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**UTAH LABOR COMMISSION**

**KEN L. HEATON,**

**Petitioner,**

vs.

**HEATON BROTHERS ROOFING,  
INC., and VALLEY FORGE  
INSURANCE CO.,**

**Respondents.**

**ORDER MODIFYING  
ALJ'S ORDER**

**Case No. 20031168**

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Ken L. Heaton, Heaton Brothers Roofing, Inc. and its insurance carrier, Valley Forge Insurance Co., (referred to jointly as "Heaton Brothers") ask the Utah Labor Commission to review Administrative Law Judge Sessions' award of benefits to Mr. Heaton under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Mr. Heaton claims workers' compensation benefits, or, alternatively, occupational disease benefits from Heaton Brothers for a work accident that occurred on June 30, 2003, injuring his back. The parties stipulated to facts, waived the evidentiary hearing, and requested that the medical aspects of the case be referred to a medical panel. After reviewing the panel's opinion, Judge Sessions found Mr. Heaton's back injury compensable as a workers' compensation claim and an occupational disease claim and awarded benefits, including temporary total disability compensation for 13 ½ weeks (with no apportionment), permanent partial disability compensation for a ½ % impairment, and medical expenses. Judge Sessions dismissed Mr. Heaton's permanent total disability claim with prejudice.

Both parties filed motions for review. Heaton Brothers argues that Judge Sessions miscalculated the permanent partial disability compensation for a ½ % impairment at .05 rather than .005 and failed to properly apportion Mr. Heaton's award for medical expenses according to the percentage caused by non-work factors, as required for an occupational disease claim.

Mr. Heaton argues that the award for temporary total disability compensation was miscalculated at 13 ½ weeks instead of 13 ½ months, or 58.45 weeks, that the permanent partial disability rating should be 1% rather than .5%, and that his claim for permanent total disability should not have been dismissed with prejudice as this claim was never adjudicated.

**FINDINGS OF FACT**

The following facts, adopted from the record and the parties' stipulation, are relevant to the issues in the motions for review:

Mr. Heaton worked as a roofer for thirty years. Over the course of those years he suffered several back injuries, both work and non-work related, and was diagnosed with degenerative disc disease. On June 20, 2003, Mr. Heaton was pulling material off a roof when he had a sudden onset of low back pain with radiation to his left leg. Mr. Heaton received conservative treatment but after his symptoms failed to subside, he opted for back surgery on April 7, 2004. Since the surgery, Mr. Heaton has had further medical treatment, including nerve root blocks.

Due to conflicting medical opinions, the parties stipulated that a medical panel would decide the disputed issues. The panel found that Mr. Heaton had a preexisting back condition that was permanently aggravated by the June 30, 2003, work injury, and that Mr. Heaton would have been temporarily disabled from June 30, 2003, through August 7, 2004. In the panel's opinion, Mr. Heaton's low back condition left him with a 10% whole person impairment, of which only 1% was attributable to Mr. Heaton's work activities. The panel also found Mr. Heaton's back surgery had been necessary to treat his work and non-work injuries, and that future medical care for these injuries would be necessary, including injections.

**DISCUSSION AND CONCLUSION OF LAW**

Section 34A-2-401 of the Utah Workers' Compensation Act provides that an employee who is injured by accident arising out of and in the course of the employee's employment shall be paid compensation and medical expenses. Although Mr. Heaton pled his claim alternatively as an occupational disease claim, Judge Session found his claim was compensable as a workers' compensation claim. After reviewing the record, the Commission agrees and finds Mr. Heaton was injured by accident arising out of and in the course of his employment and therefore his claim is compensable according to the Utah Workers' Compensation Act (the "Act").

**Temporary Total Disability Compensation.** As stated in the medical panel report and Judge Sessions' findings of fact, Mr. Heaton was temporarily disabled from his work injury from June 13, 2003, through August 7, 2004, a total of 57.71 weeks.<sup>1</sup> Therefore, the Commission finds Mr. Heaton is entitled to 57.71 weeks of temporary total disability compensation.

**Permanent Partial Disability Compensation.** Under Section 34A-2-412 of the Act, an employee is entitled to permanent partial disability for permanent impairments sustained as a result of a work accident. The Commission finds, based on a review of the panel's opinion, that Mr. Heaton has a

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<sup>1</sup> 404 days (June 30, 2003, through August 7, 2004) ÷ 7 = 57.71 weeks.

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10% whole person impairment for his back condition, of which 1% was caused by his work injuries. Therefore, Mr. Heaton is entitled to permanent partial disability compensation for a 1% impairment.

**Medical Expenses.** According to Section 34A-2-418 of the Act, an employer is required to pay reasonable sums for that medical care necessary to treat the injured employee. Based on the panel's opinion, the Commission finds Mr. Heaton's back surgery and subsequent medical treatment was necessary to treat his work injuries. As the Commission has found this is a claim for benefits under the Utah Workers' Compensation Act, apportionment is unnecessary.<sup>2</sup> The Commission finds Heaton Brothers is liable for the necessary medical care to treat Mr. Heaton's work injury.

**Dismissal of the permanent total disability claim with prejudice.** The Commission has reviewed the record and finds Mr. Heaton's claim for permanent total disability benefits, although initially claimed on the application for benefits, was not adjudicated before the Commission and therefore dismissal of this claim with prejudiced was error. Therefore, the Commission will modify its order to dismissal without prejudice.

**ORDER**

The Commission hereby modifies Judge Sessions' order as follows (with changes emphasized):

IT IS THEREFORE ORDERED that Heaton Brothers Roofing Inc shall pay Ken L Heaton temporary total disability compensation for **57.71 weeks** as detailed hereinabove at the rate (as stipulated) of \$562.00 per week, **for a total of \$32,433**, under Utah Code §34A-2-42- (3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that Heaton Brothers Roofing Inc shall pay Ken L Heaton permanent partial disability compensation for **a 1% impairment rating** at the rate (as stipulated) of \$375.00 per week for a total of **\$1,170** under Utah Code §34A-2-412. That amount is accrued, due and payable in a lump sum, plus interest at eight percent (8%) per annum, under Utah Code §34A-2-420 (3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that Petitioner's claim for permanent total disability compensation is denied and dismissed **without prejudice**.

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<sup>2</sup> The Commission further notes that, even if this claim was decided under the Utah Occupational Disease Act, the Utah Court of Appeals has recently confirmed that medical care is deemed separate from compensation benefits and therefore is not subject to apportionment. See Ameritech v. Labor Commission, 169 P.3d 784 (Utah Ct. App. 2007), certiorari granted Ameritech v. LABC, 186 P.3d 957 (Utah 2008).

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IT IS FURTHER ORDERED that Heaton Brothers Roofing Inc shall pay all medical expenses reasonably related to Ken L Heaton's **industrial accident** of June 30, 2003, according to Utah Code §34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and any travel allowances under Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, under Utah Code § 34A-2-420 (3) and Utah Administrative Code, Rule 612-2-13.

IT IS FURTHER ORDERED that statutory attorneys' fees of, plus twenty percent (20%) of the interest awarded herein, shall be paid directly to Phillip Shell Esq, according to Utah Code §34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from Ken L Heaton's award and sent directly to Phillip Shell Esq's office.

It is so ordered.

Dated this 12<sup>th</sup> day of March, 2009.

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Sherrie Hayashi  
Utah Labor Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission 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.