1992

Fred Broadbent v. Industrial Commission of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRED BROADBENT,

Plaintiff/Petitioner,

Case No. 920409-CA

vs.

INDUSTRIAL COMMISSION OF UTAH and TOLBOE CONSTRUCTION COMPANY,

Priority 7

Defendants/Respondents.

BRIEF OF DEFENDANTS/RESPONDENTS

PETITION FOR REVIEW OF THE INDUSTRIAL COMMISSION'S ORDER DATED MAY 29, 1992

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TABLE OF AUTHORITIES

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JURISDICTION

This Court has jurisdiction of this petition pursuant to § 78-2a-3(2)(a) Utah Code Ann. (1953, as amended) and § 35-1-86 Utah Code Ann. (1953, as amended).

STATEMENT OF ISSUES PRESENTED

Did the Industrial Commission err in granting Mr. Broadbent interest on his permanent partial disability award from the date his disability impairment rating was determined by a medical panel when, up to that point, many doctors had been unable to agree on his impairment rating and his condition had not stabilized?

STATUTES AND RULES

The following statute and rule are controlling:

1. Section 35-1-78 Utah Code Ann. (1953, as amended):

Continuing jurisdiction of commission to modify award--Authority to destroy records--Interest on award--No authority to change statutes of limitation.

* * *

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

2. Rule 490-1-12B.2. U.A.C. (1991) **Interest.**

* * *

For the purpose of interest calculation, benefits shall become "due and payable" (as used in Section 35-1-78, U.C.A.) as follows:

* * *

> 2. Permanent partial compensation shall be due and payable on the next day following the termination of a temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition Below.

This case is a claim by an injured worker for additional interest on his permanent partial disability compensation award. The ALJ awarded petitioner, Mr. Broadbent, interest from the date that a medical panel ascertained his disability rating. Prior to that time, several doctors, including Mr. Broadbent's treating physicians, had been unable to agree as to his disability rating, and his condition had not become stable. Both parties asked the Industrial Commission to review the Order of the ALJ.[1] The Industrial Commission affirmed the ALJ on the interest issue. The Commission held that, under the applicable statute and rule, interest was due from the date the liability of the respondents was first medically determined. (A copy of the Commission's Order is attached hereto as Addendum A.)

Mr. Broadbent seeks reversal of the portion of the Commission's Order which affirmed the ALJ's decision that Mr.

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[1]The parties asked the Industrial Commission to review several issues, which it did, but the only issue on appeal here is whether the Commission and the ALJ were correct in their rulings on the interest issue.

Broadbent was entitled to interest on the permanent partial disability compensation from December 23, 1991, the date the medical panel established his impairment rating.

B. Statement of Facts.

1. Mr. Broadbent was injured on October 6, 1982 in a work related accident, while employed by Tolboe Construction Company. (R. 3.)

2. A few days after the accident, one of Mr. Broadbent's doctors opined that Mr. Broadbent would be able to return to work after January 1983, and that it was "unknown at present time" whether any permanent injury or disability would result. (R. 4.)

3. Mr. Broadbent returned to work in July 1983, (R. 64), or September 1983,[2] after being cleared for work as of June 9, 1983. (R. 186.)

4. In April 1983, Dr. Douglas Kirkpatrick opined that Mr. Broadbent was "about 20% disabled . . ." (R. 225.) In September 1984, Dr. Kirkpatrick gave Mr. Broadbent a 5% disability rating. (R. 231.)

5. In May of 1987, Dr. Bruce Sorensen, one of Mr. Broadbent's treating physicians, gave him a 16% disability rating. (R. 262.)

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[2]Mr. Broadbent has alternatively represented that he returned to work in September of 1983, (R. 10), and July of 1983, (R. 64). It makes no difference which date he actually returned to work for the issue presented here.

6. For various periods up to May 10, 1988, Mr. Broadbent was paid temporary total disability benefits in the total sum of $13,429.30. (R. 87, 88, 89, 91.)[3]

7. On June 4, 1987, Tolboe Construction's insurer offered $9431.11 to Mr. Broadbent as compensation for his permanent partial disability. This offer was based upon Dr. Sorensen's evaluation and rating of 16%.[4] (R. 90, 91.)

8. Mr. Broadbent rejected the offer, and retained Dr. Milton Thomas to render a second opinion. (Broadbent Brief at 4.) On February 2, 1988, Dr. Thomas opined that Mr. Broadbent had a 15% disability rating. (R. 286.)

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[3]Mr. Broadbent takes the position that he was paid temporary total disability only until June 1983. (Broadbent Brief at 2, 4.) This is incorrect. Temporary total disability payments were made at various times through May 1988. (R. 88, 89 and 91.)

[4]Again, Mr. Broadbent has misstated what transpired in this case. He states that, "From termination of TTD on June 9, 1983, until approximately August 17, 1992, (the date of payment), there was never a defense tender of the full amount owed." (Broadbent Brief at 15.) Mr. Broadbent also states that, ". . . the employer and his insurance cohorts can let the matter linger on for years, like they did here . . ." (Broadbent Brief at 14.) These assertions are simply incorrect. The matter lingered on because Mr. Broadbent's own doctors could not agree on the severity or stability of his injuries and, in 1987, the insurer offered to pay disability benefits based upon the 16% rating given by Dr. Sorensen, who had treated Mr. Broadbent for four years. (R. 90, 91, 261, 262.) Mr. Broadbent rejected this offer. Mr. Broadbent's position that the insurer's tender, which was based on his own doctor's evaluation was underhanded is incredible and contrary to the evidence. Furthermore, the insurer is not allowed to initiate a resolution of such disputes before the Industrial Commission as Mr. Broadbent suggests. (Broadbent Brief at 14.)

9. In September of 1990, Dr. John Bender opined that Mr. Broadbent had a 24% disability rating for physical impairment and a 12% disability relative to a loss of dexterity and a tremor of the left hand which are apparently caused by Parkinson's disease. Dr. Bender also opined that "In review of these extensive medical records, which cover the past 8 years, it is apparent that Mr. Broadbent has a progressive problem which is undoubtedly more impaired at this time than several years ago." (Broadbent Brief at 4-5, R. 157, 160.)

10. On October 2, 1990, Mr. Broadbent filed an Application for Hearing with the Industrial Commission. (R. 10.)

11. In December of 1990, Mr. Broadbent offered to settle for $21,378.38, which included $14,826.24 for the 24% disability found by Dr. Bender, $4953.34 for interest, $330 for Dr. Bender's office visit and $1268.80 for travel expenses.[5] (R. 15-16.)

12. On March 5, 1991, at the initial hearing on Mr. Broadbent's application, it was decided that the matter would be referred to a medical panel after x-rays were received. (R. 19.) The medical panel was asked to address the following questions:

> a. Is the Parkinson's disease a result of the industrial accident of 10-6-82?

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[5]In Mr. Broadbent's Brief, he states that he offered to settle for the 24% disability rating. (Broadbent Brief at 5.) This is incorrect. The settlement offer included amounts for interest, doctor's bills and travel expenses. (R. 15-16.)

b. What is the permanent partial impairment due to the industrial accident?

c. What is the permanent partial impairment due to the pre-existing conditions?

d. Did the industrial accident permanently aggravate a pre-existing condition?

(R. 41.)

13. It took several months to gather the necessary x-rays for reference to the medical panel. (R. 28, 32, 36.)

14. On December 10, 1991, the medical panel issued its report. The panel stated that the Parkinson's Disease was not the result of the industrial accident of 10/6/82, and that Mr. Broadbent was 23% disabled, of which 3% related to a pre-existing condition. (R. 44-56.)

15. On March 9, 1992, the Administrative Law Judge adopted the findings of the medical panel and granted Mr. Broadbent relief consistent with the panel's findings. (R. 59-61.)

16. Both Mr. Broadbent and Tolboe Construction requested the Industrial Commission to review certain aspects of the ALJ's Order. (R. 64-70 and 75-80.)

17. On May 29, 1992, the Industrial Commission affirmed the ALJ and found that "[t]here is substantial evidence in light of the entire record to uphold the findings of the ALJ, and his conclusions of law are appropriate under the circumstances. (R. 113-119; Addendum A.)

18. On June 25, 1992, a Petition for Review was filed with this court. (R. 123.)

SUMMARY OF ARGUMENT

Under Mr. Broadbent's interpretation of R490-1-12B.2. U.A.C. (1991), interest is payable on permanent partial compensation if the claimant's condition has stabilized, even though doctors may not agree on the disability rating. He argues that even though the doctors who evaluated him did not agree on the impairment rating, interest is still payable from the day following the termination of temporary total disability because, hypothetically, the rating could have been determined at that time. Mr. Broadbent argues that even though the many doctors who evaluated him from 1983 to 1991, rated him anywhere from 5% disabled to 34% disabled, the final rating of 23% could have been found in 1983 and interest should be paid from that date. Under this interpretation of the rule, or any other interpretation, the evidence does not support the relief he seeks.

First, Mr. Broadbent's temporary total disability payments did not cease until May 1988. Therefore, according to the rule, the earliest interest could begin to run, in any event, would be May 11, 1988, the day following the termination of his temporary benefits. R490-1-12B.2. U.A.C. (1991). Second, in September of 1990, Dr. John Bender performed an evaluation of Mr. Broadbent at the request of Mr. Broadbent's lawyer. Dr. Bender opined that Mr. Broadbent's condition was becoming progressively worse.

Therefore, under R490-1-12B.2. Mr. Broadbent's condition was not fixed for rating purposes. Dr. Bender's opinion is consistent with the other doctor's inability to agree on an impairment rating during the preceding years. Therefore, the Industrial Commission's award was correct, under R490-1-12B.2., and it is supported by the evidence.

ARGUMENT

THE EVIDENCE SUPPORTS THE INDUSTRIAL COMMISSION'S ORDER OF MAY 29, 1992, AND IT SHOULD BE AFFIRMED.

A. Standard of Review.

Mr. Broadbent argues that the issue presented is a question of law to which the Court employs a correction-of-error standard. He also argues that the Court must "closely scrutinize the Commission's order. (Broadbent Brief at 6.) While the first part of Mr. Broadbent's position is correct, as far as it goes, he cites no authority for the second proposition that the Court must "closely scrutinize" the Commission's order.

Section 63-46b-16(4) Utah Code Ann. (1953, as amended) sets forth the standards an appellate court must follow in reviewing formal adjudicative proceedings of a state agency. That section reads:

> The Appellate Court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
>
> (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;
(c) the agency has not decided all of the issues requiring resolution;
(d) the agency has erroneously interpreted or applied the law;
(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
(h) the agency action is:
(i) an abuse of the discretion delegated to the agency by statute;
(ii) contrary to a rule of the agency;
(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
(iv) otherwise arbitrary or capricious.

Mr. Broadbent does not delineate which of these sections, if any, provide the relief he seeks. It appears Mr. Broadbent believes the issue is simply a question of law. Respondents submit the issue presented is a mixed question of law and fact. First, was the applicable administrative rule interpreted correctly and second, when was Mr. Broadbent's condition fixed? Also, when did his temporary total benefits terminate?

Therefore, the Court must accord the Commission's decision some deference and set it aside only if it is unreasonable.

Hurley v. Board of Review of Indus. Com'n, 767 P.2d 524, 527 (Utah 1988). The Court in Hurley explains:

> There are essentially three standards that determine the scope of judicial review of agency action. The correction-of-error standard applies to agency rulings on issues of law and extends no deference to agency rulings. An agency's findings of fact, however, are accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible. As to questions of mixed law and fact, a reviewing court usually accords an agency decision some deference, i.e., an agency's decision will not be set aside unless the agency's conclusion is unreasonable.

Id. at 526, 527, citations and footnotes omitted.

In this case, the Court must also review the Commission's interpretation of an administrative rule. In that regard, an agency's interpretation of its own regulation is accorded judicial deference. Concerned Parents of Stepchildren v. Mitchell, 645 P.2d 629, 633 (Utah 1982). Also, "Courts will not override an administrative agency's interpretation of its own rules unless the interpretation is obviously arbitrary or erroneous." McKnight v. State Land Board, 14 Utah 2d 238, 381 P.2d 726, 730 (Utah 1963).

The Court must also determine whether the Commission's factual finding relative to the date Mr. Broadbent's condition was fixed for rating purposes is supported by substantial evidence.

B. Question of Law.

As is set forth above, the Court must determine if the Commission's interpretation of R490-1-12B.2. is obviously arbitrary or erroneous. R490-1-12B.2. requires, in pertinent part, (emphasis added):

> Permanent partial compensation shall be due and payable on the next day following the termination of a temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

Mr. Broadbent argues that the second sentence applies only to situations where the claimant's physical condition is not fixed, rather than situations where the condition is fixed but the rating is in dispute. Although it is not clear how the rule was interpreted by the Industrial Commission, its decision was correct under either interpretation.

The Commission's order states:

> The respondents argue that the ALJ was correct in ordering that interest on the PPD award commenced on December 23, 1991, since that was the date that the liability of the respondents was first medically determined. We agree with the respondents on this issue.

(R. 114.) The Commission then cites § 35-1-78 (U.C.A.) and R490-1-12 and notes that there are no allegations of bad faith or dilatory tactics on the part of the respondents. (R. 115.) The

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[6]No caselaw has been found that interprets this rule. The cases cited by Mr. Broadbent do not address this rule and, therefore, do not directly address the issue before the Court.

Commission then concludes, "Under the circumstances, interest accrues from the date of December 23, 1991, as correctly determined by the ALJ." (Id.) It appears that the Commission interpreted R490-1-12B.2. to require that the impairment rating be fixed, rather than the condition of the claimant. Nevertheless, in this case, no matter which interpretation is correct, the result of the Commission's decision is correct and supported by the evidence. Mr. Broadbent's condition was not fixed, according to Dr. Bender, as of late 1990, so the award of interest from 1991, when his disability rating was confirmed by a medical panel, was in accordance with R490-1-12B.2.

Mr. Broadbent cites the case of Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990) as support for his position. His reliance on that case is misplaced. Heaton was a situation where an injured worker had been totally disabled since he was injured in 1975. The issue involved interest on a permanent total disability award, not a permanent partial disability determination. Although the record in that case was, apparently, somewhat confusing, there was no dispute that Mr. Heaton had been totally disabled since his injury. Id. at 681. However, for some reason, Mr. Heaton was paid permanent partial disability compensation until October of 1981.

In 1985, Heaton requested a clarification of his rights. Thereafter, Heaton applied for permanent total disability benefits. In November of 1985, an ALJ ordered that Heaton be

awarded permanent total disability benefits from July 25, 1985, the date Heaton's doctor reported that Heaton had never recovered from the accident. In his order, however, the ALJ conceded that it appeared from the record that Heaton had been totally disabled from the date of the accident. The Industrial Commission upheld the ALJ's decision and the Court of Appeals affirmed the Commission.

On a Writ of Certiorari, the Supreme Court of Utah held that Heaton was entitled to permanent total disability payments, including interest, from October 6, 1981, the date his permanent partial disability benefits expired, rather than from July, 1985. In its opinion, the Court states:

> Since it is clear that he [Heaton] was totally and permanently impaired from the time of the injury in 1985 to the time when permanent partial payments terminated, he was indisputably entitled to permanent total benefits as of the date of the termination of the permanent partial benefits.

Id.

The significant factor in the Heaton case was that there was no dispute that Heaton was totally disabled since the accident and his condition was fixed as of that date. That case is much different than this case where neither the condition nor the rating were fixed until 1991.

The case of Oman v. Industrial Commission of Utah, 735 P.2d 665 (Utah App.) cert denied, 765 P.2d 1277 (Utah 1987), is even more applicable to this case. In Oman, this Court held that the

date of medical confirmation of a permanent total disability in progressive injury cases is the appropriate date for the commencement of such benefits. Oman sought a modification of an order by the Industrial Commission awarding him permanent total disability benefits. The Commission had ordered benefits to commence the date permanent total disability was first medically confirmed. Oman argued that benefits should commence from either the date of the accident or the day he last worked for his employer, whichever is later. This Court affirmed the Industrial Commission's decision and awarded Oman interest on his benefits, pursuant to § 35-1-78 (U.C.A.), from the date his condition was medically confirmed. Id. at 667.

As in Oman, the Commission's order of May 29, 1992, which granted Mr. Broadbent interest from the date his condition was medically determined is a correct interpretation of the law.

C. Question of fact.

The one fact that is absolutely clear in the record in this case is that from 1983 until 1991, the numerous doctors who evaluated Mr. Broadbent could not agree as to the stability of his condition, nor could they agree as to the severity of his injuries. Mr. Broadbent correctly points out that he received at least the following ratings from various doctors: April 23, 1984 (20%); September 5, 1984 (5%); May 26, 1987 (16%); February 2, 1988 (15%); and September 18, 1990 (24%). (Broadbent Brief at 10.) It is difficult to understand how Mr. Broadbent can assert

that these numbers, somehow, show that his condition was fixed as of June, 1983 and his permanent partial disability rating could have been determined at that time.

Mr. Broadbent also claims that his temporary total disability payments concluded on June 10, 1983, and that his permanent partial compensation was, therefore, payable the following day. The record shows, however, that Mr. Broadbent received total temporary disability payments, at various times, up to May 10, 1988. (R. 87, 88, 89, 91.) If it is assumed that his condition was fixed as of that date, the earliest interest could be assessed in this case, is May 11, 1988, pursuant to the first sentence of R490-1-12B.2.

Although Mr. Broadbent acknowledges that his impairment ratings were all over the board for the years 1984 through 1991, (Broadbent Brief at 10), he attributes this to the inability of doctors to agree on the rating. He argues that because he returned to work in 1983, his condition had stabilized as of that time. (Id.) He chooses to ignore the clear opinion of Dr. Bender that his condition had not stabilized during that time period. On September 18, 1990, at the request of his attorney, Mr. Broadbent was evaluated by Dr. John M. Bender. (R. 157.) In his report, Dr. Bender states, "In review of these extensive medical records, which cover the past 8 years, it is apparent that Mr. Broadbent has a progressive problem which is undoubtedly more impaired at this time than several years ago." (R. 157,

emphasis added.) It is clear, through Dr. Bender, that Mr. Broadbent's condition was not "fixed" for rating purposes as late as September 1990. Therefore, under the second sentence of R490-1-12B.2., the Industrial Commission's decision was reasonable and supported by substantial evidence.

CONCLUSION

Under the circumstances of this case, the Industrial Commission was correct in awarding interest from the date the medical panel established Mr. Broadbent's impairment rating and, therefore, its order of May 29, 1992, should be affirmed.

DATED this 21st day of October, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By: _____
Stuart L. Poelman
Ryan E. Tibbitts
Attorneys for
Defendants/Respondents

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four (4) copies of BRIEF OF DEFENDANTS/RESPONDENTS this 22nd day of October, 1992, to the following:

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ADDENDUM A

JUN 0 1 1992

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6600

Fred Broadbent,	*	
	*	DENIAL OF RESPONDENT'S
Applicant,	*	MOTION FOR REVIEW AND
vs.	*	DENIAL OF APPLICANT'S
	*	MOTIONS FOR REVIEW
	*	IN PART
Tolboe Construction and/or	*	
Industrial Indemnity,	*	Case No. 90000918
Employers' Reinsurance Fund,	*	
Respondent.	*	

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The Industrial Commission of Utah reviews the Motions for Review of applicant Fred Broadbent and respondents Tolboe Construction and Industrial Indemnity in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant and the respondents Tolboe Construction and/or Industrial Indemnity submitted Motions for Review of the administrative law judge's (ALJ) decision in the above captioned case. The applicant submitted two Motions for Review of the ALJ's decision of March 9, 1992, one on March 18, 1992, and the second one on April 6, 1992. Both were timely filed.

The above named respondents submitted their response to applicant's first motion on April 8, 1992, and also, on that date timely submitted their Motion for Review. On April 20, 1992, the applicant responded to respondent's April 8, 1992 reply to applicant's Motion for Review, and on April 24, 1992 responded to respondent's Motion for Review. Respondents provided a further reply on May 12, 1992 to applicant's Motion for Review of April 6, 1992.

All parties need to be aware that responses to motions for review must be filed with the Commission within 15 days of the mailing date of the motion for review, or such responses may be considered untimely. U.C.A. Section 63-46b-12 (1953 as amended 1988). Since there were untimely responses from all parties, and because we have received no objections to the untimely filings, we will consider the responses.

Relevant facts are as follows. The applicant sustained an industrial accident on October 6, 1982. Tolboe Construction and Industrial Indemnity paid medical expenses and temporary total disability benefits (TTD). The respondents claim that the applicant refused tender of payment for permanent partial disability (PPD) due to a disagreement as to the correct PPD

rating. The tender was made on June 4, 1987. The applicant filed an application for hearing in October 1990.

In answer to the hearing application, respondents denied liability for PPD compensation asserting that the Industrial Commission of Utah (IC) is precluded from making a PPD award at any time subsequent to eight years after the date of the accident, and basing this assertion on U.C.A. Section 35-1-66. By order dated March 9, 1992, the ALJ awarded the applicant PPD benefits, but did not address the eight year limitation provision contained in the statute.

Because of a series of disputes between the parties, and among the physicians, as to the proper PPD rating, the ALJ referred this case to a medical panel. On December 10, 1991, the panel awarded the applicant a 23 percent impairment rating. The ALJ adopted the medical panel impairment rating of 23 percent, and ordered that the applicant's compensation be paid in a lump sum plus interest of eight percent from December 23, 1991.

The only issue raised in applicant's Motion for Review dated March 18, 1992 was whether the date of December 23, 1991 was the proper date for the interest to begin accrual. The applicant contends that interest should begin on June 9, 1983 which is the day after the date upon which the applicant's TTD was terminated. Alternatively, the applicant argues that if the Commission decides that the interest should not begin on that date, the interest clearly should begin on April 23, 1984 which is the date that the applicant met the standard for a permanent partial impairment rating of 20 percent.

The respondents argue that the ALJ was correct in ordering that interest on the PPD award commenced on December 23, 1991 since that was the date that the liability of the respondents was first medically determined. We agree with the respondents on this issue.

The Utah Supreme Court has discussed the rationale behind the award of interest on workers compensation benefits:

> Thus, it is clear that compensation for worker disability is legislation for the public welfare. It is also clear that the statute providing for interest on unpaid benefits was a legislative attempt to remedy a serious social problem: the depreciation of the value of benefits as a result of non-receipt of the weekly benefit for months, or perhaps years, until a final determination of eligibility and an award

was made.

Marshall v. Ind. Comm'n, 704 P.2d 581, 583 (Utah 1985).

U.C.A. Section 35-1-78 provides in pertinent part:

> Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

1953 as amended 1981.

Further, our rules state that:

> For the purpose of interest calculation, benefits shall become "due and payable" (as used in Section 35-1-78, U.C.A.) as follows:
>
> * * *
>
> 2. Permanent partial compensation shall be due and payable on the next day following the termination of a temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

Emphasis added; Rule 490-1-12 (Utah Admin. Code 1991).

There has been no allegation by the applicant of bad faith or dilatory tactics on the part of the respondents in paying the interest. Our decision on the award of interest may be different in cases where the employer cannot show that it proceeded with some dispatch to provide payments to injured employees who were entitled to such payments.

Under the circumstances, interest accrues from the date of December 23, 1991 as correctly determined by the ALJ.

The applicant in his Motion for Review dated April 6, 1992 also argues that he has never received reimbursement for his travel. The ALJ Order is silent as to this issue, and the respondents' reply to applicant's motion argues that the Order did not contain any consideration of the mileage claim because the applicant did not submit itemized information reflecting the particular amounts of mileage expense claimed for the various periods involved to the ALJ as the ALJ had ordered. The applicant

has not responded to this allegation of respondents so we will treat this statement by the respondents as true for purpose of our decision.

The current pertinent rule which was effective on March 16, 192 provides that:

> An employee who, based upon his/her physician's advice, requires hospital, medical, surgical, or consultant services for injuries arising out of and in the course of employment and who is authorized by the self-insurer, the carrier, or the Industrial Commission to obtain such services from a physician and or hospital shall be entitled to [certain reimbursements].

R568-2-19A (Utah Admin. Code 1992).

The rule further provides that "[r]equests for travel reimbursement must be submitted to the carrier for payment within one year of the authorized care. R568-2-19B4 (Utah Admin. Code 1992). Therefore, such mileage reimbursement requests are authorized under the current rule as an expense which can be passed on to the carrier or employer unless the employee does not submit such request for reimbursement within one year of the authorized care.

The applicant does not fall under the current rule since he was injured in 1982, and since he clearly filed his application before the effective date of the new rule. Therefore, the requirement that the applicant submit his requests for travel reimbursement to the carrier within one year of the authorized care will apply in his case only to those medical treatments, and other circumstances within the mileage reimbursement rule which were incurred subsequent to March 15, 1992.

Carriers should not impose rigid and onerous requirements on injured employees to prove mileage expenses. Such requirements are contrary to the spirit of the Workers' Compensation Act. However, the carrier may reasonably require the injured employee to show that he/she attended a medical appointment or other required treatment along with a statement from the injured employee showing the mileage from the home/work of the employee to the place of treatment and return.

Rather than the carrier simply stating that the burden has not been met, it is incumbent upon the carrier to tell the employee

precisely what will be reasonably needed to substantiate the reimbursement. Preferably this should be discussed, among such items as how the claim will be processed, early in the process when the carrier assigns an adjuster to the case. Such a discussion will avoid much of the contention presented by arguments over mileage as presented in this case.

We do not have sufficient information on which to approve or disapprove applicant's claim for mileage in this case. The applicant has provided us with a list of the mileage amounts claimed for the various years. Had the applicant provided this list more punctually, it could have been considered by the ALJ. However, in the interest of conserving time, we will dispose of this issue.

The carrier must do more than say that the amounts are old and unsubstantiated. The applicant has listed the day, month, and year for most of his trips, the medical practitioner or facility visited, and the number of miles. The carrier presumably has the medical records and bills which it paid to verify these trips. It would seem that sufficient information has been provided on which the carrier can determine the claim. Since the applicant was late turning in his claim, the carrier will have ten days from the issuance of our order in which to provide us more information about its specific objections, and about what it needs in the way of substantiation which are not within its records of the case, or we will approve the amounts claimed.

The remaining issue to be discussed, and which is the only issue raised by the respondents in their Motion for Review is whether U.C.A. Section 35-1-66 of the Utah Workers' Compensation Act prohibits the Commission from making an award to the applicant of permanent partial disability after eight years from the date of applicant's injury.

The statute in question reads:

> The Commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury <u>is not finally healed and fixed</u> eight years after the date of the injury and who files an application for such purpose prior to the expiration of such eight-year period.

Emphasis added. (1953 as amended 1981).

The ALJ Issued his decision more than nine years after the

date of injury. This precludes the Commission from ordering the respondents to pay an award of permanent partial disability to the applicant argue the respondents. To buttress this argument, the respondents further contend that the delay in seeking the Commission's award was caused by the applicant.

The use of the word "may" clearly shows that the Commission is not required to make such award within the eight year period, although it may do so. This particular statute is applicable to those situations where the applicant's condition has not stabilized, but the applicant desires that his medical condition be rated even though under normal circumstances no rating would be provided until stabilization. Under these circumstances, such applicant can force a rating if requested prior to the expiration of the eight year period.

In this case, the applicant clearly filed his application before the eight year period.

For these reasons, the Commission affirms the ALJ's decision. There is substantial evidence in light of the entire record to uphold the findings of the ALJ, and his conclusions of law are appropriate under the circumstances.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 9, 1992 is affirmed.

FURTHER, IT IS ORDERED that the respondents shall have ten days from the date of issuance of this Order to provide to the Commission any specific objections to the mileage reimbursement request shown at Exhibit A, Applicant's Motion for Review filed on April 6, 1992. The applicant shall have ten days from the date of service upon him to respond to respondent's objections, if any.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a

transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Certified this 29th day of May 1992.
ATTEST:

Patricia O. Ashby
Commission Secretary

THE INDUSTRIAL COMMISSION OF UTAH

CERTIFICATE OF SERVICE

I certify that I did mail by prepaid first class postage the DENIAL OF RESPONDENT'S MOTION FOR REVIEW AND DENIAL OF APPLICANT'S MOTIONS FOR REVIEWW IN PART on Fred Broadbent, Case No. 90000918 on 29 May 1992 to the following:

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Presiding Judge Allen