THE LEGAL BUZZ

WCF INSURANCE

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Thank you to those that have attended the legal department's trainings on different claims and legal topics. So far, the topics of settlement, the *Allen* decision, and course and scope have been covered. Outlines and other materials from these trainings can be found in the "Education Materials" section of the legal department's intranet page.

RECENT CASELAW

Jill Jensen v. Ogden School District

LABOR COMMISSION APPEALS BOARD
August 2, 2016

A school secretary filed an application for hearing after exposure to cleaning products and her co-workers' perfumes during a five-month period aggravated her pre-existing respiratory problems. The secretary's claim was referred to a medical panel. The panel opined that her conditions were not caused by the occupational exposure in question, but determined that such conditions were aggravated by exposure to scent in the workplace. The panel attributed 20% of the respiratory problems to exposure at work and the remaining 80% to non-industrial factors. The judge awarded benefits but reduced the benefits awarded based on the panel's apportionment. The secretary appealed, claiming that her award of temporary disability compensation should not be apportioned because only her occupational exposure, not exposure outside the workplace, caused her absences from work and resulting wage loss. The Commission held that §110 of the Utah Occupational Disease Act called for the apportionment of medical causes between work-related and non-work-related causes. The law did not instruct the Commission to then conduct a second type of apportionment to determine which of the medical causes led to the temporary disability. The Commission therefore affirmed the judge's 20% vs. 80% apportionment of benefits.

IMPACT ON WCF - The Commission reaffirmed the correct way of applying §110 of the Utah Occupational Disease Act. As displayed in Ms. Jensen's case, it did not matter that the 20% work-related causes pushed her over the edge into being temporarily and totally disabled. Her temporary disability was apportioned based on the causes of her conditions, not by analyzing which of those causes led her to miss work.

QUESTIONS about one of these cases or workers'compensation news items? One of WCF's attorneys would be happy to help you:

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JP's Landscaping v. Mondragon and Labor Commission

UTAH COURT OF APPEALS
March 30, 2017

The claimant alleged he injured his knee in a workplace accident when a wheelbarrow full of gravel he was pushing tipped and the knee was caught between and hit by one of the two handles. At the hearing, the employer proved that the specific mechanism of injury of the knee getting caught between two handles as the wheelbarrow tipped was not physically possible. One of the handles would have been significantly higher than the knee. As a result, the main defense raised was the claimant was not credible and he fabricated the workplace accident.

The ALJ concluded that although the claimant's allegation that a handle hit his knee was factually flawed, the remaining testimony and medical evidence surrounding the incident and injury were credible and supported a conclusion that he suffered a workplace accident due to "substantial exertion" while losing control of the wheelbarrow. The matter was ultimately sent to a medical panel which concluded a workplace accident caused the injuries.

The employer on appeal argued, in part, that the claim should have been dismissed once the specifically alleged mechanism of injury had been discredited and that all medical evidence using the discredited mechanism as a basis for a medical opinion should not be given any weight. The employer also argued it was improper for the ALJ to raise a new theory of "substantial exertion" on his own in place of the discredited mechanism of injury. The Court of Appeals concluded that the "substantial exertion" argument was not created by the ALJ, but was supported by the medical opinions in the record. The Court of Appeals also affirmed the ALJ's order of benefits and conclusions regarding credibility, citing multiple cases where it previously refused to re-weigh evidence regarding credibility.

IMPACT ON WCF - This case emphasizes how difficult it can be for an employer to prevail on a credibility defense before the Labor Commission. Absent significant evidence like a video of the alleged accident or direct eyewitness testimony to support the argument that an accident did not happen, or that it did not happen in the way the claimant has alleged, the Labor Commission will generally side with an injured worker on credibility issues and give them the benefit of the doubt. The Court of Appeals will not re-weigh credibility evidence. Thus, as a general rule, whatever the Labor Commission concludes regarding credibility will usually be the final result. WCF should closely scrutinize claims where credibility is the main defense and how far to push such claims through the appeals process to avoid negative appellate decisions.

Antonio O. Valdez v. Labor Comm'n and Unified Police Department

UTAH COURT OF APPEALS
April 6, 2017

A police officer experienced back pain after his patrol car came to an abrupt stop during an accident. A medical panel opined that the accident aggravated the officer's pre-existing conditions and that all of the medical problems related to the accident had stabilized by November 2011. The panel opined that the more recent problems were attributable to the ongoing progression of his pre-existing condition. The officer argued that his injuries were compensable because the accident aggravated his pre-existing condition. The Court of Appeals disagreed. The court held that if a pre-existing condition is only temporarily aggravated by an industrial accident, a claimant may only recover for the temporary aggravation, and not for unrelated symptoms or complications he may experience down the road. In other words, the entitlement ends when the aggravation stops being attributable to the industrial accident.

IMPACT ON WCF -This case further clarifies and reinforces what the Court of Appeals had already held in *Peterson v. Labor Comm'n* and *Virgin v. Board of Review of Indus. Com'n*: If an industrial accident temporarily aggravates a pre-existing condition, regardless of whether the condition was asymptomatic before the accident, the worker is not entitled to compensation beyond the point when the aggravation has resolved.

Kenny Ludlow v. Swift Transportation

UTAH LABOR COMMISSION
August 12, 2016

A truck driver rolled his truck and suffered from a fractured vertebrae and other back conditions. The treating physician and the IME doctor agreed that the driver's condition was medically caused by the industrial accident, although the IME doctor also attributed it to non-industrial factors and had a different opinion regarding what physical restrictions should be assigned to the driver. The case was referred to a medical panel. The medical panel opined that the driver's current back condition was not due to the industrial accident but that it was due to the driver's poor physical condition and pre-existing arthritis. The panel opined that the fractured vertebrae was due to the accident, but that those types of fractures typically healed within six weeks to six months. In an uncommon turn of events, the judge rejected the medical panel's report because the evidence in the record did not support the panel's opinion. After this rejection was challenged by the employer, the Commission agreed that the medical panel report was flawed, although they sent the case back to the judge with instructions to get clarification from the medical panel. The judge and Commission's problem with the medical panel report was that it did not specify how long it took the vertebrae fracture to heal, did not explain its reasoning, and did not address the opinions of the treating physician and the IME doctor.

IMPACT ON WCF - As if a medical panel did not add enough uncertainty to the adjudication of a claim, this case reminds us that the surprises may not end with the issuance of the medical panel report. The medical panel's role is to advise the judge, but the judge is not bound by their medical opinion. While the Commission did ultimately order that the panel provide some clarification, it is still concerning that it agreed that the report was unreliable given that the panel identified the other factors that were the cause of the driver's current condition.

RECENT GOING AND COMING RULE CASES

Brown v. Williams

UTAH COURT OF APPEALS
February 16, 2017

This case provides a review of several workers' compensation legal rules that we encounter often: exclusive remedy, the going and coming rule, and the premises rule exception. An IRS employee was hit and injured by a car driven by a co-employee while she was walking through the IRS parking lot on her way to work. The claimant filed a personal injury lawsuit in Utah district court against her co-employee directly, alleging the accident did not occur in the course and scope of her employment. The Court dismissed her claim citing Utah's exclusive remedy provision, which only allows an injured worker to recover the benefits provided by applicable workers' compensation laws and prohibits suing a co-employee or employer directly for personal injury tort damages. In reaching this conclusion, the Court analyzed the "going and coming rule" and the "premises rule exception." The "going and coming rule" states that an employee's injury does not arise out of or occur in the course of employment if the injury is sustained while going to or coming from work. However, under the "premises rule exception" even if an employee is going to or coming from work, the accident will be covered if it occurs on the employer's premises. In other words, as long as the accident occurs within the employer's property lines, the accident is covered under workers' compensation laws. Consistent with those rules, the Court in this case concluded workers' compensation benefits were the claimant's exclusive remedy because the accident occurred in the employer's parking lot.

IMPACT ON WCF - This decision solidifies the long-standing legal principle that when an employee is injured anywhere on an employer's premises, even when going to or coming from work, then the benefits allowed by the Workers' Compensation Act are his/her exclusive remedy against the employer.

Geneinne Ellen Davis v. Air Systems, Inc.

UTAH LABOR COMMISSION
December 9, 2016

A worker was killed in a car accident while driving a truck owned by his employer. At the time of the accident he was driving the truck from home to his worksite. The worker routinely used the truck to drive to and from work, between job sites, and on work errands. He kept both personal and work tools in the truck. His employer paid for the cost of fuel for the truck and paid the worker for the time he spent picking items up from vendors or stopping by the employer's office, but did not pay him for the time he spent commuting to and from home. The employer argued that the "going and coming rule" disqualified the workers estate from being awarded workers' compensation benefits. The worker's estate argued that the instrumentality exception* to the going and coming rule applied because the company-owned truck the worker was driving at the time of the accident was under the employer's control and conferred a benefit to its business. The Commission decided that the instrumentality exception did not apply to the worker's circumstances because the employer's control of, and benefits from, the truck were minimal. While the truck *could* be used as an instrumentality of the business to run errands, *at the time of the accident* it was not being used for that purpose. The worker argued that it was benefiting the employer because it was transporting the worker to the job site, but the Commission found that the mere arrival at work is not considered a substantial benefit to the employer. The case was dismissed.

IMPACT ON WCF - This case creates a good contrast from the Utah Supreme Court's decision in *Salt Lake City Corp. v. Labor Commission*. In that case, a police officer was driving her patrol car home when she was involved in an accident that occurred outside the officer's normal work boundaries. In that case, benefits were awarded because the court found that the employer derived the following substantial benefits from the officer's use of the car outside of work: the patrol car created a sense of police presence in the community; and taking the car home gave officers a sense of ownership and responsibility that led to the officer's taking better care of the car. In this case, *Davis v. Air Systems, Inc.*, the Commission did not find a similar substantial benefit.

**The instrumentality exception is an exception to the going and coming rule. Under the instrumentality exception, injuries are compensable if they are related to the operation of a vehicle that is being used as an instrumentality of the employer's business. When is a vehicle considered to be an instrumentality of a business? If the employer owns the vehicle, then the focus of the analysis is the employer's benefit from the vehicle's use by the employee. If the employee owns the vehicle, then a court will also consider whether the employer had enough control over the vehicle and its use.*

RECENT GOING AND COMING RULE CASES *(CONT.)*

Colt M. Harrell v. Re-Bath
UTAH LABOR COMMISSION
November 10, 2016

A salesman worked as an estimator that visited with customers to sell remodeling services. On the morning of his accident he attended a sales meeting at his employer's offices. After the meeting was over, he had some spare time before he was scheduled to meet with a customer at 3:00 in the afternoon at the customer's home. He went home to eat lunch and to retrieve the laptop he used for work, which he had forgotten. He stayed home for a few hours before heading to the appointment at the customer's house. The worker was driving a company vehicle to the appointment when he was struck from behind by another car just a few blocks from the customer's home. The employer argued that because the employee was traveling from home, the going and coming rule disqualified him from benefits. The Commission decided that the going and coming rule does not apply to employees for whom traveling is itself part of his or her job duties. The Commission explained that when the travel is essentially a part of the employment, the risk of injury during activities necessitated by travel remains an incident to the employment. The Commission clarified that the salesman likely would have forfeited coverage if he was still attending to personal matters during his side trip home, but that the facts in his case show that once he returned to his work duties by driving to the customer's home in the company vehicle, he was engaged in work activities.

IMPACT ON WCF - The going and coming rule, with all of its exceptions, can be tricky. When we hear that someone was traveling to and from home, our initial reaction is to invoke the coming and going rule. This case reminds us that the nature of the claimant's work should be investigated to find out if travel is an essential part of the employment.

Javier Rojas v. Ferrari Color
LABOR COMMISSION
APPEALS BOARD
July 5, 2016

A worker was injured while working with a large printing machine. While the machine was operating he reached into it to unwrinkle the paper, but he could not remove his left hand before the printer head briefly trapped it against the support bar inside the machine. The worker claimed entitlement to a 15% increase in his disability benefits pursuant to §34A-2-301(1) because of the employer's willful bypassing of safeguards built into the printer. The worker submitted evidence of the Utah Occupational Safety and Health Division's (UOSH) findings that a safety interlock switch had been bypassed, which allowed the printer to run with its panels open. UOSH cited the employer with a serious violation of safety standards. The employer testified that he only knew about the bypassed safety sensors after the accident, that he did not deliberately defy the safeguards, and that he did not even know how to disable the sensors. The Commission held that there was insufficient evidence of deliberate defiance of the safety provisions in §301(1) and dismissed the claim for the 15% increase in disability benefits.

IMPACT ON WCF - This case highlights just how difficult it is for a claimant to prove entitlement to the 15% increase in disability benefits according to §301(1). The claim requires workers to show that their employers *deliberately* engaged in unsafe practices, which is difficult and easily rebuttable by testimony from the employer that they did not act willfully. When it seems like a claim involves safety equipment (or the lack thereof) it is important to collect the relevant information, such as a copy of the employer's written safety program and the findings of any UOSH or OSHA investigation.

IN RE: OUT-OF-STATE JURISDICTION

Sometimes we get confused over which state has jurisdiction on a workers' compensation claim when the claimant is injured in a state different from where he or she was hired. The most important thing to remember is that an injured worker can be an employee in more than one state and may be able to file for benefits in more than one state for the same injury. Each state has different laws and requirements for jurisdiction so each case must be reviewed on an individual basis. For example, Colorado has taken the position that if the employee is injured in Colorado, then Colorado has jurisdiction. Despite where the employee was hired or where the employee did the majority of his or her work or even how long he or she was in Colorado, if the injury occurred in Colorado and the injured employee files a claim with the Colorado Department of Labor and Employment, Division of Workers' Compensation, Colorado will accept jurisdiction.

Conversely, California and Utah have a reciprocity agreement, which means that California and Utah will honor the other state's jurisdiction and limit the injured worker's choice of benefits to his or her home state. However, this limitation is based on the amount of work conducted within the other state, which also must be looked at on a case-by-case basis. The most important thing to bear in mind is that an employee can be an employee in more than one state when an injury occurs.

ALLEN LEGAL CAUSATION CASES

Pamela Topham v. Promise Specialty

LABOR COMMISSION APPEALS BOARD
October 19, 2016

A CNA injured her lower back when she was repositioning a patient weighing approximately 170 pounds that was lying in bed. The CNA had to bend over behind the bed and forcefully pull on thick and heavy pads on the bed to move the patient about three feet towards her. She then pulled on the pads from the right side of the bed to move the patient another foot in that direction. She then pushed the patient to lean on one side while she placed pillows on the left and right sides of the bed and then rolled the patient onto the pillows. She did this alone and with no help from the patient. Because she had a pre-existing condition in her lumbar spine she had to satisfy *Allen*'s more stringent standard of legal causation. While the employer argued that the CNA's exertions were similar to those of someone lifting and carrying a child to bed, the Commission decided that the exertions were well over and above the usual wear and tear of nonemployment life because this patient weighed 170 pounds and because the weight was inert. The Commission thus held that the more stringent *Allen* legal causation requirements were satisfied and awarded benefits.

Cory Wahlberg v. RC Willey Home Furnishings

UTAH LABOR COMMISSION
July 29, 2016

A worker was walking to the restroom when she was struck on the backside of her right shoulder by the men's room door that was opening outward behind her. She experienced significant shoulder pain as a result. Because she had a pre-existing shoulder condition she had to satisfy *Allen*'s more stringent standard of legal causation. The Commission had a difficult time finding a nonemployment activity that was similar to the worker's accident, but ultimately decided that being struck in the shoulder and arm by a swinging door fell within the usual wear and tear of nonemployment life. The case was dismissed.

IMPACT ON WCF - The last newsletter included summaries of two cases similar to this one. One involved a seamstress who hit her foot against a desk and another involved a worker that hit the top of his head against a metal box while climbing a ladder. In those cases, the Commission decided that the accidents were not unusual or extraordinary. In this case, the Commission is following the pattern of not only considering what kind of *exertions* people experience in nonemployment life, but also what kind of *accidents* they experience. This case is also unique in that the Commission was unable to find a nonemployment activity that was similar, but nonetheless decided that the impact and/or exertion just did not rise to a sufficient level of unusualness or extraordinariness.

Utah's Workers' Compensation Appeals – The Numbers

	APPEALS FILED BY CLAIMANTS			APPEALS FILED BY EMPLOYERS		
YEAR	**Appeals Filed**	**Number Won** (Commission overturned)	**Success Rate**	**Appeals Filed**	**Number Won** (Commission overturned)	**Success Rate**
2012	6	1	17%	0	0	-
2013	9	2	22%	1	0	0%
2014	4	0	0%	1	0	0%
2015	7	3	43%	4	1	25%
2016	2	1	50%	1	0	0%
Total	**28**	**7**	**25%**	**7**	**1**	**14%**

The table above is a statistical breakdown of all of workers' compensation cases appealed to the Utah Court of Appeals and/or the Utah Supreme Court from 2012 through 2016. An interesting takeaway from this table is that the majority of appeals, 28 out of 35, were filed by claimants. Of those 28 cases, the courts overturned the Labor Commission in 7 of them. The success rate for appeals filed by claimants is therefore 25%. During the same time period, employers filed 7 appeals, one of which led to the Labor Commission being overturned. The success rate for appeals filed by employers is therefore 14%.