

1994

# Lavell H. Helf v. Industrial Commission of Utah and Yellow Freight Systems, Inc.: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LAVELL H. HELF, )

Petitioner, )

v. )

Case No. 940433-CA  
Priority No. 7

INDUSTRIAL COMMISSION OF UTAH )  
and YELLOW FREIGHT SYSTEMS, )  
INC. )

Respondents. )

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REPLY BRIEF OF PETITIONER

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PETITION FOR REVIEW FROM AN ORDER OF THE INDUSTRIAL  
COMMISSION OF UTAH, DATED JUNE 28, 1994, DENYING THE  
PETITIONER'S CLAIM FOR WORKERS' COMPENSATION BENEFITS.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

940433

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FILED

MAR 15 1995

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IN THE UTAH COURT OF APPEALS

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LAVELL H. HELF,	)	
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v.	)	Case No. 940433-CA
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**IN THE UTAH COURT OF APPEALS**

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LAVELL H. HELF,	)	REPLY BRIEF OF
	)	THE PETITIONER
Petitioner,	)	
 v.	 )	 Case No. 940433-CA
		Priority No. 7
INDUSTRIAL COMMISSION OF UTAH	)	
and YELLOW FREIGHT SYSTEMS,	)	
INC.	)	
 Respondents.	 )	

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Comes now the Petitioner, and by and through his attorney, now files the following Reply Brief in support of his Petition for Review and in response to the Brief filed by the Respondents.

**JURISDICTION**

This court has jurisdiction pursuant to Utah Code Annotated §35-1-82.53(2), §35-1-86 and §63-46b-16.

**ISSUES PRESENTED**

1. Whether the Petitioner has marshaled the evidence as required by law?

2. Whether the Petitioner has misstated the evidence?

All issues involving questions of fact the court must apply the substantial evidence Chase v. Industrial Commission, 872 P.2d 475, 478 (Utah App. 1994).

All issues involving questions of law the court

must apply the corrections of error standard and give no deference to the Industrial Commission. Bevan v. Industrial Commission, 790 P.2d 573 (Utah App. 1990).

#### **ARGUMENT**

##### **I. THE PETITIONER HAS MARSHALED THE EVIDENCE AS REQUIRED BY LAW.**

The Respondent is correct when it argues in its Brief that the Petitioner must marshal the evidence in support of the Industrial Commission's decision. Johnson v. Board of Review, 842 P.2d 910, 912 (Utah App. 1992).

The Petitioner in his Brief at pages 9-10 stated the two critical findings of the Industrial Commission were that there is no "causal connection between [the Petitioner's] injury and his employment" and that the Petitioner's "injury did not arise out of and in the course of his employment." R. 117

To then satisfy the requirements of marshaling the evidence in support of those findings, the Petitioner cites the medical records that do prove that the Petitioner did suffer from some predisposition to loss of consciousness and that he had a prior heart condition diagnosed as idiopathic hypertrophic subaortic stenosis.

The Petitioner then stated in his Brief at page 9 that the only other evidence which marginally supports the Industrial Commission's decision is the fact that at the exact

moment he fell, he was walking up the metal loading dock plate to lower it into his trailer and that he fell backwards onto the loading dock. R. 143, 158 This was confirmed by two witnesses.

Lastly, the Industrial Commission found that the Petitioner's employment did not enhance the risk of injury. R. 117

This last finding is totally unsupported by any evidence. Unless this Court is willing to accept the Industrial Commission's narrow view that merely walking up a moving metal loading dock plate to force it down into the trailer does not enhance the risk of injury. This narrow point of view ignores the fact that before walking onto the metal loading dock plate, the Petitioner moved some freight that was in his trailer. That freight, which was described as "awkward and pretty heavy," consisting of stoves, which weighed a total of 1279 pounds and fiberglass grating weighing 200 pounds. R. 79, 81, 82, 167

The only evidence to support to Industrial Commission's finding that the Petitioner employment did not enhance the risk of injury is the fact that at the time of his fall he was walking up a moving dock plate. That is not substantial evidence to support this finding because it totally ignores what occurred before the Petitioner's last walk.

As stated above, it ignores the size and weight of

the freight he moved prior to the walk, it ignores the fact that the Petitioner had to bend over and pull a metal ring to cause the metal loading dock plate to pop up so he can then use his own weight to force it down into the trailer and it ignores the fact that the dock plate was still moving down at the time he fell.

The question then becomes not whether the Petitioner has marshaled the evidence but whether the Industrial Commission's findings are supported by substantial evidence. Substantial evidence has been defined as relevant evidence that reasonable minds might accept as adequate to support a conclusion. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989)

Based upon the evidence that the Industrial Commission elected to ignore, it is submitted that its findings and conclusions are not supported by substantial evidence. It is further submitted that the Petitioner has marshaled the evidence in support of the Industrial Commission's decision and has demonstrated that decision is, at best, only supported by a scintilla of evidence.

## **II. THE PETITIONER HAS NOT MISSTATED EVIDENCE.**

The Respondents argue that the Petitioner in his Brief misstated the evidence. The alleged misstatement comes from the fact that there was no direct evidence about the freight the Petitioner moved before pulling the pin and begin



his fateful walk up the loading dock plate. R. 79, 81, 82 and 167

The Respondent argues that there is no evidence that the freight, i.e., the stoves which weighed 1279 pounds and the fiber glass grating which weighed 200 pounds, which the Petitioner moved did weigh that much.

The undisputed evidence however is that those stoves and fiber glass grating were the only freight in the Petitioner's trailer and that the manifest submitted as evidence at the time of the hearing showed the weight of the freight. Furthermore, the Respondent's counsel stipulated that the hearing exhibits A-1 and A-2 did accurately reflect the freight that was on the Petitioner's trailer at the time he was at Gates Rubber. R. 197 It is not a great leap of logic to conclude that the items the Petitioner moved were very heavy and were very awkward.

The Respondent argues that a person who weighs 175 has to use a wall as additional leverage to lower the dock plate is "not relevant to any finding" of the Industrial Commission. (Respondent's brief, p. 18.) This fact is very relevant because it clearly proves that the lowering of the dock plate is not as easy a chore as the Respondent would like this court to believe.

It is the Respondent who is attempting to mislead this court by only focusing upon the activity the Petitioner was involved in at the time he fell off the moving dock plate.

The Respondent does not want this court to consider the entire circumstance of this tragic incident. The Respondent does not want this court to consider the fact that the Petitioner did move some very heavy and awkward freight, that he had to bend over and pull a metal ring to release the dock plate, that he had to immediately walk upon this dock plate to lower it into his trailer, that it was difficult to lower the plate and that the plate was on an angle and moving at the time the Petitioner fell.

The Respondent's assertion that there is no medical evidence to support the Petitioner's claim is just a bold faced misrepresentation. The Petitioner has presented substantial evidence that his fall and subsequent severe head injury were the direct result of his employment.

Dr. Speed in his November 11, 1992, letter stated:

"Although the cause of [the Petitioner's] fall at work on September [9], 1992, remains unknown . . . In the absence of any evidence to the contrary, it is therefore my opinion that [the Petitioner's] brain injury was work related."

Dr. Null in a June 30, 1993, letter clearly says that the stress related to the Petitioner's job, including the lowering of the dock plate and the heavy work "culminated in a situation of an arrhythmia which resulted in his syncopal episode and subsequent head injury." R. 51

Dr. Freedman in a letter dated November 24, 1992, opined that the Petitioner's syncope was probably related to his cardiac condition. The doctor further said that if the

syncope was indeed on a cardiac basis, "it is likely that it was related to whatever level of exertion was present at the time." R. 50


The truth is that Drs. Null, Freedman and Speed all opined that the syncopal episode suffered by the Petitioner on September 9, 1992, was related to his work. R. 50, 51

#### **CONCLUSION**

The Petitioner has marshaled the evidence as required by law and has conclusively proven that the evidence submitted to the Industrial Commission does not support its decision. The Petitioner has not misstated any evidence but has attempted to focus this court on the entire circumstance surrounding this disastrous event. Unlike the Respondents who would like this court to put on blinders and not examine all the evidence.

Based upon the foregoing, and the argument outlined in his brief, it is submitted that the Petitioner be awarded the benefits he claimed in his application for hearing.

Dated this 15th day of March 1995.



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Hans M. Scheffler  
Attorney for Petitioner

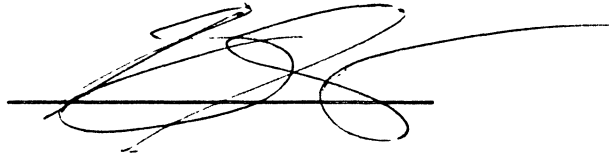
**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of March 1995  
two copies of the forgoing were delivered to the  
following:

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Alan L. Hennebold  
Attorney for Industrial  
Commission  
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Salt Lake City, Utah 84111

Dated this 15th day of March 1995.

A handwritten signature in black ink, appearing to be "D.M. McConkie", is written over a horizontal line.