

1995

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

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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UTAH COURT OF APPEALS
BRIEF

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OCKET NO. 950690-CA

FILED
Utah Court of Appeals

MAY 28 1996

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

LISA KUNZ,

:

Plaintiff/Appellant,

:

Case No. 94-0757

vs.

:

Oral Argument
Priority No. 7

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

95-0690-CA

Defendants/Appellees.

:

REPLY 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

IN THE UTAH COURT OF APPEALS

LISA KUNZ,	:	
	:	
Plaintiff/Appellant,	:	Case No. 94-0757
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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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State of Utah

INDUSTRIAL COMMISSION OF UTAH



Michael O. Leavitt
Governor

Stephen M. Hadley
Chairman
Thomas R. Carlson
Commissioner
Colleen S. Colton
Commissioner

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APR 12 1996

COURT OF APPEALS

April 11, 1996

Marilyn M. Branch
Court Clerk
Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, Utah 84102

Re: Kunz v. R.R. Donnelley & Sons Co., et al.
Court of Appeals Case No. 950690-CA

Dear Ms. Branch:

The Industrial Commission of Utah, a respondent in the above referenced matter now pending before the Court of Appeals, hereby adopts the arguments set forth in the brief of respondent Donnelley, which brief was filed with the Court on March 28, 1996.

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 950690-CA

Very truly yours,

Alan Hennebold
General Counsel
Industrial Commission of Utah

letters\4-11(2)

cc. David N. Mortensen
Brad C. Betebenner

Alan L. Hennebold
General Counsel

160 East 300 South, 3rd Floor, P.O. Box 146600, Salt Lake City, Utah 84114-6600
Telephone (801) 530-6953 1-800-530-5090 TDD (801) 530-7685 FAX (801) 530-6804



State of Utah

INDUSTRIAL COMMISSION OF UTAH



Michael O. Leavitt
Governor

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Alan Hennebold
General Counsel
Industrial Commission of Utah

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cc. David N. Mortensen
Brad C. Betebenner

Alan L. Hennebold
General Counsel

160 East 300 South, 3rd Floor, P.O. Box 146600, Salt Lake City, Utah 84114-6600
Telephone (801) 530-6953 1-800-530-5090 TDD (801) 530-7685 FAX (801) 530-6804

ARGUMENT

I. THE INDUSTRIAL COMMISSION'S CONCLUSION RELIES ON A MISUNDERSTANDING OF THE LAW AND AS A RESULT THE COMMISSION'S APPLICATION OF THE LAW IS NOT REASONABLE OR RATIONAL

R. R. Donnelly and Sedgwick Jones (hereinafter referred to as "Donnelly") admit that the Worker's Compensation Act, Utah Code Ann. § 35-1-1, et seq., does not expressly grant discretion to the commission to interpret the law. Donnelly claims that Utah Code Ann. § 35-1-16(1) was amended in 1994 somehow effecting the Stokes v. Board of Review of the Industrial Commission of Utah¹ decision. However, the 1994 amendment does not change the fact that the Industrial Commission in this case was construing Utah Code Ann. § 35-1-45 which provides in pertinent part:

Each employee...who is injured...by accident arising out of and in the course of his employment, wherever such injury occurred... shall be paid compensation....

Id. This Court recently reaffirmed that the Act does not expressly or impliedly grant discretion to the Commission to interpret this statutory language. Therefore, the Commission's interpretation of the Act is reviewed for correctness. VanLeeuwen v. Industrial Comm. of Utah, 901 P.2d 281, 283 (Utah Ct. App. 1995).

Nonetheless, as Donnelly points out, the Industrial Commission in this case has discretion to apply its factual findings to the law, and the Commission's application will not be disturbed unless its determination exceeds the bounds of reasonableness and rationality. Id. However, when the Industrial Commission's application of the facts to the law is predicated upon an

¹832 P.2d 56 (Utah Ct. App. 1992).

erroneous understanding of what the law is, its final determination almost of necessity exceeds the bounds of reasonableness and rationality.

In this case the Industrial Commission found that a special hazard was not associated with the route taken by Ms. Kunz. Both the ALJ and the Industrial Commission misapprehended the law when they found it relevant that (1) ice and snow in northern Utah in January is a common fact of life, (2) there was no evidence that the condition at the site of Ms. Kunz's accident was different than conditions elsewhere in Provo, and (3) that it was a natural result that outdoor sidewalks, stairs, and ramps were slick. The controlling law in Utah provides that the above stated factors should have been irrelevant to the Industrial Commission's determination. Therefore, the Industrial Commission and the ALJ attempted to apply law which does not exist.

Likewise, the Industrial Commission's holding that an alternate and substantially more safe route was available is neither sustainable by controlling law nor as a factual finding is the conclusion sustainable under the evidence. Since the stairs were the normal and more direct route to the front door, Ms. Kunz's use of the route was closely associated with her employment. As a result, her injury arose out of and was in the course of her employment.

Because the Industrial Commission and the ALJ applied the wrong law to the facts, their application of an erroneous legal premise was by definition beyond the bounds of reasonableness and rationality.

II. THE SNOW AND ICE UPON WHICH MS. KUNZ FELL CONSTITUTED A SPECIAL HAZARD

Donnelly, like the ALJ and the Industrial Commission, ignores Utah law in its discussion of whether a special hazard exists in this case. Because the abundant case law cited by Ms. Kunz in her principal brief could not be distinguished by Donnelly, the respondent simply brushed aside all of the cases. While acknowledging that Ms. Kunz was arguing that common perils such as ice and snow can constitute a hazard under the special hazards exception, Donnelly has proffered no case law from any jurisdiction which holds that snow and ice is not a hazard under the special hazards exception because it is a common peril. Contrary to respondent's assertion, the simple fact that an entire city or region experiences fog, rain, ice or snow does not take the condition at the employee's place of employment outside the special hazards exception. See Respondent's brief at 16. Instead, as the court in Jones v. Wendy's of Tri-State Mall, 1996 WL 30239 (Del. Super. Jan. 23, 1996) held:

Due to the location of the 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. at 3.

As asserted in petitioner's principal brief, the Utah Supreme Court decision in Park Utah Consolidated Mines v. Industrial Comm., 103 Utah 64, 133 P.2d 314 (1943) controls in this matter. In Park Utah, the applicant had slipped on a roadway leading to the place of her employment. The Park Utah court did not find it necessary that the employees uniformly followed the same exact route, but only that the applicant and the others uniformly traveled the same approximate course. It can hardly be argued in this matter that the applicant and others

uniformly traveled the exact approximate course where the applicant fell. There was but a single entrance to the building. (R. 638). In holding that the applicant was entitled to benefits, the Park Utah court commented:

When the employee arrives at the threshold of his employment and the means for entrance are limited so that he has no choice as to the mode of entrance, all of the hazards which are peculiar to such entrance attach to his employment. The converse is equally true as to leaving the employment. The employee in this case had only one means of exit from the premises, although it is true that the yard sloping down to the public road measures approximately fifty feet in width. The applicant could not leave the premises from the steps to the shop for the reason that they were blocked by snow. It may be true that if applicant had not walked quite as far to the north in leaving the premises he might not have slipped or might not have fallen, but even if the supposition were a fact it would be wholly immaterial. The employees in effect had an entrance and exit fifty feet in width, as the only practical means of access to and exit from the premises.

Id. at 317. The same can be said of Ms. Kunz in this case. There was but one entrance to the building. There was a single staircase which happened to have a disabled person's ramp next to it. It is complete supposition and conjecture to allege that if Ms. Kunz had taken the ramp she would not have fallen. If Ms. Kunz had not taken the most direct route to the front door of the building, she may well have slipped walking along the sidewalk in order to get to the ramp. Likewise she could have slipped on the ramp itself as snow had accumulated there. While the evidence indicates that water might not accumulate as easily on the ramp, it is uncontroverted that at the time of the accident snow was in fact upon the ramp. (R. 640).

Both Donnelly and the Industrial Commission, as stated, rely heavily upon the fact that the snow and ice could be considered a common peril. The Commission held that the snow and ice in January is a "common fact of life." (R. 506). The Commission further held that there was no evidence that conditions were different elsewhere in Provo, that it is a natural result of snow

that sidewalks, stairs and ramps are slick,² and that everyone in the same general area faced the same condition. These are simply irrelevant considerations. In Bountiful Brick Co. v. Industrial Comm. of Utah, 68 Utah 600, 251 P. 555 (1926), a case upon which Park Utah relies, an employee was killed while crossing a rail-road track to get to the Bountiful Brick plant. The Bountiful Brick court noted:

The employee, in crossing the track at any time, was exposed to a peril which is common to all, but by virtue of his employment he was required to cross the track regularly and continuously thus being peculiarly and abnormally exposed to a common peril.

Id. at 556. Likewise, while snow and ice might be natural and common in Provo in January, it was Ms. Kunz's employment with Donnelly which necessitated her regular and continuous crossing of the sidewalk and staircase at issue. The fact that the hazard was common to all is immaterial. Instead, the material facts which the Industrial Commission ignored along with the precedent of Bountiful Brick is that the reason Ms. Kunz was walking up the staircase in the first place was its inextricable connection with her workplace.

Donnelly's assertion that the special hazards exception does not apply to common perils or hazards to which the public is exposed wholly ignores the holding in Cudahy Packing Co. v. Industrial Comm., 60 Utah 161, 207 P.148 (1922), which was the first decision to recognize the exception to the going and coming rule. In Cudahy, the hazard was a railroad crossing, which while mostly traversed by employees of Cudahy, was open to the public and the record in fact showed public use of the area. Even under those conditions, the exception applied and benefits were awarded.

²It is important to note that the Industrial Commission assumed that the ramp itself would be slick.

Donnelly claims that the Utah Supreme Court in Soldier Creek Coal Company v. Bailey, 709 P.2d 1165 (Utah 1985) found that the elements of the special hazard exception could not be satisfied because there was no “special hazard.” This was not the holding of the court. The Soldier Creek court noted:

Nothing in the police report or the testimony of any witnesses suggest that the curve was in anyway dangerous.

Id. at 1167. Thus, as the Utah Supreme Court later pointed out in Cherne Construction v. Posso, 735 P.2d 384 (Utah 1987), the Soldier Creek court found the special hazards exception inapplicable because “there is no evidence to suggest that the curve in the road caused Bailey’s accident.” Id. at 385 (quoting Soldier Creek, 709 P.2d at 1167).³ In this case, however, the evidence is undisputed that Ms. Kunz fell on ice on the steps leading to the door of the place of her employment and that her fall caused her injuries. Therefore, it is completely un rebutted that the hazard, the snow and ice, caused the accident.

Because the ALJ and the Industrial Commission’s conclusion relied on a false understanding of what the law is, its application of the law was erroneous. The Industrial Commission and the ALJ ignored Utah precedent and as a result the Industrial Commission’s conclusion should be vacated and the matter remanded for determination of the amount of benefits to be awarded.

³Likewise in Wilkinson v. Industrial Comm., 23 Utah 2d 428, 464 P.2d 589 (1970) the holding of the court was that no hazard caused the accident.

III. ANY EVIDENCE THAT THE RAMP PROVIDED A SAFER ALTERNATIVE ROUTE WAS INSUBSTANTIAL; IN ANY EVENT, THE RAMP DID NOT CONSTITUTE AN ALTERNATIVE ROUTE MATERIAL TO THE SPECIAL HAZARDS EXCEPTION

In this matter there really was not an alternative route. Had the ramp been attached and completely parallel to the steps, it could hardly be argued that it would constitute an alternative route. In this case there is but a single entrance. Even if this Court were to consider the ramp an alternative route, there is no evidence that it was safer on the day of the accident. As the court in Park Utah pointed out, while it may be true that an applicant could have walked a litter further one way or the other, such supposition is wholly immaterial. Park Utah, 133 P.2d at 317. Instead, this Court must look at the totality of the evidence and determine if there is substantial evidence to support both the Industrial Commission is factual finding and their application of the law to that factual finding.

The record does contain some evidence of the viability of the ramp as an access way to the front door of Ms. Kunz's employment. The ramp was located "thirty feet [from the] stepped pathway." (R. 478). The ramp had hand rails. (R. 752). The ramp was made of a smooth surface and water would normally drain more efficiently from that surface. (R. 752). The ramp had a gradual slope. (R. 752). It had snowed approximately one half inch to one inch the night before, and that the snow had been partially cleared from the walks. (R. 667). However, the snow had not been cleared from the ramp, nor had it been cleared from the walk leading from the sidewalk to the steps. (R. 639). As stated, the Industrial Commission found that the ramp was probably slick. (R. 506). Ms. Kunz understood that the stairs constituted the regular route taken by employees. (R. 644). In fact, as far as Ms. Kunz knew, the stairs constituted the only route

the petitioner and other employees used. (R. 644). The only other witness, Karen LaFramboise, testified that both the ramp and stairs had been used by employees in the past and the area generally gets slippery with inclement weather. (R. 752). Ms. La Framboise indicated that she used the ramp "if I can get that far." (R. 754). Donnelly claims that Ms. Kunz has taken that statement out of context. However, the context is freely available for the appellate court to review. The statement indicates that at some times Ms. LaFramboise cannot get that far. In any event, the foregoing constitutes a complete marshaling of the evidence in support of the Industrial Commission's conclusion that the ramp provided an alternative and that that alternative was substantially safer. However, despite this evidence and any reasonable inferences that can be drawn therefrom, the finding that the ramp was either an alternative route or substantially safer is not supported by substantial evidence.

A review of the pictures attached to both the Ms. Kunz and Donnelly's briefs show that the ramp was indeed farther from the entrance to the place of employment than the stairs. The stairs, from the direction the petitioner was coming, constituted a far more direct route to the front door. Likewise, the stairs have handrails. In fact, Ms. Kunz indicated that she tried to grab the handrail as she fell. (R. 641). The Industrial Commission concluded in an unreasonable and irrational fashion that instead of taking a more direct route and more convenient route to the front door of her place of employment, crossing upon flat surface steps, Ms. Kunz should have traversed a sloping ramp which was covered with snow. It is unreasonable to expect a reasonable person to take a longer route on a slippery surface and increase the likelihood of falling. The ramp was not more level than the steps, as the Industrial Commission found (R. 506), it was not more convenient, and it was not substantially safer. This Court need only look at the pictures in

evidence in order to conclude that under no standard of reasonableness can the Industrial Commission's conclusion that the ramp was more level be sustained.

In the final analysis, the stairs and ramp constituted a single entrance. When Ms. Kunz parked her car and attempted to make her way to the only entrance to her employment, she took the most direct route following the sidewalk. Had she fallen but two paces prior to where she did fall, there would be no need to make artificial distinctions between what really constituted a single entrance. The entire area, the access way to the building, had not been cleared of snow. If the whole area gets slippery as Donnelly's witness Ms. LaFramboise indicated (R. 752), then walking further along the sidewalk and up the ramp would constitute a higher potential for slipping and falling. In fact, had Ms. Kunz taken the route suggested by Donnelly and fallen, Donnelly would now be arguing to this Court that it was unreasonable for her to not take the most direct route of the stairs and thus diminish the possibility of her falling.

The Bountiful Brick court styled the employer's argument as follows:

The main contention made by the plaintiffs is that there was a route or a way available to the employee along the Burn's road and the public street, which, altogether greater in distance, was less hazardous because the crossing of the rail-road track was a public one where the trains must be operated with greater care to avoid accidents and injuries[.]

Bountiful Brick, 251 P.2d at 556. In rejecting this argument, the Bountiful Brick court noted:

The route taken was the most direct and shortest and was used by other employees, with the knowledge of the employer who made no objection.

Id. In this case, Ms. Kunz took the most direct and shortest route, a route which to her knowledge was the normal route which employees took. In Bountiful Brick the court found that the decedent had "traveled over the route which was generally used by other employees-- the

natural, practical, customary route.” Id. Likewise in this case Ms. Kunz took the natural, practical, and customary route.

The fact that Ms. Kunz could have deviated in one direction or another does not change the fact there was but a single entrance to her place of employment, and that if she had taken the ramp in question, that circuitous route would have increased, not diminished, her chances of slipping. The Industrial Commission’s conclusion that the ramp is more level than the stairs is simply untenable. Likewise, it is pure supposition that Ms. Kunz would have been safer by taking the ramp which was sloped and covered with snow.

Donnelly’s argument that holding for Ms. Kunz in this case would extend benefits to all employees in inclement weather from the doorsteps of their homes finds no basis in reality. As the court in Bountiful Brick pointed out, it is not the common peril which makes a hazard a special hazard of employment. Instead, as the Soldier Creek court pointed out: “There must be a close association of the access way with the employer’s premises.” Soldier Creek, 709 P.2d at 1166. It cannot be reasonably argued that there is not a close association of the stairs in this case and the employers premises. A review of the photographs attached to both parties’ briefs evidences that the stairs were but a few feet from the entrance to the building. The Industrial Commission’s Order must be reversed and the matter remanded.

IV. THE ELEMENTS OF THE SPECIAL HAZARDS EXCEPTION ANNOUNCED IN THE SOLDIER CREEK DECISION HAVE BEEN MET IN THIS CASE

If the Industrial Commission had applied a correct understanding of the law, it would have found that the elements of the Soldier Creek decision had been met. There was a close association of the access way with the employers business. There was but one door to the

building. The petitioner was taking the most direct route from her vehicle to that door. It cannot be reasonably argued that the stairs did not constitute the normal access way to that door under the evidence of this case.

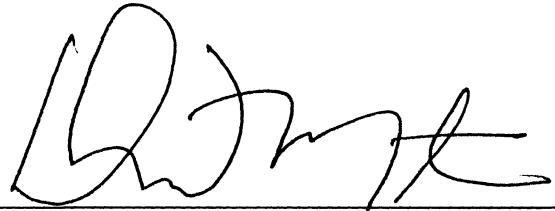
There was a special hazard associated with the access way to Ms. Kunz's place of employment, which hazard was the snow and ice. The undisputed evidence before the Industrial Commission showed that Ms. Kunz did in fact slip on snow and ice. There is absolutely no evidence that Ms. Kunz could have avoided the hazard by taking an alternative route. If she had walked further along the sidewalk to access the ramp, she could have slipped there. Likewise, it is pure supposition that had she walked further along the sidewalk or taken the ramp she would not have slipped. The sloping ramp was covered with snow. Utah law is inapposite to the Industrial Commission's conclusions. Snow and ice in Utah can constitute a hazard.

Ms. Kunz was exposed to the hazard because of the use of the route. The stairs were but a few feet away from the front door. Lastly, the proximate cause of the fall was the ice and snow. This point is undisputed. Accordingly, the proximate cause of the injuries to the employee in this case was a special hazard associated with the access way to the employer's business. Both the Park Utah and Bountiful Brick cases clearly establish precedent that a natural element or common peril does not bring a hazard out of the special hazards exception. A denial of benefits to Ms. Kunz is inconsistent with the Utah Supreme Court's decisions in Cudahy, Bountiful Brick, and Park Utah. The Industrial Commission simply misunderstood the law.

CONCLUSION

Because the Industrial Commission misunderstood the law, it has denied Ms. Kunz benefits pursuant to the Workers' Compensation laws of the State of Utah. The Industrial Commission failed to construe the Workers Compensation Act in favor of the employee, and by the denial of benefits, Ms. Kunz has been substantially prejudiced. As a result, and pursuant to Utah Code Ann. § 63-46b-16(4), the Industrial Commission's Findings of Fact and Conclusions of Law must be reversed and the matter remanded for determination of the amount of benefits to be awarded.

DATED AND SIGNED this 24th day of May, 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 true and correct copies of the foregoing Reply Brief of Petitioner with postage prepaid on May 24, 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
Salt Lake City, Utah 84114

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

DAVID N. MORTENSEN
IVIE & YOUNG
Attorneys for Petitioner