

1995

Lisa Kunz v. R. R. Donnelley and Sons, Co.,
Sedgwick James of Idaho, and Industrial
Commission of Utah : Brief of Petitioner

Utah Court of Appeals

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Brad Betebenner; Richards, Brandt, Miller and Nelson; attorney for respondent; Allen Hennebold; Industrial Commission of Utah; attorney for respondent.

David N. Mortensen, Sherlynn White Penstermaker, Ivie and Young; attorneys for petitioner.

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BRIEF

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IN THE UTAH COURT OF APPEALS

LISA KUNZ,	:	
	:	
Plaintiff/Appellant,	:	Case No: 94-0757 950690 CA
	:	
vs.	:	Oral Argument
	:	Priority No. 7
	:	
R.R. DONNELLEY & SONS, CO. and	:	
SEDGWICK JAMES OF IDAHO, and	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
Defendants/Appellees.	:	

BRIEF OF PETITIONER

PETITION FOR REVIEW OF THE FINAL DECISION
AND ORDER OF THE UTAH INDUSTRIAL COMMISSION

Brad Betebenner
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144
Attorney for Respondent R. R. Donnelley

Allen Hennebold
INDUSTRIAL COMMISSION OF UTAH
160 East 300 South, #300
Salt Lake City, Utah 84114
Attorney for Respondent Industrial Commission

David N. Mortensen, #6617
Sherlynn White Fenstermaker, #1057
IVIE & YOUNG
48 North University Avenue
Provo, Utah 84601
Attorneys for Petitioner

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RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144
Attorney for Respondent R. R. Donnelley

Allen Hennebold
INDUSTRIAL COMMISSION OF UTAH
160 East 300 South, #300
Salt Lake City, Utah 84114
Attorney for Respondent Industrial Commission

David N. Mortensen, #6617
Sherlynn White Fenstermaker, #1057
IVIE & YOUNG
48 North University Avenue
Provo, Utah 84601
Attorneys for Petitioner

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JURISDICTIONAL STATEMENT

This matter involves a final decision and order of the Industrial Commission denying a petition for Workers' Compensation Benefits. As a result, this court has jurisdiction pursuant to Utah Code Annotated §78-2a-3(2)(a) (Supp. 1995).

STATEMENT OF THE ISSUE

The issue raised in this appeal arose out of the Industrial Commission's denial of Workers' Compensation benefits to the petitioner Lisa Kunz. The Industrial Commission's action was precipitated by a hearing before an administrative law judge (R. 473), as well as briefing to the Industrial Commission (R.504). Both the Finding of Fact and Conclusion of Law of the ALJ and the Industrial Commission Order are attached as Addenda 1 and 2. Petitioner's Petition for Review is attached as Addendum 3. Accordingly, this issue has been preserved for appeal.

Issue presented: Whether the petitioner was injured in the scope and course of her employment.

Standard of Review: Whether the petitioner was injured in the scope and course of her employment presents a question of law which, absent a grant of discretion, must be reviewed for correctness. *Morton International, Inc. v. State Tax Commission*, 814 P.2d 581, 588 (Utah 1991); *Walls v. Industrial Commission*, 857 P.2d 964, 966 (Utah Ct. App. 1993). In *Stokes v. Industrial Commission*, 832 P.2d 56 (Utah Ct. App. 1992), this court refused to grant the

Commission discretion to interpret the Workers' Compensation Act. *Id.* at 58. Therefore, this court should review for correctness the Commission's determination that petitioner was not acting in the scope and course of her employment at the time of accident.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This matter involves the interpretation of the Utah Workers' Compensation Act , specifically Utah Code Ann. § 35-1-45 (1994) which provides:

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, whenever such injury occurred, if the accident was not purposefully 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.

STATEMENT OF THE CASE

On January 6, 1994, petitioner was going to work and parked her car near a stairwell entrance in the building occupied by her employer R.R. Donnelley & Sons (Donnelley). (R. 637). The parking lot was not owned by Donnelley, nor was the petitioner told where to park. (R. 638). The petitioner understood there was just one door in the building to access Donnelley. (R. 638). Donnelley shares the building with other business which are not affiliated with Donnelley. (R. 638). As the petitioner was accessing the building, she ascended stairs and

got almost to the third step when she slipped and fell. (R. 637, 641). Ms. Kunz testified that she slipped on ice which was covered by snow. (R. 667). Her right knee hit the stairs fairly hard and the petitioner testified at the administrative hearing that her knee cap was off to one side. (R. 642). The administrative law judge below, as well as the Industrial Commission (the Commission) found that the evidence showed that the petitioner did have a fall, and that she did have a scrape on her right leg on the date alleged. (R. 474,505) Surgery was performed and work time was lost. (R. 645, 648-49). As the administrative law judge and the Commission's conclusion was that the accident at issue did not arise out of and in the course of petitioner's employment, the particulars concerning her injury and the benefits she seeks are not at issue on this appeal.

The evidence before the administrative law judge and the Industrial Commission was that it had been snowing the night before the accident. (R. 637). The sidewalk had been partially cleared so that one could gain access to the staircase, however, some areas were not cleared. (R. 639). The petitioner testified, and both parties admit that other than the stairs, one can access the only door to the building via the handicap ramp. (R. 639). In order to take the ramp, the petitioner would have had to walk 20 feet farther. (R. 639-40). Petitioner testified that the area around the ramp was not cleared, nor was the ramp itself cleared of snow. (R. 640).

Petitioner testified that using the stairs was the regular route taken by the employees.¹ (R. 644). In fact, the stairs constituted the only route Ms. Kunz and employees known to her used. (R. 644).

The only other witness actually called at the administrative hearing was Karen LaFramboise. Ms. LaFramboise is employed at Donnelley and was also in a secretarial position much like Ms. Kunz. (R. 749). Ms. LaFramboise testified that both the ramp and stairs had been used by the employees in the past, and that the area generally gets slippery with inclement weather. (R. 752). Ms. LaFramboise indicated that she uses the ramp “if I can get that far.” (R. 754). Ms. LaFramboise also noted: “However, Jamestown Square, when it is snowing gets up in the night and they start [clearing] on the walks. We have never come to work with snow not plowed on the walks.” (R. 754).

SUMMARY OF THE ARGUMENT

The Workers’ Compensation Act of Utah covers injuries by accident which arise out of and in the course of employment. Normally, any injury occurring on the employer’s premises is covered. Injuries sustained while going to or coming from the place of employment are generally not covered, a rule commonly referred to as the “going and coming” rule. There exist exceptions to the going and coming rule, one of which is the special hazards exception,

¹ Petitioner would refer the court to three pictures showing the ramp as well as the entrance to the Donnelley Building. R. 407-409. One of those pictures showing the entire entrance is attached as Addendum 4.

which exception is applicable in this case.

The special hazard exception brings an injury within the coverage of the Workers' Compensation Act, although the injury occurs off the employer's premises, when (1) there is a close association between the access way and the employer's business, usually meaning the route taken is the only route, or at least the normal route, employees use, (2) there is a special hazard associated with the route, (3) the employee is exposed to the special hazard because of the use of the route, and (4) the special hazard is a proximate cause of the accident.

Comparing the present matter to the Utah Supreme Court's decision extending Workers' Compensation benefits in *Park Utah Consolidated Mines Co. v. Industrial Comm.*, 103 Utah 64, 133 P.2d 314 (1943) mandates reversal. The facts of *Park Utah* are not substantially different than the present matter. The employee in *Park Utah* was approaching the workplace, slipped and fell on ice and snow, and he could have chosen alternative routes such as stairs or an adjacent yard. Compensation was awarded in *Park Utah* and should have been awarded in this case.

A review of the facts of this case and the applicable law shows that the Industrial Commission failed to construe the Workers' Compensation Act in favor of the employee and coverage under the Act. The Industrial Commission's conclusion that two distinct routes existed, precluding the application of the special hazard exception, was erroneous. The ramp and the stairs formed but a single entrance. The stairs and ramp lead to a single entrance, are contiguous

with a common sidewalk, and provide access from a common parking lot.

In any event, the special hazard exception is not precluded when more than one route exists. The employee must only show that the route she used was the normal route. This the applicant did. In this case, evidence showed that the ramp had not been cleared of snow, and in fact access to the ramp would have been more dangerous as the sidewalk had not been cleared of snow where the ramp started.

Finally, the Industrial Commission erred in concluding that snow and ice cannot be a special hazard. Such a conclusion is untenable when compared with the facts and holding of the Utah Supreme Court in *Park Utah*. Likewise, decisions from other jurisdictions support the conclusion that snow and ice constitute special hazards. The hazard need not be out of the ordinary. Other jurisdictions have held that snow, ice, fog, potholes, and busy intersections constitute hazards within the special hazard exception.

Because the Industrial Commission failed to adhere to controlling precedent, and the well established law throughout the country, the order of the commission denying benefits must be reversed.

ARGUMENT

I. THE INDUSTRIAL COMMISSIONER FAILED TO CONSTRUE THE WORKERS' COMPENSATION ACT IN FAVOR OF THE EMPLOYEE

Section 35-1-45 of the Workers' Compensation Act (The Act) provides in part:

Each employee . . . who is injured . . . by accident arising out of and in the course of his [or her] employment, whenever such injury occurred, if the accident was not purposefully inflicted, shall be paid compensation for loss sustained on account of the injury . . . and such amount for medical, nurse, and hospital services and medicines . . . as provided in this chapter.

Utah Code Ann. § 35-1-45 (1994).

It is considered well settled in the State of Utah that, "Traveling to and from work is not part of the employment and is not covered by Workmen's Compensation." *Lundberg v. Cream of Weber/Federated Dairy Farms, Inc.*, 24 Utah 2d 16, 465 P.2d 175, 176 (1970). This is commonly called the "coming and going rule." There are numerous exceptions to the coming and going rule. When one of those exceptions applies, then the injury sustained off the premises of the employer is covered. For example, an injury suffered by an employee traveling to or from work is compensable if the employee is on a special errand for the employer. *State Tax Commission v. Industrial Commission*, 685 P.2d 1051, 1053 (Utah 1984).

The Workers' Compensation Act is basically no-fault in nature, and therefore it is not inconsistent with the Act to hold an employer responsible for an accident on a sidewalk he does not own. The employer's liability has nothing to do with fault; instead, liability is based upon the employment relationship.

The Utah Supreme Court in *State Tax Commission v. Industrial Commission*, 685

P.2d 1051 (Utah 1984) stated:

Our standard of review in an industrial commission case is stringent. In reviewing the commission's interpretations of general questions of law, we apply a correction of error standard, with no deference given to the expertise of the commission.

Id. at 1052.

Whether or not an injury arises out of or within the scope of employment depends upon the particular facts of each case. *Kinne v. Industrial Commission*, 609 P.2d 926 (Utah 1980). The Supreme Court of Utah has held that the purpose of the Workers' Compensation Act is to protect employees who have sustained injuries arising out of their employment. *State Tax Commission*, 685 P.2d at 1053. "To give effect to that purpose, the act should be liberally construed and applied to provide coverage." *Id.* "Thus, as between two competing views of the law, "[a]ny doubt respecting the right of compensation will be resolved in favor of the injured employee." *Barbara Drake v. Industrial Commission of Utah*, 274 Utah Adv. Rep. 10 (Utah Ct. App. 1995)(quoting *State Tax Commission*, 685 P.2d at 1053).

II. THE SPECIAL HAZARD EXCEPTION TO THE "GOING AND COMING" RULE IS APPLICABLE IN THIS CASE

Both the administrative law judge and the Commission below erroneously concluded that the special hazard exceptions to the going and coming rule did not apply. These conclusions must be reversed because (1) the conclusion that there were two routes to the

business was in error, (2) the special hazard exception is not precluded when more than one route exists, and finally (3) snow and ice can be a special hazard.

A. ALL FOUR ELEMENTS OF THE SPECIAL HAZARD EXCEPTION WERE PRESENT IN THIS CASE.

The Utah Supreme Court in *Soldier Creek Coal Co. v. Bailey*, 709 P.2d 1165 (Utah 1985) addressed the special hazards exception in Utah. The court quoted Larsen, The Law of Workman's Compensation, as follows:

The commonest ground of extension [of the premises rule] is that the off premises point at which the injury occurs lies on the only route, *or at least the normal route*, which employees must traverse to reach the plant, and are therefore the special hazards of that route become the hazards of employment.

1A Larsen, Law of Workmen's Compensation, §15.13 (1985) (emphasis added).

To qualify for this exception four requirements must be satisfied:

- (1) There must be a close association of the access way with the employer's business, usually meaning that it must be the only route to the work place;
- (2) There must be a special hazard associated with this route;
- (3) The employee must be exposed to the special hazard because of his use of the route; and,
- (4) The special hazard must be a proximate cause of the accident.

1A Larsen, *supra*, at §15.13(b).

All of the above stated requirements have been satisfied in this case. There was really only one route to the front door. The difference between the ramp and the staircase was

but a minor deviation. In the era of the Americans with Disabilities Act, it should hardly be surprising to find buildings equipped with wheelchair ramps. Wheelchair ramps have become part of, not distinct from, the traditional stairway leading to a place of employment. Nonetheless, even if one could conclude that there are two routes, since the stairs would be the normal route which employees use to access the building, application of the special hazards exception is not precluded. The special hazard associated with this route was the ice and snow accumulation which the employee was exposed to specifically because of her use of this route. Finally, the special hazard of accumulated ice and snow was the proximate cause of the accident at issue. The petitioner, Ms. Kunz, had no other reason to be exposed to this special hazard but for the fact that she was attempting to arrive at her place of employment.

B. THE COMMISSION'S CONCLUSION THAT TWO DISTINCT AND SEPARATE ROUTES EXISTED WAS ERRONEOUS.

The administrative law judge and the Commission concluded that there were two routes to the Donnelley business. These routes were described as stairs or a ramp. However, as the court found in its finding of fact, the two routes were separated by only twenty feet. In actuality, the two routes are deviations of a single route; that is, the two routes are contiguous to a single parking lot, connected to a common sidewalk, and arrive at the same destination, the front door.

The administrative law judge in fact noted:

The incident case can be distinguished from *Park Mine* because two distinct paths were available in the incident to the ground entrance, the disabled ramp leading to the level landing which was often used by the non-disabled, and steps adjacent to the landing.

(R. 478). The court found it significant that the ramp had handrails which were closer together than the handrails on the stairs. The administrative law judge concluded: “The applicant thus clearly had a choice unlike the worker in *Park Mine*.” *Id.* This finding is not supported by Utah law when the cases allowing recovery under the Workers’ Compensation Act and the special hazards exception are reviewed. *Park Utah Consolidated Mines Co. v. Industrial Commission*, 103 Utah 64, 133 P.2d 314 (1943); *Bountiful Brick Co. v. Industrial Commission of Utah*, 68 Utah 600, 251 P. 555 (Utah 1926); *Cudahy Packing Co. of Nebraska v. Industrial Commission of Utah*, 60 Utah 161, 207 P. 148 (1922). Particularly, *Park Utah* does not support the Administrative Law Judge’s nor the Industrial Commission’s conclusion.

The Supreme Court of *Utah in Park Utah Consolidated Mines Co. v. Industrial Commission*, 103 Utah 64, 133 P.2d 314 (1943) explored the application of the special hazards exception in a case involving Workers’ Compensation. The applicant in *Park Utah* had slipped on a roadway leading to her place of employment. In finding that the special hazards exception brought this accident within the Worker’s Compensation statute, the court stated: “[T]he record shows that the applicant and others uniformly traveled the same approximate course to enter onto as well as leave the property of the employer.” *Id.* at 315. It should be noted that the Utah Supreme Court in *Park Utah* stated, not that the applicant and other employees uniformly

traveled the exact route, but the same approximate course. Likewise, no finding was necessary that all employees use the exact same path route. In this case, employees access the building through a single entrance and by the same proximate course. Whether the ramp or the stairs is taken is simply a minor deviation. Thus, the Commission should have found that the same circumstances arose here where the applicant was on the normal course which employees took to reach Donnelley's business.

The court in *Park Utah* cited a decision in California where the California Supreme Court stated:

The fact that an accident happens upon a public road, and the danger is one to which the general public is likewise exposed, however, does not preclude the existence of a causal relationship between the accident and the employment if the danger is one to which the employee, by reason of any connection with his employment, is subject peculiarly or to an abnormal degree.

Id. at 316 (citing *State Compensation Insurance Fund v. Industrial Accounting Commission*, 105 Cal. 28, 31, 227 P. 168 (1924)). The court in *Park Utah* went on to hold: “[T]he existence of the ice under the snow on the particular slope constituting the only practical means of entrance to and access from premises, including a part of the public road, was one of the hazards peculiarly to the employment.” *Id.* at 317. The same can be said for the case at bar. The dangerous conditions which the applicant was traversing at the time of the accident were peculiar to her employment. She had no other reason for taking this route except for her employment.

A close review of the facts in the *Park Utah* decision show that the road where the employee fell was not the only route he could have taken. There were also steps which under normal circumstances the employee would have used, but at the time of the accident were blocked by snow, much like the ramp in this case. *Id.* at 315. As the facts determined by the administrative law judge in this case show, while the ramp arguably could have been used, it had not been cleared of snow. The petitioner testified at the administrative hearing that the sidewalk had not been cleared down to where the ramp started. Thus, it would have been more treacherous for the petitioner to attempt to gain access via the ramp.

C. THE SPECIAL HAZARD EXCEPTION IS NOT PRECLUDED WHEN MORE THAN ONE ROUTE EXISTS.

The Commission's conclusion that the special hazards exception did not apply because more than one route to the front door existed is likewise erroneous. As has already been pointed out, the claimant in *Park Utah* could have used a minor deviation in routes. In *Park Utah* the employer had provided a parking lot for the employees, but it was customary for the employees to park alongside of the shop on a public street. The fact that an entirely different parking lot could have been used which was designated for employees was not material to a determination of whether the special hazards exception applied in *Park Utah* and accordingly, the minor deviation of routes leading to a single entrance is not material as well. In addition to the steps in the *Park Utah* case, there was also a yard between the buildings and the structures.

The employee in *Park Utah* could have easily gone across the yard instead of the adjoining road.

In any event, the court in *Park Utah* did not find that factual issue material or determinative. The court in *Park Utah* reviewed two of its earlier decisions, both of which had been reviewed by the United States Supreme Court. In *Cudahy Packing Co. v. Industrial Commission*, 60 Utah 161, 207 P. 148 (1922), an employee was killed while crossing a railroad track 100 feet from the property line of his employer. The Industrial Commission granted an award and the Utah Supreme Court sustained that award. In *Cudahy*, the employer had contended that the railroad hazard was simply a hazard which any person would have to face and therefore was not peculiar to their employment. However, because the employee had to traverse the tracks to get to the plant, the court found that the hazards pertinent thereto were peculiar to the employment. In other words, the employee had no reason to diverse the railroad crossing except for his employment.

The court in *Park Utah* also reviewed *Bountiful Brick Co. v. Industrial Commission*, 68 Utah 600, 251 P. 555 (1926), wherein the employees of Bountiful Brick Co. used an opening in the fence on the railroad right-of-way to get to work. The facts of *Bountiful Brick* show that there were other means of access to the company property, but for most employees, they were rather inconvenient and impractical. One day, when the employee in question was using this entrance, he was hit by the train and killed. The court found that the fact that other means of ingress existed was not material since the route used by the employees in

question was a normal route, and therefore the Workers' Compensation Act would cover the accident.

These Utah cases indicate that under circumstances of the present case, both the administrative law judge and the Industrial Commission erred in concluding that because the employee could have used the ramp, her accident was not covered by the Workers' Compensation Act. Clearly under the facts found by the administrative law judge and the Industrial commission, the special hazards exception to the going and coming rule applied and compensation should have been awarded.

Decisions of other jurisdictions support this conclusion. In *ITT Continental Baking Co. v. Schneider*, 621 P.2d 1294 (Wash. Ct. App. 1980), the employee worked at a bakery. The employer did not provide designated parking, so the employees parked their vehicles in surrounding public streets. The employer knew that the employees driving to work would park on the public streets or in a public parking lot located across the street from the bakery. Actual entrance to the bakery building was gained by walking along various sidewalks abutting the building to an entrance door located on only one side of the building. That entrance was the only means of access to the building for the employees.

On the day in question, the employee parked his car along the sidewalk across one of the streets from the bakery. As the employee approached the bakery, a bakery pan truck owned by his employer rolled across the sidewalk into the employee's path and struck him. At

the time the employee was on the sidewalk continuous with the bakery, however owned by the City of Seattle.

At the hearing of this matter, the employer argued that the employee's accident did not come under the special hazards exception because the employee could have parked elsewhere and approach the bakery from a different direction. The court noted: "Whether the presence of an alternative route affects the availability of the special hazard exception would depend on the circumstances. Some cases stress the habitual use of one route with the employer's consent; others place more emphasis on the relative safety of the two routes." *Id.* at 1299. There was no evidence presented in this case that the ramp was the route used by most employees. In fact, the petitioner testified that she and other employees regularly used the stairs. Even the reasonable person looking at the entrance would have to conclude that the stairs are obviously the intended, and most likely chosen, means of access to the building. As a result, the fact that the ramp existed does not preclude the application of the special hazard exception to this case.

D. SNOW AND ICE ARE SPECIAL HAZARDS

The Industrial Commission's conclusion that snow and ice cannot be a hazard under the special hazard exception ignores controlling Utah law. Once again, *Park Utah* specifically holds that snow and ice can constitute a hazard. The court in *Park Utah* held:

[T]he existence of the ice under the snow on the particular slope constituting the only practical means of entrance to and access from the premises, including part

of the public road, was one of the hazards peculiar to the employment.

Park Utah, 133 P.2d at 317. The Industrial Commission's conclusion that snow and ice cannot constitute a hazard is untenable.

Case law from other jurisdictions supports the conclusion that common perils such as ice and snow can constitute a hazard under the special hazard exception. In *USF&G v. Gagne*, 174 A.2d 406 (N.H. 1961), a woman fell on an icy path which led from public streets, down steps, along a pathway, over railroad tracks and a canal bridge across or along a parking lot, and up one or more steps to the factory entrance where she worked. This was the usual and expected means of entry. The employee fell again as she entered the factory and under these circumstances the court found that falling on ice arose out of and in the course of her employment. The court noted that ice was the hazard at issue and

she encountered the hazard because of her employment, and her entry to her place of employment was clearly an activity which was in the course of her employment. The place of injury was "adjacent to the [employer's] premises and therefore identified with the premises in the sense that the employer should have removed the ice" or taken other appropriate precaution. 1 *Larsen, Workmen's Compensation*, § 15.22.

Id. at 408.

The court in *GATX Tank Erection Co. v. Gnewusch*, 272 S.E.2d 200 (Va. 1980) held that the special hazard exception refers to a danger at a particular location, but does not mean that risk to the employee is different from that to which the general public would be exposed at the same location. *Id.* at 204. Likewise, in *Bechtel Corp. v. Winther*, 556 S.W.2d 882

(Ark. 1977), the Supreme Court of Arkansas reviewed a case where an employee needed to travel 80 miles to his workplace. In order to reach his workplace he needed to travel across a causeway which cut across a lake and lead to one of the two entrances at the site of his employment. Apparently, the employee was found drowned in the water two days later. The evidenced showed that on the morning of the accident, there was low hanging fog resulting in low visibility. The court in *Winther* found that the fog was a special hazard. Of course, this same hazard would be applicable to any person in the general public traveling on those roads at the same time. It should be noted that the *Winther* court held: "The 'special hazard' exception may be applied when the off premises route, while not the exclusive means of access, is the 'usual' or 'regularly used' route." (citations omitted) *Id.* at 884.

In *Ehrlich v. Strawbridge & Clothier*, 615 A.2d 286 (N.J. Super. A.D. 1992), an employee sought worker's compensation benefits for injuries she sustained when she slipped and fell on ice after coming down a metal staircase which went to an exterior sidewalk which she had to traverse before reaching a parking lot where her car was parked. The Appellate division of the Superior Court of New Jersey concluded that her injuries were compensable. *See also, In re Welham*, 653 P.2d 760 (Colo. Ct. App. 1982)(where employer required off-premises parking and most convenient other parking required walking across a railroad track, the railroad track was a special hazard); *Mass Brothers v. Peo*, 498 So.2d 657 (Fla. Ct. App. 1986)(employee caught heel on chalk line in parking lot and fell, which accident was covered under the special hazards

exception); *Petroske v. Worth Avenue Burger Place*, 416 So.2d 856 (Fla. Ct. App. 1982)(pothole in the driveway which abutted employer's business a special hazard); *Goff v. Farmers Union Accounting Service, Inc.*, 241 N.W.2d 315 (Minn. 1976)(busy street between parking lot, not owned by employer, and place of work found to be a special hazard); *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Dependents of Sloane*, 480 So.2d 1117 (Miss. 1985)(dangerous intersection of road used by 90% of employees is a special hazard).

Jones v. Wendy's of Tri-State Mall, 1996 WL 30239 (Del. Super. Jan. 23, 1996), handed down this year, parallels the present matter in many respects. The employee in *Jones* traveled by bus to her workplace and disembarked at the entrance of the Tri-State Mall. According to the testimony of the employee, as she crossed through the parking lot covered with ice and snow, and approached the walkway that surrounded her employer's restaurant, she slipped as she stepped up on the walkway. A co-employee testified that the claimant had reported falling. In reversing the Industrial Accident Board's denial of benefits, the Delaware court held that the special hazards exception was applicable and that the employee's accident was compensable. *Id.* at 3. The court in *Jones* quoted the same language that Utah's Supreme Court did in *Soldier Creek* that the special hazards exception applies where "the off-premises point at which the injury occur[s] lies on the only route, or at least the normal route, which employees must traverse to reach the plant, and that therefore the special hazards of that route become the hazards of the employment." *Id.* (quoting *Quality Car Wash v. Cox*, 438 A.2d 1243,1248 (Del.

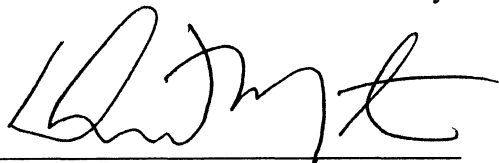
Super. 1981), *rev'd on other grounds*, 449 A.2d 231 (Del. 1982)). The *Jones* court so held commenting, "Due to the location of Employer's building, within the mall parking lot, in order to get to work, [the claimant] was forced to traverse the icy parking lot to get to work." *Id.*

Likewise, Ms. Kunz had to walk upon a walkway partially cleared of snow and traverse steps covered with snow and ice to reach her workplace. Construing the facts in favor of Ms. Kunz and coverage under the Act, this court must conclude that the special hazard exception applies in this case. Snow, ice, fog, dangerous intersections, as well as potholes are all special hazards when an employee must pass over them on her way to the workplace. Given this great abundance of case law, and the controlling precedent of *Park Utah*, the Industrial Commission's Order must be reversed.

CONCLUSION

For the foregoing reasons, the Findings of Fact and Conclusion of Law of the Administrative Law Judge and the Order entered by the Industrial Commission should be reversed and the matter remanded for determination in the amount of benefits to be awarded.

DATED AND SIGNED this 12th day of February, 1996.

A handwritten signature in black ink, appearing to read 'DM', is written over a horizontal line.


DAVID N. MORTENSEN
SHERLYNN WHITE FENSTERMAKER
IVIE & YOUNG
Attorneys for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Petitioner with postage prepaid thereon this 12th day of February, 1996, to the following:

Brad Betebenner
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144

Allen Hennebold
INDUSTRIAL COMMISSION OF UTAH
160 East 300 South, #300
Salt Lake City, Utah 84114



David N. Mortensen

ADDENDUM 1

INDUSTRIAL COMMISSION OF UTAH

Case No. 94757

LISA H. KUNZ,
Applicant,
vs.

R. R. DONNELLEY & SONS and/
or SEDGWICK JAMES OF IDAHO,
Defendants.

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FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

* * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah on January
19, 1995 at 10:30 o'clock a.m., and on February 8,
1995 at 9:00 a.m. The hearings were pursuant to
Order and Notice of the Commission.

BEFORE: The Honorable Benjamin A. Sims, Administrative Law
Judge.

APPEARANCES: The applicant, Lisa H. Kunz, was present and
represented by Sherlynn Fenstermaker, Attorney at
Law.

The defendant employer, R. R. Donnelley & Sons, and
its insurer, Sedgwick James of Idaho, were
represented by Brad Betebenner, Attorney at Law.

The applicant, Lisa H. Kunz, requests medical expenses,
recommended medical care, temporary total disability benefits,
temporary partial compensation, permanent partial compensation and
travel expenses. The applicant's date of birth is October 12,
1962. At the time of the injury her wage was \$10 per hour, and she
worked 40 hours per week. She was married and had no dependent
children.

The defendants asked for additional time until March 3, 1995
in which to submit wage information. This request was granted, and
the case was considered ready for an order on March 4, 1995.

The applicant was hired as a personal assistant to Jack
Hadfield and was employed by R. R. Donnelley & Sons Company
(Donnelley). On January 6, 1994, the applicant was going to work
and parked her car near a stairwell entrance in the building
occupied by Donnelley. There is no specific designated parking lot
at Donnelley. Ms. Kunz stated that parking was a "catch as catch
can" situation. She was never told where to park. She understood
that there was just one door in the building to access Donnelley.

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PAGE TWO

Donnelley shares the building with other businesses which are not affiliated with Donnelley.

The ground level entrance had a set of steps as well as a ramp for the disabled both leading to a level landing which led to the doorway. Exhibit J-3. The ramp for disabled persons would have required the applicant to walk approximately 20 - 30 feet further. Neither the stairs nor the disabled ramp had been completely cleared of snow.

The sidewalk had been cleared in spots, but the sidewalk had not been cleared from it to the stairs. The applicant could have entered the building by using the ramp, or by using the stairway. She chose the latter route. Once she had entered the ground level entrance, she would have had to climb another set of stairs in order to reach the second floor where her employer and other employers had their offices.

As she was ascending the ground entrance stairway of three steps, she got almost to the third step, and slipped and fell. Her right knee hit the stairs "pretty hard."

After the fall, the applicant testified that she could not straighten her knee, and her knee cap was off to the side. She composed herself, grabbed the railing, and hopped up the stairs, pulling herself by the handrail. She told Carol a fellow employee that she had fallen. She then called the hospital emergency room, was told to put her knee in ice, and to see Dr. Richard Jackson on the very next day. She reported that she had snow and mud all over her and that Joannie, another employee, noticed her dishevelment. The evidence shows that the applicant did have a fall, and that she did have a scrape on her right leg on the date alleged.

On January 12, 1994, Dr. Jackson performed surgery. He went into the knee to assess the damage and find out why the knee could not be straightened out. After the surgery, he indicated that future surgery was a possibility. Subsequent to the surgery, the applicant went through strengthening therapy. On January 20, 1994, she was released to start back to work on light duty. She worked light duty through February 2, 1994, when she had a confrontation with her supervisor, Karen, who said that she needed someone full time. At that point the applicant left work, and understood she was to be off work until she could come back full time.

She then went back to work on February 15, 1994, at Jack's request. Jack said he would talk to her more after her medical appointment on February 18, 1994. On February 18, 1994, she saw Dr. Jackson who told her that surgery was needed to stabilize her knee. Jack told her to return to work after the surgery. She had the surgery on September 30, 1994. Blue Cross/Blue Shield paid for

LISA H. KUNZ
ORDER
PAGE THREE

her two surgeries.

She claims that Dr. Jackson neither told her that she was released nor did he tell her that she could not go back to work. Subsequently she was sent a letter by Donnelley by both letter mail and fax saying that if she did not return to work she would be terminated. The evidence shows that she received the fax, but there is no evidence that she received the letter. The fax noted that she would be terminated unless she provided R.R. Donnelley with a medical release to work either full or light duty by March 4, 1994. She was then terminated because neither of the employer's conditions were met.

With regard to preexisting problems, the applicant had right knee surgery prior to this industrial incident. The right knee surgery was done on three occasions in the 1981 - 1984 time frame. She has had left knee surgeries also. She reports that she was very active before the slip and fall. The medical evidence shows that she had no significant right knee problems during the 15 years prior to her instant injury. She participated in hiking, horse back riding, and she took care of cattle, horses, and sheep. She says that she can no longer do those activities because of the current problems with the right knee. However, Dr. Jackson gave her only a three percent whole person impairment for the right knee.

The medical evidence further shows that she was temporarily and totally disabled during the period January 7, 1994 through January 24, 1994; from January 24, 1994 she was partially disabled through January 31, 1994, and was able only to work one-half days; and from her surgery on September 30, 1994 until her release on October 30, 1994. There is no medical evidence to show that she could not have worked light duty from January 31, 1994 through September 29, 1994, and the fax from the employer giving her until March 4, 1994 to produce a light duty work release shows that light duty work was available from March 4, 1994 until September 29, 1994.

Ms. Kunz has no current problems with her left knee. She reported that her husband went to Hawaii in 1994, but she was unable to go with him because of her problems. However, the evidence shows that he went to Hawaii with his male friends, and her failure to go was not because of her knee problems. She can travel because she went to Idaho with him on several occasions to see his sick father and travel time by car to Idaho is roughly comparable to travel time by air to Hawaii.

THE "GOING AND COMING" RULE AND EXCEPTIONS TO IT:

The employer claims that the "going and coming" rule prevents

LISA H. KUNZ
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it being held liable in this case. The reader will recall that Donnelley leases office space from Jamestown Square. Donnelley occupies the second floor of its building, and there are other occupying tenants not affiliated with Donnelley in the building. Donnelley does not maintain the parking lot, the sidewalks, the steps, or the stairwells of the Jamestown Square complex. The snow removal duties are performed by Jamestown Square personnel.

There is no evidence that the applicant was performing any duties for her employer on her way to work. Thus, if this accident is compensable under the workers' compensation laws, the accident must "arise out of and in the course of employment." U.C.A. Section 35-1-45 (1988)(emphasis added). It is noted that the accident must meet two tests: (1) arising out of employment, and (2) occurring in the course of employment. Id. An injury is deemed to occur "in the course of employment" when it takes place within the time and place of the employment or while the employee is fulfilling a duty incidental to his or her job. See generally Soldier Creek Coal Co. v. Bailey, 709 P.2d 1165 (Utah 1985). Since the injury occurred off the premises of the employer, and before the time for work, the injury without an exception to the rule did not occur in the course of employment. The going and coming rule generally bars off-premises injuries to an applicant while she is off premises coming to her work. If the injury is compensable at all, it must have arisen out of the applicant's employment under one of the two exceptions to the going and coming rule.

The first exception is the "premises rule," and the second exception is known as the "special hazards" rule. Id. at 1166. In general, the premises rule applies a strict property line test for determining when an employee qualifies for the premises exception. Id. at 1167. See e.g. Soldier Creek Coal, supra. In this case, the applicant was injured before she reached Donnelley's premises, and in fact was injured in a common area which was serviced by the Jamestown Square personnel.

The special hazards rule is the only other exception which could apply in this case. Under the special hazards rule, the "premises" are extended because of employer site access considerations. In order for the special hazards exception to govern, there are four requirements:

1. There must be a close association of the access way with the employer's premises, usually meaning that it must be the only route to the work place;
2. there must be a special hazard associated with this route;

LISA H. KUNZ
ORDER
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3. the employee must be exposed to the special hazard because of his use of the route; and
4. the special hazard must be the proximate cause of the accident.

Soldier Creek Coal, supra. at 1166 citing 1 A. Larsen, The Law of Workmen's Compensation, Section 15.13 (1985).

"Special hazard" implies something in addition to or in excess of that which is normally encountered in the activities associated with daily living. The result might be different if the employee had only one route to the doorway. Under U.C.A. Section 35-1-45 (1988), no special hazard has been shown, and the requirements of the going and coming rule have not been met. Since ice and snow are not special hazards to Utahns in January, there was no special hazard that was the proximate cause of the accident.

The applicant cites the case of Park Utah Consolidated Mines Co. v. Ind. Comm'n, 133 P. 2d 314 (Utah 1943) (Park Mine) to support her case. In Park Mine, the facts were as noted by the Supreme Court:

Applicant had finished his shift, changed clothing and was on his way to the parked automobile of co-worker with whom he rode to and from work. The surface structures of the employer's property are built in the shape of the letter 'U', with the open side facing a narrow oiled road, which is maintained by the county. The yard formed by the buildings and the road is about fifty feet square. Applicant crossed the yard and stepped over the edge of the property line into the road. He reached a point approximately two paces beyond the property line when he slipped on the ice and snow, fell to the ground and broke his ankle. At the point of the fall, the road slopes downhill in the direction applicant was walking at about a three per cent fall. That yard and road were covered by a fresh fall of snow about eight inches in depth. The car, which was applicant's objective, was parked on the road opposite the shop, and about fifty feet down the road from the point of the accident. Although the employer had provided a parking lot about five hundred feet lower down the road, it was customary for employees to park along the side of the shop. The employer apparently consented to this arrangement.

* * *

[T]he record shows that the applicant and others uniform-

LISA H. KUNZ
ORDER
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ly traveled the same approximate course to enter onto as well as to leave the property of the employer. There were steps from the roadway to the shop, but they were blocked at the time by snow piled up against them. There was no practical means of access to or from the Park Utah Consolidated Mines Company property, other than the adjoining road and the yard between the buildings and structures.

Id. at 314-315.

In Park Mine, the Court concluded that the worker had "only one means of exit from the premises, although it [was] true that the yard sloping down to the public road measure[d] approximately 50 feet in width. The applicant could not leave the premises from the steps to the shop for the reason they were blocked by snow." Id. at 317. It is clear from this discussion that had the steps been open, the result might have been different.

The instant case can be distinguished from Park Mine because two distinct paths were available in the instant case to the ground entrance, the disabled ramp leading to a level landing which was often used by the nondisabled, and steps adjacent to the landing. The steps had handrails which were so widely spaced that only one handrail could have been held by a person climbing the steps. In addition, the steps presented angular concrete hazards due to the juncture of the vertical and horizontal planes. It was on one of these angular steps that Ms. Kunz injured her right knee.

The disabled ramp would have been safer under the facts as presented here because it had been constructed for disabled persons to use, had no steps, was on a gradual incline, had handrails 36 inches apart, and did not accumulate ice to the extent normally found on the steps. The ramp was within 30 feet of the other stepped pathway which was not far from the path selected. In any event, it was a different path composed of a variety of features not wholly similar to those of the stepped path. The applicant thus clearly had a choice unlike the worker in Park Mine. Accord, Seabreeze Indus., Inc. v. Phily, 118 So. 2d 54 (Fla. App. 1960), cert. den., 122 So. 2d 407 (Fla. 1960).

In Park Mine, the Court determined that the available pathway to the employer's entrance was 50 feet in width, and that there was no discernible difference between any two portions of the pathway. In essence, the Court found that a safer pathway could not be found. Under such a circumstance, the Park Mine defendant could not argue that if the applicant had chosen a path 20 feet more distant from that selected, the applicant might not have been injured. The Court was saying that the applicant had no clear choice of routes which were different in terms of components or

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risks, and that all routes available were similar.

Under the facts of the instant case, there are no applicable exceptions to the going and coming rule, and no liability can be awarded under the workers' compensation laws, and U.C.A. Sections 35-1-1 et seq. against the employer. There might be some negligence on the part of responsible parties for failure to remove ice and snow from the steps on which the applicant allegedly slipped. However, such a finding is beyond the purview of the Commission, and since workers' compensation is not available to the applicant in this case, she should be free to file a claim based on tort for her injuries.

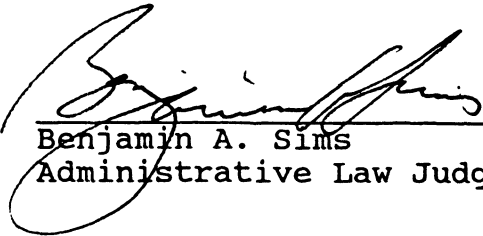
ORDER:

IT IS HEREBY ORDERED that the claim for workers' compensation benefits filed by Lisa H. Kunz for injuries to her right knee received on January 6, 1994, in an accident in a common area not controlled by the employer, R.R. Donnelley and Sons, when she was not on the employer's premises while she was coming to work, and was not performing any duty for the employer, be dismissed with prejudice.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. In the event a Motion for Review is timely filed, the parties shall have fifteen (15) days from the date of filing with the Commission, in which to file a written response with the Commission in accordance with Section 63-46b-12(2), Utah Code Annotated.

Dated this 14 day of April, 1995.

INDUSTRIAL COMMISSION OF UTAH


Benjamin A. Sims
Administrative Law Judge


MAILING of Findings, Conclusions of Law, and Order

I certify that I have mailed the attached document in the case of LISA H KUNZ, Case No. 94757, to the following parties by first class prepaid postage on the 14 day of Apr 95.

LISA H KUNZ
624 SOUTH 100 EAST
SPRINGVILL UT 84663-2223

SHERLYNN W FENSTERMAKER, Atty,
48 N UNIVERSITY AVE PO BOX 672
PROVO UT 84603

BRAD BETEBENNER, Atty,
50 S. MAIN STREET 7TH FLOOR P.O. BOX 2465
SALT LAKE CITY UT 841102465


Nicole McClain

ADDENDUM 2

THE INDUSTRIAL COMMISSION OF UTAH

LISA KUNZ,	*	
	*	ORDER DENYING
Applicant,	*	MOTION FOR REVIEW
	*	
vs.	*	
	*	
R. R. DONNELLEY & SONS CO.	*	
and SEDGWICK JAMES OF IDAHO,	*	Case No. 94-0757
	*	
Defendants.	*	

Lisa Kunz asks The Industrial Commission of Utah to review the Administrative Law Judge's decision denying her claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission of Utah exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53, and Utah Admin. Code R568-1-4.M.

ISSUE UNDER REVIEW

Did Ms. Kunz' injury arise out of and in the course of her employment at R. R. Donnelley & Sons Co. ("Donnelley" hereafter).

FINDINGS OF FACT

The underlying facts of this matter are not in dispute and can be summarized as follows:

At the time of her accident, Ms. Kunz was employed by Donnelley in Provo, Utah. She reported for work each day between 8 a.m. and 8:30 a.m, at an office leased by Donnelley in a multi-tenant office building in Provo, Utah.

As a general rule, workers' injuries that occur off the employment premises while traveling to and from work are not considered to arise out of and in the course of employment and are not compensable under the Act. However, Ms. Kunz argues that her injuries resulted from a special hazard in the route she was obliged to take to get to her employer's office.

In Soldier Creek Coal Co. V. Bailey, 709 P.2d 1165 (Utah 1985), the Utah Supreme Court recognized the "special hazards" exception to the going and coming rule and identified the four elements that define a special hazard:

. . . (1) There must be a close association of the access way with the employer's premises, usually meaning that it must be the only route to the workplace; (2) there must be a special hazard associated with this route; (3) the employee must be exposed to the special hazard because of his use of the route; and (4) the special hazard must be the proximate cause of the accident.

The ALJ ruled that the circumstances of Ms. Kunz' accident did not satisfy either the first or the second element of the foregoing test. The Industrial Commission agrees with the ALJ's conclusions for the reasons set forth below.

I. Close association of access way with the employer's premises.

The ALJ concluded that Ms. Kunz did not meet the first element of the special hazards rule because two routes were available to the work site; the stairs or the nearby ramp. Professor Larson provides the following discussion regarding this point:

If an alternate route is available, and if it is substantially more remote or more inconvenient, or not safer, the special hazard exception to the premises rule will usually be applied. Conversely, if a reasonably safe and convenient route is available, and if the employee chooses a substantially more dangerous route,

the exception will not be applied. Larson's Workmen's Compensation Law, Vol. 1, §15.13(g); p. 4-54,55.

The record in this case establishes that Ms. Kunz could have taken the ramp to travel to her work site. Had she done so, she would have had the benefit of adequate handrails and a more level surface. Under the conditions present on January 6, 1994, such an alternate route was substantially safer than the stairs, while not significantly inconvenient. Consequently, Ms. Kunz has not met the first element of the special hazards rule.

II. There must be a special hazard associated with this route.

The second element of the special hazards exception requires that Ms. Kunz demonstrate that there was, in fact, some "special hazard" associated with her route to work. The ALJ concluded that the risk presented by ice and snow in northern Utah in January is not a special hazard, but is a common fact of life.

The Industrial Commission agrees with the ALJ's conclusion on this point. There is no evidence that the condition at the site of Ms. Kunz' accident was any different than conditions elsewhere in Provo. Snow had recently fallen, with the natural result that outdoor sidewalks, stairs and ramps were slick. Everyone moving about in the area faced the same conditions as those which caused Ms. Kunz to fall. The Industrial Commission finds no basis to characterize such general conditions as a "special hazard" of Ms. Kunz' employment.

III. Summary.

In order to qualify for workers compensation benefits under the special hazard rule, Ms. Kunz must prove **each** of the four elements of the rule. Ms. Kunz has failed to establish either the first or the second elements of the rule. Consequently, the Industrial Commission concludes that Ms. Kunz' accident on January 6, 1994 did not arise out of and in the course of her employment at Donnelley and is not compensable under the Utah Workers' Compensation Act.

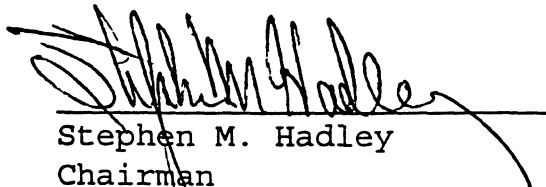
ORDER DENYING MOTION FOR REVIEW
LISA KUNZ
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ORDER

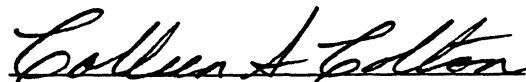
The Industrial Commission hereby affirms the decision of the ALJ and denies Ms. Kunz' motion for review. It is so ordered.

Dated this 19 day of September, 1995.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this order by filing a request for reconsideration with the Industrial 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 that court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW
LISA KUNZ
PAGE 6

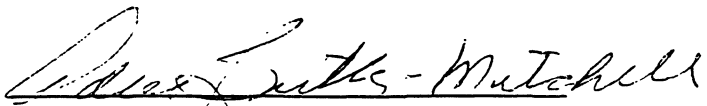
CERTIFICATE OF MAILING

I certify that a copy of the foregoing ORDER DENYING MOTION FOR REVIEW in the matter of LISA KUNZ, Case No. 94-0757, was mailed first class postage prepaid this 19 day of September, 1995, to the following:

LISA H. KUNZ
624 SOUTH 100 EAST
SPRINGVILLE, UTAH 84663-2223

SHERLYNN W. FENSTERMAKER, ATTY.
48 NORTH UNIVERSITY AVENUE
P O BOX 657
PROVO, UTAH 84603

BRAD BETEBENNER, ATTY.
50 SOUTH MAIN STREET
7TH FLOOR
P O BOX 2465
SALT LAKE CITY, UTAH 84110-2465


Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

ADDENDUM 3

SHERLYNN WHITE FENSTERMAKER, #1057
DAVID N. MORTENSEN, #6617
Attorneys for Petitioner
48 North University Avenue
P.O. Box 657
Provo, Utah 84603
(801)375-3000

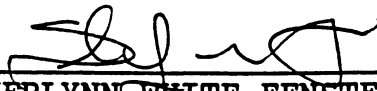
IN THE UTAH COURT OF APPEALS

LISA KUNZ,	:	PETITION FOR WRIT OF REVIEW
Petitioner,	:	
vs.	:	
R.R. DONNELLEY & SONS CO. and	:	
SEDGWICK JAMES OF IDAHO, and	:	
INDUSTRIAL COMMISSION OF UTAH,	:	Case No. 94-0757
Respondents.	:	

Petitioner, Lisa Kunz, by and through her counsel Sherlynn White Fenstermaker, petitions the Utah Court of Appeals for a Writ of Review directing the respondent Industrial Commission of Utah to certify its entire record, which shall include all the proceedings and evidence taken in this matter to this court.

This petition seeks to review the entire order of the Industrial Commission denying petitioner's Motion for a Review dated September 19, 1995, as well as the Findings of Fact and Conclusions of Law and Order of the Honorable Benjamin A. Sims, Administrative Law Judge dated April 14, 1995, copies of which are hereto attached.

DATED and SIGNED this 19th day of October, 1995.



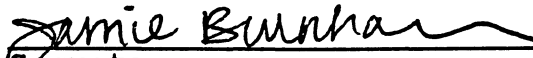
SHERLYNN WHITE FENSTERMAKER
DAVID N. MORTENSEN
Attorneys for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Writ of Review with postage prepaid thereon this 19th day of October, 1995, to the following:

Brad Betebenner
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144

The Utah Industrial Commission
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114-6615



Secretary

ADDENDUM 4

