). The ALJ did not act on the Remand for another year. Under date of May 18, 1993 the ALJ elected to submit the matter to a medical panel to resolve the "medical issues" in the case. (Record page 67).

At that point, on May 25, 1993, Mr. Keith's Counsel before the Commission filed a Motion to Recuse the ALJ. (Record page 73).

The Motion to Recuse was granted by the Presiding Law Judge and the case was reassigned to the ALJ who wrote the Findings of Fact, Conclusions of Law and Order which the Commission adopted and which is the subject of this appeal. (Record page 87) On June 28, 1993, the second ALJ concluded "[T]here is no conflict in the medical evidence." (Record page 91). He then proceeded to enter an order adverse to the Applicant/Petitioner, Charles Keith. (Record page 96).

Mr. Keith's counsel before the Commission again filed a Motion for Review on July 26, 1993 (Record page 98) and on May 12, 1994 the Commission entered It's Order Denying Motion for Review, with one dissent. (Record page 151). From this Order appeal is taken in the form of Petition for Writ of Review dated June 8, 1994. (Record page 155).

SUMMARY OF ARGUMENTS

I. The Respondents argued and the Industrial Commission found, in a split decision, that the activity of moving the cement parking bumper rose to the level of legal causation. In doing so the Commission failed to address the issue of medical causation. The Respondents argued medical causation based on medical histories taken by the three health care providers involved, but carefully avoided the conclusions of those providers.

After evaluating the records, Dr. Charles Smith concluded the current problems were secondary to the original industrial injury. After evaluating the records and examining Mr. Keith Dr. Creig MacArthur reported to the State of Utah Dept. of Health and based on his report and that of Dr. Smith denied assistance for the

surgery on the ground that it was necessitated by the original 1982 injury and was thus the responsibility of the "Industrial Commission".

Finally, during the surgery, Dr. Smith noted and attempted to free up extensive adhesions in the site of the original surgery. Following the surgery he changed his primary diagnosis to "Adhesive Radiculitis".

Only two of the three health care providers expressed opinions as to medical causation. Both were in agreement that there was medical causation between the present problems and need for surgery and the original industrial injury in 1982. No medical "opinion" to the contrary can be found in the record. There is clearly a causal connection between the surgery and the 1982 industrial injury and the Commission erred in not so finding.

II. The only way the Industrial Commission could arrive at the conclusion that there was a medically causal connection between the activities in Mr. Keith assisting his mother to move, and in moving the cement parking bumper, is to ignore the medical opinions of Dr. Charles Smith and the conclusions of the State of Utah Dept. of Health, arrived at with the assistance of Dr. Creig MacArthur. As stated in Point I there was no medical opinion to the contrary expressed by any health care provider. The Respondents argue from, and the ALJ based his findings on, selective excerpts from the medical records, in the most part created by Drs Smith and MacArthur, and purport to reinterpret them so as to arrive at different conclusions than the medical experts while ignoring those experts' own interpretation of their own medical records.

The Utah Courts have repeatedly ruled the Industrial Commission may not ignore uncontroverted evidence. Here they have clearly done so and that is error.

III. The Respondents argue and two of the Industrial Commissioners erroneously accepted their argument that "scooting" the cement block was an "unusual

and extraordinary" activity. In concluding this activity rose to the level of "legal causation" under the Allen decision the Commission confused the terminology with the activity. It is conceded that the activity was unusual and extraordinary. Few of us would ever be called upon to move such an object.

The question however is whether or not the activity required unusual and extraordinary exertion. The ALJ erroneously concluded it did because it "required" a man and two boys to move it. Oddly enough there is no evidence in the record as to the weight or size of the cement parking bumper. It is at least as consistent with the facts to conclude that Mr. Keith used the bar and obtained the assistance of his two sons, both teen agers, to make sure he did not exert himself beyond his physical capabilities. It was undoubtedly the method he used and the assistance which caused Dr. Smith to conclude he was engaged in normal activities of daily living at least as far as exertion was concerned.

Considering the method employed and the assistance utilized there can be no serious claim that Mr. Keith exceeded his capabilities in view of his physical restrictions and the Commission erred in concluding that he did.

IV. Where there are two equally plausible interpretations of a situation such as noted in Point III above, there is certainly doubt. Here the Commission assumed, without supporting evidence as to the actual difficulty in moving the cement bumper, that the use of the bar and assistance of two teenage boys was because the task required that amount of assistance and still resulted in unusual and extraordinary exertion.

Mr. Keith clearly testified he was avoiding exertion beyond his capabilities. With the use of the bar and his two sons the exertion of the task was minimized. Even if evidence were tendered by the Respondents that the cement bumper was extraordinarily heavy and required substantial effort to move, by using the bar and

his two sons the task required no greater exertion than other common activities of every day living. Certainly this interpretation of the facts is just as reasonable as those made by the Commission. Based on the ALJ's view of the matter there was clearly an element of doubt. Such doubt should, by law, be resolved in favor of Mr. Keith and the Commission erred in not doing so.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION ERRED IN FINDING NO MEDICAL CAUSATION BETWEEN THE SURGERY OF JULY 27, 1989 AND THE INDUSTRIAL ACCIDENT OF SEPTEMBER 15, 1982

Under Allen v. Industrial Commission, 729 P.2d 15, (Utah 1986) there are two causal tests which must be met: Legal and Medical. In order to rise to the level of a compensable accident an incident must meet both of these causal requirements. At the same time it is clear that an intervening event, whether industrial or non-industrial, must meet the Medical causation, as well as the Legal causation requisite before it will interrupt the causal chain and cut off the statutory responsibility of the Employer and it's Insurance Carrier. See IHC v. Board of Review, 839 P.2d 841 (Utah App. 1992) and Large v. Industrial Commission, 758 P.2d 954 (Utah Ct. App. 1988).

The ALJ found and two of the Commissioners concurred that moving the cement bumper rose to the level of Legal causation. The ALJ glossed over the issue of medical causation and the Commission failed to address it.

The Respondents argued from selective statements taken out of context from the medical histories of the three health care providers involved, but failed to acknowledge their conclusions as to causation. The first doctor seen by Mr. Keith was Dr. Keith Hooker at the Utah Valley Regional Medical Center, Emergency Center.

At no time did doctor Hooker express an opinion as to causal connection or lack thereof to the 1982 industrial accident.

The only other doctor seen, other than the treating physician, was Dr. Creig MacArthur. Mr. Keith was evaluated by Dr. MacArthur at the request of the State Department of Health, Division of Health Care Financing. When the Employer's insurance carrier denied responsibility for the surgery application was made for medicaid assistance. The Department of Health, Division of Health Care Financing ruled against that application following Dr. MacArthur's evaluation. The Division of Health Care Financing wrote Mr. Keith as follows:

"On October 27, 1988 our panel of consulting physicians reviewed this request. It is their decision since this injury is secondary to the original problem it is the Industrial Commission's responsibility for payment.

"Therefore, this request for Medicaid payment authorization has been denied."

Thus, although the Respondents take portions of Dr. MacArthur's notes out of context and interpret them to their own advantage, Dr. MacArthur obviously advised the Division of Health Care Financing that Mr. Keith's need for surgery was causally connected to the original industrial injury and not to any activity associated with assisting in his mother's move or moving the cement bumper out of the way. Dr. MacArthur would certainly be in a better position to interpret his own notes than the Respondents.

The treating physician was Dr. Charles Smith. In his notes on August 9, 1988 he stated:

"A review of medical records from 1982 onward will be carried out when they are received from Fireman's Insurance Fund, to determine whether or not this constitutes a new injury or is simply an injury secondary to the original problem"

This August 9, 1988 note appears three times in the Record - pages 10, 119 and 253.

In an unprecedented circumstance the Record, when delivered to Petitioner's Counsel contained several "Post-it Notes" apparently affixed by one of the ALJs. If the notes are those of the original ALJ, then his skepticism may well have influenced the second ALJ. If the notes were made by the second ALJ then it is obvious his review of the file was incomplete. All of the notes, which are now a part of the record, were negative in nature. The one quoted below was affixed to page 253 next to the above quoted statement. It reads as follows:

" ? SO, is
IT OR
NOT,
DOC "

The arrow pointed to the general area of the language quoted above. Doctor Smith answered this question five times in the record, ten times if you count the duplications. It is hard to understand how the ALJ would be able to miss the answer unless he had already prejudged the case and was not looking for it.

In Dr. Smith's letter to the State of Utah Dept. of Health, Division of Health Care Financing dated October 14, 1988 he stated: "Having reviewed this patient's history, this appears to be secondary to the original problem." (e.a.) Here he used the same terminology as in the question stated in his August 9, 1988 note, but here he is now making it as a statement. He is no longer in doubt. He has formed an opinion. This October 14, 1988 letter appears three times in the Record - on pages 9, 108 and 251.

Having failed to obtain authorization from Medicaid or the Industrial Carrier, Dr. Smith prevailed on Utah Valley Hospital to allow him to do the surgery there without payment for the facility. The surgery was performed July 27, 1989. During the course of the surgery the doctor's "Operative " notes reflect the following:

"Fairly extensive root adhesions were identified around the root on the left side, probably the L5 root. It was trapped in enough adhesions that substantial difficulty was encountered in attempting to free it

up. It was freed up and reflected away from the left side towards the midline and then the disk in that area was noted to be a small focal herniation underneath where the inherent root had been trapped.... At the end of the procedure the end of the root was checked on the L5-S1 site. It appeared to be free. There were still adhesions and it was felt unwise to attempt to do a complete neurolysis because of extensive adhesions which were present."

This Operative Procedure note is found twice in the record at pages 112 and 246.

On admission to the hospital Dr. Smith's diagnosis was: "Focal herniated disk L5-S1 in a previously laminectomized site with advised surgical treatment." (See Record page 114) His Operative Diagnosis was: "Focal herniated nucleus pulposus on the left side at L5-S1". (See Record pages 112 and 146) Based upon his letter of October 14, 1988 above he had already determined this was secondary to the original industrial injury. After the surgery, however, Dr. Smith changed his primary diagnosis and on his August 4, 1989 Discharge summary noted:

"FINAL DIAGNOSIS:

1. Adhesive radiculitis L5 root with a focal HNP."

This appears twice in the Record - on pages 111 and 173.

Thereafter Dr. Smith wrote two letters with his new diagnosis. In his September 12, 1989 letter addressed Mr. Keith's attorney before the Commission he stated:

"This patient had an adhesive radiculitis of the L5 root with a focal herniated disc. He was treated by disc excision, partial neurolysis of the scars involving the L5 root, and a fusion from L5 to S1."

This appears on page 4 of the Record. Then on December 4, 1989 in a report addressed "TO WHOM IT MAY CONCERN" he stated:

"This patient had adhesive radiculitis of the L5 root with a focal herniated disc. He was treated by disc excision and partial neurolysis and a definitive lumbar fusion from L5 to S1."

This report appears twice in the Record - on pages 113 and 256.

The scar tissue around the L5 root did not come from moving the cement bumper, it was the unfortunate residual of the prior surgery already determined to have been

necessitated by the 1982 injury. Thus, both before and after the surgery, Dr. Smith was clear that the current problems and the surgery itself were, on a medical level, causally connected to the 1982 industrial injury.

Only two doctors have expressed opinions as to the etiology of Mr. Keith's current problems. Both of them, Dr. MacArthur and Dr. Smith concluded it was causally related to the 1982 injury and not the 1988 activities. Without medical causation those 1988 activities cannot result in an intervening injury so as to cut off Mr. Keith's rights to medical treatment and Temporary Total benefits from the 1982 employer. The Commission clearly relied solely on the question of Legal causation and erred in doing so.

POINT II

THE INDUSTRIAL COMMISSION ERRED IN IGNORING COMPETENT, UNCONTROVERTED MEDICAL EVIDENCE THAT THE SURGERY WAS RELATED TO THE ORIGINAL 1982 PROBLEM

The only medical opinions or reports addressing the issue of medical causation are those of the treating physician, Dr. Charles Smith, and the physician who performed the independent medical evaluation for the State of Utah Dept. of Health, Dr. Creig MacArthur. From both we have the same result: The current problems and need for surgery were "secondary to the original problem." Both doctors make it clear in the context of their statements that "the original problem" is the 1982 industrial injury. The Respondents could have requested their own IME, but opted not to do so.

Thus, while there were un-interpreted statements of history which Respondents (laymen, not medical professionals) have taken out of context and tainted with their own non-professional interpretations (these will be discussed further below under a section entitled Marshalling of Evidence) there is no medically competent

statement from any source stating either that the 1989 surgery was not causally related to the 1982 injury or that the 1989 surgery was in fact causally related to the activities of July, 1988.

The Utah Courts have repeatedly ruled that the Industrial Commission cannot ignore competent, uncontroverted evidence. Clinger v. Industrial Commission, 571 P.2d 1328 (Utah 1977); Kent v. Industrial Commission, 57 P.2d 724 (Utah 1936); Jones v. California Packing Corp., 244 P.2d 640 (Utah 1952); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965).

Following the surgery Dr. Smith dictated his Operative notes in which he described the adhesions resulting from the original surgery which has previously been adjudicated to have been necessitated as a result of the 1982 injury. Based on what he found while "inside" Mr. Keith's back, he changed his diagnosis to "Adhesive Radiculitis". No health care professional has questioned that diagnosis or even been asked to give a second opinion on it.

The only way the Industrial Commission could arrive at the conclusion that there was a medically causal connection between the 1989 surgery and Mr. Keith's activities in assisting his mother to move or in moving the cement parking bumper, and, that there was no medically causal connection between the surgery and the 1982 industrial injury, is to ignore the medical opinions of Dr. Charles Smith and the conclusions of the State of Utah Dept. of Health, arrived at with the assistance of Dr. Creig MacArthur. This they did; and this is error.

POINT III

THE INDUSTRIAL COMMISSION ERRONEOUSLY CONCLUDED THE
ACTIVITY OF MOVING THE PARKING BUMPER WAS UNUSUAL AND
EXTRAORDINARY EXERTION

Under Allen, supra page 13, it is the exertion which must be unusual or extraordinary, not the activity itself. In concluding this activity rose to the level of "legal causation" under the Allen decision the Commission exhibits confusion on the terminology. There can be numerous unusual or extraordinary activities which require little or no physical exertion. In the present case the "scooting of the cement bumper was an "unusual and extraordinary" activity. Few of us would ever be called upon to move such an object. It does not follow that it required unusual or extraordinary exertion.

The ALJ erroneously concluded unusual and extraordinary exertion was required because the task "required" a man and two boys to move it. In his Findings of Fact, Conclusions of Law and Order the ALJ stated as follows:

"In the instant case, Mr. Keith was engaged in activity at the time of his 1988 injury which was both unusual and extraordinary. The concrete barriers used in parking lots against which automobiles park are both heavy and difficult to move." He states that he was "scooting one with a bar," and was being helped by his two sons. If a man and two boys are required to move such a "block," there can be little doubt that it is not an object which can be moved with a moderate amount of effort."

Oddly enough there is no evidence in the record as to the weight of the cement parking bumper. Even if we ignore Mr. Keith's testimony, it is at least as consistent with the facts that the Applicant used the bar and obtained the assistance of his two sons, both teen agers to make sure that he did not exert himself beyond his physical ability, as to conclude the opposite as did the ALJ. And Yet the ALJ acknowledges at page 94 of the Record that:

¹. When I read this conclusionary statement by the ALJ, noting no evidence in the Record to support it, I actually went into the parking lot at my office and moved one of the cement parking bumpers by hand, without help, and found it could be quite easily done by one individual. If, however, I suffered from a back problem, as did Mr. Keith, I would, in caution, seek assistance to move it as he did. On this issue I believe Commissioner Carlson is much closer to truth of the matter in his dissent than the majority opinion, the ALJ or the claims of the Respondents.

"Mr. Keith claims that he moved few boxes, and was very careful because he was in pain. He stated that he was always careful not to injure himself. His testimony at the hearing was all focused on showing that he had always been careful in his movements, had consciously avoided all lifting of heaving objects out of the light category, and even his pushing of the concrete block was minimized by the applicant. With regard to the moving of boxes, he indicated that he was cognizant of his back limitations and 'could not do much,' and allowed his relatives to move his mother's possessions."

The ALJ further stated in at page 94 of the Record:

"...[B]oth doctors' MacArthur and Smith relate the cause of the accident as being related to exertion in moving heavy objects. The doctors assumed unusual and extraordinary exertion rather than that associated with ordinary and non-strenuous activities."

This "Finding" by the judge is not supported by the records of the doctors and to jump from this to the conclusion that there was medical causation has already been shown as error. In fact Dr. Smith's records state just the opposite is true. In his August 9, 1988 note (the one in which he stated he would review the records when received from Fireman's Insurance Fund, to determine causation) Dr. Smith states:

"His present herniation occurred while apparently working around the house, pushing or pulling, no significant lifting. It appeared to be secondary to the activities of associated daily living. The patient pushed one piece of cement out of the way in conjunction with several other people."(e.a.) (Record pages 10, 119 & 253 (all the same document.))

It was undoubtedly the method of moving the cement bumper with a bar rather than bending over and lifting one end, and the assistance of his sons, which caused Dr. Smith to conclude he was engaged in normal activities of daily living at least as far as exertion was concerned. Considering the method employed and the assistance utilized, in the absence of any evidence showing unusual or extraordinary exertion, it is clearly error to conclude Mr. Keith exceeded his capabilities in view of his physical restrictions. The Commission clearly erred in concluding that he did.

POINT IV

THE INDUSTRIAL COMMISSION FAILED TO LIBERALLY INTERPRET THE
LAW AND RESOLVE DOUBT IN FAVOR OF MR. KEITH IN ACCORDANCE
WITH THE MANDATES OF THE APPELLATE COURTS OF THIS STATE

The Utah Courts have repeatedly held that the compensation statutes should be liberally construed in favor of recovery, and that factual doubt respecting the right to compensation must be resolved in favor of the injured employee.

In Chandler v. Industrial Commission, 184 P 1020 (Utah 1919), the Court first cited support for the position that "...the Employers' Liability Act should be liberally construed..." noting that all courts agreed on this question. The Court then went on to add:

"We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employe or of his dependents as the case may be." The Court reversed the Commissions denial of benefits and remanded with directions to order benefits. The question of liberal construction of the Statutes and that of resolving doubt in favor of the employee were thus discussed in separate points by the Court.

In Ogden City v. Industrial Commission of Utah, 193 P. 857 (Utah 1920), after pointing out that the issue of dependency was primarily a question of fact the Court stated:

"The law should be liberally construed in favor of the injured workman and his dependents, and 'in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be'". (citing Chandler, supra, the Court affirmed benefits.)

In Park Utah Consolidated Miners Co. v. Industrial Commission, 36 P.2d 979 (Utah 1934), the Court first quoted from Chandler, Supra:

"If there is any doubt, 'respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be."

Then several pages later stated:

"Evidence should be liberally construed in favor of injured workmen and their dependents, (citation omitted) and may properly rest upon probabilities,

(citation omitted). It need not be direct or positive. Facts may be inferred from circumstances, provided the inference...is reasonable and legitimate. (citations omitted)" (e.a.)

This case involved factual questions as to whether or not the beneficiary of the order for benefits was a 'dependent', whether or not the deceased had contributed to her 'support' and whether or not the 'dependent' required 'support'. The Court affirmed an award of benefits.

In Barber Asphalt Corporation v. Industrial Commission, 135 P.2d 266 (Utah 1943), referring to Park Utah Consolidated Miners Co. case, Supra, the Court again quoted other language from Chandler, Supra, page 17, as to resolving doubt in favor of the employee and then discussed separately, in another paragraph, the principal of liberally construing the statute, saying:

"With relation to the compensation act it was early held that 'The Industrial Act, including the procedure therein provided, must be liberally construed, and with the purpose of effecting its beneficent and humane objects.'" (citing North Beck Mining Co. v. Industrial Comm., 58 Utah 486, 200 P. 111, 112.")

In Barber the Court added the language "Including the procedure therein provided" in it's admonition for liberal construction. An additional award by the Commission was affirmed.

In Salt Lake City v. Industrial Commission, 140 P.2d 644 (Utah 1943), the Court again discussed both the rule of construction in favor of the injured employee and the principle for liberally interpreting the compensation statutes in two separate points. On page 646 of the Pacific Reported the Court stated:

"We have held that the Industrial Act must be liberally construed and that by such construction we should attempt to effectuate its beneficent and humane objects."

Then almost three pages later, in discussing the facts of the case the Court stated:

"When all of these factors are considered together it makes an extremely close case--one very close to the borderline. The Commission

resolved the doubt in favor of the applicant. We have previously adhered to the rule that doubts respecting the right to compensation should be resolved in favor of the employee or his dependents."

The Court sustained the award.

In McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977), the Court stated:

"A further equally recognized rule of construction resolves any doubt respecting the right of compensation in favor of the injured employee or his dependents, as the case may be, and the compensation statutes should be liberally construed in favor of recovery." (e.a.)

The Commission had denied compensation. The Supreme Court remanded the case for entry of an appropriate award, stating:

"The order of the Commission is contrary to law in that it fails to meet the criteria of statutory construction generally followed and to resolve reasonable doubt in favor of the injured plaintiff." (e.a.)

In Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981), the Court stated:

"Mindful of the 'recognized rule of construction [that] resolves any doubt respecting the right of compensation in favor of the injured employee or his dependents,' and the principle that 'the compensation statutes should be liberally construed in favor of recovery,' (citing McPhie v. Industrial Commission), we cannot conclude that the Commission's finding that applicant's injury and disability resulted from an 'accident' was 'arbitrary or capricious' or 'wholly without cause' or without 'any substantial evidence' to support it. The Commission's order is therefore affirmed." - Note the Commission's finding was upheld based upon the rule of construction, not its interpretation of the statute.

See also: M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948). (The Court upheld the award made by the Commission.); Purity Biscuit Co v. Industrial Commission, 201 P.2d 961 (Utah 1949). (The Court sustained the award.); Kennecott Corporation v. Industrial Commission, 675 P.2d 1187 (Utah 1983) (The Court affirmed the award of benefits.)

The foregoing cases are far from exhaustive, but are certainly more than adequate to make the point. The Utah Courts have repeatedly ruled that the workers compensations statutes should be liberally construed in favor of the employee and where there is doubt, that doubt should be resolved in favor of the employee.

Where, as here, there are two equally plausible interpretations of a situation such as noted in Point III above, there is certainly doubt. Here the Commission assumed, without supporting evidence as to the actual difficulty in moving the cement bumper, that the use of the bar and assistance of two teenage boys was because the task required that amount of assistance and still resulted in unusual and extraordinary exertion. The Applicant clearly testified he was avoiding exertion beyond his capabilities. With the use of the bar and his two sons the exertion of the task was minimized. Dr. Smith picked up on this.

Even if evidence were tendered by the Respondents that the cement bumper was extraordinarily heavy and required substantial effort to move, by using the bar and his two sons the task required no greater exertion than the activities of every day living. Certainly this interpretation of the facts is just as reasonable as those made by the Commission. When Mr. Keith's testimony is factored in, there is only questionable doubt left, if any, as to the validity of the ALJ's finding. This sort of doubt should certainly, and, by law must, be resolved in favor of the Applicant. The Commission erred in not doing so.

MARSHALLING OF EVIDENCE

I am constrained to editorialize at the outset that this is an onerous burden to place on an Appellee or Petitioner in an adversarial system. To require one party to marshall all evidence which may help his opponent under pain of an adverse ruling, if he fails to do so adequately, is simply not equitable. This is particularly so, where the Respondent is not likewise required to marshall the evidence in favor of the Petitioner. This rule adds expense to the system and paper to the records and serves no effective purpose. The traditional rebuttal of allegations of fact and reasoning in responsive briefs is more economical in cost,

time and file space. This said, I make the following submission, pursuant to the Court's present requirements.

There are several references in the Record to "re-injury" of Mr. Keith's back:

"He re-injured his back, presumably at the same site where his prior surgery has been carried out." Record pages 11 and 265 (same document) (Dr. Smith).

"IMPRESSION: Re-injury of lumbar spine. Record page 11 and 265 (same document) (Dr. Smith).

"IMPRESSION: Re-injury of the lumbar spine." Record page 106 and 116 (same document) (Dr. Smith).

"It is my opinion, based on the studies so far, that he has a legitimate re-injury of his lumbar spine with substantial neurological findings." Record page 107 (Dr. Smith).

It might be argued that the term "re-injury" implies a new and separate injury. Dr. Smith, however, concluded before surgery that the problems related to the original injury and, after surgery, that the primary problem was adhesions from the original surgery. Thus his use of the term "re-injury" must be either a preliminary, not yet documented catch-all or a synonym for "aggravation".

The Respondents argued below (Record page 54) that Dr. Smith's statement that Mr. Keith suffered from "adhesive ariculitis which supervened following the surgical treatment of his herniated disc by Dr. Chester Powell (sic)" (Record page 4) supported a conclusion of a second "supervening injury". It is clear from Dr. Smith's records that the adhesions supervened from the surgical treatment necessitated by the 1982 injury and not from some ill-defined supervening "injury" in July 1988. Dr. Hooker's notes have been used by the Respondents to support their position of a new injury. Dr. Hooker was the Emergency Room doctor seen by Mr. Keith on two or three occasions - July 22, 1988, October 26, 1988 and apparently August 1, 1988, although the notes on the August 1 visit do not appear to be in the Record. The notes on the visit of July 22nd are found on pages 6, 117 and 264 of

the Record. After noting the 1982 industrial injury and follow-up, Dr. Hooker makes the following entry in his History:

"Has had no pain in the past several months, maybe up to a year and a half. He was lifting a cement slab for somebody yesterday and now has pain down the left hip, lumbosacral area and the buttock. Doesn't really truly radiate as it did before when he had his disc, he states."

Thereafter on October 26, Dr. Hooker notes "a documented herniated disc" and states his Diagnosis as "Back pain - herniated disc". This appears on pages 7, 121 and 122 of the Record.

From these comments the Respondents argue a medically causal connection between the activities of July, 1988 and the surgery in July of 1989. Dr. Hooker states no opinion as to medical causation and his comments, although inconsistent with Mr. Keith's testimony, and the history as reported by Dr. Smith, are easily reconciled with an aggravation of a pre-existing injury, just as was found by the medical panel in 1987 and as concluded by doctors Smith and MacArthur. This is particularly so when Dr. Hooker begins his "history" with the comment that Mr. Keith had a "long history of back problems."

Dr. Creig MacArthur's note has been used by the Respondents to support their position of a new injury. Dr. MacArthur saw Mr. Keith once to conduct an IME for the State of Utah Dept. of Health. In his written notes, found on pages 118 and 248 of the Record, after noting the 1982 problem, he stated:

"He has done reasonably well until just recently, more particularly in July when, about the 26th, he had a recurrence of his symptoms subsequent to a moving-type of injury when he was moving heavy objects about. He developed a recurrence of pain in his back, his buttock and down his left leg, some into his right leg, that has persisted to the present time."

The ALJ takes the foregoing and makes a conclusion based on negative reasoning stating at page 92 of the Record: "Dr. MacArthur did not explicitly state that there

was any causal relationship between the 1982 injury and the current injury." This is true. Dr. MacArthur also did not explicitly state in this written note that there was any causal relationship between the July, 1988 injury and the current need for surgery. However, subsequent to his evaluation and dictation of the note relied on by the ALJ and the Respondents, the State of Utah Dept. of Health, based on recommendations of their medical review panel, on which Dr. MacArthur sat, declined payment for the surgery on the ground it was an industrial injury arising out of the original problem in 1982. (Record page 17)

Dr. MacArthur's notes are totally consistent with an aggravation of the prior injury as both he and Dr. Smith, in fact, concluded. The ALJ and the Respondents simply pull the above comments out of context and interpret them so as to reach an opposite conclusion from Dr. Smith and Dr. MacArthur, the professional who made the note.

The Respondents and the ALJ also rely on the notes of Dr. Charles Smith to support their interpretation of the medical facts in spite of the fact that Dr. Smith repeatedly noted there was a medically causal connection between the 1982 injury and the surgery in July of 1989 as documented above in Point I.

In his report of the first visit on August 2, 1988, found at pages 11, 106, 116 and 249, Dr. Smith stated:

"His present episode occurred while cleaing (sic) up around his apartment doing some furniture moving, etc. He re-injured his back, presumably at the same site where his prior surgery has been carried out."

In his report of the second visit on August 9, 1988 (Record pages 10, 119 and 253), after talking with the claims adjuster for one of the Respondents, Dr. Smith recorded:

"This patient has had a prior laminectomy on the left side at L5-S1. There is a focal protrusion posteriorly on the left side. This is at the same site where the prior surgery was carried out. A CT Scan

done in 1985 revealed a bulging disc but no evidence of focal herniation. His present herniation occurred while apparently working around the house, pushing or pulling, no significant lifting. It appeared to be secondary to the activities of associated daily living. The patient pushed one piece of cement out of the way in conjunction with several other people. He did not have acute, immediate pain then but he did have pain the following day at which time he went in to the Emergency Room and was seen by Dr. Hooker who then ordered routine spine films, medications, and a CT Scan was ordered."

Thus in his first two visits Dr. Smith notes the activities of July, 1988. He thereafter, after reviewing Mr. Keith's history fully concluded his need for surgery "appears to be secondary to the original problem."

In his admission statement prior to surgery on July 27, 1989 (pages 114 and 245 of the Record) Dr. Smith stated:

"His history dates back to about 1982 at which time he had a laminectomy with an excision of a herniated disk and did reasonably well in the interval up until 1988 in July when he was doing a lot of moving of boxes and so on when they were moving from one site to another. The combination of lifting and twisting with repetitive bending apparently was the underlying cause for the problem."

It should be noted this is after he has made the conclusion reported in the October 14, 1988 letter that there is a medically causal connection between the present problems and need for surgery and the original 1982 industrial injury. During the surgery and after Dr. Smith made the connection even stronger by pointing up the adhesions resulting from the original surgery and changing his diagnosis to "adhesive radiculitis".

There is no medical opinion from any source which challenges either Dr. MacArthur's (and the State Department of Health, Division of Health Care Financing) or Dr. Smith's conclusions that the surgery was causally connected to and necessitated by the original industrial injury in 1982.

Finally, there are a series of assumption apparently made by the ALJ and incorporated into his Findings which cannot be supported by the Record, but which

are taken by the Respondents as establishing additional facts upon which they hang their arguments.

The ALJ found on page 93 of the Record that:

"In the instant case, Mr. Keith was engaged in activity at the time of the 1988 injury which was both unusual and extraordinary. The concrete barriers used in parking lots against which automobiles park are both heavy and difficult to move. He states that he was 'scooting one with a bar,' and was being helped by his two sons. If a man and two boys are required to move such a 'block' there can be little doubt that it is not an object which can be moved with a moderate amount of effort." (e.a.)

There is no evidence in the record as to the weight or size of the cement bumper or as to any difficulty in moving them. Admittedly we have all seen them in parking lots and common experience tells us they may be heavy and awkward to move, but the actual weight and difficulty are left purely to conjecture.

As to the judges Finding that "If a man and two boys are required to move such a 'block' there can be little doubt that it is not an object which can be moved with a moderate amount of effort.", I can only point out the obvious: Even a difficult task, with adequate help and the proper tools, can require a minimum amount of effort. This is how Mr. Keith reported it and this is how Dr. Smith saw it in his August 9, 1988 note.

The ALJ's finding on page 95 of the Record that:

"The medical reports of Doctors' Smith and MacArthur show that Mr. Keith had done reasonably well prior to the 1988 events, and it was only because of his strenuous exertion that he reinjured his back." (e.a.)

is in direct conflict with the conclusions of both doctors. The term "strenuous exertion" in particular is extraneous to the Record. The strongest wording used by any of the doctors in the record was:

Dr. Hooker from his July 22, 1988 entry: "He was lifting a cement slab for somebody". Most likely this is in error but even so there is no comment as to "strenuous exertion".

Dr. MacArthur from his only written note: "moving type of injury when he was moving heavy objects about." No comment as to how heavy and certainly no statement identifying "strenuous exertion".

Dr. Smith from his admission note: "[H]e was doing a lot of moving of boxes and so on.... The combination of lifting and twisting with repetitive bending apparently was the underlying cause for the problem."

His other notes made contemporaneously with his first and second visits state: "cleaning up around his apartment doing some furniture moving, etc." and "working around the house, pushing or pulling, no significant lifting. It appeared to be secondary to the activities of associated daily living. The patient pushed one piece of cement out of the way in conjunction with several other people."

How the ALJ reasoned from this to "strenuous exertion" is hard to comprehend.

Finally the ALJ concluded on page 96 of the Record that the

"Medical evidence shows that the applicant knowingly and willingly greatly exceeded his physical limitations by engaging in unusual and extraordinarily strenuous activities".(e.a.)

Now the ALJ has made the additional leap to "knowingly and willingly greatly exceed(ing) his physical limitations by engaging in unusual and extraordinarily strenuous activities." No where in the Record is such a quantum leap supported by fact or logic. This conclusionary assumption, stated as fact, is, in fact, contrary to the medical evidence, contrary to Mr. Keith's testimony and contrary to the opinions of the medical professionals involved in the case.

In addition, it is totally irrelevant since the pivotal issue of the case is medical causation and the only evidence as to medical causation is that the 1982 industrial injury necessitated the surgery of July, 1989 as stated by the only two health care professionals giving an opinion on the subject.

The evidence marshalled, claimed by the Respondents and relied on by the ALJ, at best, implies that the moving of the cement bumper, if any benefit of doubt is given to the Employer, could, arguably, be elevated to a status of legal causation. From the evidence, however, it is clear that the argument is tenuous at best and

given a resolution of doubt in favor of Mr. Keith, most certainly fails. Further, the activities of July, 1988 may have aggravated Mr. Keith's original injury, but there is no evidence in the Record, either pointed out by Respondents, relied upon by the ALJ or found by this attorney, which counters the medical opinions of Dr. Charles Smith or Dr. Creig MacArthur to the effect that the surgery was medically necessitated by the industrial injury of 1982.

CONCLUSION

Dr. Charles Smith, after reviewing the records, concluded the current problems were secondary to the original industrial injury. Dr. Creig MacArthur reported to the State of Utah Dept. of Health and based on his report that agency denied assistance for the surgery on the ground that it was necessitated by the original 1982 injury and was thus the responsibility of the "Industrial Commission".

During the surgery Dr. Smith noted and attempted to free up extensive adhesions in the site of the original surgery. Following the surgery he changed his primary diagnosis to "Adhesive Radiculitis".

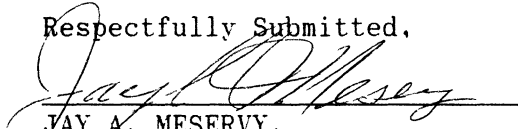
Both health care providers who expressed opinions as to medical causation were in agreement that there was medical causation between the present problems and need for surgery and the original industrial injury in 1982. No medical "opinion" to the contrary can be found in the record. There is clearly a causal connection between the surgery and the 1982 industrial injury. The Industrial Commission may not ignore such competent and uncontroverted evidence.

The "scooting" of the cement bumper may have been an "unusual and extraordinary" activity, but performed with an appropriate tool and with more than adequate help it did not require unusual or extraordinary exertion. There was thus no legal causation.

Any doubt should have been resolved in Mr. Keith's favor. The Industrial Commission clearly erred. The matter should be reversed remanded to the Commission for appropriate findings and order for payment of medicals and temporary total benefits.

DATED this 2nd day of February, 1995.

Respectfully Submitted,

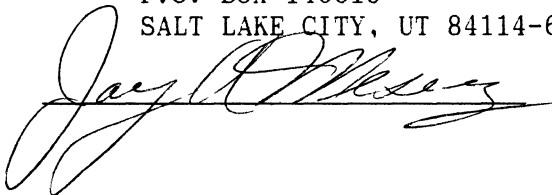

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CERTIFICATE OF MAILING

I certify I mailed a copy of the foregoing Brief this 2nd day of February, 1995, to the following:

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pensable as "accidental" injury within this section since in order to recover for accidental injury there must be some causal connection or relation between act causing injury and employment or duties of injured employee. *Westerdahl v. State Ins. Fund*, 60 Utah 325, 208 P. 494 (1922).

Although an employee is employed on the day of an accident, it cannot be said he is in the course of his employment where he steps aside to engage in an altercation with some third person concerning a personal grievance wholly unrelated to matters connected with his employment. *Wilkerson v. Industrial Comm'n*, 71 Utah 355, 266 P. 270 (1928).

Wife of deceased drugstore employee was not entitled to compensation where she did not sustain burden of proving that typhoid fever was result of injury received in course of his employment. *Chase v. Industrial Comm'n*, 81 Utah 141, 17 P.2d 205 (1932).

Death of beer truck driver after being taken

to the hospital when he had a severe pain in his chest after making his second morning delivery did not result from an accident arising out of or in the course of his employment, where substance of opinions of medical panel was that death from coronary thrombosis with myocardial infarction was not caused from the exertion of deceased's work on that morning. *Burton v. Industrial Comm'n*, 13 Utah 2d 353, 374 P.2d 439 (1962).

Regular course of employment.

Bricklayer killed in automobile accident while returning home from work was not killed in an accident arising out of or in the course of employment despite fact that decedent's hourly wage had been increased due to location of construction site; increased hourly wage did not constitute pay for travel time. *Barney v. Industrial Comm'n*, 29 Utah 2d 179, 506 P.2d 1271 (1973).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 1.

A.L.R. — Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.

Workmen's compensation: injury or death due to storms, 42 A.L.R.3d 385.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A.L.R.3d 566.

Employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A.L.R.3d 505.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Workers' compensation: sexual assaults as compensable, 52 A.L.R.4th 731.

Workers' compensation: injuries incurred during labor activity, 61 A.L.R.4th 196.

Workers' compensation: injuries incurred while traveling to or from work with employer's receipts, 63 A.L.R.4th 253.

Key Numbers. — Workers' Compensation 47.

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

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

History: L. 1917, ch. 100, § 52a; C.L. 1917, § 3113; L. 1919, ch. 63, § 1; R.S. 1933 & C. 1943, 42-1-43; L. 1984, ch. 75, § 1; 1988, ch.

vice, as affected by compensation, § 35-6-1 et seq.

Occupational diseases generally. Chapter 2 of

State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive 66⅔% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

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

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

History: L. 1917, ch. 100, § 76; C.L. 1917, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; § 3137; L. 1919, ch. 63, § 1; 1921, ch. 67, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 3; R.S. 1933, 42-1-61; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-61; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, 1971, ch. 76, § 4; 1973, ch. 67, § 2; 1975, ch. 101, § 4; 1977, ch. 151, § 1; 1981, ch. 287, § 1.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Construction and application.
Effect of voluntary payments.
Estoppel.
Findings of commission.
Limitations.
Maximum benefits.
Maximum time.
Operation and effect.
Overpayment of benefits.
Reclassification of disability.
Stabilization of condition.
Temporary total disability.
Validity of award.

Constitutionality.

This section does not violate the open courts provision of the Utah Constitution, Article I, § 11. *Middlestadt v. Indus. Comm'n*, 852 P.2d 1012 (Utah Ct. App. 1993).

Construction and application.

weeks' compensation for loss of arm under § 35-1-66 as well as compensation for temporary total disability under this section, and award was for 200 weeks' compensation; commission considered payments as compensation due for temporary disability under this section. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

Estoppel.

Fact that insurance carrier pays compensation for temporary total disability does not preclude it from denying that applicant for compensation met with an accident which caused his death. *Taggart v. Industrial Comm'n*, 79 Utah 598, 12 P.2d 356 (1932).

Findings of commission.

Order of Industrial Commission denying additional compensation on ground workman had not become totally and permanently disabled since original finding and award for temporary disability was affirmed, although medical testimony was in conflict, and since failure to re-

expenses — Artificial means and appliances.

(1) In addition to the compensation provided in this chapter the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

(2) If death results from the injury, the employer or the insurance carrier shall pay the burial expenses in ordinary cases as established by rule.

(3) If a compensable accident results in the breaking of or loss of an employee's artificial means or appliance including eyeglasses, the employer or insurance carrier shall provide a replacement of the artificial means or appliance.

(4) The commission may require the employer or insurance carrier to maintain the artificial means or appliances or provide the employee with a replacement of any artificial means or appliance for the reason of breakage, wear and tear, deterioration, or obsolescence.

(5) The commission may, in unusual cases, order the payment of additional sums for burial expenses or to provide for artificial means or appliances as the commission considers just and proper.

History: L. 1917, ch. 100, § 86; C.L. 1917, § 3147; L. 1921, ch. 67, § 1; R.S. 1933, 42-1-75; L. 1941 (1st S.S.), ch. 15, § 1; C. 1943, 42-1-75; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1965, ch. 68, § 1; 1969, ch. 86, § 10; 1971, ch. 76, § 9; 1975, ch. 101, § 8; 1977, ch. 156, § 11; 1984, ch. 78, § 1; 1992, ch. 178, § 4; 1994, ch. 224, § 9.

Amendment Notes. — The 1992 amend-

ment, effective April 27, 1992, rewrote the provisions of the former first and second undesignated paragraphs and designated them as Subsections (1) through (3); deleted the former third through fifth undesignated paragraphs, relating to replacement of artificial means or appliances and to payments of additional sums; and added Subsections (4) and (5).

The 1994 amendment, effective May 2, 1994, made stylistic changes in Subsection (1).

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This section does not require that employee file special application for allowance of medical expenses in excess of \$500 if he has on file a claim for compensation generally, and he need not ask for such relief in his regular claim. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937); *Anderson v. Industrial Comm'n*, 108 Utah 52, 157 P.2d 253 (1945).

Obligation to pay compensation under this section is governed by the law at the time the injury occurred. *Utah Constr. Co. v. Matheson*, 534 P.2d 1238 (Utah 1975).

Chiropractic treatment.

Claimant was entitled to continued chiropractic treatment where there was uncertainty

States Casing Serv. v. McKean, 706 P.2d 601 (Utah 1985).

Employee's additional insurance.

Neither employer nor his insurance carrier was excused from additional liability imposed by this section because employee carried other accident insurance, where award and employee's insurance taken together did not exceed medical, nurse and hospital services actually incurred. *Anderson v. Industrial Comm'n*, 108 Utah 52, 157 P.2d 253 (1945).

Employment of physician by employee.

If injured employee himself employs a physician to attend him, and he is not negligent in seeking or employing such physician, but due to erroneous diagnosis employee has all of his teeth unnecessarily extracted, he may recover therefor as being attributable to the accident or injury, and not due to an independent and intervening cause; at least where employer knew that the employee had been injured and was being treated, and employer was content with treatment. *Gunnison Sugar Co. v. Industrial Comm'n*, 73 Utah 535, 275 P. 777 (1929).

Extraordinary cases.

Upon proper application to the Industrial Commission, the employer is entitled to some limitations and definiteness in regard to the amount of medical expenses; however, where