K. S. asks the Utah Labor Commission to review Administrative Law Judge Sessions' decision regarding Mr. S.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

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

BACKGROUND AND ISSUE PRESENTED

Mr. S. injured his back while working for Sorenson Construction on September 18, 2002. The employer and its insurance carrier, Workers Compensation Fund (referred to jointly as "Sorenson" hereafter), accepted liability for Mr. S.'s injuries and paid some medical and disability benefits. On January 4, 2005, Mr. S. filed an application with the Commission to compel Sorenson to pay additional benefits.

Judge Sessions held an evidentiary hearing on Mr. S.'s claim on August 5, 2005, and then issued an interim order on August 10, 2005. In summary, Judge Sessions' interim order: 1) appointed a medical panel to consider whether the work accident was the cause of edema in Mr. S.'s legs; and 2) denied Mr. S.'s claim for temporary total disability compensation between December 6, 2002, and January 31, 2003, on the grounds Mr. S. had refused suitable light duty work that Sorenson made available during that time.

The medical panel submitted its report to Judge Sessions on December 21, 2005. Based on the panel's opinion, Judge Sessions concluded that Mr. S.'s edema was not caused by his accident at Sorenson and, consequently, was not compensable under the Act.

Mr. S.'s motion for review contends that Judge Sessions has not resolved Mr. S.'s claim for temporary total disability compensation between December 6, 2002, and January 31, 2003. It appears to the Commission that Judge Sessions intended his interim order to stand as the final judgment on that point. Consequently, the Commission will consider whether the interim order has, in fact, adequately addressed Mr. S.'s claim to temporary total disability compensation.

DISCUSSION AND CONCLUSION OF LAW

Subsection 410(1)(a) of the Act, which generally establishes the right of injured workers to temporary total disability compensation, provides that "in case of temporary disability, so long as the disability is total, the employee shall receive (compensation) . . . ." This provision must be interpreted in light of two decisions by the Utah Supreme Court. In *Entwistle Co. v. Wilkins*, 626 P.2d 495, 498 (Utah 1981), the Court held that an injured worker's temporary disability "may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury." In *Booms v. Rapp*, 720 P. 2d 1363, 1366 (Utah 1986), the Court ruled that "once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits."

Although Judge Sessions' decision is not clear on this point, it appears undisputed that Mr. S.'s back injury prevented him from performing the work duties he had engaged in before his accident. Consequently, he has a presumptive right to temporary total disability compensation until he reached medical stability.

The Commission describes Mr. S.'s right to temporary total disability compensation as "presumptive" because another statutory provision, subsection 410(2), allows an employer to avoid paying such compensation by providing light-duty work for the injured worker. Subsection 410(2) states:

> In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

Thus, the foregoing statute establishes two conditions that must be met before an employer is excused from paying temporary total disability compensation. First, the injured worker must have a medical release to perform light duty work. Second, the employer must make such light duty work available. Apparently, Mr. S. had a medical release to perform light duty work, thereby satisfying the first condition of subsection 410(2). The real dispute in this case relates to the second condition—whether light duty employment was actually available to Mr. S..

On this point, Judge Sessions concluded that Mr. S. was discharged "for cause" by Sorenson, thereby terminating Mr. S.'s entitlement to temporary total disability compensation. The Commission views Judge Sessions' findings of fact on this point as inadequate. In particular, Judge Sessions finds that Mr. S. was fired for taking Sorenson property for personal use. However, the property in question is never identified and the circumstances of the misappropriation are not described. As discussed below, a clear understanding of the facts surrounding Mr. S.'s discharge is essential in evaluating his right to temporary total disability compensation. The Commission will therefore remand this matter to Judge Sessions for further fact finding on this point.

The Commission is also concerned with Judge Sessions' interpretation of subsection 410(2)'s light duty provisions. Judge Sessions reasoned that because Mr. S.'s own misconduct precluded him from continuing with light-duty work at Sorenson, Mr. S.'s right to temporary total disability compensation was extinguished. The Utah Court of Appeals has considered an analogous situation in *King v. Industrial Commission*, 850 P.2d 1281 (Utah App., 1993). In *King*, the employer argued it was the injured worker's incarceration, rather than a lack of light-duty work, that prevented the injured worker from returning to work. After evaluating the underlying principles of the Utah Workers' Compensation Act and the statutory language of what is now subsection 410(2), the Court held as follows:

> . . . the absence of a statutory provision limiting workers' compensation benefits upon a claimant's incarceration mandates a conclusion that temporary total benefits should be awarded to King. Moreover, the Utah Workers' Compensation Act is based on contract principles and an employee's right to benefits arises when he

suffers a work-related injury. Absent an explicit statutory provision, the Industrial Commission is not free to reduce statutorily-created benefits.

This is not to say that an injured worker can escape his or her duty to accept suitable light duty work simply by engaging in misconduct that he or she knows will result in termination. If an injured worker on light duty assignment intentionally engages in misconduct with the purpose of severing the employment relationship, such misconduct should be viewed as a refusal of light duty work. In such cases, the injured worker's constructive refusal of suitable light duty work will terminate the injured worker's right to continuing temporary total disability benefits.

ORDER

The Commission sets aside Judge Sessions' decision of March 1, 2006, and remands this matter to Judge Sessions for such additional proceedings he deems necessary. Judge Sessions will then issue a final order that addresses the various aspects of Mr. S.'s claim, including his claim to temporary total disability compensation. Any party dissatisfied with Judge Sessions' decision may then seek review by either the Commission or Appeals Board. It is so ordered.

Dated this 28th day of April, 2006.

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R. Lee Ellertson
Utah Labor Commissioner