

1995

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

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

LISA KUNZ,

Plaintiff and Appellant,

vs.

R.R. DONNELLEY & SONS CO., and
SEDGWICK JAMES OF IDAHO, and
INDUSTRIAL COMMISSION OF UTAH,

Defendants and Appellees.

Appeal No. 95-0690

Oral Argument Priority No. 7

**BRIEF OF APPELLEES R.R. DONNELLEY & SONS, CO.
and SEDGWICK JAMES OF IDAHO**

**On Appeal from Decision of
The Industrial Commission of Utah**

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STATEMENT OF JURISDICTION

Ms. Kunz appeals the final decision and order of the Industrial Commission of Utah. This court's jurisdiction is pursuant to Utah Code Ann. § 78-2a-3(2)(a).

STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF REVIEW

Although Ms. Kunz identifies the issue presented for review as “whether the petitioner was injured in the scope and course of her employment,” there are two threshold issues which bear upon the determination of this ultimate issue. Either of the following threshold issues, if decided in favor of appellees, will dispose of Ms. Kunz's appeal:

Issue I: Did the Industrial Commission of Utah correctly determine, under the facts of this case, that the ramp located approximately twenty feet from the stairs constituted a separate and safer route which precludes application of the “special hazard exception”?

Standard of Review: This issue involves the Industrial Commission's factual determinations as well as its interpretation and application of settled law to those facts. This court reviews the Industrial Commission's factual determinations on a “substantial evidence” basis.¹ Because the Industrial Commission is expressly granted discretion to apply the law to the facts of this case, the court reviews the Commission's application of the law on a reasonableness basis. Absent a grant of discretion, this court reviews the Industrial Commission's interpretation of the law for correctness.

Issue II: Did the Industrial Commission of Utah correctly determine that under the facts of this case snow and ice did not constitute a “special hazard”?

Standard of Review: This issue involves interpretation and application of the law as it applies to the facts of this case.¹

¹The appropriate standards for this court's review of the administrative law judge's and Industrial Commission's decisions are discussed infra at p. 6, section I.

DETERMINATIVE STATUTE

This case involves the interpretation of Utah Code Ann. § 35-1-45 (1988), and its application to the facts of this case. This section states:

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 the 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

Ms. Kunz brought this action to recover for injuries she sustained when she slipped on the stairs on her way to work at her new employer R.R. Donnelley & Sons, Co. (“**R.R. Donnelley**”) Brief of Appellant, pp. 2-3. It is undisputed that R.R. Donnelley did not own the premises upon which Ms. Kunz slipped, and only leased a suite on the second floor of the building which Ms. Kunz was about to enter. Id. It is also undisputed that approximately twenty feet from the steps upon which Ms. Kunz slipped was a ramp for the disabled. Id. at 3. The ramp had a gradual slope, handrails on either side of the ramp thirty-six inches apart and was a smooth even surface. R. 752-53 Furthermore, the administrative law judge was presented with evidence that because of the gentle slope of the ramp, water tended to drain from the ramp better than from the stairs, and the ramp did not have the same tendency to accumulate ice as the steps. Id.

At the hearing of this matter Ms. Kunz testified that at the time of her injury she had worked for R.R. Donnelley a total of 8 days, and after her injury she worked on light-duty status

approximately 7 or 8 days, but that during the 15 or 16 total days worked, Ms. Kunz did not witness other employees enter the building by any means other than the stairs. R. 677-681, 644. Ms. Kunz's co-worker, Karen LaFramboise, was the only other witness to testify at the hearing of this matter. Ms. LaFramboise testified that in inclement weather she generally uses the ramp because it has handrails on both sides.² R. 752-53.

At the time of Ms. Kunz's accident, approximately ½ inch to 1 inch of snow had fallen the night before, which snow had been partially cleared from the walks. R. 667. However, the snow had not been cleared all of the way to the ramp nor had it been cleared from walk leading from the sidewalk to the steps or from the steps. R. 639.

The administrative law judge and the Industrial Commission of Utah³ determined that under the coming and going rule Ms. Kunz was not entitled to workers' compensation benefits because at the time of her accident she was traveling to work. See generally, Findings of Fact, Conclusions of Law and Order and Order Denying Motion for Review, copies of which are attached hereto as Appendices "A" and "B" respectively. Ms. Kunz argues that she is entitled to recover under the special hazard exception to the coming and going rule. However, because (1) there was an alternative route available to Ms. Kunz which was substantially safer and not significantly more

²Ms. Kunz quotes Ms. LaFramboise's testimony emphasizing her statement that she uses the ramp "if [she] can get that far," insinuating that it was difficult to reach the ramp. Brief of Appellant, p. 4. Ms. LaFramboise was testifying as to her general practice on snowy days. R. 752-53. Ms. Kunz testified at the hearing that there was only ½ to 1 inch of snow and that it seemed navigable without difficulty. R. 667. Accordingly, any suggestion that the ramp was inaccessible on the day of Ms. Kunz's accident is contrary to Ms. Kunz's own testimony.

³Because the administrative law judge's findings and conclusions were adopted and upheld by the Industrial Commission, the Industrial Commission and administrative law judge are hereinafter collectively referred to as the "Commission."

inconvenient, and (2) Ms. Kunz's injuries did not result from a "special hazard," but rather from the general hazard of ice and snow, the special hazard exception does not apply in this case.

SUMMARY OF THE ARGUMENTS

The standard by which this court reviews the determinations of an administrative agency depends upon the nature of the question the court is reviewing. This court will not disturb the administrative agency's factual determinations if supported by substantial evidence. When reviewing an administrative agency's conclusions of law, the standard for this court's review hinges upon whether or not the administrative agency has been granted discretion to interpret or apply the law. Where an administrative agency has been granted discretion either to interpret or to apply the law, this court will not reverse its interpretation or application of the law unless such interpretation or application exceeds the bounds of reasonableness and rationality. Absent a grant of discretion, a correction of error standard is used in reviewing the agency's interpretation or application of the law.

Utah Code Ann. § 35-1-16 expressly grants the Commission discretion to apply the law in workers' compensation cases. Accordingly, in reviewing the Commission's application of the law to the facts of this case, the Commission's determinations are entitled to remain undisturbed so long as they do not exceed the bounds of reasonableness and rationality. The Commission has not been *expressly* granted discretion to interpret the law. However, because the Commission's interpretations of law are clearly supported by existing law, its interpretations should be upheld regardless of whether this court reviews the Commission's interpretations for error or under a reasonableness standard.

The Commission properly found, as a factual matter, that in addition to the stairs upon which Ms. Kunz fell, an alternative route was available to her via the ramp for disabled persons. The Commission determined that the ramp was substantially safer and not significantly more inconvenient

than the stairs. The Commission's factual findings on these issues are well supported by substantial evidence, and therefore should not be disturbed.

Under the facts as determined by the Commission, the Commission correctly interpreted and applied the law regarding the special hazard exception and determined that because an alternate route existed, which was substantially safer and not significantly more inconvenient, the special hazard exception does not apply in this case. The Commission's application of the law is entitled to considerable deference. Not only was its application of the law reasonable and rational, but it is clearly a correct application of the law.

The special hazard exception does not apply in this case for the additional reason that ice and snow, in and of themselves, are not special hazards to Utahns in January. The Commission determined as a factual matter that the conditions which caused Ms. Kunz to slip existed throughout Provo, and indeed throughout northern Utah, and were not limited to those persons traveling to or near R.R. Donnelley. The snow and ice upon which Ms. Kunz slipped was not a special hazard as contemplated under the exception to the coming and going rule, but rather a general hazard faced by all motorists and pedestrians regardless of whether they were traveling to R.R. Donnelley or elsewhere in Provo. Accordingly, to accept the Ms. Kunz's argument that snow and ice alone constitutes a special hazard would be to eliminate the coming and going rule, at least on snowy days. Such a result would effectively require employers to insure their employees' safety from the time each employee leaves home until reaching work and then returns home again. This result is irrational and has no support in Utah law or under any of the law cited by the appellant.

ARGUMENTS

I. STANDARD OF REVIEW.

The standard under which this court reviews decisions of an administrative agency varies depending on whether the question being reviewed is one of fact or of law, and if reviewing a question of law, whether or not the administrative agency has been granted discretion to interpret or apply the law. Under the Utah Administrative Procedures Act, when reviewing a administration agency's determination of fact, "[t]his court grants great deference to an agency's findings, and will uphold them if they are supported by substantial evidence when viewed in light of the whole record before the court." Stokes v. Board of Review of the Indus Comm'n of Utah, 832 P 2d 56, 58 (Utah App 1992), Utah Code Ann. § 63-46b-16(4)(g). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." Stokes, 832 P 2d at 58.

Where the legislature either expressly or implicitly grants an agency discretion to interpret or apply the law, this court reviews the agency's interpretation or application under a reasonableness standard. Luckau v. Board of Review, 840 P 2d 811, 813 (Utah App 1992), Stokes, 857 P 2d at 858. "When there exists a grant of discretion, '[this court] will not disturb the [agency's] application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality.'" Walls v. Industrial Commission of Utah, 857 P 2d 964, 965 (Utah App 1993), see also VanLeeuwen v. Industrial Comm'n of Utah, 901 P 2d 281, 283-84 (Utah App 1995), cert denied, 910 P 2d 426 (Utah 1995).

In Luckau v. Board of Review, supra, this court requested that parties to appeals under the Utah Administrative Procedures Act "distinguish between grants of discretion to apply the law and grants of discretion to interpret a statute, [and] specify whether the statute contains an explicit or

implicit grant of discretion, and specifically identify the grant of discretion if one is claimed ” 840 P 2d at 813

The Workers’ Compensation Act, Utah Code Ann § 35-1-1, et seq , does not expressly grant discretion to the Commission to *interpret* the law. However, the law to be applied in this case is well-established. Accordingly, regardless of the standard applied to the Commission’s interpretations of law, the Commission’s decision should be upheld.

Under Utah Code Ann § 35-1-16(1), “[t]he Commission has the duty and the full power, jurisdiction, and authority to determine the facts and *apply the law* in [the Workers’ Compensation Act] or any other title or chapter that it administers ” (Emphasis added)⁴ . Accordingly, this court grants discretion to the Commission’s *application* of the law to its factual findings, and “will not disturb the agency’s application unless its determination exceeds the bounds of reasonableness and rationality ” VanLeeuwen, 901 P 2d at 283-84

⁴Ms. Kunz relies on Stokes, to argue that there is no statutory grant of discretion. (Cf., VanLeeuwen, 901 P 2d at 283 (stating “[e]very agency decision we review under [the Utah Administrative Procedures Act] necessarily involves an express statutory grant of discretion to the agency to apply the law at issue ”)). However, Utah Code Ann § 35-1-16(1) was amended in 1994, after the Stokes decision but before the hearing in this matter, to add the express grant of authority quoted above. Because this grant of discretion is a procedural rule which does not affect the substantive rights of the parties, the law as it existed at the time of the hearing and as it exists at the time of this court’s review should apply. Cooper v. Texas Board of Medical Examiners, 489 S W 2d 129, 131-32 (Tex. Civ. App. 1973), cert. denied, 414 U S 1072 (1973), reh. denied, 414 U S 1172 (1974) (holding that where standard of appellate review changed after appellant’s conviction but prior to review, from a de novo review to a substantial evidence review, change was procedural and therefore substantial evidence review applied), Cocco v. Maryland Commission on Med. Discipline, 384 A 2d 766, 770-71 (Md. App. 1978) (holding that where interim statutory change was procedural rather than substantive, amended law should be applied on appeal). Cf., In re Board of trustees of Maplewood-Colonie Common School District, 443 N E 2d 949 (N Y Ct. App. 1982) (holding where change affects *substantive* as distinct from procedural matters, appeal should be decided on the basis of the law as it existed at the time of decision being reviewed).

II. THE SPECIAL HAZARD EXCEPTION TO THE COMING AND GOING RULE DOES NOT APPLY IN THIS CASE BECAUSE AN ALTERNATIVE ROUTE WAS AVAILABLE WHICH WAS SUBSTANTIALLY SAFER WHILE NOT SIGNIFICANTLY MORE INCONVENIENT.

The Worker's Compensation Act of Utah provides coverage to employees who are injured while in the "course of their employment." Utah Code Ann. § 35-1-45. As a general rule, employees traveling to or from work are not acting within the course of their employment, and are therefore not covered under the Workers' Compensation Act. E.g., VanLeeuwen, 901 P.2d at 284. This is known as the "coming and going rule." Id. An exception to the coming and going rule exists where, in traveling to or from his or her employment, the employee is subjected to a "special hazard" which is closely associated with the employer's business, and to which the employee would not otherwise be subjected, but for his or her employment. Soldier Creek Coal Company v. Bailey, 709 P.2d 1165, 1166 (Utah 1985). In order to fall within this "special hazard exception," four elements must be met:

- (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 or her use of the route; and
- (4) the special hazard must be the proximate cause of the accident.

Id. Where however, a reasonably safe and convenient route is available, and the employee chooses a substantially more dangerous route, the exception does not apply. E.g., Larsen, Workmen's Compensation, vol. 1, §15.13(g); pp. 4-54, -55. (See also, discussion at section II.b, infra.)

The special hazard exception is inapplicable to the present case for two separate reasons. First, Ms. Kunz had an alternate route available to her which was substantially safer and not

significantly more inconvenient. Second, snow and ice, in and of itself, during January in northern Utah is not a “special hazard.” Rather, snow and ice was a general hazard to which all motorists and pedestrians in northern Utah are exposed during winter months regardless of whether traveling to or near R.R. Donnelley. Accordingly, the general hazard that Ms. Kunz encountered was not a “special hazard” *associated with her route to work*. (See Discussion at section II, infra.)

A. The Commission’s factual determination at the ramp for the disabled provided a substantially safer alternative route. hich was not significantly more inconvenient is supported by substantial eviöence.

The administrative law judge found that a safer alternate route existed which was not significantly more inconvenient, stating:

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 feet⁵ [from] 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.

Findings of Fact and Conclusions and Law and Order, p. 6 (emphasis and footnote added).

The Commission’s factual findings are well supported by substantial evidence. The administrative law judge was provided with photographs of the entry way showing the gradual incline of the ramp as well as the handrails and the ramp’s close proximity to the steps. R. 407-409 (copies of these photographs are attached hereto as Appendix “C.” Ms. LaFramboise testified that on snowy days water would not accumulate and freeze in the same fashion on the sloped ramp as it would on the stairs, and that on snowy days she uses the sloped ramp because it has handrails on both sides.

⁵In her brief Ms. Kunz states that the two routes were separated by only twenty feet. (Brief of Appellant, p. 10).

(R. 752-53.) Each of these items of evidence supports the administrative law judge's factual conclusion. Their cumulative effect constitutes substantial evidence which a reasonable mind might accept as adequate to support the conclusion that the ramp provided a safer alternative route which was not significantly more inconvenient.

B. The Commission correctly interpreted the well-established law in holding that the special hazard exception does not apply where a substantially safer alternate route exists that is not significantly more inconvenient.

Ms. Kunz argues that the special hazard exception is not precluded where an alternate route exists. Brief of Appellant, pp. 13-16. In support of her claim Ms. Kunz relies on Park Utah Consolidated Mines Co. v. Industrial Commission, 133 P.2d 314 (Utah 1943), Cudahy Packing Co. v. Industrial Commission, 207 P. 148 (Utah 1922), Bountiful Brick Co. v. Industrial Commission, 251 P. 555 (Utah 1926) and ITT Continental Baking Co. v. Schneider, 621 P.2d 1294 (Wash. App. 1980). Ms. Kunz's argument fails to appreciate the entire holding and findings of the Commission. The Commission found, as a factual matter, not only that an alternate route existed, but that this alternate route was also *substantially safer and not significantly more inconvenient*. Order Denying Motion for Review, p. 6; Order Denying Motion for Review, p. 4.

As noted in Ms. Kunz's own brief, in each of the cases cited by Ms. Kunz there was only a single route available or the alternative route was impractical. Each of the employees in those cases were faced with a "special hazard" associated with the employer's business which rendered travel to or from work dangerous. Those cases are clearly distinguishable from the present case in which Ms. Kunz could have avoided the "hazard" altogether by taking the "not significantly more inconvenient route."

Ms. Kunz chooses to focus on language from Larsen, Workmen's Compensation Law, which states that the point at which the injury occurs must lie on the "only route, *or at least the normal route.*" Brief of Appellant, p. 9 (emphasis added by Appellant). However, Ms. Kunz ignores the portion of this text most relevant to this case, which portion was quoted by the Commission in the Order Denying Motion for Review. Professor Larsen states:

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.*

Larsen, Workmen's Compensation Law, Vol. 1, § 15.13(g), pp. 4-54, -55. Cf., Lane v. Gleaves Volkswagen, 594 P.2d 1249, (Or. App. 1979) (injury sustained by employee while climbing over a fence to leave work after he found himself in a locked car storage lot after hours not compensable regardless of whether alternative route *actually* existed, where employee failed to investigate the *possibility* of a safer route).

The reasoning behind this principle is obvious. Where the employee has a safe and convenient alternative route, the employee is not faced with a "special hazard" to reach her employment. Under such circumstances, there is no justification for excepting the employee from the well-established coming and going rule, which provides that workers' compensation benefits do not extend to employees who are traveling to or from work. This is not to say that employees will never be hurt when traveling to or from employment, but rather that employers are not liable for injuries unless there exists a special hazard associated with the employees arrival or departure from the workplace -- as opposed to a general hazard to which we all are exposed during winter months.

C. **The Commission's application of the law, whereby it determined that the existence of an alternative route precluded application of the special hazard exception in this case, is reasonable.**

Ms. Kunz argues:

there was really 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.

(Brief of Appellant, pp. 9-10.) Ms. Kunz's argument conspicuously ignores the salient issue on this point. Although a "minor deviation," by taking the ramp rather than the stairs, Ms. Kunz would have avoided the "hazard" to which she now alleges to have been exposed altogether.

Ms. Kunz relies heavily on Park Utah, *supra*, in support of her claim. However, as noted by the Administrative Law Judge, the Park Utah case is distinguishable from the present case. Among other things, in the Park Utah case, there was only one practical route of entrance to or exit from the premises. 133 P.2d at 317. In that case, although there were stairs, the claimant could not reach them because they were blocked by snow. *Id.* The route which the claimant in Park Utah was required to cross was covered with eight inches of snow, and there was no discernible difference between any two portions of the path. *Id.* at 315.

In the present case there can be no dispute that the ramp was easily accessible. Ms. Kunz testified "as I recall there wasn't a lot of snow. I mean it seems that I could navigate it without any difficulty. My recollection is that it was probably, you know, maybe half an inch to an inch" R. 667. In addition, Ms. Kunz testified that the snow had not been cleared from the sidewalk to the stairs either. R. 639. Nonetheless, Ms. Kunz traversed the uncleared section to reach the stairs rather than to the ramp, apparently without problem until reaching the stairs.

Ms. Kunz argues that the two available routes in this case were really “deviations of a single route” because they were separated by only twenty feet, and began and ended in the same place. Brief of Appellant, p. 10. Obviously, by definition alternative routes begin and end in the same place. It is not the proximity of the routes which distinguishes them, nor the beginning or end points, but rather the difference in character.

As noted above, the Commission correctly found, as a factual matter, that the two routes were different in character, and that the ramp provided a substantially safer alternative. These factual findings were supported by substantial evidence. Given the differences in character between the two routes, the Commission correctly determined that they constitute two separate routes. The close proximity of the two routes only demonstrates the convenience with which Ms. Kunz could have used the ramp and avoided the stairs.

The facts of this case as found by the Commission are supported by substantial evidence. The relevant law in this case is well-established. Where, as in this case, a substantially safer route was available to Ms. Kunz with relatively little inconvenience, the special hazard exception to the coming and going rule does not apply. The Commission’s application of the well-settled law to the facts of this case is therefore within the bounds of reasonableness and rationality, and is the only logical conclusion. Accordingly, this court should uphold the Commission’s decision denying workers’ compensation benefits to Ms. Kunz.

III. THE COMMISSION CORRECTLY DETERMINED THAT SNOW AND ICE IN UTAH DURING JANUARY IS NOT A “SPECIAL HAZARD” AS CONTEMPLATED UNDER THE SPECIAL HAZARD EXCEPTION.

In the event the court finds that application of the special hazard exception is precluded by the existence of a safer and convenient alternative route, the court need not reach the second issue presented by Ms. Kunz’s appeal. However, the Commission also determined that the special hazard exception does not apply for the additional reason that the risk presented by snow and ice during January in northern Utah is not a “special hazard” as contemplated under the special hazard exception, but rather is a common fact of life. Findings of Fact, Conclusions of Law and Order, p. 5; Order Denying Motion for Review, p. 4.

Ms. Kunz relies upon Park Utah, *supra*, for the proposition that snow and ice *can* constitute a hazard, quoting:

The 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.

Brief of Appellant, pp. 16-17 (quoting Park Utah, 133 P.2d at 317) (emphasis added).

From this general proposition, Ms. Kunz makes the illogical jump that snow and ice *always* constitute a special hazard. The Park Utah decision does not support Ms. Kunz’s conclusion. As clearly stated in the court’s decision, in Park Utah there was eight inches of snow which was combined with a particular slope (which constituted the only practical means of entrance to and access from the premises). 133 P.2d at 315. By contrast, the Commission determined in the present case that one-half to one inch of snow and ice during January in northern Utah is not, in and of itself, sufficient to constitute a special hazard. As stated by the Commission

there was no evidence that the condition at the site of Ms. Kunz's 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 was faced the same conditions as those which caused Ms. Kunz to fall.

Order Denying Motion for Review, p. 4.

In this regard, Ms. Kunz's argument is similar to that of the applicant in Soldier Creek Coal Company v. Bailey, 709 P.2d 1165 (Utah 1985). In Soldier Creek, the court overturned the Commission's order granting benefits to the dependent spouse of a deceased employee under the special hazard exception because her husband had died in a single car accident while on his way to work. Id. The Utah Supreme Court reversed the Commission's order and reinstated the order of the administrative law judge denying benefits, *inter alia*, because the Commission had relied on the "fallacious assumption" that the curve in the road on which this particular accident occurred "complicated by a particular grade" was a peculiar and abnormal peril. Id. at 1165. In that case the court found that the elements of the special hazard exception could not be satisfied because there was no "special hazard." Id. Similarly, in this case, although snow and ice may routinely cause pedestrians to slip and fall, it is not a "special hazard" which renders access to a place of employment more dangerous than any other activity.

In Wilkinson v. Industrial Commission of Utah, 464 P.2d 589 (Utah 1970), the claimant appealed the industrial commission's denial of workers' compensation benefits. The claimant was injured while making a left-hand turn leaving his employer's business and attempting to cross Redwood Road. Id. at 590. The claimant claimed, among other things, that he was subject to a "special hazard" because he was forced to cross a wide and busy street. Id. at 591. The Utah

Supreme Court found that there was no “special hazard” because “[t]he only hazard at all is that type which every person has who enters or leaves a street.” Id.

In support of her argument that common perils such as ice and snow constitute a hazard under the special hazard exception, Ms. Kunz cites numerous cases from other jurisdictions where the special hazard exception was found to apply. (Brief of Appellant, pp. 17-20.) However, in every case cited by appellant, the special hazard was one which was associated with a particular location which was closely associated with the employer’s business. Although the risk to the employee need not be different from that to which the general public would be exposed *at the same location*, this does not expand the special hazard exception to apply to a hazard that affects an entire city or region.

The practical effect of Ms. Kunz’s argument is that on snowy days, each employer becomes the insurer of its employees’ safety from the time they leave their home until the time they reach the workplace, and until they return home again. This is so because the employee would be faced with the “special hazard” of snow and ice, with which they arguably would otherwise not be confronted if they were stay home and not go to work. For example, an employee who slips in her own driveway while entering her car to leave for work would arguably be faced with a hazard with which she would not otherwise be faced, thereby rendering the employer liable under Ms. Kunz’s theory. The logical extension of Plaintiff’s theory would include rainy days, foggy days, heavy traffic days and any other hazard with which the general public is confronted on their way to work, regardless of whether or not that hazard bears any association to the employer’s workplace.

Obviously, if Ms. Kunz’s argument that snow and ice alone is a special hazard is accepted, the coming and going rule no longer has any application at least on snowy and inclement weather days. Such a result finds no support in Utah law nor in any of the cases cited by the applicant, and

flies in the face of reason. In VanLeeuwen v. Industrial Commission, *supra*, this court explained the policy behind the coming and going rule stating “[t]he major premise of the ‘going and coming’ rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit.” 901 P.2d at 284. The special hazard exception is a limited exception which provides coverage to employees who are forced to traverse a “special hazard” closely associated with their route to or from their workplace. This limited exception should not be extended to impose liability on employers for all employees injured in the general vicinity of their place of employment, regardless of whether the injury results from a hazard associated with the employer’s business or not.

Although snow and ice may constitute a special hazard when combined with other factors which are associated with the employer’s business location, it is not by itself a special hazard as contemplated under the exception to the coming and going rule in this case. Accordingly, the Commission’s decision should be upheld for the additional reason that Ms. Kunz’s injury did not result from a “special hazard,” but rather from a general hazard with which all persons moving about in the area were also faced.

CONCLUSION

Ms. Kunz’s appeal presents two separate issues for this court’s review, either of which if resolved in favor of appellees is dispositive of this case. The special hazard exception is a limited exception which extends coverage to employees traveling to or from work who are faced with a special hazard *because* of their work. The exception does not extend coverage for every hazard the employee encounters, but only those closely associated with travel to or from the employer’s business.

The Commission determined based upon substantial evidence that at the time of Ms. Kunz's accident there was an alternative route conveniently available which was substantially safer. Under these facts, the special hazard exception does not apply, and Ms. Kunz is not entitled to workers' compensation benefits because her injury was sustained on the way to work.

In addition, the Commission found that the "hazard" which Ms. Kunz faced was no greater than that faced by others moving about in Provo, whether or not they were traveling to or near R.R. Donnelley. Consequently, Ms. Kunz would have faced ice and snow whether she was traveling to the grocery store or some other activity equally unrelated to her employment. Because the Commission found that the hazard faced by Ms. Kunz was not unique to R.R. Donnelley, but rather was common to all of Provo, the Commission correctly determined that snow and ice alone during January in Utah does not constitute a "special hazard." Any other conclusion would extend workers' compensation benefits to employees whose injury had no relationship to their employment, merely because they happened to be traveling to work on a snowy or inclement weather day. Such a result is not justified under the special hazard exception.

DATED this 26th day of March, 1996.

RICHARDS, BRANDT, MILLER & NELSON



Brad C. Betebenner

Kent W. Hansen

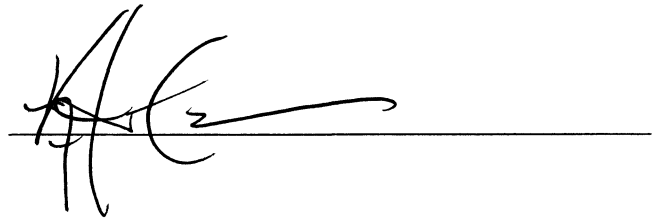
Attorneys for R.R. Donnelley and Sons, Co., and
Sedgwick James of Idaho

MAILING CERTIFICATE

I hereby certify that I served the foregoing instrument by causing 2 copies to be sent by first class mail, postage prepaid, on this 28th day of March, 1996, to each of the following addressees:

David N. Mortensen
Sherlynn White Fenstermaker
IVIE & YOUNG
48 North University Ave.
Post Office Box 672
Provo, Utah 84603

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



9359-011: 93604

Exhibit A

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.

LISA H. KUNZ
ORDER
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
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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

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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;

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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
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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

LISA H. KUNZ
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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.

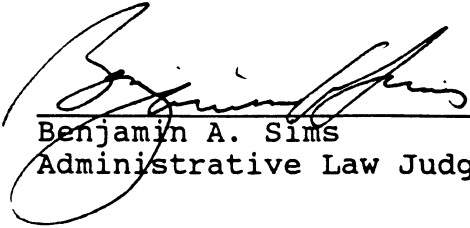
ORDER:

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

CC47

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

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SALT LAKE CITY UT 841102465

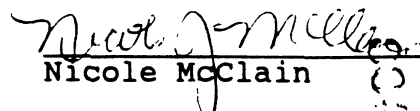

Nicole McClain
05/10/95

Exhibit B

THE INDUSTRIAL COMMISSION OF UTAH

LISA KUNZ,

Applicant,

vs.

R. R. DONNELLEY & SONS CO.
and SEDGWICK JAMES OF IDAHO,

Defendants.

*
* ORDER DENYING
* MOTION FOR REVIEW
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Case No. 94-0757

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.

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ORDER DENYING MOTION FOR REVIEW
LISA KUNZ
PAGE 3

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. 4-34,55.

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.

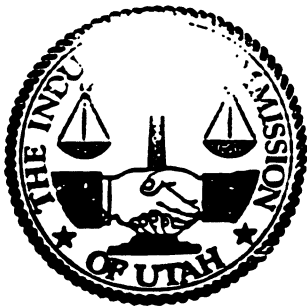
In order to qualify for workers compensation benefits under the special hazard rule, Ms. Kunz must prove each of the four elements of the rule. Ms. Kunz has failed to establish either the first or the second elements of the rule. Consequently, the Industrial Commission concludes that Ms. Kunz' accident 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
PAGE 5


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.

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ORDER DENYING MOTION FOR REVIEW
LISA KUNZ
PAGE 6

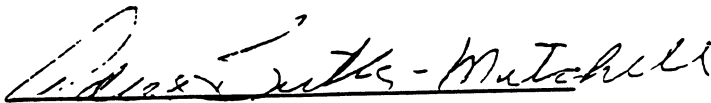
CERTIFICATE OF MAILING

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:

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Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

005.8

Exhibit C



