2007

Dale T. Smith & Sons v. Utah Labor Commission, and Jeffrey D. Smith : Brief of Petitioner

Utah Supreme Court

BEFORE THE SUPREME COURT OF UTAH

DALE T. SMITH & SONS, and WORKERS COMPENSATION FUND, Petitioners, v LABOR COMMISSION of UTAH and JEFFREY D. SMITH, Respondents.	*	Appellate No. 20070848

BRIEF OF PETITIONERS

On Writ of *Certiorari* from the Utah Court of Appeals

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STATEMENT OF JURISDICTION

The Supreme Court of Utah has discretionary appellate jurisdiction by writ of *certiorari* on decisions of the Utah Court of Appeals. Utah Code Ann. § 78A-3-102(3)(a) & (5) (Supp. 2008).

STATEMENT OF THE ISSUES

The sole issue is whether the court of appeals correctly interpreted the term "compensation" under Section 34A-3-110 of the Utah Code to not include payments medical expenses subject to apportionment under that provision.

The standard of review for the court of appeals' interpretation/application of a statute is correction-of-error. *Thomas v. Color Country Management*, 2004 UT 12, ¶ 9, 84 P.3d 1201, 1205.

TEXT OF AUTHORITIES

1. "As used in this chapter: . . . (3) 'Compensation' means the payments and benefits provided for in this chapter or Chapter 3, Utah Occupational Disease Act. Utah Code Ann. § 34A-2-102(3) (2005).

2. The "Occupational disease aggravated by other diseases" provision is set forth verbatim in the Addendum to this brief. Utah Code Ann. § 34A-3-110 (2005).

STATEMENT OF THE CASE

a. Nature of the Case.

This is a petition, on writ of *certiorari*, to review the decision and opinion of the Utah Court of Appeals in *Dale T. Smith & Sons v. Labor Commission*, 2007 UT App

306[1], which affirmed the Order Affirming ALJ's Decision (hereinafter "Decision") of the Appeals Board of the Utah Labor Commission dated November 30, 2006 (R.68-70), and which likewise affirmed the Findings of Fact, Conclusions of Law, and Order (hereinafter "Order") of the Administrative Law Judge (hereinafter "ALJ") dated September 6, 2006 (R.53-57).

b. Course of Proceedings.

On August 11, 2005, Jeffrey D. Smith (hereinafter "claimant") filed an Application for Hearing alternatively claiming industrial accident or occupational disease for a lower back condition he claims arose from working "as a meat packer for many years [causing] cumulative injury to [his] lower back from excessive bending and lifting of heavy meat." (R.1). Petitioners herein, Dale T. Smith & Sons, Inc. and Workers Compensation Fund (hereinafter, collectively, "WCF") answered the Application by generally denying that claimant's "low back condition was caused by any work-related accident or exposures."[2] (R. 16).

After discovery, the case proceeded to hearing on July 7, 2006. The parties stipulated that the matter should be heard on a theory of occupational disease, not industrial accident. (R. 68 n.1). Also, claimant withdrew his claims for temporary total

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[1] This opinion was not published; however a companion case, *Ameritech Library Services v. Labor Commission*, 2007 UT App 305, 169 P.3d 784, which adjudicated the same issue, was published and relied upon by the court of appeals in this case. Likewise, this court has granted *certiorari* in *Ameritech*.

[2] Claimant also joined Liberty Insurance Corp., an earlier workers compensation insurance carrier for Dale T. Smith & Sons, as a respondent. At the hearing, based upon stipulation of the parties, Liberty Insurance Corp. was dismissed as a party. (R. 53, 56).

disability compensation and permanent partial impairment compensation because those issues were resolved by stipulation of the parties prior to the hearing.[3] (R. 54).

On September 6, 2006, the ALJ entered the Order, which determined, *inter alia*, that because the claim was only for medical expenses and because even WCF's medical evidence showed that at least thirty-five percent (35%) of claimant's condition was attributable to occupational exposures, WCF was liable for payment of all medical expenses because such benefits are not "compensation" under the meaning of Section 34A-3-110 allowing for apportionment of "compensation" against non-employment causes of claimant's condition. In making this determination, the ALJ relied upon the recent Labor Commission Appeals Board Order on Motion for Review in *Edmonds v. Epixtech*, Case No. 02-0969 (Appeals Board, August 29, 2006).[4] (R. 55-56).

On October 5, 2006, WCF filed a Motion for Review before the Labor Commissioner, contending that although the ALJ properly applied the holding of *Edmonds*, *Edmonds* was wrongly decided and should be overruled.[5] (R. 59-61). On

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WCF now admits that it is solely liable for claimant's occupational disease, subject to apportionment for non-employment causes of claimant's low back condition.

[3] Claimant never lost any work because of his condition so no temporary total disability was owed. Based upon the independent medical examination report and addendum from Dr. Stephen Marble, WCF admitted liability for permanent partial impairment compensation for seven percent (7%) of the whole person.

[4] The *Edmonds* case is the case now styled *Ameritech Library Services v. Labor Commission*, 2007 UT App 305, 169 P.3d 784, now also before this court on *certiorari*.

[5] WCF also argued that, because the apportionment was in dispute, that issue should have been referred to a medical panel under both statutory and administrative provisions. Utah Code Ann. § 34A-2-601 (2005); Utah Admin. Code § R602-2-2(A)(1) (2007). Since the Appeals Board rejected WCF's suggestion that the Labor Commission overrule *Edmonds*, it did not reach this issue. If WCF prevails herein, then, on remand, the

November 30, 2006, the Labor Commission Appeals Board rejected WCF's contention that *Edmonds* was wrongly decided and entered the Decision, consisting of two pages. (R. 68-69).

c. Disposition at Utah Court of Appeals.

As already stated, the Utah Court of Appeals affirmed the Decision, holding that, as it determined in *Ameritech Library Services v. Labor Commission* 2007 UT App 305, 169 P.3d 784, "compensation" does not include payment for medical expenses, thereby subject to apportionment under Section 34A-3-110 of the Utah Code. *Dale T. Smith & Sons v. Labor Commission*, 2007 UT App 306, unnumbered ¶ 2.

d. Statement of Facts.

Claimant was employed at Petitioner Dale T. Smith and Sons at an early age in 1978. Dale T. Smith is claimant's grandfather, who founded the company as a family business. Claimant worked initially cleaning corrals and the plant and then, at age 16 (1982), started working part time as a meat cutter. After college, claimant began working full time as a meat cutter. This job required heavy lifting, bending, pushing and pulling of cattle quarters and more. (R. 54).

In 1995, claimant began experiencing low back pain and sought treatment with a chiropractor. Claimant periodically obtained chiropractic treatments and other conservative care for his low back pain over the years. Then, in 2003, claimant saw Dr. Gordon Kimball, M.D., who ultimately referred claimant for an MRI, which disclosed an

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Appeals Board will still need to consider whether the matter should be referred to a medical panel.

L5-S1 disk extrusion and lumbar degenerative changes, all of which Dr. Kimball attributed to claimant's work activities at Dale T. Smith & Sons. (R. 54, 74 [p. 12]).

During discovery, WCF obtained an independent medical examination from Dr. Stephen Marble, M.D. In a report dated April 26, 2006, and an addendum thereto dated May 30, 2006, Dr. Marble agreed that most of claimant's L5-S1 injury and some of Smith's lumbar degenerative disease were attributable to claimant's work activities at Dale T. Smith and sons. In general, Dr. Marble concluded that 35% of claimant's entire low back condition was related to claimant's work activities and 65% to non-employment causes and conditions. (R. 54-55, 74 [pp. 1-B to 1-C, 8-9]).

SUMMARY OF ARGUMENT

The court of appeals did not properly interpret Section 34A-3-110 of the Utah Code to conclude that payment of medical expenses are not "compensation" subject to apportionment, especially when considering the plain language of the definition of "compensation" under Section 34A-2-102(3). Moreover, in *Ameritech*, which it applied here, the court of appeals improperly relied upon the rule of statutory construction announced in *Kennecott Copper Corp. v. Industrial Commission*, 597 P.2d 875 (Utah 1979) and *Christensen v. Industrial Commission*, 642 P.2d 755 (Utah 1982) because the factual framework in neither *Kennecott* nor *Christensen* exists here.

ARGUMENT

I.

THE COURT OF APPEALS IMPROPERLY CONCLUDED THAT PAYMENT OF MEDICAL EXPENSES IS NOT "COMPENSATION" SUBJECT TO APPORTIONMENT UNDER SECTION 34A-3-110 OF THE UTAH CODE

In *Ameritech*, the court of appeals held that "because the [Workers Compensation Act] excludes payment of medical expenses from the definition of compensation, the term compensation as used in the [Utah Occupational Disease Act] also excludes medical expenses." *Ameritech Library Services v. Labor Commission*, 2007 UT App 305, ¶ 16, 169 P.3d 784, 789. The court of appeals mistakenly relied upon this court's decisions in *Kennecott Copper Corp. v. Industrial Commission*, 597 P.2d 875 (Utah 1979) and *Christensen v. Industrial Commission*, 642 P.2d 755 (Utah 1982) in support of its holding that "compensation", as interpreted in those cases under the Workers Compensation Act, does not include payment of medical expenses. In *Kennecott* and *Christensen* this court adopted a more narrow interpretation of "compensation" so that it would fulfill the intent of the statutes of limitations considered in those cases; however, there was no such justification here. Based upon rules of statutory construction and *Taylor v. Industrial Commission*, 743 P.2d 1183 (Utah 1987), the court of appeals should have adopted the more general definition of "compensation" set forth in Section 34A-2-102(3).

Section 34A-3-110 provides that "[t]he compensation payable under this chapter shall be reduced and limited" by causes outside employment in the State of Utah. Utah

Code Ann. § 34A-3-110 (2005) (emphasis added). Thus, the key question is whether payment of medical expenses is "compensation" within the meaning of Section 34A-3-110.

In order to determine if the court of appeals correctly interpreted the term "compensation" this court has held that it must first look to the plain language of the statute. *See, e.g., Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 46, 164 P.3d 384, 396; *Thomas v. Color Country Management*, 2004 UT 12, ¶ 9, 84 P.3d 1201, 1205 (workers compensation matters); *see also, Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242 (general).

Although "compensation" is certainly defined in the dictionary, it is obviously a term of art used throughout Title 34A, the Utah Labor Code. "Compensation" is not defined in Section 34A-3-110, but has been defined in general definitions of the Utah Labor Code as follows: "'Compensation' means the payments and benefits provided for in this chapter or Chapter 3, Utah Occupational Disease Act." Utah Code Ann. § 34A-2-102(3) (2005). Since payment of medical expenses is a "payment" and/or "benefit" under the Occupational Disease Act (*see Id.*, §§ 34A-2-418; 34A-3-102(2); 34A-3-107(2)), it then should follow that under the plain language of Section 34A-2-102(3), medical expenses <u>are</u> "compensation" subject to apportionment under Section 34A-3-110.

Even assuming that it is <u>not</u> plain that the general definition of "compensation" applies to Section 34A-3-110, this court has also held that "[s]tatutes should be read as a whole and their provisions interpreted in harmony with related provisions and statutes."

Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶ 46, 164 P.3d 384,396; *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592.

Under another section of the Occupational Disease Act itself, the legislature explicitly provides that in cases of occupational disease, an employer is liable to pay both medical and disability (indemnity) benefits and then in following subsection of the very same section, states that "compensation shall not be paid when the last day of injurious exposure of the employee to the hazards of the occupational disease occurred prior to 1941." Utah Code Ann. § 34A-3-104 (2005) (emphasis added). Surely the legislature intended this "statute of repose" also to include both types of benefits together as "compensation?"

Likewise, under Section 34A-3-111 of the Occupational Disease Act, the legislature explicitly provides that "compensation under this chapter is not in addition to compensation that may be payable under [the Workers Compensation Act] . . . ." *Id.*, § 34A-3-111 (emphasis added). Surely, the legislature did not intend that an injured worker could not recover indemnity benefits for the same injury (medical condition) under both the Workers Compensation Act and the Occupational Disease Act, yet could recover medical expenses under both acts?

The court of appeals takes a more narrow approach by contending that Section 34A-3-110, by its terms, is limited to cases of occupational disease resulting in disability or death only. Therefore, the court of appeals reasons, the legislature did not intend "compensation" in that section to include payment of medical expenses. *Ameritech*

Library Services v. Labor Commission, 2007 UT App 306, ¶ 14, 169 P.3d at 788.[6] But, under the Occupational Disease Act, a cause of action for occupational disease arguably does not even arise until the employee has suffered disability. Utah Code Ann. § 34A-3-108(2)(b) (2005). Moreover, Section 34A-3-107 provides that "[t]he disabled employee is entitled to medical, hospital and burial expenses . . . ," *Id.*, § 34A-3-107(2) (emphasis added), which implies that the employee must be disabled before he is entitled to any benefits under the Occupational Disease Act. Of course, if, within the meaning of Sections 34A-3-107 and -108, disability has a more general meaning of loss of bodily function, as opposed to disability from employment, then that meaning makes more sense in the context of the Occupational Disease Act as a whole, including Section 34A-3-110. Otherwise, an employee could suffer an occupational disease for which he seeks payment of medical expenses only, but not have a cause of action to recover such benefits because he has not yet lost work as a result. It is doubtful that this is what the legislature intended.

As stated above, the court of appeals supports its deviation from the plain language of Section 34A-2-102(3) by relying upon *Kennecott* and *Christensen* to show that this

[6] The court of appeals partly bases this contention on the fact that Section 34A-3-105 of the Occupational Disease Act does specifically include medical expenses in the apportionment formula when the apportionment of harmful exposures at other employers is at issue. *Id.* Interestingly, claimant has previously argued that one reason medical expenses should not be apportioned in the current context is that it would be difficult to administer when the claim is for medical expenses only. Yet, it would be just as difficult, if not more so in the case of multiple employers, when Section 34A-3-105 likewise applies to a claim for medical expenses only.

court has already interpreted "compensation" to not include payment of medical expenses.

In both *Kennecott* and *Christensen*, this court interpreted "compensation" within the more narrow meaning of that term in the then statute of limitations. Utah Code Ann. § 35-1-99 (1953 codification). This court did not consider the more general meaning of "compensation" under Section 34A-2-102(3).[7] Had this court adopted the more general definition of "compensation" under the then version of Section 34A-2-102(3), it would have rendered the statute of limitations regarding indemnity benefits meaningless. In that regard, this court stated as follows:

> [I]f the furnishing of or payment for medical expenses by the company, which may continue indefinitely, were to extend the limitation in which a claim may be filed until three years after the last payment of such medical expense, that would completely nullify any effect to be given to Sec. 35-1-99, and thus defeat the legislative intent and the purpose of that statute. That would be contrary to a cardinal rule of statutory construction: that, if there is uncertainty of doubt as to the meaning of statutes, they should be so interpreted and implied as to give meaning in effect to both.

Kennecott Copper Corp., v. Industrial Commission, 597 P.2d 875, 877-78 (Utah 1979) (citing, 73 Am. Jur. 2d, Statutes, § 253).

In *Christensen*, this court held the same on converse facts: that "compensation" cannot be interpreted to limit the statute of limitations for payment of medical expenses

[7] Although Section 34A-2-102(3) was numbered differently as Section § 35-1-44(6) in the Workers Compensation Act and Section 35-2-12(b) in the Occupational Disease Act when *Kennecott* and *Christensen* were decided in 1979 and 1982, the basic definition has not changed.

to the same period as for indemnity benefits. *Christensen v. Industrial Commission,* 642 P.2d 755, 756-57 (Utah 1982).

In the instant case, since no conflict is created by applying the more general definition of "compensation" under Section 34A-2-102(3), the court of appeals and Labor Commission need not have reverted to the rule of statutory construction stated in *Kennecott* to resolve a conflict between statutes.

The narrow applicability of *Kennecott* and *Christensen* is further illustrated in another Utah Supreme Court case that determined that "compensation" does include medical expenses. In *Taylor v. Industrial Commission*, 743 P.2d 1183 (Utah 1987), a claimant sought a determination that payment of medical expenses were not "compensation" to which a claim for reimbursement and offset against recovery in a Third Party action would be applied under the then version of Utah Code Ann. § 34A-2-106 (2005).[8] This court upheld the ALJ and Labor Commission's holding that within the meaning of the then version of Section 34A-2-106, "compensation" did include payment of medical expenses. *Id.*, at 1185-86 (citing 2A A. Larsen, Workers' Compensation Law § 74.33). Although *Taylor* did not directly consider the interpretation of "compensation" found in *Kennecott*, it is obvious that the supreme court can and does apply differing interpretations depending upon the context of the statute. Here, as already stated, the context of the statute requires the more general definition of compensation under Section 34A-2-102(3).

[8] The then version was Utah Code Ann. § 35-1-62 (Supp. 1987).

It is also interesting to note that *Taylor* was decided after both *Kennecott* and *Christensen*. The court of appeals reasoned that since the legislature had left the definition of "compensation", now under Section 34A-2-102(3), unchanged since *Kennecott* and *Christensen* were decided, "'the legislature is presumed to have been satisfied with the prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent.'" *Ameritech Library Services v. Labor Commission*, 2007 UT App 305, ¶ 12, 169 P.3d 784, 787 (quoting *Christensen*, 642 P.2d at 756). Of course, WCF urges that this court does adopt this reasoning of the court of appeals; that is, if the legislature had not changed the general definition of "compensation" since *Taylor* was decided, then it must have intended the interpretation there to apply to future cases, including the instant case.[9]

CONCLUSION

Based upon the above discussion, this court should reverse the decision of the court of appeals and remand the case for further proceedings before the Appeals Board and, ultimately, the ALJ.

RESPECTFULLY SUBMITTED, this 27th day of February, 2008.

Floyd W Holm, Attorney for Petitioners

[9] In fairness to the court of appeals, it should be noted that *Taylor* was not mentioned in the briefing in *Ameritech*; however, it was thoroughly discussed in the briefing before the court of appeals in this case. Also, this argument is somewhat "tongue in cheek". WCF still maintains its fundamental argument that "compensation" can mean different things in different contexts.

MAILING CERTIFICATE

I hereby certify that on the 27th day of February, 2008, true and correct copies of the attached **Brief of Petitioners** in the above-entitled matter, was mailed, postage pre-paid to the following:

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ADDENDUM

Text of Utah Code Ann. § 34A-3-110 (2005)

§ 34A-3-110. Occupational disease aggravated by other diseases

The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or death when the occupational disease, or any part of the disease:

(1) is causally related to employment with a non-Utah employer not subject to commission jurisdiction;

(2) is of a character to which the employee may have had substantial exposure outside of employment or to which the general public is commonly exposed;

(3) is aggravated by any other disease or infirmity not itself compensable; or

(4) when disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

Dale T. Smith & Sons v. Labor Commission,
2007 UT App 306

Dale T. Smith & Sons and Workers' Compensation Fund, Petitioners, v. Labor Commission and Jeffrey D. Smith, Respondents.

Case No. 20061169-CA

COURT OF APPEALS OF UTAH

2007 UT App 306*; *2007 Utah App. LEXIS 314

September 20, 2007, Filed

NOTICE: NOT FOR OFFICIAL PUBLICATION

PRIOR HISTORY: [*1]
Original Proceeding in this Court.
Ameritech Library Servs. v. Labor Comm'n, 2007 UT App 305, 2007 Utah App. LEXIS 320 (2007)

DISPOSITION: Affirmed.

COUNSEL: Floyd W. Holm, Salt Lake City, for Petitioners.

Phillip B. Shell, Murray, and Alan L. Hennebold, Salt Lake City, for Respondents.

JUDGES: Carolyn B. McHugh, Judge. WE CONCUR: Russell W. Bench, Presiding Judge, William A. Thorne Jr., Judge.

OPINION BY: Carolyn B. McHugh

OPINION

MEMORANDUM DECISION

McHUGH, Judge:

Dale T. Smith & Sons and the Workers' Compensation Fund (collectively Petitioners) seek review of the Utah Labor Commission's order requiring that they pay 100% of Jeffrey D. Smith's medical expenses related to treatment of his lumbar degenerative joint disease. Petitioners argue that the Labor Commission incorrectly interpreted *Utah Code section 34A-3-110* when it determined that medical expenses are not "compensation" subject to apportionment under that section. *See Utah Code Ann. § 34A-3-110* (2005).

In *Ameritech Library Services v. Labor Commission, 2007 UT App 305*, a companion case that was briefed concurrently with this case, we rejected arguments identical to those raised by Petitioners. In *Ameritech* we held that the term "compensation," as used in *section 34A-3-110*, does not include medical expenses and that apportionment of medical expenses is not appropriate [*2] under that section of the Utah Occupational Disease Act. *See id. at PP14-16*. For the reasons stated in that decision, we affirm.

Affirmed.

Carolyn B. McHugh, Judge

WE CONCUR:

Russell W. Bench,

Presiding Judge

William A. Thorne Jr., Judge

***Ameritech Library Services v. Labor Commission*,**
2007 UT App 305, 169 P.3d 784

Ameritech Library Services (DYNIX) and/or American Manufacturing Mutual/Kemper, Petitioners, v. Labor Commission and Tamara Edmonds, Respondents.

Case No. 20060870-CA

COURT OF APPEALS OF UTAH

2007 UT App 305*; *169 P.3d 784*; *587 Utah Adv. Rep. 5*; *2007 Utah App. LEXIS 320

September 20, 2007, Filed

SUBSEQUENT HISTORY: Companion case at *Dale T. Smith & Sons v. Labor Comm'n, 2007 UT App 306, 2007 Utah App. LEXIS 314 (2007)*

DISPOSITION: [***1] Affirmed.

COUNSEL: Joseph C. Alamilla and Theodore E. Kanell, Salt Lake City, for Petitioners.

Phillip B. Shell, Murray, and Alan L. Hennebold, Salt Lake City, for Respondents.

JUDGES: Carolyn B. McHugh, Judge. WE CONCUR: Russell W. Bench, Presiding Judge, William A. Thorne Jr., Judge.

OPINION BY: Carolyn B. McHugh

OPINION

Original Proceeding in this Court

[**784] McHUGH, Judge:

[*P1] Ameritech Library Services and American Manufacturing Mutual/Kemper (collectively Ameritech) petition for review of the Utah Labor Commission's (the Commission) order requiring that they pay 100% of Tamara Edmonds's medical expenses related to treatment of her carpal tunnel syndrome. Ameritech argues that the Appeals Board of the Commission (the Appeals Board) erred when it failed to properly apply *Utah Code section 34A-3-110*, *see Utah Code Ann. § 34A-3-110* (2005), to apportion medical expenses based on the causal contribution of industrial factors to Edmonds's occupational disease. We affirm.

[**785] BACKGROUND

[*P2] Ameritech Library Services employed Edmonds as a project coordinator and administrative assistant from 1991 until 1999. Edmonds's duties included scheduling and completing purchase orders for all equipment, entering data, installing hardware, and performing [***2] other miscellaneous tasks necessary to complete projects. [1] In 1992, Edmonds first noticed intermittent pain in her wrists. The pain became constant in the fall of 1993, and Edmonds sought medical treatment in January 1994. Treatment for her pain continued over the course of the next several years. She terminated her employment in 1999. By that time, her symptoms included bilateral pain and numbness in the fingers, hands, wrists, arms, shoulders, neck, and head. Despite Edmonds ending her employment with Ameritech, the pain continued.

1 Eventually, Edmonds accepted a position as an inside sales representative. However, most of her duties remained the same, requiring constant desk and telephone work.

[*P3] In September 2002, Edmonds filed an Application for Hearing with the Commission seeking further coverage for carpal tunnel syndrome, which she attributed to the repetitive trauma to her hands and arms from excessive keyboard use and other job activities with Ameritech. The Commission appointed a medical panel to evaluate the conflicting medical aspects of Edmonds's claim. The panel opined that Edmonds's work activities acted as a 10% aggravation of the 90% non-industrial risk factors that [***3] caused her carpal tunnel syndrome. The Administrative Law Judge (ALJ) concluded that "10% of the cause of [Edmonds's] carpal tunnel symptoms is related to her work exposure throughout her period of employment with [Ameritech]."

[*P4] Edmonds filed a motion for review with the Appeals Board arguing that the ALJ erred in apportioning medical expenses pursuant to *section 34A-3-110*, *see id.*, which resulted in the determination that Ameritech was liable for only 10% of Edmonds's medical expenses. The Appeals Board affirmed the ALJ's finding that Edmonds's carpal tunnel syndrome had a 10% causal connection to industrial factors, but reversed the ALJ's determination that Ameritech was liable for only 10% of Edmonds's medical expenses. Instead, the Appeals Board concluded that apportionment under

section 34A-3-110, see id., was not applicable to medical expenses and that Ameritech, therefore, was liable for 100% of those expenses. Ameritech seeks review of the Appeals Board's decision.

ISSUE AND STANDARD OF REVIEW

[*P5] Ameritech argues that the Appeals Board incorrectly interpreted "compensation" as used in *Utah Code section 34A-3-110, see id.,* when it concluded that medical expenses were not included [***4] in the term and were therefore not apportionable under the statute. "[A]n agency's interpretation or application of statutory terms should be reviewed under the correction-of-error standard." *Esquivel v. Labor Comm'n, 2000 UT 66,P14, 7 P.3d 777*; *see also Strate v. Labor Comm'n, 2006 UT App 179,P13, 136 P.3d 1273* ("We review the [Labor] Commission's interpretations of law under a correction-of-error standard."). "Additionally, if the legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction, the agency's interpretation will be granted no deference and the statute will be interpreted in accord with its legislative intent." *Esquivel, 2000 UT 66 at P14, 7 P.3d 777* (internal quotation marks omitted).

ANALYSIS

[*P6] Ameritech argues that the Appeals Board erred when it determined that apportionment of Edmonds's medical expenses was not appropriate under *section 34A-3-110* of the Utah Occupational Disease Act (UODA), *see Utah Code Ann. §§ 34A-3-101 to -112* (2005 & Supp. 2007). *Section 34A-3-110* states in relevant part:

> The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would [***5] be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or [**786] death when the occupational disease, or any part of the disease:
>
> . . . .
>
> (3) is aggravated by any other disease or infirmity not itself compensable; or
>
> (4) when disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

Id. § 34A-3-110 (2005).

[*P7] Thus, the narrow question presented by this case is whether the term compensation under *section 34A-3-110 of the UODA, see id.,* includes payments for medical expenses. If it does, then Edmonds's claim for future medical expenses should be apportioned, requiring Ameritech to pay only that share of the medical expenses attributable to the industrial cause of Edmonds's disease--here, 10%. If compensation does not include payments for medical expenses, then apportionment under *section 34A-3-110* is inapplicable and Edmonds is entitled to recover all medical expenses incurred in the treatment of her disease regardless of the percentage attributable to an industrial cause.

[*P8] In support [***6] of its contention that the term compensation, as used in *section 34A-3-110,* includes payments for medical expenses, Ameritech relies on *section 34A-2-102(3)* of the Workers' Compensation Act (WCA), *see id. §§ 34A-2-101 to -905* (2005 & Supp. 2007), which defines "[c]ompensation" to "mean[] the payments and benefits provided for in this chapter[, WCA,] or Chapter 3, [UODA]," *id. § 34A-2-102(3)* (2005). Ameritech reasons that medical expenses are both a payment and a benefit for Edmonds's industrial disease.

[*P9] Between 1979 and 1982, however, the Utah Supreme Court twice addressed whether the term compensation as used in the WCA included payments for medical expenses. In the first case, *Kennecott Copper Corp. v. Industrial Commission, 597 P.2d 875 (Utah 1979),* the court held that, under the WCA, the term compensation did not include payments for medical or hospital expenses. *See id. at 877* ("[T]here is a distinct difference between 'compensation' which is paid for an injury in lieu of wages which otherwise would have been earned, and the adjunctive award of medical and hospital expenses for treating the injury."). The supreme court reached this conclusion without specifically referencing the [***7] definition of compensation in the WCA, but instead relied upon two provisions of the WCA, Utah Code sections 35-1-45 [2] and 35-1-81. [3] *See id.* The *Kennecott* court determined that these two sections "treat[ed] medicals as something different from the compensation in lieu of wages, and that it therefore" followed that medical expenses are not compensation within the meaning of the WCA. *Id.*

2 Section 35-1-45 stated in relevant part:

> Every employee . . . who is injured . . . by accident arising out of or in the course of his employment . . . shall be paid, such compensation for loss

> sustained on account of such injury or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as is herein provided.

Utah Code Ann. § 35-1-45 (1974) (current version at *id. § 34A-2-401* (2005)).

3 Section 35-1-81 provided in relevant part:

> In addition to the compensation provided for in this title the employer or the insurance carrier shall also be required to pay such reasonable sum for medical, nurse and hospital services, and for medicines . . . as may be necessary to treat the patient . . . .

Id. § 35-1-81 (Supp. 1979) (current version [***8] at *id. § 34A-2-418* (2005)).

[*P10] In 1982, the supreme court again considered the question of whether compensation, as defined by the WCA, included medical expenses. In *Christensen v. Industrial Commission, 642 P.2d 755 (Utah 1982)*, the petitioners made an argument identical to that asserted here by Ameritech. Relying on a prior version of *section 34A-2-102(3)*, which defined compensation to "mean the payments and benefits provided for in this title," Utah Code Ann. § 35-1-44(6) (1974) (current version at *id. § 34A-2-102(3)* (2005)), [4] the petitioners argued that medical [**787] expenses were both a payment and a benefit under the WCA. *See Christensen, 642 P.2d at 756.*

4 At the time the Utah Supreme Court decided *Christensen v. Industrial Commission, 642 P.2d 755 (Utah 1982)*, the definition of compensation for purposes of the Workers' Compensation Act was found in section 35-1-44(6). *See* Utah Code Ann. § 35-1-44(6) (1974) (amended and renumbered at *id. § 34A-2-102(3)* (2005)). Since that time, the legislature has amended and renumbered the section several times. *See, e.g.,* Act of Feb. 7, 1991, ch. 136, sec. 3, § 35-1-44, 1991 Utah Laws 496, 497 (amending some defined terms, adding new terms, and renumbering); [***9] Act of Feb. 27, 1996, ch. 240, sec. 106, *§ 35A-3-102*, 1996 Utah Laws 893, 938 (renumbering section 35-1-44 as *35A-3-102*); Act of Mar. 4, 1997, ch. 375, sec. 84, *§ 34A-2-102*, 1997 Utah Laws 1438, 1474 (renumbering *section 35A-3-102* as *34A-2-102* and amending to add reference to the Utah Occupational Disease Act in definition of compensation).

[*P11] The *Christensen* court disagreed. Reaffirming *Kennecott,* the supreme court held that despite the broad definition of compensation in the WCA, the term did not include medical expenses. *See id. at 757.* The court reasoned that because it had previously determined that medical expenses were outside the definition of compensation, and because the Utah Legislature had not amended or changed the two sections of the Utah Code relied upon for that decision--sections 35-1-45 and 35-1-81--that the legislature must have ratified, as consistent with its own intent, the definition of compensation announced in *Kennecott. See id. at 756-57.*

[*P12] Since the Utah Supreme Court decided *Kennecott* and *Christensen,* the Utah Legislature has left the statutes relied upon for those decisions largely unchanged. Although section 35-1-45 has been renumbered twice and subdivided [***10] once since *Kennecott,* [5] it remains substantively similar to the previous version. *Compare Utah Code Ann. § 34A-2-401* (2005), [6] *with id.* § 35-1-45 (1974) (amended and renumbered). Furthermore, the legislature has left intact over the last twenty-five years the language of section 35-1-81 relied upon by the *Kennecott* court. *See id.* § 35-1-81 (Supp. 1979) (amended and renumbered); *Kennecott, 597 P.2d at 877.* Indeed, it has done so while amending other portions of section 35-1-81 to specifically refer to the UODA. *See* Act of Mar. 4, 1997, ch. 375, sec. 126, *§ 34A-2-418*, 1997 Utah Laws 1438, 1498 (renumbering section 35A-3-418 as *34A-2-418* and amending to add a reference to UODA). In its current form the section states:

> (1) *In addition to the compensation provided in this chapter or Chapter 3, Utah Occupational Disease Act,* the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

Utah Code Ann. § 34A-2-418 (2005) (emphasis added). This amendment is particularly instructive because, as the *Kennecott* court noted, the use of the phrase [***11] "'*[i]n addition to* the compensation provided for'" indicates that the legislature intended to "treat[] medicals

as something different from the compensation in lieu of wages." *597 P.2d at 877* (quoting Utah Code Ann. § 35-1-81 (Supp. 1979) (amended and renumbered)). Moreover, because the legislature chose to insert a reference to the *UODA in section 34A-2-418* without otherwise changing the substantive language, we must assume that, like the WCA, medical expenses are something *in addition to* or otherwise separate from compensation for purposes of the UODA. *See Christensen, 642 P.2d at 756* ("A well-established canon of statutory construction provides that where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with [**788] its own intent."); *see also Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 674 (Utah 1997)* (noting that compensation has been construed "to exclude medical expenses" within the meaning of WCA (citing *Kennecott, 597 P.2d 875*)); *United States Fid. & Guar. Co. v. Industrial Comm'n, 657 P.2d 764, 766 (Utah 1983)* [***12] (noting that *Kennecott* "draws a distinction between *compensation* which is paid for an injury and *medical and hospital expenses* which are paid for treatment of the injury"); *Christensen, 642 P.2d at 756-57*; *Kennecott, 597 P.2d at 877-78*.

5 *See* Act of Feb. 27, 1996, ch. 240, sec. 144, *§ 35A-3-401*, 1996 Utah Laws 893, 952 (renumbering section 35-1-45 as *35A-3-401*); Act of Mar. 4, 1997, ch. 375, sec. 109, *§ 34A-2-401*, 1997 Utah Laws 1438, 1488 (renumbering *section 35A-3-401* as 34A-2-401); Workers Compensation Coverage Amendments, ch. 55, sec. 6, *§ 34A-2-401*, 1999 Utah Laws 215, 222 (dividing *section 34A-2-401* into subsections).

6 The current version provides:

> (1) An employee . . . who is injured . . . by accident arising out of and in the course of the employee's employment, . . . shall be paid:
>
> (a) compensation for loss sustained on account of the injury or death;
>
> (b) the amount provided in this chapter for:
>
> (i) medical, nurse, and hospital services;
>
> (ii) medicines; and
>
> (iii) in case of death, the amount of funeral expenses.

Utah Code Ann. § 34A-2-401 (2005).

[*P13] Ameritech argues that the *Kennecott* and *Christensen* decisions are limited to their facts and only govern the resolution of issues related [***13] to the applicable statute of limitations. In support of its position, Ameritech notes the express provision allowing for the apportionment of medical expenses in the case of occupational disease. *See Utah Code Ann. § 34A-3-105(2)* ("[L]iability for disability, death, and medical benefits shall be apportioned between employers based on the involved employers' causal contribution to the occupational disease."). According to Ameritech, the fact that apportionment was expressly added to *section 34A-3-105* after the decisions in *Kennecott* and *Christensen* indicates the legislature's intent to supersede the analysis in those cases. In addition, Ameritech argues that it would make no sense for the legislature to allow apportionment of medical expenses in the context of an occupational disease under *section 34A-3-105*, *see id. § 34A-3-105*, but not under *section 34A-3-110*, *see id. § 34A-3-110*. Consequently, Ameritech contends that the use of the term compensation in *section 34A-3-110*, *see id.*, must have included medical expenses as well as payments made in lieu of wages. We are not persuaded by this argument.

[*P14] First, *section 34A-3-110* is limited to situations in which the occupational disease causes [***14] "disability or death." *Id.* ("The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death . . . ."). Here, Edmonds has not died and the Commission expressly found that "Ms. Edmonds has not shown that her carpal tunnel syndrome caused any disability, but she has required medical care." Second, the inclusion of apportionment language in *section 34A-3-105* evidences the legislature's understanding of how to make allocation available. Consequently, the omission of such language in *section 34A-3-110* indicates that the legislature did not intend to allow apportionment under that section. *See, e.g., State*

Farm Mut. Auto. Ins. Co. v. Clyde, 920 P.2d 1183, 1187 (Utah 1996) (concluding that where provisions in one section show that the legislature knew how to make its intent clear, absence of similar language in a different section indicates contrary intent); *State v. Hobbs, 2003 UT App 27,P21, 64 P.3d 1218* (same); *In re A.B., 936 P.2d 1091, 1098 (Utah Ct. App. 1997)* (same). Third, to the extent that the legislature is unclear, we must interpret the UODA [***15] liberally in favor of the claimant to implement its remedial purpose. *See, e.g., State Tax Comm'n v. Industrial Comm'n, 685 P.2d 1051, 1053 (Utah 1984)* ("The [WCA] should be liberally construed and applied to provide coverage."); *Luckau v. Industrial Comm'n, 840 P.2d 811, 815 (Utah Ct. App. 1992)* ("[A]ny doubts [about the interpretation of the UODA] should be resolved in favor of the applicant."). Resolving any doubts in favor of Edmonds, we conclude that the Appeals Board was correct in disallowing apportionment of medical expenses under *section 34A-3-110.*

[*P15] Ameritech's final argument is that, from a public policy standpoint, it makes no sense to require an employer to pay 100% of the medical expenses for the treatment of a disease that has only a 10% contribution from industrial causes. While this argument may be appropriately made to the legislature, we simply cannot substitute our judgment for its in matters of public policy. *Cf. Anderson v. United Parcel Serv., 2004 UT 57,P30, 96 P.3d 903* (noting that allocation of recovery under the WCA "is a matter for legislative, rather than judicial, determination"). Had the legislature intended to require apportionment of medical expenses [***16] based on the employer's causal contribution [**789] to the occupational disease it would have done so. *Cf., e.g., Utah Code Ann. § 34A-3-105* (requiring that medical expenses be apportioned between two or more employers relative to their causal contribution to the occupational disease under the WCA). [7]

7 Counsel for Edmonds noted, during oral argument, that there may be persuasive policy reasons for eliminating any dispute about medical expenses so that applicants can be treated immediately, without any confusion as to whether medical providers will be compensated.

CONCLUSION

[*P16] The UODA uses the same definition of compensation as the WCA. Consequently, because the WCA excludes medical expenses from the definition of compensation, the term compensation as used in the UODA also excludes medical expenses. Therefore, the Appeals Board of the Commission properly concluded that apportionment under *Utah Code section 34A-3-110* of the Utah Occupational Disease Act was not applicable to Edmonds's medical expenses for carpal tunnel syndrome.

[*P17] Affirmed.

Carolyn B. McHugh, Judge

[*P18] WE CONCUR:

Russell W. Bench,

Presiding Judge

William A. Thorne Jr., Judge

Order Affirming ALJ's Decision, (Appeals Board, November 30, 2006)

APPEALS BOARD
UTAH LABOR COMMISSION

JEFFREY D. SMITH, Petitioner, vs. DALE T. SMITH & SONS and WORKERS COMPENSATION FUND, Respondents.	20041e396 ORDER AFFIRMING ALJ'S DECISION Case No. 05-0707

Dale T. Smith & Sons and its insurance carrier, Workers Compensation Fund (referred to jointly as "Smith & Sons" hereafter), request review of Administrative Law Judge Hann's decision awarding medical benefits to Jeffrey D. Smith under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12, §34A-2-801(3) and §34A-3-102.

BACKGROUND AND ISSUE PRESENTED

Jeffrey Smith seeks payment of medical expenses necessary to treat his degenerative low back condition.[1] Smith & Sons contends that Mr. Smith's low back condition should be apportioned between work and non-work causes and that Smith & Son's liability for medical expenses should be limited accordingly.

In her decision of September 6, 2006, Judge Hann denied Smith & Sons' request for apportionment of Mr. Smith's medical expenses. In doing so, she relied on the Appeals Board's decision in Tamara Edmonds v. Epixtech, et al. (Labor Commission Case No. 02-0969; issued August 29, 2006), which held that medical expenses are not subject to the apportionment provisions of §34A-3-110 of the Act. In seeking review of Judge Hann's decision, Smith & Sons argues that Edmonds was wrongly decided

1 Initially, Mr Smith originally filed alternative claims for medical benefits and disability compensation under both the Utah Occupational Disease Act and the Utah Workers' Compensation Act Mr Smith also named Liberty Insurance Corp as a respondent. Liberty was later dismissed from these proceedings and the remaining parties resolved Mr. Smith's claim for disability compensation Consequently, the only remaining issue is Mr Smith's right to payment of medical expenses With the apparent consent of the parties, Judge Hann adjudicated that issue under the provisions of the Utah Occupational Disease Act.

DISCUSSION

In Edmonds the Appeals Board concluded that §34A-3-110's use of the term "compensation" for purposes of apportionment must be understood in light of the Utah Supreme Court's decision in *Kennecott Copper Corp. v. Industrial Commission,* 597 P.2d 875 (Utah 1979), which held that compensation did not include medical benefits. The Appeals Board further concluded that this interpretation was supported by the principle that the Act must be liberally construed and the impossibility of applying §34A-3-110's apportionment provision to medical-only claims.

Having visited this issue once again, the Appeals Board believes the reasoning followed in Edmonds is correct. Under that reasoning, Mr. Smith's medical expenses are not subject to apportionment under §34A-3-110.

ORDER

The Appeals Board affirms Judge Hann's decision. It is so ordered.

Dated this 30th day of November, 2006.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board 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 the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Jeffrey D. Smith, Case No. 05-0707, was mailed first class postage prepaid this 30th day of November, 2006, to the following:

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Sara Danielson
Utah Labor Commission

Findings of Fact Conclusions of Law, and Order, Dated September 6, 2006

2004 26346

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
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JEFFREY D SMITH, **Petitioner,** **vs.** **DALE T SMITH AND SONS and/or WORKERS COMPENSATION FUND; LIBERTY INSURANCE CORP,** **Respondent.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Case No. 05-0707** **Judge Debbie L. Hann**

HEARING: Room 332 Labor Commission, 160 East 300 South, Salt Lake City, Utah, on July 7, 2006 at 8:30 AM. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Debbie L. Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Jeffrey D Smith, was present and represented by his/her attorney Phillip Shell Esq.

The respondents, Dale T Smith and Sons and Workers Compensation Fund, were represented by attorney Floyd Holm Esq. The respondents, Dale T Smith and Sons and Liberty Insurance Corp were represented by attorney Bret Gardner Esq.

STATEMENT OF THE CASE

The petitioner's Application for Hearing alleges entitlement to medical expenses, recommended medical care, temporary total compensation and permanent partial compensation as the result of a cumulative trauma injury and an occupational disease to the petitioner's low back. The Commission issued a Notice of Formal Adjudicative Proceedings & Order for Answer on August 17, 2005. Both Answers denied the petitioner had suffered a compensable injury or occupational disease.

Prior to the hearing, Liberty Insurance Corp, filed a motion to dismiss itself as a party to the proceedings. This motion was granted at the hearing based upon the stipulation of the parties.

At the hearing, the petitioner withdrew its claims for compensation as those issues had been resolved leaving the medical claim as outstanding. The only issue remaining as to medical expenses is the apportionment between industrial and non-industrial causes.

FINDINGS OF FACT

The petitioner is employed by the respondent, a family business. He began at age 12 after school cleaning corrals and the plant. He began working part time as a meat cutter at age 16 and then began working full time as a meat cutter when he joined the business full time following college. Generally, this employment required the petitioner to regularly lift and manipulate quarters of beef weighing 100-200 pounds, haul live cattle, including "downer" cows that required the petitioner to prod, shock, push, pull, lift and twist to get these immobile cows into trailers The petitioner is now age 40 and suffers from lumbar degenerative joint disease.

The petitioner sought treatment for low back pain in August 1995 and was diagnosed with "sciatic neuralgia" by Dr. Egbert, a chiropractor. The petitioner sought treatment for low back pain off and on with chiropractors over the years.

On September 22, 2003, the petitioner sought treatment with Dr. Kimball for, among other things, low back pain. He was assessed with a lumbar sprain and an MRI was recommended. Medical exhibit 15. The MRI was done on September 26, 2003 and revealed the L5-S1 disc extrusion and lumbar degenerative changes but the petitioner did not get the results of this report until February 2004. Medical exhibit 77-78, 14.

The petitioner told his father and uncles, the owners of Dale T. Smith and Sons, about his back condition as the result of the heaving lifting at work. The petitioner reported back pain as the result of heavy lifting to his family members over the years of working. The petitioner characterized Dr. Kimball's report to him as having the back of "a 65 year old man" and when he realized he had more than a temporary back strain, he reported his condition to his father and uncles. The respondent, Dale T. Smith and Sons, filed a first report of injury in September 2004 after the petitioner expressed concern that his claim might not be covered for lack of notice. The respondent, Dale T. Smith and Sons, received timely notice of the petitioner's claim. Whether a first report was timely prepared by the employer is not within the control of the employee who reported his industrial back condition, progressing from temporary strains to the current claim of lumbar degenerative disc disease.

Dr. Kimball attributed the petitioner's L5-S1 ruptured disc and narrowing at L4-5 and L2-3 to "years of rigorous work ex: lifting, turning, pulling." Medical exhibit 13.

Dr. Marble opined that 75% of the petitioner's L5-S1 condition was caused by his work activities and that 25% of the other lumbar degenerative changes were caused by work activities.

Medical exhibit 9. In a subsequent addendum to his original report, Dr. Marble apportioned 35% of the petitioner's "entire overall low back condition" to his work activities and 75% to non-industrial conditions. Dr. Marble assigned a 7% whole person impairment for the petitioner's L5-S1 disk condition fully to the petitioner's work activities. Medical exibit 1-B.

The petitioner's employment activities with the respondent, Dale T. Smith and Sons, caused in full or in part, the petitioner's degenerative lumbar disc disease.

PRINCIPLES OF LAW

A compensable occupational disease is "... any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." Utah Code Ann. § 34A-3-103.

Utah Code § 34A-3-108(2) outlines the petitioner's reporting obligation for an occupational disease:

> (2) (a) Any employee who fails to notify the employee's employer or the division within 180 days after the cause of action arises is barred from any claim of benefits arising from the occupational disease.
>
> (b) The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment.

Utah Code § 34A-3-110 outlines when "compensation" should be apportioned to account for other non-compensable contributing causes. In Edmonds v. Epixtech et al., Case No. 02-0969 (issued 8/29/06)[1], the Commission Appeals Board ruled that medical benefits are not compensation under § 34A-3-110 and therefore not subject to apportionment.

CONCLUSIONS OF LAW

The petitioner suffered a compensable occupational disease, degenerative lumbar disc disease, while employed by the respondent, Dale T. Smiths and Sons.

The respondent, Liberty Insurance Co., is dismissed as a party to this claim.

[1] This case appears to overrule the holding in Milligan v. Utah State Tax Commission, Case No. 00-0232 (issued 4/30/02).

The respondents, Dale T. Smith and Sons and Workers Compensation Fund, are liable to the petitioner for reasonable and necessary medical treatment for the petitioner's low back condition pursuant to the Commission RBRVS fee schedule.

ORDER

IT IS THEREFORE ORDERED that the respondents, Dale T. Smith and Sons and Workers Compensation Fund, pay the petitioner for reasonable and necessary medical treatment for the petitioner's low back condition pursuant to the Commission RBRVS fee schedule.

IT IS FURTHER ORDERED that the respondent, Liberty Insurance Co, is dismissed as a party to this claim.

DATED September 6, 2006.

Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on September 6, 2006, to the persons/parties at the following addresses:

Phillip Shell Esq
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