THE LEGAL
BUZZ

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RECENT CASELAW

Steve Salas v. Utah Dept of Public Safety

UTAH LABOR COMMISSION
September 7, 2016

A police officer was exercising in his home at 7 AM doing pull-ups in his basement. The pull-up bar that was installed in a door frame dislodged and the officer fell, injuring his right shoulder. The officer claimed that he was in the course and scope of his employment at the time of his accident because he was participating in a voluntary physical-fitness program sponsored by his employer. Under the program, he was allowed, and compensated for, up to 60 minutes of work time three days a week. The Commission looked at four factors in deciding whether the officer's accident was in the course and scope of his employment: 1) time and place, 2) degree of employer initiative, promotion and sponsorship, 3) financial support by the employer, and 4) employer benefit. The Commission found that even though it was early in the morning, the accident occurred during work time because it happened during one of the periods designated under the physical fitness policy to allow employees to be compensated for the time they spend exercising. The Commission found that although the program was voluntary, the employer encouraged its employees to participate and promoted the program by setting different fitness goals for their employees, especially the sworn officers. The Commission found that because he was a police officer, the employer benefited from the exercise because there was enough of an implied correlation between the officer's physical condition and his ability to carry out his duties. The Commission decided that the officer's meeting these factors was enough to conclude that the officer's injuries arose out of and in the course of his employment.

IMPACT ON WCF - With more and more employers incentivizing their employees to exercise and meet physical fitness goals, this is an issue that may force carriers and employers to adapt. Liability has historically and in theory been based on control. That is what the "time and place" factors are really getting at: If an employee is on company property and on duty, there is an assumption that the employer had enough control to be liable. This case is concerning because based on the Commission's reasoning, an employer could be held liable for any injury occurring from any exercise, in any place, with equipment not installed correctly, and with equipment not available for the employer's inspection. Carriers and employers are going to have to take a close look at their physical fitness programs to either exercise their control to minimize risk, or modify their programs to relinquish control (and liability) to the employee.

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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Steiner v. Salt Lake County

UTAH LABOR COMMISSION
June 24, 2016

On October 2, 2013, a prison guard was assaulted by a prisoner, leading to injuries to the guard's face and finger. In July 2014, the guard began to experience pain in his neck. In August 2014 (180+ days after the industrial accident), he informed his employer of the new symptoms and injury. At hearing, a medical panel opined that the cervical-spine condition was medically caused by the work accident. Still, the employer claimed that the guard was not entitled to benefits related to the cervical-spine because the guard had not provided proper notice of the injury within 180 days of the industrial accident, pursuant to §34A-2-407. The Commission recognized that §407 required an injured worker to not only provide notice of the accident, but required an injured worker to provide notice of a specific injury. However, the Commission pointed to the Utah Supreme Court's opinion in *Interstate Elec. Co. v. Industrial Comm'n*, where the Supreme Court explained that one of the principal inquiries in determining whether an injured worker failed to provide adequate notice is whether the employer was prejudiced in its ability to investigate the claim by the injured worker's delay in providing notice. Following that reasoning, the Commission decided that there was no real prejudice to the employer because of the guard's late reporting since the employer investigated the accident after receiving notice of the face and finger injuries.

IMPACT ON WCF - This is something that we run into often: an injury that makes a delayed appearance after an industrial accident. While claimants have 180 days to report their injuries, WCF should be aware that the Commission is ultimately going to look at whether the employer is prejudiced by the delay. Therefore, when faced with this situation, questions we should ask ourselves include: Are witnesses no longer available to me because of the delay? Is UR or the medical director or an IME going to have a much harder time providing an opinion because of the delay? Is my investigation of the accident and of the development of this injury otherwise frustrated because of the delay? If the answer to those questions is "no," then a denial based on the 180-day rule may be valid on its face, but may nonetheless conflict with what the Commission referred to as "the spirit and purpose of the notice requirement."

Makin v. Weber School District

UTAH LABOR COMMISSION
February 24, 2016

A worker sustained a head injury in a 2006 industrial accident. In 2011, a medical panel opined that the injured worker was not medically stable until March 7, 2011. The judge accordingly awarded benefits. In 2012, there were new disputes between the parties and the injured worker filed a new application for hearing. The claim was again referred a medical panel. The medical panel, contrary to the findings in the previous case, opined that the injured worker was stable as of June 2007. The judge asked the panel to revise its opinion and instructed the new panel that it could not find the injured worker to be medically stable prior to the date of the previous order: March 7, 2011. The employer objected to the judge's instruction to the panel, arguing that the Commission had continuing jurisdiction to modify or change former decisions. The Commission disagreed. The Commission explained that §34A-2-420(1)(b) provided that the Commission *may* modify or change a former finding, but that this continuing jurisdiction was discretionary and required a showing of some significant change or new development in the claimant's condition.

IMPACT ON WCF - It seems that the new panel's opinion would have stood if the employer had specifically presented evidence of some significant change related to the worker's MMI date. That didn't happen here; the new panel's opinion regarding the MMI date was more incidental than anything else. If anything, this case suggests that when a case revisits the Labor Commission it is worth presenting and emphasizing new evidence or evidence of a significant change in a worker's condition.

Francisco Bautista v. Contractor Resource Flooring

UTAH LABOR COMMISSION
November 30, 2016

A roofer periodically worked for two employers: Employer A and Employer B. He only worked for one at a time, never concurrently working for both. Both employers paid him based on his output. The roofer sustained an injury while working for Employer A. At hearing, the roofer claimed that his Average Weekly Wage ("AWW") should be calculated by combining what he earned during his most productive period with Employer A, with what he earned during his most produce period with Employer B (even though those were separate periods). The employer argued that the earnings from Employer B should not be included in the calculation since the employee was only employed at one employer at a time. The Commission disagreed with both parties and applied §34A-2-409(1)(g)(i), which states that for employees whose pay is fixed by output the AWW should be calculated by looking at the most favorable 13-week quarter of the 52 weeks immediately preceding the injury. During that 52-week period, the roofer had one particular quarter where he earned more than usual from Employer A, and then went to work for Employer B and also earned more than usual. That quarter was identified by the Commission as being the most favorable and the average of the earnings during those 13 weeks in that quarter was found to be the AWW.

IMPACT ON WCF - The Commission's application of §409(1)(g)(i) to calculate the AWW in this case was curious. §409(1)(g)(i) is used to give workers that are paid based on their output the benefit of using their most productive period for calculating the AWW. This statute, however, seems to imply that it is solely the historical earnings from the employer of injury that should be used. Evidently, the Commission does not believe that is the case. Those handling claims at WCF should be aware of the Commission's decision in this case when choosing which §409 method of calculating average wages should be used.

Dahle v. CB Travel Corp.

UTAH LABOR COMMISSION
March 29, 2016

A worker filed two applications against the same employer, but different carriers. The worker filed a claim for carpel tunnel in 2010, which was denied by WCF. She then fell at work on June 2, 2011 and injured her wrist and low back and developed DVT. WCF paid all of the associated compensation for the June fall. The DVT resolved; however, the worker continued to complain of low back pain and leg pain. An IME stated the pain was not from the June fall. In January, 2012 the worker renewed her carpel tunnel claim with the employer, now insured by Zurich. Zurich approved carpel tunnel surgery and she developed CRPS. She filed for permanent total disability claiming either the fall or the repetitive trauma caused the perm total. The medical panel determined that none of worker's work activities contributed to her upper extremity and the leg and low back pain were not related to her June 2011 fall. The worker objected to the report and asked the ALJ to send the case back to the panel to determine what caused the CRPS. The judge sent it back to the panel and the panel stated that the fall in June 2011 caused numbness and tingling in her wrist, which lead to the surgery, which caused the CRPS. Therefore, the commission decided that the June 2011 fall was the cause of the perm total claim. WCF appealed. The Commission decided that the judge's requesting clarification from the panel was not in error because the medical cause of the CRPS was a separate and necessary basis for the panel to supplement its initial report. The Commission also decided that because the panel's opinion was that her right arm surgery was reasonable to treat the numbness and tingling sensations that were caused by her employment, the adverse effects of that treatment were also compensable.

IMPACT ON WCF - This is the second case in this newsletter where there is a favorable medical panel report that becomes unfavorable after the judge sends it back for clarification. It is important for WCF to be aware of the possibility of this happening in the future. Usually the outcome of a case is known with the receipt of the medical panel report. However, that is not always the case.

Petersen v. Utah State University

UTAH COURT OF APPEALS
November 3, 2016

The claimant had two surgeries in her cervical spine that her treating physician concluded were necessitated by a workplace accident. A medical panel disagreed and concluded the surgeries were necessitated by pre-existing arthritis. Despite that opinion, the ALJ concluded the surgeries were work related because the surgeon based his care on the medical information available at the time of the surgeries. The ALJ relied on the following language from a previous ruling to reach her decision: "… if well-founded medical opinion concludes that a particular medical treatment is required, that treatment will be considered 'necessary' regardless of outcome."

The ALJ's conclusion created a new standard that as long as a treating physician's treatment is subjectively reasonable, then that treatment will be covered even if medical professionals reviewing the treatment after the fact disagree. It would make IME physician and medical panel opinions largely irrelevant. However, the commission overturned the ALJ's decision and Ms. Petersen appealed to the Court of Appeals.

Ms. Petersen made a sweeping argument on appeal that once a worker has a work related injury to a specific body part, then all treatment to that body part subsequent to the accident should be covered until the end of that person's life, even if not all of the care is directly related to the industrial accident. The Court of Appeals did not buy the argument. The Court held that Utah law requires "a nexus between the accident and the injury for which treatment is sought . . ." because it "prevents an employer from becoming a general insurer of his employees and discourages fraudulent claims."

IMPACT ON WCF - It is a fundamental tenet of workers' compensation law that only injuries actually caused by a workplace accident are covered under the law. This case demonstrates that some ALJs, claimants, and attorneys seek novel ways to expand coverage wherever possible. It also provides an important lesson to expect the unexpected from claimants, ALJ's, etc., even on cases that seem very straightforward. We need to be nimble enough to address these unexpected issues. A final note, this case is not over. Mr. Petersen has asked the Court of Appeals to reconsider its ruling. The Court of Appeals recently denied the claimant's request for a rehearing. No word yet regarding whether the claimant will ask the Utah Supreme Court to review her case.

Fassold v. Elk Meadows

LABOR COMMISSION APPEALS BOARD
May 11, 2016

A worker was involved in an industrial accident and filed an application for hearing claiming entitlement to workers' compensation benefits. The employer accepted the L3-4 portion of the claim but contended that the L4-5 injury was due to a pre-existing condition. The medical panel agreed that the L4-5 injury was not due to the industrial accident. The worker objected to the medical panel report and offered a new theory of medical causation: that the L3-4 instability and fusion contributed to the need for an L4-5 fusion, therefore entitling the worker to benefits related to L4-5. The judge asked the panel to clarify the report, asking *specifically* if the panel agreed with the new theory put forth by the worker. The panel then changed its opinion and opined that the accident permanently aggravated the worker's pre-existing degenerative changes at both levels of the lumbar spine. The employer appealed to the Commission's Appeals Board arguing that the judge's request for clarification was improper because 1) the request was prompted by a new theory of medical causation not presented at the hearing, and 2) because the worker did not offer any new medical evidence. One member of the board agreed with the employer, but the majority decided that a judge may request clarification or additional information from the panel when the judge believes he or she needs more assistance in rendering a finding.

IMPACT ON WCF - The Commission's decision in this case is concerning because it allowed for a new theory of medical causation to be presented to the medical panel without the other party (the employer) being able to present evidence rebutting that theory. This is another example of how the Commission regards the medical panel as a flexible tool that the judge can use to help him or her make medically related findings.

Erspamer v. Select Staffing

UTAH LABOR COMMISSION
March 15, 2016

In 2012, a worker inured her left elbow after tripping on a box and striking her elbow against the ground, fracturing it severely enough to require a total left-elbow arthroplasty. The employer accepted liability and paid some TTD, PPD, and medical expenses. The parties then entered into a commutation agreement, which provided that the employer would pay an additional $15,000 in compensation. In exchange, the injured worker released the employer from any existing or future claims for workers' compensation benefits. The injured worker then filed for social security disability benefits and filed a motion with the Commission seeking to set aside the portion of the parties' agreement barring her from claiming permanent total disability compensation ("PTD"). The Commission determined that the injured worker was not barred from filing a claim for PTD because the dispute that led to the agreement did not truly regard PTD. Those benefits therefore could not be settled. Even though the agreement specifically released the employer from liability for a PTD claim, the Commission considered the release to be in violation of §34A-2-108(1), which prevents an injured worker from waiving his or her rights to workers' compensation benefits.

IMPACT ON WCF - This decision represents a case in which the difference between a compromise settlement and a commutation agreement is on display. With a compromise settlement the only challenge that can reasonably be brought would be one claiming that the agreement should not have been approved in the first place or that there was some concern regarding the true nature of an injured workers' willingness to enter into, or understanding of, the agreement. In contrast, where commutation agreements are concerned, the Commission is free to analyze whether an injured worker should be barred from claiming certain benefits if those benefits were not the subject of the parties' disputes. For more information regarding these agreements, Commissioner Hayashi wrote a letter in 2008 clarifying the Commission's perspective.

LEGAL CAUSATION CASES

Quintana v. Premier Group Staffing

UTAH LABOR COMMISSION
January 29, 2016

A worker was injured after he climbed a ladder and struck his head against a metal box. He described that he felt his head hit the inside of his hard hat and saw a flash of light, but he did not lose consciousness. He also felt pain in his shoulders. Because he had a pre-existing cervical condition the injured worker was required to satisfy *Allen*'s more stringent standard of legal causation and show that his work activity increased the risk the public faced in nonemployment life. The Commission found that the injured worker's injury – climbing a ladder and striking his head – to be similar to the common exertion of stepping on a stool and striking one's head on an overhead object. The Commission therefore concluded that the activity and exertion involved in the accident did not meet *Allen*.

IMPACT ON WCF - It is easy to make the mistake of deciding an accident meets *Allen* because there is some kind of impact or blunt force trauma. This case reminds us that the Commission not only looks at what activities form part of nonemployment life, but also what accidents form part of nonemployment life.

Adam Idsinga, Zachary Hansen v. Rimports USA, LLC

UTAH LABOR COMMISSION
February 8, 2016

A doctor who provided treatment to an injured worker filed an application for hearing seeking to recover the cost of treatment he provided to that injured worker. The employer asked the Commission to dismiss the claim because compensability of the injured worker's claim had not yet been determined (the injured worker had not filed his own application for hearing.) The employer argued that a claim by a medical provider could only derive from a claim by an injured worker and that the doctor's claims were improper because he was not a party to the dispute. The Commission disagreed, citing to §34A-2-801(1)(c) of the Utah Workers' Compensation Act, which allows a "person providing medical services" to file an application for hearing. The Commission did recognize that it would be problematic to adjudicate the doctor's claims since compensability had not been proven by the injured worker yet. For example, since the injured worker was not part of the case (and was not pursuing his own) then would he submit to an IME or even a medical panel? The Commission decided that they would allow the doctor's claims because the burden of proof was on the doctor, so if anything he was the one disadvantaged by not having the worker prove compensability yet.

IMPACT ON WCF - The Commission is apparently allowing medical providers to step in the shoes of injured workers and allowing them to vicariously prove compensability for the claim. This raises a number of interesting questions. For example, if the medical provider proves medical causation, does that mean that the employer/carrier can't continue to deny other benefits to an injured worker on the grounds that medical causation is not met? Can a doctor who brings one of these claims offer his own medical opinion as the basis for a medical dispute that would make referring the case to a medical panel appropriate? Luckily these claims will likely be few and far between, but WCF will continue to pay attention to how judges and the Commission land on these issues.

LEGAL CAUSATION CASES CONT.

Elting v. Maverik
UTAH LABOR COMMISSION
April 25, 2016

A worker kneeled on a beer display about three feet off the ground and reached down to pick up a case of beer weighing about 32 pounds from the floor. As she lifted the case to her chest height, she twisted to the right to set the case down and felt a sharp, stabbing pain in her left shoulder. Because she had a pre-existing shoulder condition the injured worker was required to satisfy *Allen*'s more stringent standard of legal causation and show that his work activity increased the risk faced by the public in nonemployment life. The employer argued that the worker did not meet the *Allen* requirements because the Commission had previously decided that lifting objects weighing up to 47 pounds and twisting with the object was not unusual or extraordinary. The Commission disagreed. What made the difference in this case was that the worker was kneeling in an awkward posture on that three-foot-high platform and *then* twisting.

IMPACT ON WCF - Again and again we see the Commission looking at the details when considering whether the more stringent *Allen* standard is met. All it took was a posture and position that may not have made the lifting of the 32 pounds more difficult, but the key was that it made it *different* than what someone in nonemployment life would do.

Stone v. Fastenal
LABOR COMMISSION APPEALS BOARD
May 25, 2016

A long-haul truck driver claimed he developed an ulcer on his left foot after driving a truck during an eleven-day period. At a hearing, he presented an expert witness who testified that the worker exerted 67 pounds of force to engage the clutch of the truck and noted that this force was more than the force required to engage the clutches of regular passenger vehicles. The worker testified that because his routes were mountainous that he had to engage the clutch often. Because the worker suffered from pre-existing neuropathy, he was required to satisfy *Allen*'s more stringent standard of legal causation. The employer argued that although the clutch on the worker's truck was more difficult to engage than one in a normal car, the work activity was not unusual or extraordinary when compared to the typical nonemployment activities of standing and walking since the 67 pounds of force required to press the clutch was less than the force placed on someone's foot while taking a step. The Commission disagreed. The Commission did not specifically distinguish the truck driving from the exertions involved in walking or standing, but simply said that the work activities were unusual and extraordinary "because it involved repetitive and significant pressure to his left foot for many hours during his three long-haul trips per week."

Brandt v. RC Willey Home Furnishings
UTAH LABOR COMMISSION
June 2, 2016

A worker was on a business trip as part of his employment. At the airport, he was getting into the third row of a shuttle vehicle, a Chevrolet Suburban. He maneuvered around the second row, which was flipped forward to allow access to the third row. He crouched, shuffled his feet, and turned his torso and left leg to sit in the third-row seat, but his left foot did not turn with his leg and he felt his left knee crack. Because he suffered from pre-existing condition, he was required to satisfy *Allen*'s more stringent standard of legal causation. The Commission decided that the accident did not meet *Allen*'s legal causation requirements. Although the Commission could have said something along the lines of, "everyone gets into cars," they instead said that the employee's actions were similar to those involved in crouching and maneuvering into a seat on an airplane.

Chiokai v. Beehive Clothing
UTAH LABOR COMMISSION
June 24, 2016

A seamstress was moving around her work area quickly when she struck her left foot on the wheel of a metal cart and felt a pinch on the inside of her left knee. She stumbled but did not fall. A week later she was walking through the employer's parking lot when she felt a sudden "snap" in her left knee. A medical panel opined that the seamstress's work duties caused her condition. However, because she suffered from pre-existing condition, she was required to satisfy *Allen*'s more stringent standard of legal causation. The seamstress argued that the quick and hurried pace of work when she struck her foot made her accident unusual and extraordinary. The Commission disagreed. The Commission decided that it was not unusual for an individual to be moving at a quick pace while at home or running errands and then to strike his or her foot against and object and stumble. Neither was the seamstress's walking to her car in a parking lot unusual or extraordinary.

WORKERS' COMPENSATION IN THE NEWS

Federal Workers Compensation System?

Periodically there is discussion among workers' compensation stakeholders about whether state workers' compensation systems should be federalized or whether there should be more federal oversight. This discussion has renewed vigor after the Department of Labor (DOL) released a 43 page report on October 6, 2016 titled, "Does the Workers' Compensation System Fulfill its Obligation to Injured Workers?" NPR also did a feature story about this issue. The DOL concluded that just a fraction of the overall costs of workplace injuries are borne by employers, while injured workers are in danger of falling into poverty because states are failing to provide adequate benefits. The report also concludes that inadequate workers' compensation benefits have resulted in cost shifting to social security disability and Medicare.

Reaction to the report highlights the longstanding friction between employers/insurance carriers and injured worker advocates. Predictably, the employer and insurance stakeholders believe the state systems are better than an alternate federal system would be, while the injured workers believe the report shines a light on a gaping hole in the social safety net. Many believe a federalized system would better protect injured workers across the country more uniformly. Whether injured workers are adequately protected in the current state workers' compensation systems is a complex issue.

The reality is with a Trump presidency and republican control of Congress, if there was any wind behind the sails of federalizing the workers' compensation system, that wind is now dead. It is highly unlikely any move toward federalizing state workers' compensation systems or more federal oversight will occur in the near future under the Trump administration. This is, however, a conversation that will continue crop up and WCF will keep close tabs on this issue as the environment around this issue changes.

Utah's Opioid Crisis

A recent Utah Department of Health study highlights the growing problem of opiate drug addiction in Utah. Some interesting facts from the study:

- From 2000 to 2014, Utah has experienced a 400 percent increase in deaths from misuse of prescription drugs.
- Every month 24 people die in Utah from prescription drug overdose.
- 32% of Utah adults age 18 and older have been prescribed opioid pain medication in the last 12 months.
- Utah ranked No. 4 in the US for drug poisoning deaths from 2012 to 2014.
- 59% of deaths from prescription pain medications involve oxycodone, but risk of death is significantly higher when methadone is involved.

IMPACT ON WCF - It is more critical than ever that we look very closely at claims to make sure opiates are not being prescribed unnecessarily or in greater quantities than needed. With the beefed-up prescription-drug database discussed in the last newsletter, there are already good resources at our disposal that should be used to track a claimant's opiate drug use.

? ASK LEGAL

Q: The decisions in the last newsletter were all from the Utah Supreme Court and the Court of Appeals. Most of these are from the Labor Commission and the Commission's Appeals Board. Do Commission decisions affect WCF and the workers' compensation market differently than court of appeals or supreme court decisions?

A: In Utah, like in all other states, there is a hierarchy of judicial authority:

Utah Supreme Court

Utah Court of Appeals

Labor Commissioner and the Labor Commission Appeals Board

Administrative Law Judges

All of these are tasked with interpreting and applying the Utah Workers' Compensation Act and other statutes as competently, reasonably, and equitably as they can. When deciding how a statute should be applied to a case, each of these judicial tiers are bound by the opinion of the courts above them regarding that issue. If a particular issue has not been decided by a court above, then an administrative law judge is free to do their best to reason the issue out and make a decision. That decision is of course subject to the parties' right to appeal the decision to the Commissioner (or Commission Appeals Board), then to the Court of Appeals, and then to the Utah Supreme Court. Each one of these levels has the ability to change their minds and to interpret a statute differently than they did before, but they may not make decisions that conflict with opinions from courts and judicial bodies above them. The higher an issue is decided, the more settled that issue is considered to be. So Commission decisions are influential in that they create precedent that binds the way judges can decide WCF's cases, but they are not so definitive that they can't be overruled by a higher court. *Have a question regarding these decisions or the legal issues faced by WCF? Email your questions to Danny Vazquez (dvazquez@wcf.com) or Matt Black (mblack@wcf.com).*