2003

Glenda W. Giles v. Utah Labor Commission, Oakridge Country Club and/or Workers Compensation Fund; Employers Reinsurance Fund; Wasatch Crest Mutual Insurance; IRS; Adecco, f/k/a TAD Technical Services and/or Liberty Mutual Insurance; Constiutional State Service Co.; ACE USA/Pacific Employers Insurance Co : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Glenda W. Giles Petitioner/Appellant, vs. Utah Labor Commission, Oakridge Country Club and/or Workers Compensation Fund; Employers Reinsurance Fund; Wasatch Crest Mutual Insurance; IRS; Adecco, f/k/a TAD Technical Services and/or Liberty Mutual Insurance; Constitutional State Service Co.; ACE USA/Pacific Employers Insurance Co Respondents/Appellees	)	COURT OF APPEALS Case No.: 20030577-CA Priority 7

BRIEF OF RESPONDENTS WORKERS COMPENSATION FUND AND OAKRIDGE COUNTRY CLUB

WRIT OF REVIEW FROM AN ORDER
OF THE LABOR COMMISSION OF UTAH

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The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §§ 34A-2-801(8) (2001); 63-46b-14, -16 (1997); 78-2a-3(a) (2002).

IV. STATEMENT OF THE ISSUES

A. Did the Labor Commission err in summarily dismissing Giles' occupational disease case against WCF and the Employers Reinsurance Fund based on the the March 1995 settlement agreement and the applicable version of Section 35-2-110 of the Utah Code?

R. at 720-735, 1030-36, 1231-35.

Standard of Review:

1) With the Legislature's grant of discretion to the Labor Commission, the Court of Appeals upholds the Commission's determination of facts and application of the law "unless the determination exceeds the bounds of reasonableness and rationality." Utah Code Ann. § 34A-1-301 (1997) (granting Labor Commission full power to determine the facts and apply the law); *McKesson Corp. v. Labor Comm'n*, 2002 UT App 10 ¶ 11, 41 P.3d 468.

2) In deciding whether summary judgment is appropriate, the Court of Appeals reviews the lower courts' legal conclusion for correctness. *Olson v. Park-Craig-Olson,* 815 P.2d 1356 (Utah Ct. App. 1991).

B. Are Giles' allegations of Labor Commission bias supported by sufficient objective evidence to warrant reversal of its decision and appointment of an outside adjudication officer?

R. at 192-94, R. at 373-74.

Standard of Review:

The Court of Appeals reviews an agency's interpretation of general law under a correction of error standard. *King v. Industrial Commission*, 850 P.2d 1281, 1285 (Utah App. 1993).

V. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

STATUTES

Utah Code Ann. § 35-2-110 (Supp. 1993) (currently renumbered as 34A-3-111). Compensation not additional to that provided for accidents. [full text]

The compensation provided under this chapter is not in addition to compensation which may be payable under Title 35, Chapter 1, and in all cases where injury results by reason of an accident arising out of and in the course of employment and compensation is payable for the injury under Title 35, Chapter 1, no compensation under this chapter shall be payable.

Utah Code Ann. § 34A-1-301 (2001)(formerly § 35-1-16) Commission jurisdiction and power. [full text]

The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter and any other title or chapter it administers.

Utah Code Ann. § 34A-2-802 (2001). Rules of evidence and procedure before commission - Admissible evidence [full text]

(1) The commission, the commissioner, an administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission pursuant to this chapter and Chapter 3, Utah Occupational Disease Act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter.

(2) The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

(a) depositions and sworn testimony presented in open hearings;

(b) reports of attending or examining physicians, or of pathologists;

(c) reports of investigators appointed by the commission;

(d) reports of employers, including copies of time sheets, book accounts, or other records; or

(e) hospital records in the case of an injured or diseased employee.

Utah Code Ann. § 31A-33-116 (2003). Dividends [full text]

The board may declare a dividend to policyholders if it determines that a surplus exists in the Injury Fund at the end of a fiscal period after the payment of all claims, administrative costs, and the establishment of appropriate reserves for future liabilities. In making this determination, the board shall require a certified audit and actuarial report of the financial condition of the Injury Fund. The board shall establish uniform eligibility requirements for such dividends. In determining the amount of dividend to be paid to policyholders, the board may establish a procedure which takes into consideration the claims loss experience of policyholders as an incentive to encourage safe working conditions for employees. The Workers' Compensation Fund may use dividends to offset amounts due or owing by policyholders or former policyholders.

ADMINISTRATIVE RULES

Utah Admin. Code § R-568-1-16 Settlement Agreements (effective Jan. 1, 1995) [full text]

A. Section 35-1-90, U.C.A., invalidates any agreement which requires an employee to waive his rights. Settlement agreements are appropriate, however, when the parties, in good faith, view the claim as one of doubtful compensability.

B. In determining if a claim is of doubtful compensability, the Commission will look to the facts of the matter and will not be bound by mere recitations in the settlement agreement.

C. The Commission encourages the settlement of disputed claims on an amicable basis whenever possible. If the claim is not of doubtful compensability, the settlement agreement must be open-ended to the extent allowed under the Workers' Compensation Act. Parties will be bound by their agreement to pay and receive a given amount of compensation for a given injury.

D. Settlement agreements involving claims of doubtful compensability shall be subject to approval by the Commission.

E. The agreement shall be final and not subject to further review upon the same facts merely because of subsequent dissatisfaction.

F. The Commission shall suggest a format for use by parties desirous of settling claims of doubtful compensability.

VI. STATEMENT OF THE CASE

A. Nature of the case.

Giles seeks review of the Labor Commission's Order denying her Request for Reconsideration and dismissing her claims for workers' compensation benefits for an occupational disease allegedly related to her employment at Oakridge Country Club. The Commission upheld the administrative law judge's (ALJ) June 6, 2002 Order. The ALJ found that Giles' settlement in her earlier industrial accident claim barred her from asserting an

additional claim for the same injuries as an occupational disease.

B. Course of Proceedings and Disposition

Petitioner Giles filled an Application for Hearing with the Utah Industrial Commission on May 30, 1992, against Oakridge Country Club and its insurer the Workers Compensation Fund[1], claiming benefits for injuries caused by an alleged exposure to chlorine case while employed at Oakridge. R. at 2. The ALJ denied Giles' claim. R. at 47. After exhausting her administrative remedies, she filed a writ of review with the Court of Appeals. (Case No. 940468-CA). While the appellate case was pending, Giles, WCF and the Employers Reinsurance Fund settled the case by an executed agreement approved by the ALJ on March 8, 1995. Addendum A at 003-008, R. at 149-55.

Shortly after executing the agreement, Giles filed another claim for benefits with WCF, alleging the same physical and mental injuries, but now labeling them as an occupational disease incurred during her employment with Oakridge. R. at 47,66-70. She filed an Application for Hearing with the Labor Commission against WCF on December 27, 2000, claiming benefits, including permanent total disability, for her alleged occupational disease. R. at 98. WCF requested dismissal based on the March 8, 1995 settlement agreement. Addendum A at 009-010, R. at 147-48.

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[1]Respondents Oakridge and the Workers Compensation Fund shall be collectively referred to as WCF.

Giles also requested that the Commission appoint an ALJ independent of the Commission to preside over her case. R. at 96. The Presiding ALJ denied her request, R. at 121, and the Commission upheld his decision on Giles' motion for review and request for reconsideration. Addendum B at 013-015, 017-018, R. at 129-132,192-94, 198-319, 373-374. Giles filed for judicial review, and the Court of Appeals dismissed her claim for lack of jurisdiction. R. at 416, 686-89. The Utah Supreme Court denied certiorari. R. at 701-703.

The Commission joined additional respondents, including the Employers Reinsurance Fund and Giles' previous employers and their insurers. R. at. 195-96.

The ALJ issued a Ruling on Motions for Summary Judgment and Motions to Dismiss on June 6, 2002. Addendum B at 019-034, R. at 720-735. The ALJ dismissed Giles' claims against WCF and the Employers Reinsurance Fund based on the agreement reached in the March 8, 1995 settlement and the then version of Section 35-2-110 of the Utah Code. Addendum B at 029-031, R. at 731-33.

Giles filed a Motion for Review on July 5, 2002. R. at 736-789. The Commission issued an Order Denying Motion for Review on May 1, 2003, affirming the ALJ's dismissal of her claims against WCF and the Employers Reinsurance Fund. Addendum B at 035-041, R. at 1030-36. Giles filed a Motion

for Reconsideration on May 21, 2003 and submitted new arguments and evidence not part of the record. The Commission issued an Order Denying Request for Reconsideration, affirming its previous ruling, on July 16, 2003. Addendum B at 043-047, R. at 1231-35. The Commission also found no basis to consider Giles' newly submitted evidence. R. at 1233.

Giles filed an amended Petition for Review with the Court of Appeals on July 23, 2003. R. at 1239-40.

VII. FACTS

1. Giles filed an Application for Hearing with the Utah Industrial Commission on May 30, 1992, claiming workers' compensation benefits for seizures, memory loss, sinus, heart and lung injury allegedly due to a work-related exposure to chlorine gas at Oakridge Country Club on September 7, 1991. R. at 2.

2. After an evidentiary hearing and medical panel review, the ALJ dismissed Giles' claims. R. at 47. Giles sought administrative review of the ALJ's order of dismissal and eventually filed a writ of review with the Court of Appeals. (Case No. 940468-CA).

3. Giles consulted allergist Gordon Baker, M.D., who on January 5, 1995 diagnosed her collective mental and physical ailments as porphyria, a disease resulting from environmental exposure to chemicals and/or certain categories of drugs. R. at 110-112. Dr. Baker attributed her porphyria to ostensible exposure to chemicals while working at Oakridge Country Club. *Id.*

4. On March 8, 1995, while her appeal was pending, Giles, through her attorney Phillip Shell, WCF, and the Employers Reinsurance Fund settled her 1992 claims on a disputed basis. Addendum A at 003-008, R. at 150-55. The parties stipulated that Giles was permanently and totally disabled due to her multiple physical and mental conditions, including organic brain damage, and agreed to payment of a $135.00 weekly disability rate beginning December 1, 1991. Addendum A at 004, R. at 150-151. Because WCF's statutory limit of liability was 156 weeks of compensation[2], WCF paid Giles $21,060.00 as an accrued lump sum from December 1, 1991 to December 1, 1994, and $6,000 for medical expenses. Addendum A at 004-005, R. at 151-152. The Employers Reinsurance Fund paid $6000 for medical expenses and placed Giles on the rolls for lifetime permanent total disability compensation commencing December 1, 1994. Addendum A at 005, R. at 152. Under the agreement, upon reaching age 65, Giles' compensation rate will convert to the prevailing minimum amount based on 36% of the state average weekly rate, adjusted yearly. *Id.*

5. On or about May 26, 1995, shortly after executing her settlement, Giles filed a claim with the Workers Compensation Fund[3] for workers' compensation

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[2]At the time of Giles' claim, the employer/carrier's liability for permanent total disabilty was limited to the first 156 weeks of compensation if the injured worker has a pre-existing 10% whole person impairment. Utah Code Ann. §§ 35-1-67, -69 (Supp. 1993).

[3]The claim was actually received by the Fund on May 31,1995.

benefits for the same mental and physical conditions as her 1992 claim, but claimed these conditions as an occupational disease, porphyria. R. at 56, 66-70. She contended that her porphyria was caused by exposure to chemicals at Oakridge Country Club. R. at 66,68-70. Giles worked at Oakridge for six months, from June 1 to December 1, 1991. R. at 66. The Fund's claims department processed her claim by assigning a claim number and requesting an Employers First Report of Injury or Illness from Oakridge. R at 179,182.

6. Giles filed an Application for Hearing with the Labor Commission on December 27, 2001, against WCF, claiming permanent total disability as a result of an occupational disease, porphyria. R. at 96-117. At the same time, she requested assignment of an independent ALJ "because of the treatment I received from the Industrial Commission and its agencies in the past." R. at 96.

7. Two months later, the Labor Commission sent WCF a copy of Giles' Application for Hearing. R. at 123-124. WCF filed a timely Answer on March 22, 2001. Addendum A at 009-010, R. at 147-148. WCF requested dismissal from the case, noting in part as follows:

> Prior to the actual appellate review, the parties entered into a settlement agreement which was a full and final release of any claims resulting from [Giles] exposure at Oakridge Country Club. The settlement agreement was approved by the Labor Commission on March 8, 1995. The Petitioner was paid substantial amounts of money in consideration for her release of all claims. At the time of the release, the Petitioner was also represented by legal counsel. It is our belief Petitioner must be bound

> by her agreement in 1995. We have attached a copy of that agreement to substantiate our request for a dismissal.

Addendum A at 010, R. at 148.

8. The Presiding ALJ advised Giles that workers' compensation claims can only be heard by the Labor Commission's administrative law judges. R. at 121. Giles filed a Motion for Review on the ALJ's decision, and the Commission denied her Motion, holding that "unfounded, subjective opinion regarding bias, prejudice or conflict of interest is not sufficient to disqualify an ALJ." R. at 129-32; Addendum B at 013-015, R. at 192-194. The Commission also denied her Request for Reconsideration. Addendum B at 017-018 R. at 373-374.

9. While pursuing administrative review of the ALJ assignment issue, Giles responded to WCF's answer and request for dismissal on April 4, 2001. R at 165-182.

10. The Labor Commission joined several respondents, including the Employers Reinsurance Fund and Giles' previous employers. R. at 195-96.

11. Giles filed a timely request for judicial review of the Commission's interim order denying her request for an independent ALJ. R. at 416-417. This Court dismissed her case for lack of jurisdiction because the Commission's decision was not a final order. *Giles v. Oakridge Country Club, mem. decision*, 2001 UT App 381, *reh'g denied*, January 7, 2002, *cert. denied*, April 2, 2002. R. at 686-89, 701-703.

12. To allow her an opportunity to respond, the ALJ notified Giles that multiple parties had filed motions for summary judgment and dismissal. R. at 386. Giles informed the ALJ that she had already responded to WCF's request for dismissal. R. at 409-10.

13. The ALJ dismissed Giles' claims against WCF and the Employers Reinsurance Fund as part of his June 6, 2002 Order. Addendum B at 019-034, R. at 720-735. Relying on the applicable version of Section 35-2-110 of the Utah Code, the ALJ found that Giles could not "recast her claim for permanent total disability compensation as an occupational disease rather than an industrial accident" and create a new remedy that is separate from her first claim. "In short, Ms. Giles is not allowed double recovery for permanent total disability compensation from the same injury by the same employer under both the industrial accidents, and occupational disease, chapters of the Workers' Compensation Act." Addendum B at 030, R. at 731. The ALJ found that the March 8, 1995 agreement was a valid settlement of Giles' claim for permanent total disability and related benefits. Addendum B at 031, R. at 732.

14. Giles filed a Motion for Review on July 5, 2002, contending that the March 8, 1995 settlement agreement did not bar her current occupational disease claim against WCF and the Employers Reinsurance Fund. R. at 736-789.

15. The Labor Commission denied her Motion for Review on May 1, 2003. Addendum B at 035-041, R. at 1030-36. The Commission noted that summary

dismissal, in accord with Utah R. Civ. P. 56, requires a record that shows "'no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" Addendum B at 038, R. at 1033. It found, in part, as follows:

> When Mrs. Giles filed her first claim for benefits against Oakridge in 1992, she initially described her injury in terms of symptoms: "seizures, memory loss, sinus, heart and lung injury." As her claim progressed and additional medical evaluations were conducted, these descriptive symptoms were brought within a single over-arching diagnosis of porphyria. Thus, at the time Mrs. Giles settled her initial workers' compensation claim, that claim was for the injury of porphyria.
>
> Now Mrs. Giles has recast her initial claim for workers compensation benefit for the **injury** of porphyria into a claim for occupational disease benefits for the **illness** of porphyria.

Addendum B at 039, R. at 1034 (emphasis in original). The Commission affirmed the ALJ's finding that section 35-2-110[4] of the Occupational Disease Act does not allow payment of benefits in addition to benefits received for the same injury as an industrial accident. *Id.*

16. Giles filed a Request for Reconsideration on May 21, 2003, in which she argued that her 1992 injury claim was different from her current occupational disease claim. R. at 1037-1120. She also introduced new evidence and claims

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[4] Although the Commission erroneously identified the statute as "§ 34A-2-311," it quoted the text of Section 34A-3-111, the current, renumbered version of the statute in effect in 1995, Section 35-2-110. Both statutes contain the same substantive provisions.

not asserted in her motion for review, including medical records, affidavits, and a 1997 federal wage claim settlement agreement. *Id.*

17. The Commission denied Giles' Motion for Reconsideration on July 16, 2003, finding that both her 1992 accident claim and her current occupational disease claim relate to the same medical condition. Addendum B at 044, R. at 1232. The Commission also reaffirmed its determination that the benefits paid in the March 1995 settlement agreement between Giles, WCF, and the Employers Reinsurance Fund precludes additional benefits as an occupational disease claim for the same medical condition. Addendum B at 045, R. at 1233. The Commission also found no reasonable basis for accepting or considering Giles' newly submitted evidence and additional allegations. *Id.*

VIII. SUMMARY OF ARGUMENT

Section 35-2-110 of the Utah Code precluded dual payment of workers' compensation benefits for the same injury filed as separate industria accident and occupational disease claims. In 1992, Giles claimed impairment from multiple injuries arising from an alleged accident involving chlorine gas. Because Giles received benefits, including permanent total disability compensation, in the March 1995 settlement agreement of her industrial accident claim, section 35-2-110 prevents a second claim of benefits for the same set of disabling injuries reformulated as an occupational disease claim.

The Labor Commission had jurisdiction to approve the 1995

settlement agreement while the case was pending on appeal before the Court of Appeals. Settlements are favored by the law, and are promoted by the Commission and the Court of Appeals. By analogy, the current Appellate Mediation Program follows the same procedural sequence of agency approval and case dismissal as the procedural path taken by the parties in the March 1995 settlement agreement.

The March 1995 settlement agreement is a valid defense to Giles' occupational disease claim. However, Giles failed to properly introduce her argument of purported invalidity, and the underlying evidence, in administrative proceedings. Absent extraordinary circumstances, the Court of Appeals declines any review of issues and evidence not properly presented at the trial court, or administrative, level. Moreover, even if the issue and evidence had met submission and relevance standards, Giles' evidence has no force or effect on Giles' workers' compensation case.

There are no objective indicia of bias in the record of the Labor Commission's proceedings to warrant either reversal of its decision or appointment of an outside ALJ. Actionable bias requires evidence in the record of active hostility, a clear demonstration of partiality, manifested prejudice, and preconceived attitudes on points of law or policy in dispute. The Commission has made a concerted effort to address Giles' issues to the point of providing her relevant case law so that she was able to cure an incorrectly filed petition for

review.

Additionally, the State of Utah's industrial insurance policy does not meet reasonable criteria for a direct pecuniary interest between the Workers Compensation Fund and the Labor Commission. The Commission does not receive financial benefits through the Fund's dividend distributions that may flow to the State treasury.

IX. ARGUMENT

POINT I. SECTION 35-2-110 OF THE UTAH CODE BARS GILES' OCCUPATIONAL DISEASE CLAIM BASED ON THE SETTLEMENT AGREEMENT IN HER PRIOR INDUSTRIAL ACCIDENT CLAIM

The Labor Commission "has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers." Utah Code Ann. § 34A-1-301 (2001). With this authority, the Commission dismissed Giles' occupational disease claim by applying the 1991 version of Section 35-2-110 of the Occupational Disease Act to the facts in the case. Section 110 provides as follows:

> The compensation provided under this chapter [occupational disease] is not in addition to compensation which may be payable under Title 35, Chapter 1, and in all cases where injury results by reason of an accident arising out of and in the course of employment and compensation is payable for the injury under Title 35, Chapter 1 [industrial accidents], no compensation under this chapter shall be payable.

Utah Code Ann. § 35-2-110 (1991 version, Supp. 1993).

Giles brought an industrial accident claim in 1992 against her employer, Oakridge and its insurer the Workers Compensation Fund of Utah. R. at 2. She claimed permanent impairment due to multiple physical and mental impairments and injuries, including seizures, memory loss, sinus, heart and lung injury, allegedly caused by exposure to chlorine gas on September 7, 1991. *Id.* After her claim was adjudicated by the Commission, Giles settled it through a compromise settlement agreement while her case was on appeal before this court. Addendum A at 003-008, R. at 150-55. As part of the settlement, WCF and the Employers Reinsurance Fund agreed that Giles was permanently and totally disabled due to her claimed physical and mental impairments, and paid both medical expenses and permanent total disability compensation. *Id.*

In the case at hand, Giles filed an occupational disease claim, with a diagnosis of porphyria allegedly due to chemical exposure, against the same parties based on the same physical and mental impairments that were at the heart of her prior industrial accident case. R. at 2 (1992 Application), 96-117(current Application). At the time she executed her settlement in March 1995, a Seattle allergist, Dr. Gordon Baker, had already diagnosed her constellation of symptoms as porphyria. R. at 110.

The Commission, affirming the ALJ's order, found that the 1995 settlement agreement, signed by all parties and approved by the administrative law judge, awarded her benefits for her physical and mental impairments.

Addendum B at 037, R. at 1032. Section 35-2-110 therefore precluded a second award of benefits, as an occupational disease, for the same conditions and impairments. Addendum B at 039, R. at 1034. Characterization of Giles' various conditions as an accident due to chemical exposure or an occupational disease due to chemical exposure does not change the nature and extent of her physical and/or mental injuries. Giles' state of permanent total disability, and her underlying injurious impairments, were no different when she filed the Claim for Occupational Disease than they were at the time she filed her industrial accident case in 1992.

The Commission's decision is consistent with case law that upholds the binding nature of settlement agreements. In an analogous case, this Court affirmed the Industrial Commission's denial of the applicant's permanent total disability claim based on a prior settlement agreement. *Wilburn v. Interstate Electric*, 748 P.2d 582, 587-88 (Utah Ct. App. 1988) (Addendum C at 095). In *Wilburn,* the applicant's compromise settlement agreement did not include a claim for permanent total disability compensation for his back injury, yet the Commission found that the settlement barred his subsequent claim for such compensation. *Id.* at 586-87 (Addendum C at 094-095).

In the instant case, the parties, including Giles, agreed through the March 1995 settlement that she was permanently and totally disabled beginning December 1, 1991 due to multiple physical and mental impairments. Her current

occupational disease claim alleges that she is permanently and totally disabled as a result of the same injurious impairments. While the *Wilburn* case did not involve an applicant who reformulated his industrial accident into an occupational disease, the Court affirmed the Commission's determination that a compromise agreement settling claims for compensation for a disabling medical condition foreclosed a subsequent claim for different compensation for the same disability. Likewise, the Commission determined that Giles cannot seek a second award of permanent total disability and related benefits because her March 1995 agreement settled claims for the same disabling conditions.

In addition, the Commission's application of section 35-2-110 is based on the premise that Giles is not allowed double recovery for permanent total disability compensation for the same injury by the same employer under both the industrial accident and occupational disease chapters of the Workers' Compensation Act. Addendum B at 045, R. at 1233. The Utah Supreme Court has opined that double recovery of compensation is contrary to the Workers' Compensation Act. *Johnson v. Harsco/Heckett*, 739 P.2d 986, 988 (Utah 1987) (Addendum C at 052).

The Commission upheld the ALJ's summary dismissal of Giles' claim against WCF and the Employers Reinsurance Fund because there were no material facts in dispute and the law barred her new occupational disease claim for the same injuries. The parties agreed, per the March 1995 agreement, that

Giles was permanently and totally disabled due to multiple mental and physical problems. Addendum A at 004, R. at 151. The parties settled their dispute as to the compensability of Giles' claims by a compromise award of lifetime benefits. Addendum A at 004-005, R. at 151-152. Section 35-2-110 of the Utah Code precludes claims for an injury due to an occupational disease when the injured worker received benefits for the same injury as an accident.

Accordingly, the Commission applied the facts to the law and correctly found that Section 35-2-110 barred Giles' second claim against WCF and the Employers Reinsurance Fund for benefits under the Occupational Disease Act.

POINT II. THE LABOR COMMISSION HAD JURISDICTION TO APPROVE THE MARCH 1995 SETTLEMENT AGREEMENT

Giles contends that the Commission did not have jurisdiction to approve the March 1995 settlement agreement because this Court did not remand the pending appeal case back to the Commission for its approval of the agreement. This position is without merit. Her case was before the Court of Appeals under its authority to review the Commission's order, but that jurisdiction does not take away the parties' right to pursue and execute settlement of that case, with the Commission's concomitant approval.

Settlement agreements are favored by the law. *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995). Moreover, the Commission encourages and

supports settlement through its administrative rules. Utah Admin. Code § R568-1-16 (1995)[5] (full text in section V at page 4, *supra*). The Court of Appeals also promotes dispute resolution and compromise settlement through the Appellate Mediation Office. *See* Utah R. App. P. 28A (added April 1, 2000). While this program was not in effect when Giles' industrial accident claim was before the Court in 1995, the appellate mediators utilize sequential procedures that are analogous to this case. If the parties reach a compromise settlement agreement through mediation, the executed document is then submitted to the appellate mediator and the court of appeals issues an order of dismissal. *See* Addendum D at 099 (February 26, 2004 letter from which the names of the parties have been redacted).[6]

The March 1995 settlement agreement was executed in the same sequence as cases currently settled in the appellate mediation program: the court dismissed the case after the parties and the Commission executed the agreement. If agency-approved mediated settlements are valid while the case is under the Court's jurisdiction on appeal, then the March 1995 settlement was valid while Giles' 1992 case was under the same jurisdiction.

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[5]This rule was in effect when the March 1995 settlement agreement was approved. The current version of the settlement rule is Utah Admin. Code § R602-2-5.

[6]This letter is not intended as evidence but is included in the Addendum for the Court's convenience.

Accordingly, the Court of Appeals' jurisdiction to review administrative decisions did not prevent the Commission from approving the March 1995 settlement agreement.[7]

POINT III. WCF IS NOT BARRED FROM RELYING ON THE MARCH 1995 SETTLEMENT AGREEMENT AS AN AFFIRMATIVE DEFENSE

Giles erroneously contends that extraneous statements in a 1997 federal overtime wage agreement between Giles and her employer, Oakridge, abrogates her prior 1995 workers' compensation settlement agreement.

First, Giles' 1997 wage claim settlement document was not evidence in the Commission's record. She did not raise the abrogation argument or submit the documents until she filed her Request for Reconsideration. R. at 1037-1120. In contrast, WCF asserted the March 1995 settlement agreement as an affirmative defense in their Answer to Giles' Application for Hearing. Addendum A at 003-010, R. at 147-155. Giles filed a response to WCF's Answer and also acknowledged to the ALJ that she had responded to WCF's request for dismissal. R. at 165, 409. Thus, she had ample opportunity to present the proported evidence and any related claims prior to the ALJ's Order.

The Labor Commission declined to accept Giles' additional argument

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[7]Moreover, requiring the Court to remand the case to the Labor Commission for settlement and approval before execution of the settlement leaves a petitioner at risk of no remedy. In the event the parties failed to reach an agreement, or the Commission did not approve the settlement, a petitioner would be left with a dismissed appeal and no settlement.

and new evidence in her Request for Reconsideration, noting that they have "consistently declined to consider evidence or issues raised for the first time as part of a request for reconsideration, unless such matters could not reasonably have been raised earlier." Addendum B at 045, R. at 1233. The Commission has statutory discretion to receive evidence and manage the agency's adjudicative proceedings. Utah Code Ann. § 34A-2-802 (2001) (full text in section V page 3, *supra*). Giles' ostensible reluctance to proffer a settlement agreement containing a confidentiality clause does not pass muster as newly discovered evidence or similar situation that would compel submission of evidence and related arguments after the record was closed.

Absent plain error or other exceptional circumstances, the Court of Appeals declines consideration of issues not properly raised below. *See, e.g.*,*Olson v. Park-Craig-Olson Inc.*, 815 P.2d 1356, 1358-59 (Utah Ct. App. 1991) ("[w]e may, however, weigh only those facts and legal arguments preserved for us in the trial court record") (Addendum C at 063-064). Giles' did not properly submit her argument and underlying evidence to the Commission. Nor has she presented any exceptional circumstances that would justify the Court's consideration of this issue for the first time on appeal.

Even if the documents Giles submitted in her Request for

Reconsideration were admissible as evidence[8], her wage claim settlement agreement has no force or effect on her workers' compensation claims. Except in limited circumstances prescribed by statute, district courts in Utah do not have jurisdiction to adjudicate or enforce workers' compensation claims. *See Sheppick v. Albertson's Inc.*, 922 P.2d 769 (Utah 1996) ("[d]istrict courts have no jurisdiction whatsoever over cases that fall within the purview of the Workers" Compensation Act") (Addendum C at 072). Likewise, federal district courts, incident to adjudication of federal wage claims, have no jurisdiction over state workers' compensation claims. *See United States Smelting v. Evans*, 35 F.2d 459, 461 (8th Cir. 1929), *cert. denied*, 281 U.S. 744, 50 S. Ct. 350 (1930) (Addendum C at 076-077).

Accordingly, Giles cannot enforce whatever extraneous provisions related to her workers' compensation claims that may have been injected into her 1997 federal wage claim settlement agreement. District courts, regardless of their adjudication of Giles' federal wage issues, do not have jurisdiction to enforce superfluous terms in that agreement relating to Giles' past or present workers' compensation claims.

Further, by basic principles of contract law, the purported terms of her federal wage claim agreement cannot modify Giles' workers' compensation

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[8]Given the inherent lack of connection between Giles' federal wage claim agreement and her workers' compensation case, her evidence may have been inadmissible for lack of relevance. Utah Code Ann. § 34A-2-802(2) (2001).

settlement agreement. All parties must agree to alter, supplement, supercede, or modify a prior contract. *See Rapp v. Mountain States Telephone & Telegraph*, 606 P.2d 1189, 1191 (Utah 1980) ("[p]arties to a contract may, by mutual consent, alter all or any portion of that contract by agreeing upon a modification thereof" [emphasis added]); *17A Am. Jur.* 2d Contracts § 500 (2004) ("[t]he same meeting of minds is needed that was necessary to make the contract in the first place"). Neither the Workers Compensation Fund nor the Employers Reinsurance Fund were parties in Giles' federal wage claim dispute with Oakridge. Additionally, the Commission did not approve any purported changes to the March 1995 agreement. Without the mutual consent and agreement of all parties involved in her prior workers' compensation settlement and approval by the Labor Commission, the abrogating provisions bootstrapped into her wage claim settlement have no legal force or effect.

In summary, the Commission correctly declined to consider Giles' late submission of evidence and accompanying argument raised for the first time at the last stage of administrative review. Because her claim was not properly raised below, it cannot be raised on appeal. Notwithstanding the improper submission issue, the purported settlement provisions upon which she relies are not enforceable, both on jurisdictional grounds and on contract law principles.

POINT IV. THERE IS NO OBJECTIVE EVIDENCE OF BIAS THAT JUSTIFIES EITHER REVERSAL OF THE LABOR COMMISSION'S DECISIONS OR APPOINTMENT OF AN OUTSIDE ADJUDICATION OFFICER

The Utah Supreme Court has addressed bias issues, both actual impermissible bias and the unacceptable risk of bias, in the context of administrative proceedings. *V-1 Oil Co. v. Department of Environmental Quality*, 939 P.2d 1192, 1195-1198 (Utah 1997) (Addendum C at 082-084). In *V-1 Oil*, the court examined agencies' adjudicative functions in deciding that the Department of Environmental Quality satisfied due process with sufficient separation between their adjudicative and investigative/prosecutorial functions. *Id.* at 1203 (Addendum C at 088). The court noted the following scenarios that may compel a judge's recusal, or new proceedings, due to bias: 1) previous legal representation of one or more parties; 2) clear demonstration of partiality on the face of the record; 3) a direct and personal pecuniary benefit; 4) preconceived attitudes on points of law or policy at the heart of the dispute (rarely severe enough for disqualification)[9]; 5) overt prejudice against a person or group of people. *Id.* at 1197-99.

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[9]"'[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' . . . Mere 'expressions of impatience, dissatisfaction, annoyance, and even anger,' are insufficient to establish the existence of bias or partiality." *Campbell Maack & Sessions v. Debry*, 2001 UT App 397 ¶ 25, 38 P.3d 984 (quoting *Liteky v. United States*, 510 U.S. 540, 555-56 (1994)).

Giles has asserted multiple claims regarding the Commission's alleged procedural irregularities in the summary disposition of her case as evidence of bias. However, the Commission has followed appropriate procedures despite a constant barrage of lengthy documents and filings. Giles was given full opportunity to respond to WCF's request for dismissal. When the ALJ notified Giles of pending motions for dismissal and summary judgment to allow her an opportunity to respond, she acknowledged that she had already responded to WCF's request for dismissal. R. at 165, 386, 409.

Additionally, when Giles filed a premature petition for judicial review, the Commission's general counsel informed her of a recent relevant court decision so that she was able to cure her faulty filing with an amended petition. R. at 1236, 1238, 1239. Thus, the Commission showed understandable deference to Giles by leveling the playing field for her, despite the fact that *pro se* parties are nominally presumed to know the law. *See Lundahl v. Quinn*, 2003 UT 11, ¶ 3-4, 67 P.3d 1000.

Giles alleges a financial conflict of interest between the Workers Compensation Fund and the Commission. However, she fails to present rational criteria that may be construed as direct pecuniary interest. The State of Utah insures all of its entities through the Workers Compensation Fund, a quasi-public corporation. If funds are distributed to policyholders in accordance with Section 31A-33-116 of the Utah Code, the State, as the policyholder, may qualify for

such payments. The funds are not distributed to a specific division of the State.

Consequently, the Labor Commission reaps no more financial benefit than this court and the entire state court system, which as state entities are covered by the State's policy with the Workers Compensation Fund.[10] Giles' contrived financial nexus does not qualify as "the presence of a clear, substantial pecuniary benefit." *V-1 Oil Co.*, 939 P.2d at 1198.

Accordingly, by the criteria discussed in *V-1 Oil Co.*, there is no objective evidence in the record of the established indicia of bias or prejudice that may compel reversal of the Commission's decisions in this case and/or appointment of an outside adjudicative officer. Likewise, there is no financial conflict of interest between the Commission and the Workers Compensation Fund based on the State of Utah's industrial insurance policy.

X. CONCLUSION

The Labor Commission correctly dismissed Giles' claim against WCF and the Employers Reinsurance for permanent total disability due to an occupational disease. The applicable version of Section 35-2-110 of the Utah Code precludes awards of benefits for the same injury claimed as both an industrial accident and an occupational disease. Because the parties' March

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[10]Possibly the Utah taxpayers are beneficiaries of this arrangement insofar as a small amount of their tax dollars are returned to the treasury to offset future state expenditures.

1995 settlement agreement deemed her permanently and totally disabled and awarded benefits for an industrial accident, Giles cannot receive the same benefits for the same injurious impairments as a separate occupational disease.

The record is devoid of any bias or partiality that would necessitate appointment of an outside administrative law judge or reversal of the Commission's decision.

Respondents Workers Compensation Fund and Oakridge respectfully request the Court of Appeals affirm the Labor Commission's decision.

Submitted this 30th day of June, 2004.

Floyd W Holm, Attorney for Oakridge Country Club
and the Workers Compensation Fund

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the brief of Respondents Workers Compensation Fund and Oakridge Country Club in Giles v. Utah Labor Commission, et al, Case # 20030577-CA were mailed, first class postage prepaid, on the 30th day of June, 2004, to each of the following parties:

Glenda W. Giles
Petitioner
P.O. Box 354
Eureka, MT 59917

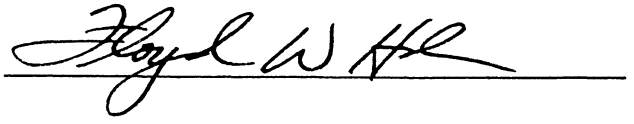
Alan Hennebold
Counsel for the Labor Commission
Labor Commission
P.O. Box 146600
Salt Lake City, UT 84114

Lorrie Lima
Counsel for the Employers Reinsurance Fund.
Employers Reinsurance Fund
P.O. Box 146600
Salt Lake City, UT 84114

Michael E. Dyer
Counsel for Adecco, f/k/a TAD Technical Svc. Corp and/or Liberty Mutual Ins.
Blackburn & Stoll
257 East 200 South Suite 800
Salt Lake City, UT 84111

Mark R. Sumsion
Counsel for Oakridge and/or Wasatch Crest Mutual Ins.
Richards Brandt Miller & Nelson
P.O. Box 2465
Salt Lake City, UT 84110

Theodore E. Kanell
Counsel for ACE USA/Pacific Employers Ins.
Plant, Wallace, Christensen & Kanell
136 East South Temple Suite # 1700
Salt Lake City, UT 84111



ADDENDUM

SECTION A

PHILLIP B. SHELL (3861)
DAY & BARNEY
Attorneys for Applicant
45 East Vine Street
Murray, Utah 84107
Telephone: (801) 262-6800

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

GLENDA GILES, Applicant, vs. OAKRIDGE COUNTRY CLUB, and/or WORKERS' COMPENSATION FUND OF UTAH, and EMPLOYERS' REINSURANCE FUND Defendants.	: : : : : :	SETTLEMENT AGREEMENT AND ORDER Case No. 92-693 Judge Timothy C. Allen

1. THIS IS A SETTLEMENT AGREEMENT between Glenda Giles, applicant; Oakridge Country Club, the employer; the Workers' Compensation Fund of Utah as insurance carrier for the employer, and the Employers' Reinsurance Fund.

2. The applicant has filed a claim for workers' compensation insurance benefits in connection with allegations that she was exposed to chlorine gas in the course of her employment with the Oakridge Country Club on September 7, 1991. She submits that she is permanently and totally disabled from further employment as a direct result of the physical and

mental injuries allegedly, including organic brain damage, sustained via the exposure.

3. The employer, and its workers' compensation insurer, denies that the applicant's claim is valid. First, the employer denies that the applicant was exposed to chlorine gas, but rather the smell of chlorine fumes coming from so-called superchlorinated water. Second, the employer denies any causal relationship between this incident and the applicant's health difficulties.

4. In light of this dispute, and in light of the varying odds for success for the claims of the parties, it is the desire of the parties to reach a compromise settlement of a claim of disputed validity. The parties are willing, as set forth below to stipulate that the claimant is permanently and totally disabled, but that any benefits paid shall be as set forth and limited by the terms of this agreement.

5. For the purpose of this compromise of this disputed claim, the defendants agree to pay the applicant compensation for permanent total disability at the rate of $135.00 per week.

6. It is further agreed that the applicant has at least a 10% whole body impairment rating due to pre-existing conditions, including cervical degenerative disk disease.

7. The applicant's commencement date for permanent total disability is agreed to be December 1, 1991. In light of her age and physical limitations, she is not considered to be a candidate for successful vocational rehabilitation. She qualified for Social Security Disability beginning December 1, 1991.

8. Based upon the foregoing, the employer/carrier shall pay the applicant the lump sum amount of $21,060.00 in compensation in full settlement of their portion of her workers' compensation claim of September 7, 1991. This represents $135.00 per week for 156 weeks beginning December 1, 1991. The defendants shall not be responsible for any

medical or health care benefits, except that the Defendants shall reimburse the applicant in the sum of $12,000.00 for past medical bills and expenses incurred in connection with her alleged September 7, 1991 injury. Of this amount, $6,000.00 shall be paid by the employer/carrier and $6,000.00 shall be paid by the Employers' Reinsurance Fund. The total lump sum payment of $33,060.00, less attorneys fees as set forth below, shall be paid upon approval of this agreement by the Industrial Commission.

9. The Employers' Reinsurance Fund agrees to place the applicant on its permanent total disability rolls beginning December 1, 1994 at the rate of $135.00 per week. Applicant shall remain on the Fund's payroll for so long as she shall live, or until further order of the Industrial Commission of Utah, subject to any ~~affects~~ effects too afforded by the terms of §35-1-67(5), U.C.A.. Upon the applicant reaching the age of 65 years (June 17, 2004), her weekly compensation rate shall convert to the then prevailing minimum amount based on 36% of the state average weekly wage, as adjusted yearly.

10. Based upon the legal services provided by applicant's attorney in connection with this case and in reaching this settlement, it is agreed that an attorneys fee of $4,212.00 should be awarded and deducted from the lump sum due the applicant and be paid by the Workers' Compensation Fund directly to the applicant's attorney.

11. It is understood that this is the full agreement of the parties. No other terms, express or implied, are intended.

12. The parties agree that the appeal pending in the Utah Court of Appeals, Case No. 940468-CA shall be remanded back to the Industrial Commission for approval of this settlement agreement.

It is understood that this Settlement Agreement becomes binding and effective only when approved by the Industrial Commission of Utah.

By this Settlement Agreement, the parties hereto jointly petition the Industrial Commission for the entry of an Order approving this Settlement Agreement.

Dated this 28th day of February, 1995.

Glenda Giles
GLENDA GILES
Applicant

PHILLIP B. SHELL
Day & Barney
Attorney for Applicant

Dated this 7th day of ~~February~~ March, 1995.

RICHARD G. SUMSION
Attorney for Workers' Compensation Fund

Dated this ~~8~~ 14th day of ~~February,~~ March 1995.

ERIE V. BOORMAN, Administrator
Employers' Reinsurance Fund

ORDER

The parties hereto, having settled the claim of Glenda Giles, and good cause appearing therefore

IT IS HEREBY ORDERED that the stipulated terms of the settlement agreement of the parties, as set forth above, are accepted in full and are hereby adopted as the order of the Industrial Commission in this matter.

Dated this 8 day of March, 1995.

Timothy C. Allen
Administrative Law Judge
Industrial Commission of Utah

CERTIFICATE OF MAILING

I certify that on March 8, 1995, a copy of the attached Settlement Agreement and Order, in the case of Glenda Giles, was mailed to the following persons at the following addresses, postage pre-paid:

Glenda Giles, P.O. Box 411, Kaysville, UT 84037

Phillip Shell, Atty., 45 East Vine Street, Murray, UT 84107

Richard Sumsion, Atty., P.O. Box 57929, SLC, UT 84157-0929

Erie V. Boorman, Administrator, Employers' Reinsurance Fund
P.O. Box 146611, SLC, UT 84114-6611

THE INDUSTRIAL COMMISSION OF UTAH

By [signature]

WCF

March 22, 2001

Loretta Woodmansee, Hearing Clerk
Legal Division
Labor Commission of Utah
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6615

RE: Claimant: Glenda W. Giles
File No.: 1995-24547-8J
Inj Date: 09-07-91
Employer: Oakridge Country Club
Case No.: 2000-1228

Dear Ms. Woodmansee:

We are in receipt of your letter dated February 23, 2001 together with the Application for Hearing filed by the above-named Petitioner.

With regard to the specific allegations contained in the Application for Hearing, Respondents respond as follows:

1. With regard to the allegations contained in Paragraph 1, 2, and 3 of the Application for Hearing, Respondents deny the Petitioner sustained any injuries as a result of a chemical exposure on or about September 7, 1991 while employed at Oakridge Country Club.

2. With regard to the allegations contained in Paragraph 4 of the Application for Hearing, Respondents are without sufficient information to admit or deny this allegation.

3. With regard to the allegations contained in Paragraph 5 of the Application for Hearing, Respondents would indicate all the medical evidence submitted by the Petitioner has been reviewed in full by the parties and is no longer relevant to the proceedings.

4. With regard to the allegations contained in Paragraph 6 of the Application for Hearing, Respondents have no knowledge other than the employment with Oakridge Country Club of the Petitioner's prior employers.

At this time, Workers Compensation Fund on behalf of the employer, Oakridge Country Club, would request they be dismissed from this action. Petitioner has had many opportunities to provide evidence concerning her alleged exposure. The exposure was thoroughly explored by a medical panel in 1993 and the Petitioner's case was resoundingly dismissed.

Subsequent to the dismissal by the administrative law judge, the Petitioner sought appellate review of her claim. Prior to the actual appellate review, the parties entered into a settlement agreement which was a full and final release of any claims resulting from her exposure at Oakridge Country Club. That settlement agreement was approved by the Labor Commission on March 8, 1995. The Petitioner was paid substantial amounts of money in consideration for her release of all claims. At the time of the release, the Petitioner was also represented by legal counsel. It is our belief Petitioner must be bound by her agreement in 1995. We have attached a copy of that agreement to substantiate our request for a dismissal.

We have no knowledge of what Petitioner's claims consist of as it relates to her other employers and will not comment on those. It is, however, our belief the claim against Workers Compensation Fund and Oakridge Country Club should be promptly dismissed.

Very truly yours,

WORKERS COMPENSATION FUND

Janet L. Moffitt
Attorney at Law
288-8058

JLM:kj

cc: Glenda W. Giles, P. O. Box 354, Eureka, Montana 59917 (w/enc.)
Oakridge Country Club, 1492 West Shepherd Lane, Farmington, Utah 84025
Mike Baker - Section C-8
Mike Bowman - Section CC

SECTION B

UTAH LABOR COMMISSION

GLENDA W. GILES,	*	
	*	ORDER DENYING
Applicant,	*	MOTION FOR REVIEW
	*	
v.	*	
	*	
OAKRIDGE COUNTRY CLUB and	*	
WORKERS COMPENSATION FUND	*	
OF UTAH,	*	
	*	Case No. 20001228
Defendants.	*	

Glenda W. Giles asks the Utah Labor Commission to review the Administrative Law Judge's denial of Ms. Giles' request for appointment of an ALJ from outside the Commission to preside over the adjudication of Ms. Giles' claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Have sufficient grounds been shown to warrant appointment of an ALJ from outside the Commission to preside over the adjudication of Ms. Giles' claim?

BACKGROUND AND DISCUSSION

On approximately December 20, 2000, Ms. Giles filed a claim for occupational disease benefits against Oakridge Country Club and its workers' compensation carrier, the Workers Compensation Fund. In an accompanying letter, Ms. Giles asked that her claim be assigned to an ALJ from outside the Labor Commission "because of the treatment I have received form the Industrial Commission and its agencies in the past." On February 22, 2001, Judge LaJeunesse denied Ms. Giles' request for an independent ALJ. On March 16, 2001, Ms. Giles sought Commission review of Judge LaJeunesse's decision.

In her motion for review to the Commission, Ms. Giles gives the following explanation of her request for an independent ALJ:

> Given the many illegal actions previously committed against me by employees of the Industrial/Labor Commission; the fact that my Application for

> Hearing was 'lost' for a two month time period by the Adjudication Division: together with the arbitrary and capricious decision rendered by (Judge) LaJenuesse. I renew my contention that I cannot receive a fair hearing before the Labor Commission or any of its ALJs. I also renew my official written request that my case be assigned to an ALJ with absolutely no ties to the Labor Commission.

As a matter of constitutional and statutory law, as well as Commission practice, Ms. Giles is entitled to a fair hearing before an impartial ALJ, free of bias, prejudice or conflict of interest. The Commission would, if necessary, appoint an independent ALJ in any case where the Commission's ALJs could not meet the foregoing standards of impartiality.

However, a party's unfounded, subjective opinion regarding bias, prejudice or conflict of interest is not sufficient to disqualify an ALJ. In this case, Ms. Giles has not submitted any objective support for her motion for an independent ALJ, nor is the Commission aware of any basis for such action. The Commission therefore declines to appoint an independent ALJ to preside over Ms. Giles' occupational disease claim.

ORDER

The Commission affirms the decision of the ALJ and denies Ms. Giles' motion for review. It is so ordered.

Dated this 30th day of April, 2001.

R. Lee Ellertson
Utah Labor Commissioner

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Glenda W. Giles, Case No. 20001228, was mailed first class postage prepaid this 30th day of April, 2001, to the following:

GLENDA W. GILES
P O BOX 354
EUREKA MT 59917

OAKRIDGE COUNTRY CLUB
1492 WEST SHEPHERD LANE
FARMINGTON UT 84025

JAN MOFFITT
WORKERS COMPENSATION FUND OF UTAH
P O BOX 57929
SALT LAKE CITY UT 84157

Sara Jenson
Support Specialist
Utah Labor Commission

Orders\01-1228a

UTAH LABOR COMMISSION

GLENDA W. GILES,	*	
	*	**ORDER DENYING RECONSIDERATION**
Applicant,	*	
	*	
v.	*	
	*	
OAKRIDGE COUNTRY CLUB and WORKERS COMPENSATION FUND OF UTAH,	*	
	*	
	*	**Case No. 20001228**
Defendants.	*	

Glenda W. Giles asks the Utah Labor Commission to reconsider its prior decision upholding the Administrative Law Judge's denial of Ms. Giles' request for appointment of an ALJ from outside the Commission to preside over the adjudication of Ms. Giles' claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-13 and Utah Admin. Code R602-2-1.O.

BACKGROUND AND DISCUSSION

Ms. Giles has asked that her claim for occupational disease benefits against Oakridge Country Club and its workers' compensation carrier, the Workers Compensation Fund, be assigned to an ALJ from outside the Labor Commission "because of the treatment I have received from the Industrial Commission and its agencies in the past." The ALJ denied Ms. Giles' request. Ms. Giles then asked the Commission to review the ALJ's decision. The Commission considered Ms. Giles' proffered basis for appointment of an ALJ from outside the Commission, but ultimately agreed with the ALJ's determination that no such action was warranted.

Ms. Giles now asks the Commission to reconsider its decision. But as the Commission noted in its previous decision, "a party's unfounded, subjective opinion regarding bias, prejudice or conflict of interest is not sufficient to disqualify an ALJ. In this case, Ms. Giles has not submitted any objective support for her motion for an independent ALJ, nor is the Commission aware of any basis for such action."

There is nothing in Ms. Giles' most recent submissions that convinces the Commission that its prior decision was in error. The Commission therefore reaffirms its decision not to appoint an independent ALJ to preside over Ms. Giles' occupational disease claim.

In passing, the Commission notes it advised the parties that its decision regarding Ms. Giles' request for reconsideration would be issued by June 8, 2001. However, because the Utah Labor Commissioner was out-of-state from June 2 through June 9, 2001, the Commission was unable to issue its decision in this matter until June 11, 2001.

ORDER

The Commission hereby denies Ms. Giles' request for reconsideration. It is so ordered.

Dated this 11th day of June, 2001.

R. Lee Ellertson
Utah Labor Commissioner

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Glenda W. Giles, Case No. 20001228, was mailed first class postage prepaid this 11th day of June, 2001, to the following:

GLENDA W. GILES
P O BOX 354
EUREKA MT 59917

OAKRIDGE COUNTRY CLUB
1492 WEST SHEPHERD LANE
FARMINGTON UT 84025

JAN MOFFITT
WORKERS COMPENSATION FUND OF UTAH
P O BOX 57929
SALT LAKE CITY UT 84157

Sara Jenson
Support Specialist
Utah Labor Commission

Orders\01-1228b

UTAH LABOR COMMISSION
P.O. BOX 146615
Salt Lake City, Utah 84114-6615

Case No. 20001228

GLENDA W. GILES,	*	RULING ON MOTIONS FOR
Petitioner,	*	SUMMARY JUDGMENT AND
vs.	*	MOTIONS TO DISMISS
OAKRIDGE COUNTRY CLUB and/or WORKERS COMPENSATION FUND OF UTAH and/or WASATCH CREST MUTUAL INS., and EMPLOYERS' REINSURANCE FUND; TAD RESOURCES nka ADECCO and/or CONSTITUTION STATE SERVICE CO. and/or ACE USA/PACIFIC EMPLOYERS INS. CO. and/or LIBERTY MUTUAL INS. CO.; INTERNAL REVENUE SERVICE,	*	Judge: Richard M. La Jeunesse
Respondents,	*	

I. STATEMENT OF THE CASE

The petitioner, Glenda Giles, filed an "Occupational Disease Claim" with the Utah Labor Commission on December 27, 2000, and claimed entitlement to permanent total disability compensation. Ms. Giles' claim for workers' compensation benefits arose out of her alleged contraction of "chemically induced porphyria" as a result of exposure to "numerous toxic fumes and materials" during the course of her employment with Oakridge Country Club (Oakridge), TAD Resources nka Adecco (Adecco), and the Internal Revenue Service (IRS).

The respondents denied that Ms. Giles' employment with respondents exposed her to substances which medically caused porphyria. The respondents argued that Ms. Giles' alleged porphyria resulted from causes other than her employment conditions.

Employers' Reinsurance Fund (ERF), Oakridge, Workers' Compensation Fund of Utah (WCF), Wasatch Crest Mutual Ins. Co. (Wasatch Crest), all contended that Ms. Giles' released them from further workers' compensation liability as to her employment with Oakridge when on March 8, 1995 she entered into a "Settlement Agreement."

Adecco claimed that Ms. Giles' failed to meet certain statutes of limitations with respect to the filing of her claim. ACE USA/Pacific Employers' Mutual Ins. Co. (ACE) and Constitution State Service Co. (Constitution) both denied that they provided insurance coverage for Adecco during the periods of Ms. Giles' employment. Finally, a question existed in my mind as to whether the Labor Commission exercised any Jurisdiction over the IRS, a federal agency.

II. ISSUES.

1. Did Glenda Giles' employment with any or all of the respondents expose her to "toxic fumes and materials" that caused her to suffer porphyria?

2. Is Glenda Giles' Occupational Disease Claim against any or all of the respondents precluded by the March 8, 1995 Settlement Agreement?

3. Did Glenda Giles' fail to file her workers' compensation claims against Adecco within the applicable statutes of limitations?[1]

4. Should the respondents, Wasatch Crest, ACE, and Constitution, be dismissed from the present action because they never provided insurance coverage for any of the respondent employers during the times relevant to this case?

5. Does the Labor Commission have jurisdiction to adjudicate the workers' compensation liability of the Internal Revenue Service?

III. PROCEEDINGS.

On December 27, 2000 Ms. Giles filed the present Occupational Disease claim based on her alleged exposure to "toxic fumes and materials" during the course of her employment with Oakridge from May 1991, through December 1991. On March 5, 2001 Wasatch Crest filed a Request for Dismissal from the present claim based on the assertion that Wasatch Crest never insured Oakridge during the period May 1991, through December 1991. Wasatch Crest filed a number of subsequent motions to dismiss along the same lines.

[1] I never reached this issue, because I found resolution of the other issues dispositive.

On March 23, 2001 WCF filed an answer to Ms. Giles' Occupational Disease Claim. WCF denied the existence of any evidence that demonstrated a causal connection between Ms. Giles' porphyria and her employment with Oakridge. WCF also claimed that the Settlement Agreement of March 8, 1995 released Oakridge and WCF.

On April 4, 2001 Constitution filed a response that Constitution provided no coverage for Adecco during the relevant time periods at issue in this case. On May 24, 2001 ACE also filed a response that ACE provided no coverage for Adecco during the relevant time periods at issue in this case.

Adecco and Liberty Mutual filed an answer to Ms. Giles' Occupational Disease Claim. Adecco denied the existence of any evidence that demonstrated a causal connection between Ms. Giles' porphyria and her employment with Adecco. On the same day Liberty Mutual and Adecco filed a Motion for Summary Judgment. Adecco argued that Ms. Giles' claims failed for untimeliness under applicable statutes of limitations.

On July 11, 2001 ERF filed a Motion to Dismiss ERF from the present action. ERF raised the same legal defenses advanced by WCF.

Ms. Giles filed her own assorted dispositive motions on April 4, 2001. Additionally, Ms. Giles filed at various times motions to default each of the respondents for untimely answers.[2]

In the meantime, Ms. Giles requested the appointment of an Administrative Law Judge outside the Labor Commission. Ms. Giles pursued her request all the way to the Utah Supreme Court, which ultimately denied her Petition for Writ of Certiorari on April 8, 2002. The Utah Court of Appeals remitted the case back to the Labor Commission on May 9, 2002.

IV. FINDINGS OF FACT

A. The Respondents, Oakridge Country Club, Workers Compensation Fund of Utah, and Employers' Reinsurance Fund.

On March 8, 1995 Judge Timothy C. Allen of the Industrial Commission of Utah nka Labor Commission issued an Order that adopted a Settlement Agreement entered into by Glenda Giles, Oakridge, WCF and ERF. Ms. Giles and her attorney Phillip Shell both executed the Settlement Agreement.

[2] IRS was the only respondent that failed to file an answer in this case.

The Settlement Agreement between Ms. Giles, WCF and ERF stated in relevant part:

2. The applicant (Glenda Giles) has filed a claim for workers' compensation insurance benefits in connection with allegations that she was exposed to chlorine gas in the course of her employment with the Oakridge Country Club on September 7, 1991. She submits that she is permanently and totally disabled from further employment as a direct result of the physical and mental injuries allegedly, including organic brain damage, sustained via the exposure.

3. [t]he employer denies any causal relationship between this incident and the applicant's health difficulties.

4. In light of this dispute, and in light of the varying odds for success for the claims of the parties, it is the desire of the parties to reach a compromise settlement of a claim of disputed validity. The parties are willing, as set forth below to stipulate that the claimant is permanently and totally disabled, but that any benefits paid shall be as set forth and limited by the terms of this agreement.

5. For the purpose of this compromise of this disputed claim, the defendants agree to pay the applicant compensation for permanent total disability at the rate of $135.00 per week.

7. The applicant's commencement date for permanent total disability is agreed to be December 1, 1991. In light of her age and physical limitations, she is not considered to be a candidate for successful vocational rehabilitation. She qualified for Social Security Disability beginning December 1, 1991.

8. Based on the forgoing, the employer/carrier shall pay the applicant the lump sum amount of $21,060.00 in compensation in full settlement of their portion of her workers' compensation claim of September 7, 1991. This represents $135.00 per week for 156 weeks beginning December 1, 1991. The defendants shall not be responsible for any medical or health care benefits, except that the Defendants shall reimburse the applicant in the sum of $12,000.00 for past medical bills and expenses incurred in connection with her alleged September 7, 1991 injury. Of this amount, $6,000.00....The total lump sum payment of $33,060.00, less attorneys fees set forth below, shall be paid upon approval of this agreement by the Industrial Commission.

9. The Employers' Reinsurance Fund agrees to place the applicant on it's permanent total disability roles beginning December 1, 1994 at the rate of $135.00 per week. Applicant shall remain on the Fund's payroll for so long as she shall live, or until further order of the Industrial Commission of Utah, subject to any offsets afforded by the terms of §35-1-67(5) U.C.A. Upon the applicant reaching the age of 65 years (June 17, 2004), her weekly compensation rate shall convert to the then prevailing minimum amount based on 36% of the state average weekly wage, as adjusted yearly.

Ms. Giles based her original claim for permanent total disability benefits against the respondents on a diagnosis of porphyria by Dr. Gordon Baker M.D. dated January 5, 1995. [see: letter of Dr. Gordon Baker M.D. attached to Ms. Giles' Application for Hearing]. Ms. Giles also based her present claim for permanent total disability benefits against the respondents on the same diagnosis of porphyria by Dr. Baker only couched as an occupational disease, rather than an industrial accident claim. [id.].

B. The Respondents Wasatch Crest Mutual Ins. Co., Constitution State Service Co., and AC USA/Pacific Employers Ins. Co.

The respondents Wasatch Crest, Constitution, and ACE all denied that they as insurance companies provided workers' compensation insurance coverage for any of Ms. Giles' employers during the relevant time periods at issue. None of the other parties contradicted the assertions of the respondents Wasatch Crest, Constitution, and ACE. None of the parties alleged the existence of insurance policies provided by Wasatch Crest, Constitution, or ACE that covered any of Ms. Giles' employers during the relevant time periods at issue.

C. The Respondents TAD Resources nka Adecco and Liberty Mutual Ins, Co.

Ms. Giles' "Occupational Disease Claim" filed on December 27, 2000 originally named only Oakridge and WCF as respondents. Ms. Giles' initially claimed that her porphyria resulted from exposure to "numerous toxic fumes and materials in the course of her employment with Oakridge C.C....the period May 1991 to December 1991." [see: "Occupational Disease Claim" filed December 27, 2000 page 1].

On March 14, 2001 Ms. Giles filed a letter that obliquely requested the joinder of Adecco and its insurance carrier Liberty to her Occupational Disease Claim as respondents. On March 30, 2001 Ms. Giles provided to the Labor Commission the address of Adecco.

On May 14, 2001 the Labor Commission sent an "Amended Request for Answer" to Adecco and Liberty. On June 8, 2001 Adecco and Liberty filed an "Answer" and "Motion for Summary Judgment." Adecco claimed inter alia that Ms. Giles presented no evidence that linked her employment at Adecco with her porphyria.

Dr. Baker's letters dated January 5, 1995, and May 3, 1995, constituted the only medical evidence provided by Ms. Giles in support of her Occupational Disease Claim and her multiple responses to the various motions filed in this case. Dr. Baker's January 5, 1995 letter stated in pertinent part that:

> Glenda Giles is a 55-year-old woman who was in good health until she was working at a country club in Utah. At that time, extensive remodeling was going on. Chlorine was used for a junior Olympic swimming pool in the basement. She was exposed to chlorine gas, which has been previously documented.
>
> She has extensive documentation of her initial exposure and there is no need to repeat this.
>
> **********
>
> This (tests) would indicate that she has an intoxication or chemically acquired or chemically induced porphyria.
>
> **********
>
> Porphyria is considered to be a rare hereditary disease; however, porphyria may be acquired by exposure to a group of porphyric drugs and chemicals. The acquired porphyria may be considered to be the result of an environmental insult or poison on either 1. A genetically predisposed individual, or 2. a previously normal individual with no familial history or predisposition to this disease.
>
> **********
>
> The causes of acquired porphyria are:
>
> 1. Drugs. Over 20 drugs are known to induce or cause porphyria including barbituates, chloriphenical, Danazol, Ergot alkaloids, glutethamide, Griseufulvin, imipramine, Meprobamate, Metho-Dopa, Fenton, Sulfonamides, Albutamide, birth control pills with estrogens, and many others.
>
> 2. Chemicals. Many, at least 50 environmental porphyrogenic substances include lead, paints, metal fumes, arsenic, vinyl chloride, alcohols, glycols and their derivatives, polychlorinated biphenals (PCB), Dioxin, Chlorobenzina, possibly all chlorinated hydrocarbons or any chemical the (sic) mimics estrogen. One large outbreak was caused by grain contaminated with the fungacided hexachlorabenzine.
> 3. Infectious Hepatitis C is a major cause of porphyria.
> 4. Malnutrition can bring on a hereditary form.
>
> **********

> In summary, then, Glenda Giles has developed porphyria as a result of exposure to toxic materials at work at a country club. In addition to be (sic) exposed to chlorine, she was exposed to extensive materials in remodeling including carpeting. She did notice illness in this area and she was consistently better away from this area.
>
> **********
>
> Tests at the Mayo Clinic do indicate that she does have porphyria. It is highly unlikely that she had this previously as she does have a triple enzyme defect, and the hereditary forms of porphyria usually will have one enzyme defect. [emphasis added].

On May 3, 1995 Dr. Baker added:

> She has had multiple exposures. She was not only exposed to chlorine gas in a one-time exposure, which could be significant, she also was chronically exposed to chemical fumes used in extensive remodeling. So she would have been exposed to the different building materials and also office machinery. She was exposed to copiers, fax machines, and carbonless copy paper, which may release many toxic substances. She was also exposed to new electronic equipment including computers. There could have been other materials used at the country club. Golf courses are well-known for having large amounts of pesticides being constantly sprayed.

In sum, Dr. Baker listed a host of potential environmental factors as possible contributing causes of Ms. Giles' porphyria. However, Dr. Baker specifically opined that Ms. Giles' "developed porphyria as a result of exposure to toxic materials at" Oakridge. Dr. Baker emphasized the unlikelihood that Ms. Giles developed porphyria prior to her employment at Oakridge.

Ms. Giles acknowledged that Dr. Baker directed his opinion concerning the medical causation of her porphyria exclusively toward her exposure to chemicals at Oakridge. [see: Petitioner's Response to "Answer' Filed by Respondents Oakridge Country Club and Workers Compensation Fund page 4 filed April 4, 2001]. Ms. Giles observed:

> The doctor who diagnosed Petitioner's occupational disease has stated that her exposure to the many chemicals involved in the re-modeling and new construction of the club house; the many chemicals used in and around the club house, and on the golf course grounds; together with the office supplies and equipment were sufficient to produce the chemically induced porphyrinopathy. [id.].

Ms. Giles confirmed that:

> Petitioner's case is primarily directed at Oakridge Country Club, and Workers Compen-sation (sic) Fund. All other parties have been joined in this case because Petitioner did not work for Oakridge for twelve consecutive months, and therefore apportionment is required by law. There can be no doubt that Petitioner became permanently and totally disabled while in Oakridge Country Club's employ. However, there are substantial questions concerning the causal contribution of her prior employers. The extent of these Respondents' liability is a question of fact for the Labor Commission to determine through these proceedings. [see: "Petitioner's Response to Motion for Summary Judgment filed by Respondents'; Adecco f/k/a Tad Technical Services Corporation and/or Liberty Mutual Insurance Company" at pages 4-5, filed June 18, 2001].

Ms. Giles alleged that she worked for Adecco from September 1985, to October 1990. [see: Occupational Disease Claim Sec. J.]. In her response to Adecco's "Motion for Summary Judgment," Ms. Giles admitted that: "The extent of these Respondents' causal contribution to Petitioner's chemically induced porphyrinopathy has yet to be determined." [see: Petitioner's Response to these Respondents' Motion for Summary Judgment p. 1 numbered paragraph 2 filed June 18, 2001]. Ms. Giles further stated:

> Petitioner submits that when she filed her notice of occupational disease with the Industrial Commission of Utah on May 19, 1985, she stated therein: 'I also worked for McDonnell Aircraft (a subsidiary of McDonnell Douglas) In the office located in the hangers at Hill Air Force Base. I worked there for five years (1985 to October 1990). There were numerous fumes there.' In addition, Petitioner testified on 4 January 1993 at the hearing on her occupational injury claim: 'I told the Workers Comp people that I worked at Hill Field for five years in the hangers; and that once a year during the winter when they closed the hangers up to keep it warm, I would develop bronchitis.' (Citation omitted). Petitioner does not know all of the chemicals and fumes she was exposed to while in TAD's employ; but she does know that she was exposed to these hazards on a daily basis while working for TAD.
>
> **********
>
> Petitioner admits she knew on 5 January 1995 that her occupational disease was work related; but she did not know then, and still does not know, to what extent the exposure she endured while working for TAD may have aggravated, predisposed, or contributed to her diagnosed occupational disease. [id. at pp. 2-3][emphasis added].

On June 25, 2001 Ms. Giles filed "Petitioner's Response to 'Answer' filed by Respondents Adecco f/k/a TAD Technical Services Corporation and Liberty Mutual" wherein she reiterated:

> As stated in her Response to these Respondent's Motion for Summary Judgment, Petitioner informed TAD in May 1995 that she was exposed to numerous fumes while in their employ. Petitioner does not know to what extent her exposures while employed by TAD affected, contributed, predisposed, and/or caused her occupational disease. [Petitioner's Response to 'Answer' filed by Respondents Adecco f/k/a TAD Technical Services Corporation and Liberty Mutual p. 4 Response to Sixth Defense filed June 25, 2001][emphasis added].

In her "Response to Memorandum in Support of Respondents', Adecco f/k/a TAD Technical Services Corporation and/or Liberty Mutual Insurance Company, Motion for Summary Judgement" filed on July 28, 2001, Ms. Giles' offered a slightly more specific description of the substances she believed her employment at Adecco exposed her to:

> 'Petitioner did notice strange odors which she believed to be solvents, cleaning materials, exhaust fumes, welding and soldering fumes, jet fuel, adhesives, paint fumes, carpet, and carpet glues.' (Ms. Giles quoting her own answer to respondents' interrogatory No. 21). Petitioner also mentioned a new computer system, a leased copy machine, a FAX machine, and working with newly printed documents....'Petitioner was evacuated from her office and the hanger on at least one occasion when the chemical alarms sounded.' Although Petitioner was not notified what chemical caused the alarm, or what effects the exposure might have, this is evidence of injurious exposure while employed by TAD at Hill Airforce Base. ["Response to Memorandum in Support of Respondents', Adecco f/k/a TAD Technical Services Corporation and/or Liberty Mutual Insurance Company, Motion for Summary Judgement" at pages 3-4 filed on July 28, 2001].

Nevertheless, earlier in her answer to interrogatory No. 21 Ms. Giles stated:

> These exposures occurred eleven to sixteen years ago, and it is impossible for Petitioner, at this late date, to compile a list of each exposure; on what date or dates they occurred; the length of time of exposure; the quantity of fume exposed to; the source or sources of each fume. Petitioner was exposed to toxic fumes on a daily basis, but has no way of knowing the identity of all the toxic materials she was exposed to. [see: "Reply Memorandum in Support of Respondents, Adecco f/k/a TAD Technical Service Corporation and/or Liberty Mutual Insurance Company's Motion for Summary Judgment" Exhibit "A" filed July 18, 2001].

The medical evidence produced by Ms. Giles to date in this case, and taken in the light most favorable to Ms. Giles, established that she developed porphyria as a result of exposure to toxic materials while at work for Oakridge and not from any prior industrial exposure. Accordingly, Ms. Giles' own medical evidence excluded Adecco from any liability for Ms. Giles' porphyria.

Further, Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time and place of any such exposure. At best Ms. Giles could only express her belief as to the type of substances her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that she did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case was against Oakridge, but she joined Adecco as a hedge against apportionment under the Occupational Disease statute. With her case against Adecco mired in mere speculation, Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since any proof of a causal connection between Ms. Giles employment with Adecco and her porphyria is admittedly beyond her means, Ms. Giles' claim against Adecco must be dismissed.

V. CONCLUSIONS OF LAW

A. Standard for Motions for Summary Judgment.

Utah Code §63-46b-1(4) provides in pertinent part that:

> This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:
>
> **********
>
> (b) granting a timely motion ... for summary judgement if the requirements of ... Rule 56 ... of the Utah Rules of Civil Procedure are met by the moving party ....

Utah Rule of Civil Procedure 56 states in relevant part that:

> (c) [T]he judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgement as a matter of law.

B. The Respondents, Oakridge Country Club, Workers Compensation Fund of Utah and Employers' Reinsurance Fund.

Utah Code Ann. §35-1-16 (1994) in effect at the time of the March 8, 1995 Settlement agreement provided in relevant part:

> (1) The commission has the duty and full power, jurisdiction, and authority to determine the facts and apply the law in this or any other title or chapter that it administers and to:
>
> **********
>
> (e) promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees.

The Utah Court of Appeals upheld a decision by an Industrial Commission administrative law judge that a "Compromise and Settlement Agreement" executed by a claimant/employee, employer/respondent, and Second Injury Fund (now ERF), barred the claimant/employee's subsequent claim for permanent total disability compensation. Wilburn v. Interstate Electric, 748 P. 2d 582 (Utah App. 1988). In Wilburn the claimant/employee (Wilburn) received a 36% whole person impairment apportioned 10% to the industrial low back injury at issue, 15% to a preexisting low back problem, and 15% to a nonindustrial cervical spine pathology. [id. at 584]. The respondents in Wilburn paid Mr. Wilburn some temporary total, and permanent partial, disability benefits. [id.]. Mr. Wilburn then notified the respondents that he intended to file for permanent total disability benefits. [id.]. The parties then entered into the "Compromise and Settlement Agreement" whereby the respondents paid Mr. Wilburn some additional permanent partial disability benefits. [id.].

After the "Compromise and Settlement Agreement" Mr. Wilburn filed a claim against respondents with the then Industrial Commission for permanent total disability compensation. [id.]. The administrative law judge ultimately ruled that:

> The Compromise and Settlement Agreement was therefore binding and barred plaintiff's claim for permanent and total disability compensation. [id.].

As noted above, the Utah Court of Appeals affirmed the decision of the administrative law judge. [id. at 588].

The undisputed facts of the present claim verified that Ms. Giles entered into a "Settlement Agreement" with the respondents Oakridge, WCF, and ERF on March 8, 1995. The "Settlement Agreement" established that Ms. Giles became permanently and totally disabled as a result of porphyria she allegedly contracted from her employment with Oakridge. [see: paragraphs 2 and 7 of the "Settlement Agreement"]. The respondents agreed to pay Ms. Giles a compromised, weekly benefit rate of $135.00 for her permanent total disability allegedly incurred while employed for Oakridge. [see: paragraphs 8 and 9 of the "Settlement Agreement"]. The "Settlement Agreement" specifically stated that the sum paid represented a compromise of a disputed claim. [see: paragraphs 4 and 5 of the "Settlement Agreement"].

Ms. Giles couched her present claim as an occupational disease rather than an industrial accident. Nevertheless, Ms. Giles' present Occupational Disease Claim essentially constituted the same claim for permanent total disability benefits that she compromised in her "Settlement Agreement" approved on March 8, 1995. Both Ms. Giles' claims consisted of claims for permanent total disability compensation derived from her diagnosis of porphyria allegedly caused by her employment at Oakridge. Accordingly, the March 8, 1995 "Settlement Agreement" barred Ms. Giles' present Occupational Disease Claim. Wilburn v. Interstate Electric, 748 P. 2d 582.

The mere fact that Ms. Giles' recast her claim for permanent total disability compensation as an occupational disease rather than an industrial accident failed to create a separate and distinct remedy from her first claim. Utah Code Ann. §35-2-110 (1991) in effect at the time of the March 8, 1995 Settlement agreement stated:

> The compensation provided under this chapter (occupational disease chapter) is not in addition to compensation which may be payable under Title 35, Chapter 1 (industrial accidents chapter), and in all cases where injury results by reason of an accident arising out of an in the course of employment and compensation is payable for the injury under Title 35, Chapter 1, no compensation under this chapter shall be payable.

In short, Ms. Giles is not allowed double recovery for permanent total disability compensation from the same injury by the same employer under both the industrial accidents, and occupational disease, chapters of the Workers Compensation Act.[3]

---

[3] The Utah Supreme Court held that:

> [a]n employee is not entitled to compensation for wage loss for which the employer has already compensated him or her. Realistically, and in view of our workers' compensation plan, any other holding ignores the plain language of the

Ms. Giles argued that Utah Code §35-1-90 prevented her from compromising her rights to further benefits via the March 8, 1995 "Settlement Agreement." [see: Petitioner's Response to Answer Filed by Respondents Oakridge Country Club and Workers Compensation Fund" filed April 4, 2001 at page 8]. Utah Code Ann. §35-1-90 (1917) in effect at the time of the March 8, 1995 "Settlement Agreement" stated in part:

> No agreement by an employee to waive his rights to compensation under this title shall be valid.

The Court in Wilburn specifically addressed this argument:

> Under this provision, settlements are appropriate only when the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful. (citation omitted). Wilburn v. Interstate Electric, 748 P. 2d at 586.

The "Settlement Agreement" of March 8, 1995 specifically stated that: "it is the desire of the parties to reach a compromise settlement of a claim of disputed validity." [see: paragraph 4 of the "Settlement Agreement"]. In such a case, the Court in Wilburn held "§ 35-1-90 is no bar to enforceability of the agreement." [id. at 587].

C. The Respondents Wasatch Crest Mutual Ins. Co., Constitution State Service Co., and AC USA/Pacific Employers Ins. Co.

The respondents Wasatch Crest, Constitution, and ACE all denied that they as insurance carriers provided workers' compensation insurance coverage for any of Ms. Giles' employers during the relevant time periods at issue. None of the other parties contradicted the assertions of the respondents Wasatch Crest, Constitution, and ACE. None of the parties alleged the existence of insurance policies provided by Wasatch Crest, Constitution, or ACE that covered any of Ms. Giles' employers during the relevant time periods at issue.

The Utah Supreme Court specifically held that:

> [t]he Industrial Commission is without authority to apply the terms of an insurance policy to an individual or a corporation not named in the policy as the insured. State Ins. Fund v. Industrial Commission of Utah, 115 Utah 383, __, 205 P. 2d 245, ___ (1949)

> workers' compensation statutes and would result in claimants' receiving duplicate payments for loss of earning capacity. Johnson v. Harsco/Heckett, 737 P. 2d 986, 988 (Utah 1987).

Absent any assertion that Wasatch Crest, Constitution, or ACE issued workers' compensation insurance policies for any of Ms. Giles' employers during the relevant time periods at issue, the Labor Commission lacks authority to keep them as respondents in the present case.

D. The Respondents TAD Resources nka Adecco and Liberty Mutual Ins, Co.

Utah Code Ann. § 35-2-107 (1991) provided that:

> For purposes of this chapter, a compensable occupational disease is defined as any disease or illness which arises out of and in the course of employment and is medically caused or aggravated by that employment.

Ms. Giles as the petitioner in the present matter carried the burden to prove by a preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco. [see gen: Ashcroft v. The Industrial Comm'n of Utah, 855 P. 2d 267, 269 (Ut App. 1993) (petitioner's burden of proof by preponderance of the evidence)]. Ms. Giles also bore the burden to prove by a preponderance of the evidence that her employment at Adecco medically caused her porphyria.

The medical evidence produced by Ms. Giles to date in this case, and taken in the light most favorable to Ms. Giles, established that she developed porphyria as a result of exposure to toxic materials while at work for Oakridge and not from any prior industrial exposure. Accordingly, Ms. Giles' own medical evidence excluded Adecco from any liability for Ms. Giles' porphyria. [see gen: Stevenson v. The Industrial Comm'n of Utah, 641 P. 2d 117 (Utah 1982).

Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time and place of any such exposure. At best Ms. Giles could only express her belief as to the type of substances her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case was against Oakridge, but she joined Adecco as a hedge against apportionment under the Occupational Disease statute. Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since Ms. Giles lacked the means to prove by a preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco her claim must be dismissed.

E. The Respondent Internal Revenue Service.

Ms. Giles requested joinder of her former employer the Internal Revenue Service. However, a federal employee's remedy for a workers' compensation claim lies exclusively under the Federal Employees' Compensation Act 5 U.S.C. § 8101-8152 (FECA). see: Miller v. V.A. Medical Center, 2001 U.S. App. Lexis 7659 (10th Cir. 2001) and Hope v. Berrett, 756 P. 2d 102, 103 (Ut. App 1988). Further, the Utah Court of Appeals noted in Hope a "[f]ederal employee...is not actually an 'employee' as defined by Utah Code Ann. § 35-1-43 (1987)." id. at fn 1. Consequently, the Utah Labor Commission lacks jurisdiction to consider Ms. Giles' occupational disease claim against the IRS under the Utah Workers Compensation Act. Ms. Giles must pursue her claim against the IRS pursuant to FECA before the United States Secretary of Labor.

VI. ORDER

IT IS THEREFORE ORDERED that Glenda Giles' Occupational Disease Claim against Oakridge Country Club, Workers Compensation Fund of Utah, Wasatch Crest Mutual Ins., Employers' Reinsurance Fund, TAD Resources nka Adecco, Constitution State Service Co., ACE USA/Pacific Employers' Ins. Co., Liberty Mutual Ins. Co., and Internal Revenue Service, is hereby dismissed with prejudice.

Dated this 6th day of June 2002,

Richard M. La Jeunesse
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 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 requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

CERTIFICATE OF MAILING

I, Alicia Zavala-Lopez, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Ruling on Motions for Summary Judgment and Motions to Dismiss in the case of Giles v. Oakridge Country Club et al, Case No. 20001228 on the 6th day of June 2002, to the following:

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Alicia Zavala-Lopez

UTAH LABOR COMMISSION

GLENDA W. GILES,	*	
	*	
Applicant,	*	
	*	
v.	*	ORDER DENYING
	*	MOTION FOR REVIEW
OAKRIDGE COUNTRY CLUB;	*	
WORKERS COMPENSATION FUND;	*	
WASATCH CREST MUTUAL;	*	
EMPLOYERS REINSURANCE FUND;	*	
TAD RESOURCES, nka ADECCO;	*	
CONSTITUTION STATE SERVICE	*	
CO.; ACE USA/PACIFIC EMPLOYERS;	*	
INC. CO.; LIBERTY MUTUAL INS. CO.;	*	
and INTERNAL REVENUE SERVICE.	*	Case No. 00-1228
	*	
Defendants.	*	

Administrative Law Judge La Jeunesse summarily dismissed Glenda W. Giles' claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.). Mrs. Giles now asks the Utah Labor Commission to review Judge La Jeunesse's decision.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

On approximately May 30, 1992, Mrs. Giles filed an Application for Hearing seeking workers' compensation benefits from Oakridge Country Club and its insurance carrier, Workers Compensation Fund. Mrs. Giles' Application alleged injuries from exposure to chlorine gas at Oakridge on September 7, 1991. The Employers' Reinsurance Fund was later added as a defendant to Mrs. Giles' claim. On March 8, 1995, the parties resolved this claim by settlement agreement.

On December 27, 2000, Mrs. Giles filed a second Application against Oakridge and Workers' Compensation Fund, this time for "porphyria" allegedly caused by exposure to toxic fumes at Oakridge between May and December 1991. Thereafter, the Employers' Reinsurance Fund, Wasatch Crest Mutual Insurance, TAD Resources, Constitution State Service Co., ACE USA/Pacific Employers Ins. Co., Liberty Mutual Ins. Co., and the Internal Revenue Service were added as defendants to Mrs. Giles' second claim.

Wasatch Crest and ACE-USA/Pacific Employers Insurance Co. each moved for dismissal of Mrs. Giles' claim on the grounds neither company was an insurance carrier for Mrs. Giles' employers during any time relevant to Mrs. Giles' claim.

TAD and its insurance carrier, Liberty Mutual, moved for summary judgment on the grounds, among others, that there was no evidence establishing Mrs. Giles' work at TAD as a cause of her porphyria.

The Employers Reinsurance Fund, Oakridge and the Workers Compensation Fund moved for dismissal on the grounds Mrs. Giles' current occupational disease claim was subject to the parties' settlement of her original workers' compensation claim.

The Internal Revenue Service did not appear or otherwise participate in this matter.

On June 6, 2002, Judge La Jeunesse granted the defendants' various motions for dismissal and summary judgment. Judge La Jeunesse also dismissed Mrs. Giles' claim against the I.R.S. for lack of jurisdiction over that federal agency. Mrs. Giles now seeks Commission review of Judge La Jeunesse's decision.

The Commission has carefully reviewed Mrs. Giles' motion for review. Much of it deals with points that are legally irrelevant or factually unsupported. Ultimately, the Commission believes the following issues are determinative of Mrs. Giles' current claim for occupational disease benefits:

1. Is there any basis to conclude that Wasatch Crest, ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., or other nominal defendants may be liable for Mrs. Giles' current claim?
2. Is there a genuine issue of material facts regarding TAD and Liberty Mutual's possible liability for Mrs. Giles' current claim?
3. Does the settlement agreement which resolved Mrs. Giles' first claim against Oakridge, Workers Compensation Fund and ERF bar Mrs. Giles' current claim against those entities?

FINDINGS OF FACT

The Commission finds there is no genuine dispute regarding the following facts which are material to resolution of Mrs. Giles' current claim.

On May 30, 1992, Mrs. Giles filed an Application For Hearing with the Utah Industrial Commission claiming workers' compensation benefits for "seizures, memory loss, sinus, heart and lung injury" caused by work-related exposure to chlorine gas at Oakridge on September 7, 1991. Oakridge denied liability for the alleged injuries.

Mrs. Giles' claim was eventually denied by the Commission. Mrs. Giles sought review by the

Utah Court of Appeals. In the meantime, Mrs. Giles continued to seek medical diagnosis of her alleged injury. On January 5, 1995, Dr. Baker diagnosed the injury as "chemically acquired or chemically induced porphyria" from exposure to toxic fumes at Oakridge. According to Dr. Baker:

> The porphyrias are a group of diseases of heme synthesis in which the over production of porphyrin compounds results from deficient enyzme activity in the biosynthetic pathway of heme . . . .
>
> . . . .
>
> Without attempting to separately describe each different porphyria, general symptoms of the acute attack may include abdominal pain . . . nausea, vomiting, . . . diarrhea. Neurological symptoms . . . may include peripheral neuropathy, weakness, . . . sensory disorder, possible respiratory problems, hallucinations, confusion, depression, sometimes even seizures.

Although Oakridge continued to dispute Mrs. Giles' claim, the parties agreed to a compromise settlement. Their written agreement identified Mrs. Giles' claim as "physical and mental injuries allegedly, including organic brain damage, sustained via the exposure." The agreement provided for lump-sum and monthly payments to Mrs. Giles in lieu of any other benefits Mrs. Giles might be entitled to receive for her alleged injuries. The Commission approved the parties' agreement, the defendants paid the required compensation, and Mrs. Giles' claim was dismissed.

On December 10, 2000, Mrs. Giles filed a second Application For Hearing with the Labor Commission, this time seeking benefits under the Utah Occupational Disease Act. This second claim was based on the same condition, porphyria, that had served as the basis for her first claim under the Workers' Compensation Act. In support of this second claim, Mrs. Giles submitted the same diagnosis from Dr. Baker that had been obtained in early 1995 to support her first claim.

Mrs. Giles has presented no evidence that would establish the liability of Wasatch Crest, ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., or Transportation Insurance Company with respect to her current occupational disease claim.

Mrs. Giles has failed to submit any evidence of exposure to substances at TAD that caused or contributed to her porphyria.

DISCUSSION AND CONCLUSIONS OF LAW

In this case, the Commission must determine whether the various defendants are entitled to summary dismissal of Mrs. Giles' claim against them. Section 63-46b-1(4)(b) of the Utah Administrative Procedures Act permits summary judgment if the requirements of Rule 56 of the Utah

Rules of Civil Procedure are satisfied. Rule 56 allows summary judgment only if the record shows "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

The parties seeking summary dismissal of Mrs. Giles' claim have the burden of establishing their right to judgment, even when all facts and reasonable inferences are viewed in the light most favorable to the nonmoving party . Estate Landscape & Snow Removal Specialists v. Mountain States Telephone & Telegraph Co., 844 P.2d 322, 324 n. 1 (Utah 1992). In Hill v. Grand Central, Inc., 477 P.2d 150 (Utah 1970),the Utah Supreme Court observed:

> Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the parties properly bring the motion before the court.

The Commission bears the foregoing principles in mind as it considers the propriety of summary dismissal of Mrs. Giles' claim.

Liability of Wasatch Crest , ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., Transportation Insurance Company and IRS. Neither Wasatch Crest nor ACE-USA/Pacific were named by Mrs. Giles as defendants in this matter. Through some process that is not clear from the record, it appears that the Adjudication Division itself added these parties as defendants in the caption of this case. Likewise, from time to time, other insurance carriers such as "Constitution State" and "Transportation Insurance Company" have been listed as defendants in one or more pleading, motion or decision in this case. However, the Commission is unaware of any factual basis by which these companies would have any legal liability to pay Mrs. Giles' current claim. The Commission therefore concludes that Mrs. Giles has no cognizable claim against these parties.

As to the I.R.S., Judge La Jeunesse correctly noted that the Utah Labor Commission has no jurisdiction over workers' compensation or occupational disease claims against an instrumentality of the federal government. Mrs. Giles' claim against the I.R.S. must also be dismissed.

Liability of TAD. The Commission now turns to Mrs. Giles' claim against TAD and its workers' compensation insurance carrier, Liberty Mutual. TAD and Liberty Mutual were added as defendants to Mrs. Giles' claim on the grounds that the Occupational Disease Act's apportionment provisions might reach TAD, as Mrs. Giles' former employers. But for TAD and Liberty Mutual to incur any liability for Mrs. Giles' alleged occupational disease, Mrs. Giles must first establish that her work at TAD exposed her to chemicals that caused or contributed to her porphyria.

Mrs. Giles acknowledges she is unable to produce any evidence establishing what, if any, chemicals she was exposed to at TAD, nor can she establish the extent of any such chemical

exposure. Her claims regarding the possibility of exposure to chemicals at TAD are entirely speculative. Under such circumstances, the Commission agrees with Judge La Jeunesse that the evidence, even when considered in the light most favorable to Mrs. Giles, fails to establish a genuine dispute of material fact regarding TAD's liability in this matter, and that TAD is therefore entitled to summary dismissal of Mrs. Giles' claim against TAD.

Mrs. Giles' second claim against Oakridge. As already noted, Mrs. Giles' first claim for benefits was filed under Utah's Workers' Compensation Act. Section 34A-2-401(1) of the Act defines the coverage of the Act as follows: "An employee . . . injured . . . by accident arising out of and in the course of . . . employment, wherever such injury occurred . . . shall be paid . . . compensation for loss sustained on account of the injury . . . ." Thus, it is the existence of a work-related **injury** that is the basis for payment of benefits under the Worker' Compensation Act.

When Mrs. Giles filed her first claim for benefits against Oakridge in 1992, she initially described her injury in terms of symptoms: "seizures, memory loss, sinus, heart and lung injury." As her claim progressed and additional medical evaluations were conducted, these descriptive symptoms were brought within a single over-arching diagnosis of porphyria. Thus, at the time Mrs. Giles settled her initial workers' compensation claim, that claim was for the injury of porphyria.

Now, Mrs. Giles has recast her initial claim for workers' compensation benefits for the **injury** of porphyria into a claim for occupational disease benefits for the **illness** of porphyria. In attempting to obtain benefits under both the Workers' Compensation Act and the Occupational Disease Act for the single diagnosis of porphyria, Mrs. Giles runs afoul of the following limitation found in §34A-2-311 of the Occupational Disease Act:

> The compensation provided under this chapter (the Occupational Disease Act) is not in addition to compensation that may be payable under Chapter (the Workers' Compensation Act), and in all cases when injury results by reason of an accident arising out of and in the course of employment and compensation is payable for the injury under Chapter 2, compensation under this chapter may not be payable.

The 1995 settlement agreement between Mrs. Giles and Oakridge and ERF granted certain workers' compensation benefits to Mrs. Giles for her porphyria. Pursuant to §34A-2-311 of the Occupational Disease Act, additional compensation for that same condition may not be paid. In light of the foregoing, the Commission concludes, as did Judge La Jeunesse, that Mrs. Giles' claim against Oakridge and ERF under the Occupational Disease Act must be dismissed.

ORDER

The Commission affirms the decision of Judge La Jeunesse in this matter and denies Mrs. Giles' motion for review. It is so ordered.

Dated this 1st day of May, 2003.

R. Lee Ellertson
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.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Glenda W. Giles, Case No. 20001228, was mailed first class postage prepaid this 1st day of May, 2002, to the following:

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Sara Davidson

UTAH LABOR COMMISSION

GLENDA W. GILES,	*	
	*	
Applicant,	*	
	*	
v.	*	ORDER DENYING
	*	REQUEST FOR
OAKRIDGE COUNTRY CLUB;	*	RECONSIDERATION
WORKERS COMPENSATION FUND;	*	
WASATCH CREST MUTUAL;	*	
EMPLOYERS REINSURANCE FUND;	*	
TAD RESOURCES, nka ADECCO;	*	
CONSTITUTION STATE SERVICE	*	
CO.; ACE USA/PACIFIC EMPLOYERS;	*	
INC. CO.; LIBERTY MUTUAL INS. CO.;	*	
and INTERNAL REVENUE SERVICE.	*	Case No. 00-1228
	*	
Defendants.	*	
	*	

Glenda W. Giles asks the Utah Labor Commission to reconsider its prior decision denying Ms. Giles' claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND AND ISSUES PRESENTED

On March 8, 1995, Mrs. Giles, Oakridge Country Club, the Workers Compensation Fund and the Employers' Reinsurance Fund settled Mrs. Giles' claim for workers' compensation benefits for alleged injuries from exposure to chlorine gas at Oakridge on September 7, 1991.

On December 27, 2000, Mrs. Giles filed another claim against Oakridge and Workers' Compensation Fund, this time for occupational disease benefits for the disease of "porphyria" allegedly caused by exposure to toxic fumes at Oakridge between May and December 1991. Various other parties were later added as defendants to Mrs. Giles' second claim.

On June 6, 2002, Judge La Jeunesse summarily dismissed Mrs. Giles' occupational disease claim. Mrs. Giles then asked the Commission to review Judge LaJeunesse's decision. After careful

review of the matter, the Commission concluded that three issues were determinative of Mrs. Giles' current claim for occupational disease benefits:

- Is there any basis to conclude that Wasatch Crest, ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., or other nominal defendants may be liable for Mrs. Giles' current claim?
- Is there a genuine issue of material facts regarding TAD and Liberty Mutual's possible liability for Mrs. Giles' current claim?
- Does the settlement agreement which resolved Mrs. Giles' first claim against Oakridge, Workers Compensation Fund and ERF bar Mrs. Giles' current claim against those entities?

Answering the first two issues negatively and the third issue affirmatively, the Commission concurred with Judge LaJeunesse's dismissal of Mrs. Giles' occupational disease claim.

Ms. Giles now asks the Commission to reconsider its prior decision. Specifically, Mrs. Giles raises a wide variety of issues that can be loosely categorized as follows:

1. Effect of settlement of prior workers' compensation claim: Mrs. Giles argues that her initial workers' compensation injury was different than her current occupational disease, and that settlement of the injury claim should not prevent her from pursuing her occupational disease claim.

2. Propriety of summary judgment: Mrs. Giles argues that genuine issues of material fact exist regarding legal and medical causation and other circumstances of her occupational disease, thereby precluding summary judgment.

3. Procedural errors and other defects in the Commission's adjudicative process: Mrs. Giles alleges errors regarding proper notice, denial of right to conduct discovery, failure to appoint a medical panel, lack of good faith, and conflict of interest.

DISCUSSION

Beginning with Mrs. Giles' arguments that her initial workers' compensation claim was for an "injury" that is different from her current "disease," the Commission has again reviewed the evidence on that point and remains convinced that both claims relate to the same medical condition, now diagnosed as "porphyria." Under such circumstances, Mrs. Giles may not receive compensation for that condition under both the Workers' Compensation Act and the Occupational Disease Act. Specifically, §34A-3-111 of the Occupational Disease Act provides as follows:

> The compensation provided under this chapter (the Occupational Disease Act) is not in addition to compensation that may be payable under Chapter 2 (the Workers' Compensation Act), and in all cases when injury results by reason of an accident arising out of and in the course of employment and compensation is payable for the injury under Chapter 2, compensation under this chapter may not be payable.

The Commission therefore reaffirms its determination that the prior settlement by Mrs. Giles, Oakridge, Workers' Compensation Fund, and ERF of Mrs. Giles' injury claim, and the payment of workers' compensation benefits to Mrs. Giles pursuant to that claim, precludes an additional award of occupational disease benefits to Mrs. Giles for the same medical condition.

Ms. Giles's second category of arguments focus on the propriety of summary dismissal of her occupational disease claim. As noted above, Mrs. Giles is precluded as a matter of law from receiving occupational disease benefits for the same medical condition that is the basis for payment of her workers' compensation benefits. Furthermore, Mrs. Giles has failed to identify evidence that would support liability on the part of defendants Wasatch Crest, ACE-USA/Pacific, Constitution State, Transportation Insurance Company, the I.R.S., TAD or Liberty Mutual. The Commission remains convinced that no genuine dispute exists regarding the facts that are material to the resolution of this matter, and that the defendants are entitled to dismissal of Mrs. Giles' occupational disease claim as a matter of law.

Finally, Mrs. Giles raises a host of issues regarding notice, discovery, failure to appoint a medical panel, lack of good faith, and conflict of interest. Mrs. Giles' arguments on these issues reflect some confusion over the facts, as well as a misunderstandings of Commission practice and applicable procedural standards. Furthermore, Mrs. Giles' request for reconsideration submits evidence that was not presented to Judge LaJeunesse or, even later, as part of Mrs. Giles' initial motion for review to the Commission. Likewise, Mrs. Giles' request for reconsideration raises allegations and procedural challenges that were not raised in her initial motion for review.

Section 63-46b-12(1)(b) of the Utah Administrative Procedures Act requires that a motion for review ". . . shall: . . . (ii) state the grounds for review and the relief requested; . . . ." Furthermore, §34-46b-12(1)(a) establishes a 30-day jurisdictional time limit for filing motions for review. The foregoing provisions as essential to the fair and orderly conclusion of administrative adjudicative proceedings. The Commission has consistently declined to consider evidence or issues raised for the first time as part of a request for reconsideration, unless such matters could not reasonably have been raised earlier.

In this case, the Commission finds no basis to conclude that Mrs. Giles' newly-presented evidence or arguments could not have been submitted to Judge LaJeunesse and also incorporated into Mrs. Giles' motion for review. The Commission therefore declines to accept or consider such evidence or argument now.

ORDER

The Commission reaffirms its prior decision in this matter and denies Mrs. Giles' request for reconsideration. It is so ordered.

Dated this 16th day of July, 2003.

R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Request for Reconsideration in the matter of Glenda W. Giles, Case No. 00-1228, was mailed first class postage prepaid this 16th day of July, 2003, to the following:

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SECTION C

***986** 737 P 2d 986

Supreme Court of Utah

Kenneth JOHNSON, Plaintiff,
v
HARSCO/HECKETT and/or Insurance Company of North America/Aetna, and the Industrial Commission of Utah, Defendants.
No 860086
May 14, 1987

Employee sought review of Industrial Commission's order denying additional workers' compensation benefits The Supreme Court, Hall, C J , held that employee was not entitled to receive both temporary total disability benefits for statutory maximum of 312 weeks after it was determined that he suffered from permanent partial disability

Affirmed

West Headnotes

Workers' Compensation ⚿842
413 ----
413IX Amount and Period of Compensation
413IX(B) Compensation for Disability
413IX(B)1 In General
413k842 Minimum and Maximum Compensation

Employee was not entitled to receive both temporary total disability benefits for statutory maximum of 312 weeks as well as permanent partial disability benefits for another 312 weeks after it was determined that he suffered from permanent partial disability, employee was not entitled to compensation for wage loss for which he had already been compensated U C A 1953, 35-1-65, 35-1-66, 35-1-67

***987** Mary C Corporon, Salt Lake City, for plaintiff

Robert J Shaughnessy, Salt Lake City, for defendants

HALL, Chief Justice

Plaintiff Kenneth Johnson seeks review of an order of the Industrial Commission denying additional workers' compensation benefits

The facts are not in dispute On October 9, 1980, plaintiff was injured in an accident arising out of the course of his employment The accident occurred when a truck rolled backward and ran over him Since the accident, plaintiff has been under the treatment of several physicians, including Dr Douglas Schow A medical report prepared by Dr Schow dated December 5, 1983, indicated that plaintiff's combined injuries resulted in 79 percent permanent impairment Plaintiff did not work from the date of injury until May 15, 1985

Defendant insurance company paid all medical bills resulting from the accident It also paid temporary total disability compensation commencing with the date of the accident until January 16, 1984, at the rate of $230 per week, for a total of $39,198 57 On January 16, 1984, the insurance carrier began paying plaintiff permanent total disability benefits at the rate of $196 per week, which represented 85 percent of the state average weekly wage at the time of plaintiff's injuries These latter payments were made on the assumption that plaintiff would be permanently and totally disabled, but in fact he was not

An administrative law judge determined that since plaintiff had returned to work, he should be paid permanent partial disability benefits subject to the limitations set forth in the last paragraph of Utah Code Ann § 35-1-67 (Supp 1986) Accordingly, the insurance carrier was required to pay plaintiff compensation at the rate of $196 per week for a total amount of $61,152 (representing 85 percent of the state average weekly wage at the time of plaintiff's injury, payable over a single period of 312 weeks) Payments plaintiff had already received were deducted from this total amount Further, the administrative law judge ordered the employer and the insurance carrier to pay all medical expenses incurred as a result of the accident

Plaintiff filed a motion for review with the Industrial Commission on December 31, 1985, which motion was denied on January 21, 1986 Thereafter, plaintiff petitioned this Court

Plaintiff challenges the Industrial Commission's determination that he is not entitled to maximum compensation for both temporary total and permanent partial disability Specifically, plaintiff contends that as a matter of law he is entitled under Utah Code Ann § 35-1-65 (Supp 1979) (amended 1981) to receive temporary total disability benefits for 312 weeks at 100 percent of the state average weekly wage at the time of his accident and, in addition, under Utah Code Ann § 35-1-66 (Supp 1979) (amended 1981 & 1983), he is entitled to receive benefits for permanent partial

disability at the appropriate level of compensation ***988** for another 312 weeks. We disagree.

Plaintiff's claim must be reviewed in light of the final paragraph of Utah Code Ann. § 35-1-67 (Supp.1986), (FN1) which limits the compensation to which claimants are entitled and provides as follows:

> In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in §§ 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

This statutory provision indicates an intent to prevent double compensation by limiting a claimant's comprehensive benefits to one 312-week maximum period. Plaintiff, however, argues that section 35-1-67 is in direct contradiction with sections 35-1-65 and 35-1-66 and thus should not be applied. We are not persuaded.

To accept plaintiff's argument would be to ignore the plain language of section 35-1-67, and plaintiff has demonstrated no convincing rationale for so doing. Moreover, the result plaintiff urges is inconsistent with the statutory structure which provides for both temporary and permanent benefits. In this regard, under Utah's workers' compensation statutes, there are four categories of disability, each controlled by a separate statutory provision. (FN2) The common denominator for compensation under each category is the loss of employability resulting from injury. (FN3) Generally, temporary total disability benefits are awarded when an individual suffers a job-related injury that prevents him or her from returning to work. These benefits continue until the Commission determines that the disability fits into another classification or until benefits have been paid for the statutory maximum of 312 weeks. (FN4) Determination of the temporary or permanent nature of a disability is typically made when the claimant reaches medical stabilization. (FN5) Once stabilization has occurred and the claimant moves from temporary to permanent status, "he is no longer eligible for temporary benefits." (FN6) Therefore, to award plaintiff temporary total disability compensation regardless of the permanent nature of his impairment contravenes the statutory structure which provides for both temporary and permanent benefits. (FN7)

Furthermore, because in this case the statutory provisions for temporary total and permanent partial disability are parts of an integrated effort to compensate employees for wage loss suffered by reason of industrial injuries, they should be viewed and applied if possible as a whole, not in isolation. (FN8) So considered and applied, an employee is not entitled to compensation for wage loss for which the employer has already compensated him or her. (FN9) Realistically, and in view of our workers' compensation plan, any other holding ignores the plain language of the workers' compensation statutes and would result in claimants' receiving duplicate payments for loss of earning capacity.

Accordingly, the order of the Industrial Commission is affirmed.

***989.** STEWART, Associate C.J., and HOWE, DURHAM and ZIMMERMAN, JJ., concur.

(FN1.) The substance of the last paragraph of Utah Code Ann. § 35-1-67 has remained unchanged since 1975.

(FN2.) *Booms v. Rapp Const. Co.*, 720 P.2d 1363, 1366 n. 1 (Utah 1986). Categories of disability include: temporary total, Utah Code Ann. § 35-1-65 (Supp. 1986); temporary partial, Utah Code Ann. § 35-1-65.1 (Supp.1986); permanent partial, Utah Code Ann. § 35-1-66 (Supp.1986); and permanent total, Utah Code Ann. § 35-1-67 (Supp.1986).

(FN3.) *Marshall v. Industrial Comm'n*, 681 P.2d 208, 211 (Utah 1984).

(FN4.) *Booms*, 720 P.2d at 1366. "Every disability may be reclassified if the character of the disability changes from temporary to permanent and/or the character of the disability changes from total to partial." *Id.* (footnote omitted).

(FN5.) *Id.*

(FN6.) *Id.*

(FN7.) *See id.* at 1366-67.

(FN8.) *Hudson v. Kaiser Steel Corp.*, 662 P.2d 29, 30 (Utah 1983).

(FN9.) *Hudson*, 662 P.2d at 30-31.

***468** 41 P.3d 468

439 Utah Adv. Rep. 6, 2002 UT App 10

Court of Appeals of Utah.

McKESSON CORPORATION and C.W. Reese Company, Petitioners,
v.
Labor Commission and Robert P. Lieberman, Respondents.

No. 20000800-CA.
Jan. 17, 2002.

Employer appealed from decision of the Labor Commission awarding claimant workers' compensation benefits. The Court of Appeals, Thorne, J., held that claimant's subsequent injury was natural result of his original compensable workplace neck injury, and circumstances surrounding claimant's subsequent injury did not relieve employer of financial responsibility for the injury.

Affirmed.

West Headnotes

[1] Workers' Compensation ⚿1939.1
413 ----
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.1 In General; Questions of Law or Fact.

Employer's claim that Labor Commission relied upon incorrect legal standard in determining claimant's eligibility for additional workers' compensation benefits presented question of law which Court of Appeals would review for correctness.

[2] Workers' Compensation ⚿1939.3
413 ----
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.3 Conclusiveness of Administrative Findings in General.

Court of Appeals must uphold Labor Commission's workers' compensation determination unless determination exceeds bounds of reasonableness and rationality.

[3] Workers' Compensation ⚿1338
413 ----
413XVI Proceedings to Secure Compensation
413XVI(L) Presumptions and Burden of Proof
413XVI(L)1 In General
413k1338 Presumptions in General.

Court resolves all doubts regarding employee's right to workers' compensation in favor of employee.

[4] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability.

When workers' compensation claimant experiences subsequent aggravation to injury that arose out of and in course of employment, question of additional compensation will hinge on whether subsequent injury is natural result of accident underlying compensable primary injury. U.C.A.1953, 34a-2-401.

[5] Workers' Compensation ⚿1487
413 ----
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1487 Injuries Arising Out of and in Course of Employment in General.

[See headnote text below]

[5] Workers' Compensation ⚿1490
413 ----
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1490 Fact of Injury, and Accidental Nature in General.

Workers' compensation claimant must satisfy three elements by preponderance of evidence in order to qualify for workers' compensation benefits: (1) claimant must show that injury underlying claim occurred by accident; (2) claimant must establish that accident is legal cause of injury or, in other words, that injury arose out of and in course of exertions that were, at minimum, usual and ordinary for claimant's employment; and (3) claimant must show that the workplace accident was medical cause of injury.

[6] Workers' Compensation ⚿604
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(C) Injuries Arising Out of and in Course of Employment in General
413k604 In General.

Once workers' compensation claimant has established that his injuries arose from accident and that sufficient causal connection exists between his disability and working conditions, claimant must be compensated for his workplace injuries.

[7] Workers' Compensation ⚿961
413 ----
413IX Amount and Period of Compensation
413IX(E) Medical or Other Expenses
413IX(E)1 In General
413k961 In General.

Once injury is determined to be compensable injury under workers' compensation law, employer is responsible for all medical costs resulting from the injury.

[8] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability.

To qualify for additional workers' compensation benefits after suffering subsequent aggravation to compensable workplace injury, claimant need only prove that his subsequent injury is natural result of his compensable primary injury, and claimant need not show that his original tragedy was sole cause of his subsequent injury; if claimant can show that initial work-related accident is merely contributing cause of subsequent injury, claimant has met his burden.

[9] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability.

To meet legal causation requirement, workers' compensation claimant with pre-existing condition implicated in claim must demonstrate that his workplace efforts exceeded exertion that average person undertakes in nonemployment life.

[10] Workers' Compensation ⚿961
413 ----
413IX Amount and Period of Compensation
413IX(E) Medical or Other Expenses
413IX(E)1 In General
413k961 In General.

Whether or not workers' compensation claimant suffers from pre-existing condition, once benefits are properly awarded, employer is responsible for all medical costs resulting from compensable injury, including costs resulting from subsequent aggravations to compensable workplace injury.

[11] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability.

Under workers' compensation law, it is inappropriate to examine subsequent aggravations of compensable work-related injuries by applying the same exacting standard that the court applies when determining compensability of primary workplace injuries involving pre-existing conditions.

[12] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability.

If workers' compensation claimant successfully establishes that subsequent injury is natural result or

consequence of compensable workplace injury, claimant is eligible for additional workers' compensation benefits

[13] Workers' Compensation ⚿1691
413 ----
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)1 In General
413k1691 Scope and Extent, Matters and Evidence Considered

Labor Commission properly analyzed claim for additional workers' compensation benefits when Commission, having accepting as undisputed the fact that the claimant had suffered compensable workplace injury to vertebra of his neck, analyzed facts surrounding claimant's subsequent injury and connection between subsequent injury and original compensable industrial injury to determine whether his subsequent injury was natural result of his compensable primary injury

[14] ***468** Workers' Compensation ⚿1939 3
413 ----
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939 3 Conclusiveness of Administrative Findings in General

Court of Appeals will not overturn Labor Commission's factual findings in workers' compensation case unless they are arbitrary and capricious, or wholly without cause, or contrary to the one inevitable conclusion from evidence

[15] Workers' Compensation ⚿565
413 ----
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k565 Further Disability

Workers' compensation claimant's subsequent injury, which occurred when he hit his head while pulling himself into his truck, thereby aggravating his original neck injury, was natural result of his compensable workplace neck injury, and circumstances surrounding claimant's subsequent injury did not relieve employer of financial responsibility, medical expert opinion suggested that claimant's compensable workplace neck injury never properly healed and that subsequent aggravation of that injury was not unexpected, and nothing suggested that claimant's subsequent injury resulted from unreasonable conduct

***470** Henry K Chai, II, and Kristy L Bertelsen, Blackburn & Stoll LC, Salt Lake City, for Petitioners

Alan Hennebold, Labor Comission, Salt Lake City, for Respondent Labor Commission

Robert P Lieberman, Salt Lake City, Respondent Pro Se

Before JACKSON, P J , DAVIS, and THORNE, JJ

OPINION

THORNE, Judge

¶ 1 Appellant McKesson Industries Corporation (McKesson) appeals from an order of the Utah Labor Commission (Commission) awarding Robert Lieberman workers' compensation benefits We affirm

BACKGROUND

¶ 2 In 1995, while working in a warehouse owned and operated by McKesson, Lieberman was struck in the head by a fourteen pound case that fell six or seven feet The impact caused Lieberman to suffer two herniated cervical disks In an attempt to repair the damage from the accident, Lieberman subsequently underwent a variety of surgical procedures, including both the installation of a plate, and disk fusion

¶ 3 During a scheduled follow-up visit, Lieberman's doctor noted that

> Rob is now three and one-half months post-op ACD, allograft interbody fusion and plate fixation C5-6-7 He is working, but the company has basically put him back to regular duty with repetitive overhead reaching and lifting, contrary to my restrictions which said no overhead repetitious lifting In the past several days this has aggravated his neck pain

¶ 4 In September 1996, Lieberman entered into an agreement with McKesson through which McKesson agreed to pay Lieberman $13,965 35 in temporary total disability, $10,707 84 in total permanent partial

disability for a 12% whole person impairment, and $10,392 04 for Lieberman's medical expenses However, on April 21, 1997, McKesson's doctor noted that Lieberman still suffered "neck pain and stiffness when he has to look upward or when using his arms and hands above his head "

¶ 5 In July 1997, Lieberman petitioned the Commission for a hearing seeking payment of additional medical expenses and further disability compensation The Commission granted the petition, and, following a hearing on the petition, an Administrative Law Judge (ALJ) found that Lieberman did suffer from ongoing symptoms resulting from the accident and ordered McKesson to pay Lieberman an additional $4,550 96 as compensation for his temporary total disability

¶ 6 By February 1999, Lieberman's doctor suspected that the attempt to fuse the disks had failed, but opined that Lieberman's chronic pain was likely the result of soft-tissue fatigue caused by his new job

¶ 7 On May 22, 1999, while pulling himself into his pickup truck, Lieberman hit his head on the truck's door frame aggravating his neck injury Lieberman was subsequently reexamined by Dr Hood, who determined that Lieberman had exacerbated his earlier injury and recommended additional surgery McKesson denied responsibility for any costs ***471** associated with the aggravation to Lieberman's neck injury

¶ 8 Lieberman petitioned the Commission for another hearing, seeking an order requiring McKesson to pay medical expenses resulting from treatment of the subsequent injury, other necessary medical care, and additional temporary total disability compensation Following a hearing, the ALJ determined that "the incident of May 22, 1999 failed to constitute an event that would relieve McKesson of liability for Mr Lieberman's current disability and medical needs "

¶ 9 The ALJ ordered McKesson to pay Lieberman's medical costs, and awarded Lieberman temporary total disability compensation McKesson sought review of the ALJ's decision through the Labor Commission's Appeals Board However, after reviewing McKesson's claims, the Board affirmed the ALJ's order McKesson now appeals

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 10 McKesson argues that the Commission relied upon an incorrect legal standard in determining Lieberman's eligibility for additional workers' compensation benefits This argument presents a question of law, which we review for correctness *See Esquivel v Labor Comm'n* 2000 UT 66,¶ 13, 7 P 3d 777

[2][3] ¶ 11 McKesson also argues that the Commission erred in concluding that Lieberman's September 25, 1995 accident was the cause of his May 22, 1999 injuries "[T]he Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it As such, we must uphold the Commission's determination unless the determination exceeds the bounds of reasonableness and rationality " *AE Clevite, Inc v Labor Comm'n* 2000 UT App 35,¶ 7, 996 P 2d 1072 (citation and footnote omitted), *see also* Utah Code Ann § 34A-1-301 (1997) ("The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers ") Further, we resolve all doubts regarding an employee's right to compensation in favor of the employee *See AE Clevite,* 2000 UT App 35 at ¶ 7

ANALYSIS

¶ 12 McKesson first argues that the Commission failed to apply the causation analysis mandated by *Allen v Industrial Commission,* 729 P 2d 15 (Utah 1986), when it reviewed Lieberman's petition We disagree

[4] ¶ 13 When an individual experiences a subsequent aggravation to an injury that arose "out of and in the course of employment," Utah Code Ann § 34A-2-401 (1997), the question of additional compensation will hinge on whether the " 'subsequent injury is a *natural result* of [the accident underlying the] compensable primary injury' " *Intermountain Health Care v Board of Rev ,* 839 P 2d 841, 845 (Utah Ct App 1992) (quoting *Mountain States Casing Servs v McKean,* 706 P 2d 601, 602 (Utah 1985))

¶ 14 McKesson argues that *Allen* supersedes the standard articulated above, however, McKesson misconstrues both the holding of *Allen* and the thrust of *Intermountain*

[5] ¶ 15 In *Allen,* the Utah Supreme Court set out to clarify the requirements of Utah's workers' compensation law *See Allen,* 729 P 2d at 18 After thoroughly examining available case law, the court articulated three elements that a claimant must satisfy by a preponderance of the evidence to qualify for

workers' compensation benefits *See id* at 18-25 First, the claimant must show that the injury underlying the claim occurred by accident *See id* at 18, 22 Second, assuming the claimant has established a connection between the injury and an accident, the claimant must then establish that the accident is the legal cause of the injury (FN1) *See id* at 25 In other words, the claimant must show that the injury arose out of and in the course of exertions that were, at a minimum, ***472** usual and ordinary for the claimant's employment *See id* Finally, should the claimant demonstrate that the exertion underlying his accident was "sufficient to support compensation," i e the exertion was "usual or ordinary" for the job, *id* at 25-26, the claimant must show that the workplace accident was the medical cause of the injury *See id*

[6][7] ¶ 16 Once the claimant has established that his injuries arose from an accident, and that "a sufficient causal connection [exists] between [his] disability and the working conditions," *id* at 25, the claimant has met the *Allen* requirements, and thus must be compensated for his workplace injuries Moreover, once the injury is determined to be a compensable injury, the employer is responsible for "all medical[costs] resulting from that injury " *McKean,* 706 P 2d at 602

¶ 17 Here, there is no dispute concerning the compensability of Lieberman's workplace injury, rather, the dispute centers on his subsequent aggravation of the compensable workplace injury When a claimant suffers a subsequent aggravation to a compensable workplace injury, the question of whether the subsequent injury is compensable turns upon the standard articulated in *Intermountain See Intermountain,* 839 P 2d at 845

[8] ¶ 18 To qualify for additional benefits after suffering a subsequent aggravation to a compensable workplace injury, a claimant need only prove that his "subsequent injury [is] a *natural result* of [his] compensable primary injury " (FN2) *Id* Furthermore, a claimant need not " 'show that his original tragedy was the *sole cause* of [his] subsequent injury ' " *Id* at 845 (quoting *McKean,* 706 P 2d at 602) (emphasis added) Indeed, if the claimant can show that " 'the initial work-related accident [is merely] a*contributing cause*' of the subsequent injury," *id* at 845 (quoting *McKean,* 706 P 2d at 602), the claimant has met his burden

¶ 19 McKesson asserts, however, that *Allen* demands the application of a substantively different standard to determine whether a claimant is eligible for additional workers' compensation benefits to cover the costs of a subsequent aggravation to a compensable workplace injury McKesson argues that Lieberman's compensable primary injury created a preexisting condition, and, as stated by the supreme court, "where the claimant suffers from a preexisting condition which contributes to the injury, *an unusual or extraordinary exertion* is required to prove legal causation " *Allen,* 729 P 2d at 26 (emphasis added) McKesson's reliance upon this distinction is misplaced

[9] ¶ 20 In *Allen,* a claimant who suffered from non-compensable preexisting back problems was denied workers' compensation benefits for injuries to his back that he claimed resulted from a workplace accident *See id* at 17 On appeal, the supreme court reversed the Commission's decision, stating that "emphasis on prior injuries is not determinative of whether an accident occurred " *Id* at 27 Rather, the court continued, preexisting conditions are more appropriately analyzed for their impact on the question of legal causation *See id* at 27-28 To meet the legal causation requirement, a claimant with a preexisting condition implicated in the claim must demonstrate that his workplace efforts "exceeded the exertion that the average person undertakes in nonemployment life " *Id*

[10] ¶ 21 However, whether or not a claimant suffers from a preexisting condition, once benefits are properly awarded, the employer is responsible for "all medical[costs] resulting from [the compensable] injury," including costs resulting from subsequent aggravations to the compensable workplace injury (FN3) *McKean,* 706 P 2d at 602

***473** [11] ¶ 22 We conclude that it would be inappropriate to examine subsequent aggravations of compensable work-related injuries by applying the same exacting standard that we apply when determining the compensability of primary workplace injuries involving preexisting conditions

[12] ¶ 23 Accordingly, if the claimant successfully establishes that the subsequent injury is the "natural result" or consequence of a compensable workplace injury, the claimant is eligible for additional workers' compensation benefits *McKean,* 706 P 2d at 602

[13] ¶ 24 In the instant case, the Commission accepted as undisputed the fact that Lieberman had suffered a compensable workplace injury to the vertebra of his neck in 1995 The Commission then analyzed "the facts surrounding [Lieberman's] subsequent injury and the connection between the subsequent injury and the original compensable

industrial injury," *Intermountain,* 839 P 2d at 846, to determine whether his subsequent injury was the "natural result" of his compensable primary injury *Id* Therefore, we conclude the Commission properly analyzed Lieberman's claim under the standard set forth in *Intermountain Health Care v Board of Review,* 839 P 2d 841, 845 (Utah Ct App 1992)

[14] ¶ 25 McKesson next argues that the Commission erred in concluding that Lieberman's compensable workplace injury was the cause of his subsequent aggravating injury This court will not overturn the Commission's factual findings "unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence " *Large v Industrial Comm'n,* 758 P 2d 954, 956 (Utah Ct App 1988), 758 P 2d at 956 (alteration in original) (quotations and citations omitted) Additionally, we grant the Commission a measure of discretion when applying the legal standard to a given set of facts *See Drake v Industrial Comm'n,* 939 P 2d 177, 182 (Utah 1997), *see also AE Clevite,* 996 P 2d 1072, 2000 UT App 35 at ¶ 6 (stating, "we must uphold the Commission's determination unless the determination exceeds the bounds of reasonableness and rationality")

[15] ¶ 26 Here, the Commission accepted as undisputed the existence of Lieberman's compensable workplace injury (FN4) The Commission then determined that the available medical evidence pointed to Lieberman's compensable workplace injury as the medical cause of his subsequent aggravating injury Finally, after examining the facts surrounding Lieberman's subsequent injury, as well as "the connection between [his] subsequent injury and [his] original compensable industrial injury," *Intermountain,* 839 P 2d at 846, the Commission determined that Lieberman's subsequent injury occurred after a "simple accident brought on by ordinary error and unintentional miscalculation " Thus, the Commission effectively concluded that Lieberman's subsequent injury was the "natural result" of his compensable workplace injury, and that the circumstances surrounding Lieberman's subsequent injury did not relieve McKesson of the financial responsibility for the injury

¶ 27 We have reviewed the record and conclude that the evidence supports the Commission's findings Lieberman clearly suffered a grave compensable workplace injury to his neck in 1995 Additionally, medical expert opinion proffered by both sides suggested that Lieberman's injury never properly healed, and that a subsequent aggravation of that injury was not unexpected Finally, nothing in the record suggests that Lieberman's subsequent injury resulted from unreasonable conduct, therefore, we cannot say that the Commission's findings were "wholly without cause, or contrary to the one [inevitable] conclusion from the evidence " *Large,* 758 P 2d at 956 (alteration in original) (quotations and citations omitted)

¶ 28 We also conclude that the Commission had an adequate factual basis upon which to determine that Lieberman's subsequent re-injury was the "natural result" of his compensable workplace injury Therefore, the Commission properly determined that McKesson was responsible for the costs associated with the re-injury

*474. CONCLUSION

¶ 29 The Commission properly examined Lieberman's petition for additional workers' compensation benefits under the standard set forth in *Intermountain Health Care v Board of Review,* 839 P 2d 841, 845-46 (Utah Ct App 1992) Additionally, the Commission acted within the scope of its discretion in determining that Lieberman's subsequent injury was the natural result of his earlier compensable primary injury

¶ 30 Accordingly, we affirm the Commission's findings and conclusions

¶ 31 WE CONCUR NORMAN H JACKSON, Presiding Judge, and JAMES Z DAVIS, Judge

(FN1) In most cases, "a usual or ordinary" exertion is sufficient to meet the legal causation requirement, however, "a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition " *Allen v Industrial Comm'n,* 729 P 2d 15, 25 (Utah 1986)

(FN2) Stated more precisely, the claimant must establish that the subsequent aggravation is causally linked to the primary compensable injury *See Intermountain Health Care v Board of Rev ,* 839 P 2d 841, 846 (Utah Ct App 1992)

(FN3) Of course, responsibility for costs resulting from subsequent aggravations to compensable workplace injuries is not automatic The claimant must first demonstrate that the subsequent aggravation is the "natural result" of the primary workplace injury or accident *Mountain States Casing Servs v McKean,* 706 P 2d 601, 602 (Utah

1985).

(FN4.) The Commission adopted the findings of the ALJ.

***1356** 815 P 2d 1356

Court of Appeals of Utah

H. Glenn OLSON, Plaintiff and Appellee,
v
PARK-CRAIG-OLSON, INC.; J. Samuel Park; and Ellis Edward Craig, Defendants and Appellants.
No 900545-CA
Aug 14, 1991

Minority shareholder brought action against corporation and other shareholders for indemnity and contribution for amounts he had paid in satisfaction of corporation debts Controlling shareholder filed counterclaim in quantum meruit for unreimbursed expenses The Third District Court, Salt Lake County, Richard H Moffat, J , dismissed controlling shareholder's counterclaim and awarded summary judgment to minority shareholder Controlling shareholder and corporation appealed The Court of Appeals, Orme, J , held that (1) summary judgment on minority shareholder's complaint was appropriate given arguments made and state of record, and (2) trial court's dismissal of controlling shareholder's counterclaim constituted error

Affirmed in part, reversed in part, and remanded

West Headnotes

[1] Appeal and Error ⚿934(1)
30 ----
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In General
In reviewing whether summary judgment was properly granted, Court of Appeals examines facts in light most favorable to losing party

[2] Appeal and Error ⚿169
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 Necessity of Presentation in General
Court of Appeals will not consider arguments on appeal which were not raised before trial court

[3] Courts ⚿111
106 ----
106II Establishment, Organization, and Procedure
106II(M) Records
106k111 Necessity
District courts are courts of record, and record of all official proceedings should be made Const Art 8, § 1

[4] Appeal and Error ⚿499(1)
30 ----
30X Record
30X(A) Matters to Be Shown
30k498 Presentation and Reservation of Grounds of Review
30k499 Questions and Objections in General
30k499(1) In General
Although role of appellate court is to sift parties' arguments in light of facts found by trial court and square those arguments with law, appellate court may weigh only those facts and legal arguments preserved in trial court record

[5] Appeal and Error ⚿654
30 ----
30X Record
30X(J) Defects, Objections, Amendments, and Corrections
30k652 Amendment in Appellate Court
30k654 Supplying Omissions
Motion, under rule establishing procedure for supplementing record when necessary, is appropriate only when record must be augmented because of omission or exclusion or dispute as to accuracy of reporting, and not to introduce new material into record, when record appropriately needs supplementation, this rule is method to be implemented Rules App Proc , Rule 11(h)

[6] Appeal and Error ⚿499(1)
30 ----
30X Record
30X(A) Matters to Be Shown
30k498 Presentation and Reservation of Grounds of Review
30k499 Questions and Objections in General
30k499(1) In General
Controlling shareholder had not preserved arguments which he advanced on appeal where he had not sought leave to supplement record in accordance with rule establishing proper procedure for supplementing record, and sole source of information as to whether any issues raised on appeal were considered by trial court was affidavit of controlling shareholder's trial counsel discussing dialogue held in chambers, without court reporter, concerning those arguments Rules App Proc , Rule 11(h)

[7] Pretrial Procedure ⚷624
307A ----
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak624 Availability of Relief Under Any State of Facts Provable.

Dismissal of claim for failure to state claim upon which relief can be granted is severe measure, given liberality of notice pleading, and must be granted only when it is apparent that under no set of facts proven in support of claim as pleaded would party be entitled to relief. Rules Civ.Proc., Rule 12(b)(6).

[8] Appeal and Error ⚷919
30 ----
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k919 Striking Out or Dismissal.

When challenging dismissal for failure to state a claim, appellant is entitled to generous standard of review; Court of Appeals construes pleading in light most favorable to appellant and indulges all reasonable inferences in appellant's favor. Rules Civ.Proc., Rule 12(b)(6).

[9] Implied and Constructive Contracts ⚷30
205H ----
205HI Nature and Grounds of Obligation
205HI(C) Services Rendered
205Hk30 Work and Labor in General; Quantum Meruit.

In order to succeed on claim of quantum meruit, or contract implied in law, claimant must show that other party received benefit from claimant's efforts, that other party had appreciation or knowledge of benefit, and that circumstances make it unjust for other party to retain benefit without reimbursing claimant for it; if claimant succeeds in establishing these elements, he can recover reasonable value of his services inuring to other party's benefit.

[10] Implied and Constructive Contracts ⚷30
205H ----
205HI Nature and Grounds of Obligation
205HI(C) Services Rendered
205Hk30 Work and Labor in General; Quantum Meruit.

Controlling shareholder stated claim for quantum meruit where minority shareholder conceded that controlling shareholder's successful efforts to release minority shareholder from several obligations were beneficial to minority shareholder, record contained evidence that minority shareholder knew that controlling shareholder had conferred benefit upon him, and controlling shareholder personally negotiated agreements which released minority shareholder from liability, while leaving controlling shareholder assuming even greater potential short-term liability.

***1357** Brent R. Armstrong, Jeffrey Weston Shields (argued), Paul M. Simmons, Suitter, Axland, Armstrong & Hanson, Salt Lake City, for defendants and appellants.

Reed L. Martineau, Bryce D. Panzer, (argued), Snow, Christensen & Martineau, Salt Lake City, for plaintiff and appellee.

Before BILLINGS, GARFF and ORME, JJ.

OPINION

ORME, Judge:

H. Glenn Olson (Olson) brought an action against Park-Craig-Olson, Inc., (PCO), J. Samuel Park (Park), and Ellis E. Craig (Craig) for indemnity and contribution for amounts paid on certain loans. Park filed a counterclaim for unreimbursed expenses. The trial court dismissed Park's counterclaim and awarded summary judgment to Olson. Park and PCO appeal the dismissal of the counterclaim and the grant of summary judgment. We affirm in part, reverse in part, and remand.

FACTS

Park, Craig, and Olson were shareholders in PCO, a corporation which owned and operated six Marie Callender restaurants in Utah and California. Park was the majority shareholder; he held 54.33 percent of the outstanding shares. Craig owned 29 percent, and Olson owned the remaining 16.67 percent of the outstanding shares.

PCO incurred obligations to First Security Bank (the bank), which were in turn personally guaranteed by Park, Craig, and Olson. The first note was in the principal amount of $215,000, and the second was in the principal amount of $225,000. Park, Craig, and Olson also acted as guarantors on other obligations, including several real estate leases for the restaurant locations, and a franchise contract with the Marie Callender franchisor. Park, however, was not a guarantor on the lease for the California restaurant.

In January 1985, Park sold his interest in PCO to the Marsh Group, an investment ***1358** partnership A little more than two years later, the Marsh Group defaulted on its payments to Park, and Park took steps to repossess his shares in PCO He regained possession of the shares in September 1987 Park learned PCO was in severe financial distress and that the value of the PCO shares was in serious jeopardy The bank sued PCO in June 1987, after PCO defaulted on both notes Park resumed an active role in PCO management and vigorously sought refinancing and negotiated with creditors Park's efforts resulted in Olson's release from his guaranties of several of the real estate leases, including one significant lease, namely for the California restaurant on which Park was himself not a guarantor Park was required to remain as a guarantor on the lease for the West Valley City restaurant, although Olson was released from liability Park also successfully negotiated the forgiveness of substantial past due franchise fees

Park reached a settlement with the bank in which Park, Craig, and PCO, were released from the notes in exchange for a payment of $235,000 After the sale of PCO's remaining assets to the Marie Callender franchisor, Park was fully reimbursed for his payment to the bank As part of the settlement, the bank reserved its rights to seek an additional $80,000 payment from Olson Ultimately the bank obtained a judgment against Olson and he paid over $84,000 to the bank

Olson sued Park, Craig, and PCO, seeking indemnity from PCO and contribution from Craig and Park for the amounts he paid on the judgment arising from the bank notes Park counterclaimed against Olson for reimbursement for personal services and expenditures in his efforts to avoid financial disaster for PCO and its shareholders and for managing PCO during its final year of operation The trial court granted summary judgment in favor of Olson and dismissed Park's counterclaim Olson was also awarded attorney fees against PCO

SUMMARY JUDGMENT

[1] Summary judgment is appropriate "only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law" *Projects Unlimited v Copper State Thrift,* 798 P 2d 738, 743 (Utah 1990) (quoting *Transamerica Cash Reserve Inc v Dixie Power & Water, Inc* , 789 P 2d 24, 25 (Utah 1990)), Utah R Civ P 56(c) In our review of whether summary judgment was properly granted, we examine the facts in the light most favorable to the losing party *Donahue v Durfee* 780 P 2d 1275, 1276 (Utah App 1989) "[W]e review the trial court's legal conclusions for correctness and give no particular deference to that court's view of the law" *Projects Unlimited,* 798 P 2d at 743

Park argues that Olson was not entitled to summary judgment because the court erred in its conclusion that Olson was owed contribution from Park Park claims he was not liable for contribution because he paid more than his proportionate share of PCO's debt on the bank notes, while Olson did not pay more than his fair share Park also alleges that the court erred in its method of calculating the amount of Park's liability, and he additionally contests the award of attorney fees Olson counters that none of these arguments were raised before the trial court, and asks that we not consider them on appeal Olson's argument appears well-taken In his memorandum in opposition to Olson's renewed summary judgment motion, Park only argued that (1) the motion was premature since it was filed prior to the date scheduled for the closing of discovery, (2) the motion suggested that Park failed to file a counterclaim as ordered by the court, when the court had not so ordered, and (3) the motion was not ripe Park does not pursue any of these arguments in this appeal

[2] We normally will not consider arguments on appeal which were not raised before the trial court *See, e g , James v Preston,* 746 P 2d 799, 801 (Utah App 1987) Park urges us to consider his arguments, stating that they were "broadly speaking raised below" and suggesting that the trial court "implicitly considered" the arguments now raised on appeal Park ***1359** refers us to a number of cases establishing an exception to the general rule, all of which suggest that standing issues may be raised for the first time on appeal (FN1) *See, e g , Blodgett v Zions First Nat'l Bank,* 752 P 2d 901, 904 (Utah App 1988) (court or parties may raise standing concerns for the first time on appeal) *But see State v Marshall,* 791 P 2d 880, 885 (Utah App) (Fourth Amendment standing cannot be raised for first time on appeal), *cert denied,* 800 P 2d 1105 (Utah 1990) Park suggests we voraciously expand the bite of the standing exception, urging that the expanded exception be applied to him. He posits that issues of standing affect substantive rights to maintain an action, and since maintenance of his action is in peril if we do not consider his arguments, we must proceed as if the arguments concerned standing and reach their merits We do not regard Park's arguments on appeal as touching upon standing in any meaningful sense We decline to enlarge the standing exception to our long-standing rule as argued by Park Such an expansion of the exception would essentially gut the

rule requiring that arguments raised on appeal have first been raised below

Park also supports his position that the arguments were raised below by submission of an affidavit of his trial counsel discussing an "active dialogue" that was held in chambers and without a court reporter, concerning these arguments However, we are constrained to disregard the affidavit as it has not been made part of the record before us The affidavit presents but one account of an unrecorded conversation in which critical issues were allegedly addressed

[3][4] The district courts of this state are courts of record, Utah Const , art VIII, § 1, Utah Code Ann § 78-1-2 (1987), and a record of all its official proceedings should be made *See, e g State v Suarez* 793 P 2d 934, 936 n 3 (Utah App 1990), *Birch v Birch,* 771 P 2d 1114, 1116 (Utah App 1989), *Briggs v Holcomb,* 740 P 2d 281, 282-83 (Utah App 1987) This precept "applies to conferences in chambers as well as courtroom proceedings " *Onyeabor v Pro Roofing, Inc ,* 787 P 2d 525, 527 (Utah App 1990) "The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review " *Franklin Fin v New Empire Dev Co ,* 659 P 2d 1040, 1045 (Utah 1983) The role of the appellate court is to sift the parties' arguments in light of "the facts found by the trial court and square them with the law " *State v Vigil* 815 P 2d 1296, 1299 We may, however, weigh only those facts and legal arguments preserved for us in the trial court record *Ringwood v Foreign Auto Works Inc ,* 786 P 2d 1350, 1358-59 (Utah App 1990) Counsel's recollection of the course of proceedings is no substitute for a record of those proceedings

[5] Rule 11 of the Utah Rules of Appellate Procedure establishes a procedure for supplementing the record when necessary Utah R App P 11(h) But a motion under Rule 11(h) is appropriate only when the record must be augmented because of an omission or exclusion, or a dispute as to the accuracy of reporting, *State v Moosman,* 794 P 2d 474, 478-79 & n 17 (Utah 1990), and not to introduce new material into the record *Id* at 478 n 17 The rule provides a reliable method for the reconstruction of events when the record has failed in some limited respect *See also Jeschke v Willis,* 793 P 2d 428, 428-29 (Utah App 1990) (in considering a Rule 11(h) motion, court may examine prior opportunity to introduce material, necessity of supplemental material, and potential delay) When the record appropriately needs supplementation, Rule 11(h) is the method to be implemented

[6] Park has not sought leave to supplement the record in accordance with Rule 11(h), and we cannot consider his counsel's affidavit, which appears as an unsolicited addendum to Park's brief A careful review of the record on appeal persuades us ***1360** that Park has not preserved the arguments advanced in opposition to the judgment in Olson's favor and we decline to consider them On the record properly before us, and given the issues raised on appeal, we find no error in the grant of summary judgment to Olson

RULE 12(b)(6) DISMISSAL OF PARK'S COUNTERCLAIM

[7][8] Dismissal of a claim under Rule 12(b)(6) is a severe measure given the liberality of notice pleading, and must be granted only when it is apparent that under no set of facts proven in support of the claim as pleaded would a party be entitled to relief *Colman v Utah State Land Bd ,* 795 P 2d 622, 624 (Utah 1990) Rule 12(b)(6) provides that a pleading may be dismissed for "failure to state a claim upon which relief can be granted ' Utah R Civ P 12(b)(6) When challenging a dismissal under Rule 12(b)(6) the appellant is entitled to a generous standard of review We "construe the [pleading] in the light most favorable to the [claimant] and indulge all reasonable inferences in [the claimant's] favor " *Mounteer v Utah Power & Light Co ,* 773 P 2d 405, 406 (Utah App 1989) *See also Arrow Indus v Zions First Nat'l Bank* 767 P 2d 935, 936 (Utah 1988) (Rule 12(b)(6) motion appropriate only "where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim ")

[9] Each party relies on *Davies v Olson,* 746 P 2d 264 (Utah App 1987), in which this court distinguished the variants of *quantum meruit* and diagrammed the elements of each Park's counterclaim alleges a contract implied in law, also referred to as unjust enrichment or quasi-contract In order to succeed on this claim, Park must show Olson received a benefit from Park's efforts, Olson's appreciation or knowledge of the benefit, and that the circumstances make it unjust for Olson to retain the benefit without reimbursing Park for it *Id* at 269 If Park succeeded in establishing these elements, he could recover the reasonable value of his services inuring to Olson's benefit *Id*

Olson asserts that, even generously indulging all reasonable inferences, no set of facts proved in support

of the counterclaim could sustain Park's theory of unjust enrichment Tempering our review with a liberal construction of the counterclaim, as we must, we disagree We need not dwell on the first element, i e , that a benefit be conferred on Olson, as Olson conceded in his own deposition that Park's successful efforts to release Olson from several obligations was beneficial to Olson The remaining issues concern Olson's appreciation or knowledge of the benefit, and whether the circumstances make it unjust for Olson to retain that benefit gratis Support for these elements of the claim can be reasonably inferred from the record

[10] Olson relies on the subtle distinction of whether he knew that Park *in his individual capacity,* as opposed to Park acting as operating officer of PCO, conferred a benefit upon him Olson proclaims that it would be "an unjustified leap of faith, and not a reasonable inference" for us to interpret the record in Park's favor While the record does show that Olson did not entirely countenance Park's actions, we find a far wider chasm between references in the record and Olson's claim of ignorance of Park's actions as an individual shareholder in contradistinction to his actions as an operating officer We agree with Olson that this unique situation does not neatly conform to "textbook examples of contract implied in law" However, our task is not to pass on the ultimate merits of Park's claim--we conduct our inquiry only far enough to discern some set of "facts which could be proved in support of [his] claim" *Arrow Indus* 767 P 2d at 936 The record amply supports a reasonable inference that Olson knew of the benefit conferred by Park acting as a fellow shareholder On remand, the parties will have their opportunity to introduce evidence to prove whether that reasonable inference can be adequately supported or refuted

Park must also prevail on the issue of whether it would be unjust for Olson to retain the benefit of Park's services without payment Olson claims that Park's efforts ***1361.** to save PCO from financial ruin were motivated by Park's understandable desire to salvage his own investment, and argues that any benefit to him is merely incidental Yet Park personally negotiated agreements which released Olson from liability, while leaving Park assuming even greater potential liability, at least in the short term (FN2) Although there may be other factors which would counter this apparent inequity, viewing the record in the light most favorable to Park, it is clear he has a reasonable prospect of success on this aspect of his claim

Olson may yet prevail against Park's counterclaim for reimbursement Nonetheless, the record does not persuade us that there is no set of facts under which Park might succeed, and we must reverse dismissal of his counterclaim and remand for further proceedings addressed to the merits of his claim

CONCLUSION

The assertions contained in Park's counsel's affidavit are not properly before us Accordingly, we cannot consider them in our decision Park's arguments challenging the award of summary judgment on the question of contribution owed to Olson are raised for the first time on appeal and we will not entertain them The summary judgment on Olson's complaint is beyond reproach given the arguments made and the state of the record

The dismissal of Park's counterclaim is reversed and the case remanded for a trial on the merits of the counterclaim or such other proceedings as may be proper

BILLINGS and GARFF, JJ , concur

(FN1) Park enumerates additional grounds for considering his arguments for the first time on appeal, none of which we find persuasive

(FN2) Park successfully obtained a release of Olson's liability on the lease for the West Valley City restaurant Park was required to remain liable While Park and Olson were formerly each liable for the full amount of the lease, Olson's release effectively terminated any right that Park would have had against Olson for liability if Park were required to pay on his guaranty

*769 922 P 2d 769

Supreme Court of Utah

Lesa D. SHEPPICK, as personal representative of the Estate of David A. Sheppick, Plaintiff and Appellant,
v
ALBERTSON'S, INC., and Scott Wetzel Services, Inc., Defendants and Appellees.

No 940364
Aug 13, 1996

Employee brought action against his employer and its workers' compensation administrator, alleging bad faith refusal to pay his claim for medical and travel expenses The Fifth District Court, Iron County, J Philip Eves, J , dismissed complaint, and appeal was taken The Supreme Court, Stewart, Associate C J , held that district court lacked jurisdiction over employee's claim alleging bad faith refusal to pay medical expenses which were allegedly required by Industrial Commission's orders because whether those orders could be construed to require employer and administrator to pay medical expenses for employee's injury depended on whether injury was caused by industrial accident and that determination was within exclusive jurisdiction of Industrial Commission

Affirmed

West Headnotes

[1] Workers' Compensation ⚿1910
413 ----
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12 Scope and Extent of Review in General
413k1910 In General
Whether Industrial Commission has exclusive jurisdiction to determine entitlement to workers' compensation benefits is issue of law subject to a correctness standard of review

[2] Workers' Compensation ⚿11
413 ----
413I Nature and Grounds of Master's Liability
413k11 Purpose of Legislation
Workers' Compensation Act is comprehensive scheme enacted to provide speedy compensation to workers who are injured as result of accident occurring in the course and scope of their employment, irrespective of negligence on the part of employers or employees U C A 1953, 35A-3-101

[3] Workers' Compensation ⚿2
413 ----
413I Nature and Grounds of Master's Liability
413k2 Statutory Foundation and Relation to Common Law
Workers' Compensation Act creates no-fault type insurance protection scheme for work related injuries in lieu of traditional common law tort remedies and although, in some cases, amount of compensation worker can receive under the Act is more limited than the amount worker might receive in common law damages, compensation is available without regard to fault, is more flexible in providing for physical disabilities and loss of wages, medical benefits, and benefits for dependents and survivors, and is provided more speedily and generally with less expense U C A 1953, 35A-3-101

[4] Workers' Compensation ⚿2084
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2084 In General
Remedies provided by Workers' Compensation Act for injuries to workers are exclusive of common law remedies U C A 1953, 35-1-60

[5] Workers' Compensation ⚿1087
413 ----
413XII Administrative Officers and Boards
413k1085 Jurisdiction
413k1087 Exclusiveness
Although Workers' Compensation Act does not specifically state that no court may award benefits provided by Workers' Compensation Act, that is its clear import U C A 1953, 35A-3-101

[6] Workers' Compensation ⚿1087
413 ----
413XII Administrative Officers and Boards
413k1085 Jurisdiction
413k1087 Exclusiveness

[See headnote text below]

[6] Workers' Compensation ⚿1187
413 ----
413XVI Proceedings to Secure Compensation
413XVI(A) In General

413k1187 Jurisdiction of Courts.

District courts have no jurisdiction whatsoever over cases that fall within purview of Workers' Compensation Act and they may enforce award only if it is properly docketed. U.C.A.1953, 35-1-59.

[7] Workers' Compensation ⚿1187
413 ----
413XVI Proceedings to Secure Compensation
413XVI(A) In General
413k1187 Jurisdiction of Courts.

Court of Appeals has power only to exercise appellate review of Industrial Commission awards, not to make awards itself. U.C.A.1953, 35-1-86.

[8] Workers' Compensation ⚿2093
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2093 Willful or Deliberate Act or Negligence.

[See headnote text below]

[8] Workers' Compensation ⚿2100
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2100 Failure to Provide Insurance or to Secure Compensation.

[See headnote text below]

[8] Workers' Compensation ⚿2122
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)5 Actions
413k2122 In General.

Workers' Compensation Act allows for only two instances in which resort to district court may be had for judicial common law remedy, but not for compensation award: (1) employee injured by willful or intentional tortious act of employer or coworker may sue in district court for a common law remedy and (2) if employer fails to comply with statute requiring employers either to provide workers' compensation insurance or to be self-insured, employee may sue in district court for personal injuries arising out of or in the course of employment caused by wrongful act or default of employer or employer's agents. U.C.A.1953, 35-1-46, 35-1-57.

[9] Workers' Compensation ⚿2100
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2100 Failure to Provide Insurance or to Secure Compensation.

If employer fails to comply with statutory insurance requirements, employee may sue in district court for personal injuries arising out of or in the course of employment caused by wrongful act of employer or any of its agents and in such action, employer may not defend on the ground of the fellow-servant rule, assumption of risk, or contributory negligence; proof of worker's injury constitutes prima facie evidence of negligence on part of employer and burden is on employer to show freedom from negligence resulting in worker's injury. U.C.A.1953, 35-1-46, 35-1-57.

[10] Workers' Compensation ⚿11
413 ----
413I Nature and Grounds of Master's Liability
413k11 Purpose of Legislation.

[See headnote text below]

[10] Workers' Compensation ⚿1038
413 ----
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1037 Judgment on Award
413k1038 In General.

Purpose of workers' compensation statute providing that abstract of any award may be filed in the office of the clerk of the district court and execution may be issued thereon within the same time and in the same manner and with the same effect as if said award *769 were a judgment of the district court is to provide employee with judicial remedy for enforcing compensation awards in cases where Industrial Commission has adjudicated; statute does not confer jurisdiction on court to make workers' compensation

award, but only authorizes courts to enforce judgments on awards made by Commission who has no authority to issue judgment that can be enforced against property of employer or issuer that fails to pay award U C A 1953, 35-1-59

[11] Workers' Compensation ⚿1036
413 ----
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1036 Action on Award

[See headnote text below]

[11] Workers' Compensation ⚿1090
413 ----
413XII Administrative Officers and Boards
413k1090 Powers and Duties in General
Industrial Commission itself has no authority to issue judgment that can be enforced against property of employer or insurer that fails to pay workers' compensation award

[12] Workers' Compensation ⚿1038
413 ----
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1037 Judgment on Award
413k1038 In General
Because Industrial Commission issued no order respecting employee's alleged injury, district court had no order on which a judgment could be entered and, accordingly, had no jurisdiction to adjudicate employee's claim against employer and its workers' compensation administrator, Commission had exclusive jurisdiction thereof

[13] Workers' Compensation ⚿1087
413 ----
413XII Administrative Officers and Boards
413k1085 Jurisdiction
413k1087 Exclusiveness

[See headnote text below]

[13] Workers' Compensation ⚿2084
413 ----
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2084 In General
Exclusive remedy provided for in workers' compensation statute, providing that the right to recover compensation for injuries sustained by employee is the exclusive remedy against employer, and the means for adjudicating the right to such remedy rests with Industrial Commission, and only the Commission U C A 1953, 35-1-60

[14] Workers' Compensation ⚿1087
413 ----
413XII Administrative Officers and Boards
413k1085 Jurisdiction
413k1087 Exclusiveness
Scheme of Workers' Compensation Act contemplates that only Industrial Commission can make awards of benefits under the Act and the necessary factual and legal conclusions in support thereof, not only do terms of the Act refer exclusively to Commission in those sections dealing with adjudication of claims and the award of benefits, but Commission itself is intended to develop and apply the kind of expertise that grows out of the special situations to which the Act applies and to give full force to remedial provisions of the Act U C A 1953, 35A-3-101

[15] Workers' Compensation ⚿1778
413 ----
413XVI Proceedings to Secure Compensation
413XVI(Q) Award or Judgment
413k1777 Modification, Amendment, and Correction
413k1778 In General
In contrast to like actions at common law, under Workers' Compensation Act, Industrial Commission has continuing jurisdiction to modify awards to injured employees and this continuing jurisdiction includes the authority to modify award for medical benefits and the doctrine of res judicata does not bar Commission from making such a modification U C A 1953, 35A-3-101

[16] Workers' Compensation ⚿1789
413 ----
413XVI Proceedings to Secure Compensation
413XVI(Q) Award or Judgment
413k1788 Conclusiveness and Effect
413k1789 In General
Under general common law doctrine, entry of judgment for damages based on personal injuries bars subsequent actions based on the same injury, but such is not the case under Workers' Compensation Act

[17] Workers' Compensation ⚿1782
413 ----
413XVI Proceedings to Secure Compensation
413XVI(Q) Award or Judgment
413k1780 Opening and Vacating
413k1782 Grounds in General
Industrial Commission is empowered to adjust workers' compensation award in accordance with changes in circumstances and such changes could include deterioration of former employee's condition or discovery of previously unnoticed injury U C A 1953, 35-1-78

[18] Workers' Compensation ⚿1187
413 ----
413XVI Proceedings to Secure Compensation
413XVI(A) In General
413k1187 Jurisdiction of Courts
Workers' compensation claimant's complaint for declaratory judgment did not give district court jurisdiction to rule on a matter committed to the authority of another adjudicatory body, namely Industrial Commission

[19] Declaratory Judgment ⚿271
118A ----
118AIII Proceedings
118AIII(B) Jurisdiction and Venue
118Ak271 In General
District courts are authorized to declare rights, status, and other legal relations, however, not only may court decline to exercise this authority, but it must do so when it has no subject matter jurisdiction U C A 1953, 78-33-1

[20] Workers' Compensation ⚿1087
413 ----
413XII Administrative Officers and Boards
413k1085 Jurisdiction
413k1087 Exclusiveness
Industrial Commission has exclusive jurisdiction not only to issue compensation awards authorized by Workers' Compensation Act, but also to make the necessary factual findings upon which such awards may be made

[21] Workers' Compensation ⚿1042
413 ----
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1042 Unfair Practices, Bad Faith, Penalties
Injured employee's claim against employer and its workers' compensation administrator for bad faith refusal to deal, if cognizable, could be adjudicated only in the district court, such a claim was a common law cause of action which Industrial Commission had neither the authority nor the jurisdiction to adjudicate

[22] Workers' Compensation ⚿1042
413 ----
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1042 Unfair Practices, Bad Faith, Penalties
District court lacked jurisdiction to adjudicate employee's claim against employer and its workers' compensation administrator for bad faith refusal to pay medical expenses which were allegedly required by Industrial Commission's original and supplemental orders, whether those orders could be construed to require employer and administrator to pay medical expenses for employee's injury depended on whether the injury was caused by his industrial accident or by some subsequent event and that determination was within exclusive jurisdiction of Commission

***772** Floyd W Holm, Cedar City, for plaintiff

Steven J Aeschbacher, Salt Lake City, for defendants

STEWART, Associate Chief Justice

This case is here on appeal from an order of the trial court dismissing David A Sheppick's claims against his former employer, Albertson's, Inc , and Scott Wetzel Services, Inc , Albertson's workers' compensation administrator, for bad faith and unfair dealing in refusing to pay Sheppick's claim for medical expense reimbursement under the Workers' Compensation Act

I FACTS

The events that give rise to this case occurred over a seven-year period While employed by Albertson's, which was self-insured under the Workers' Compensation Act, David Sheppick suffered a work-related back injury on or about July 4, 1986, and did not work at Albertson's after that time On February 23, 1990, the Industrial Commission awarded him permanent total disability benefits and medical benefits for treatment of the work-related injury Since that time, the Commission has retained jurisdiction over this matter

In 1992, Sheppick applied to the Commission for an award of medical expenses for treatment of the L1-2 and L2-3 areas of his spine In response to Sheppick's application, Albertson's asserted that this injury did not arise from Sheppick's July 4, 1986, industrial accident The issue was submitted to a medical panel, and it found that the injury to the L1-2 and L2-3 areas was related to the industrial accident The Commission ruled on the basis of the medical panel's report that Sheppick was entitled to receive payment for the medical treatment necessary "to treat his problems at L1-2 and L2-3 and that the cost of the treatment was to be assumed by Albertson's " This supplemental order was entered May 17, 1993

Subsequently, Sheppick claimed that he had suffered an injury to a different part of his spine, the L3-4 level, and sought additional medical and travel reimbursement from Albertson's Albertson's refused to pay, asserting that the injury was not related to the industrial accident but had been caused by activities occurring subsequent thereto In response, Sheppick filed an application in September 1993 with the Commission for a hearing to determine whether he was entitled to medical and travel expenses related to that injury In October 1993, Albertson's answered Sheppick's application, alleging that his injury was caused by events subsequent to the industrial accident and raising the issue of his permanent total disability status Before a hearing could be held, Sheppick withdrew his application, and the Commission issued an order of dismissal

Sheppick then filed a complaint in district court on February 14, 1994, against Albertson's and Scott Wetzel Services, alleging bad faith refusal to pay his claim for medical and travel expenses and for "enforcement" of the Commission's May 1993 order The trial court dismissed Sheppick's complaint against both defendants for lack of jurisdiction and failure to state a claim

On this appeal, Sheppick argues that (1) the complaint asserted a valid claim for relief for "bad faith" against defendants, irrespective of privity of contract with them, (2) the dismissal of plaintiff's bad faith claims was unconstitutional under the Utah open courts provision, Article I, section 11, (3) the district court had jurisdiction under Utah Code Ann § 35-1-59 to enforce the stipulation and order and supplemental order as an "award" made by the Commission, (4) the district court had subject matter jurisdiction to determine *773 the dispute between the parties under the declaratory judgment act, and (5) plaintiff's claims were not barred under the exclusive remedy provision of the Workers' Compensation Act, Utah Code Ann § 35-1-60 Following David Sheppick's unrelated death in June 1995, we granted an order substituting his wife, Lesa D Sheppick, as plaintiff

The dispositive issue in this case is whether the district court had jurisdiction to determine the issues in dispute or whether those issues either fell within the exclusive jurisdiction of the Commission or were dependent on Commission action as an essential prerequisite to the exercise of judicial jurisdiction

II THE EXCLUSIVE REMEDY PROVISION OF THE WORKERS' COMPENSATION ACT AND THE INDUSTRIAL COMMISSION'S EXCLUSIVE JURISDICTION TO AWARD BENEFITS UNDER THE ACT

[1] Whether the Commission has exclusive jurisdiction to determine entitlement to workers' compensation benefits is an issue of law subject to a correctness standard of review *See State Dep't of Social Servs v Vigil,* 784 P 2d 1130, 1132 (Utah 1989)

Sheppick's basic argument is that the district court had jurisdiction to decide his eligibility under the Act for medical and travel benefits for the injury to the L3-4 area of his spine and to award him damages for defendants' bad faith refusal to settle his claim for those expenses Specifically, he argues that the district court had jurisdiction to do so because Utah Code Ann § 35-1-59 permits a worker to enforce a Commission order by docketing the award in a district court so that it can be enforced as a judgment Sheppick concludes from this that the Act recognizes the jurisdiction of the district court to make compensation awards

Plaintiff's argument is founded on a misunderstanding of the jurisdiction of the Commission and the district courts with respect to the award of benefits under the Act

[2][3] The Workers' Compensation Act is a comprehensive scheme enacted to provide speedy compensation to workers who are injured as a result of an accident occurring in the course and scope of their employment, irrespective of negligence on the part of employers or employees The Act basically creates a no-fault type insurance protection scheme for work-related injuries in lieu of traditional common law tort remedies Although in some cases, the amount of compensation a worker can receive under the Act is

more limited than the worker might receive in common law damages, compensation is available without regard to fault, is more flexible in providing for physical disabilities and loss of wages, medical benefits, and benefits for dependents and survivors, and is provided more speedily and generally with less expense

[4] The remedies provided by the Act for injuries to workers are exclusive of common law remedies Section 35-1-60 of the Utah Code provides that compensation awarded under the Act is "exclusive" and the "liabilities of the employer imposed by the Act shall be in place of any and all other civil liability whatsoever, at common law or otherwise " That section further provides that "no action at law may be maintained against an employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee "

[5][6][7] Although the Act does not specifically state that no court may award benefits provided by the Act, that is its clear import District courts have no jurisdiction whatsoever over cases that fall within the purview of the Workers' Compensation Act *See Morrill v J & M Constr Co*, 635 P 2d 88, 89 (Utah 1981), *Bryan v Utah Int'l,* 533 P 2d 892 (Utah 1975), *Ortega v Salt Lake Wet Wash Laundry,* 108 Utah 1, 5, 156 P 2d 885 (1945), *Murray v Wasatch Grading Co*, 73 Utah 430, 435, 274 P 940 (1929) They may enforce an award only if it is properly docketed Utah Code Ann § 35-1-59 The court of appeals has power only to exercise appellate review of Commission awards, not to make awards itself Utah Code Ann § 35-1-86

[8] The Act allows for only two instances in which resort to a district court may be had for a judicial common law remedy but not for a compensation award First, an employee ***774** injured by a willful or intentional tortious act of an employer or a fellow employee may sue in a district court for a common law remedy *Mounteer v Utah Power & Light Co*, 823 P 2d 1055 (Utah 1991), *Bryan v Utah Int'l,* 533 P 2d 892 (1975), *see Lantz v National Semiconductor Corp*, 775 P 2d 937 (Utah Ct App 1989), *see also* Eric Hollowell, Annotation, *Willful, Wanton, or Reckless Conduct of Coemployee as Ground of Liability Despite Bar of Workers' Compensation Law,* 57 A L R 4th 888 (1987)

[9] Second, if an employer fails to comply with the insurance requirements stated in Utah Code Ann § 35-1-46, which requires employers either to provide workers' compensation insurance or to be self-insured if the Commission finds that certain requirements are met, an employee may sue in district court for personal injuries "arising out of or in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees " Utah Code Ann § 35-1-57 In such an action, an employer may not defend on the ground of the fellow-servant rule, assumption of risk, or contributory negligence Proof of the worker's injury constitutes prima facie evidence of negligence on the part of the employer, and the burden is on the employer to show freedom from negligence resulting in the employee's injury (FN1)

[10][11] Plaintiff argues that the district court had jurisdiction under § 35-1-59 to adjudicate its claim for medical benefits That section provides "An abstract of any award may be filed in the office of the clerk of the district court Execution may be issued thereon within the same time and in the same manner and with the same effect as if said award were a judgment of the district court " The purpose of this provision is to provide an employee with a judicial remedy for enforcing compensation awards in cases the Industrial Commission has adjudicated The Commission itself has no authority to issue a judgment that can be enforced against the property of an employer or an insurance company that fails to pay an award Thus, § 35-1-59 does not confer jurisdiction on a court to make a workers' compensation award, it only authorizes courts to enforce judgments on awards made by the Commission If defendants had failed to pay the compensation ordered by the Commission, Sheppick could have docketed the orders in a district court and proceeded to enforce a judgment based thereon Defendants did, however, comply with the awards made by the Commission

[12] The instant dispute arose subsequent to those awards when Sheppick claimed for the first time that he was entitled to compensation for an injury to a somewhat different area of his back, the L3-4 area Defendants contended that this injury was not caused by the industrial accident but was incurred after Sheppick's employment was terminated Rather than submitting the issue of whether that injury was prior-work-related to the Commission for adjudication as Sheppick had done in the supplemental proceeding, he withdrew his petition for an award of additional medical benefits before the Commission could decide whether the L3-4 injury was caused by the industrial accident The Commission, therefore, had no option but to dismiss the petition Because the Commission issued no order respecting the alleged L3-4 injury and the district court had no order on which a judgment could be entered, it had no jurisdiction to adjudicate

plaintiff's claim, and the Commission had exclusive jurisdiction thereof *Cf United States Smelting, Refining & Mining Co v Evans* 35 F 2d 459 (8th Cir 1929)

[13] Thus, although Utah Code Ann § 35-1-60 explicitly speaks only in terms of an "exclusive remedy" and although an exclusive remedy does not necessarily mean exclusive jurisdiction, it is clear from the context of that provision and other provisions that the exclusive remedy provided in § 35-1-60 and the means for adjudicating the right to such a remedy rests with the Commission, ***775** and only the Commission *See also* Utah Code Ann §§ 35-1-16, 35-1-27

[14] Plaintiff argues that the district court could and should have enforced the Commission's supplemental order of May 17, 1993, which in effect provided lifetime medical benefits for treatment of the injuries arising out of the industrial accident Plaintiff asserts that on that basis, the district court should have granted him medical benefits for the L3-4 injury The argument assumes that the district court could have made the factual and legal determinations necessary for such an award, i e , that the L3-4 injury was related to the industrial accident That determination, however, lies squarely within the exclusive jurisdiction of the Industrial Commission The whole scheme of the Workers' Compensation Act contemplates that only the Commission can make awards of benefits under the Act and the necessary factual and legal conclusions in support thereof Not only do the terms of the Act refer exclusively to the Commission in those sections dealing with the adjudication of claims and the award of benefits, but the Commission itself is intended to develop and apply the kind of expertise that grows out of the special situations to which the Act applies and to give full force to the remedial provisions of the Act

[15][16][17] In contrast to like actions at common law, under the Workers' Compensation Act, the Commission has continuing jurisdiction to modify awards to injured employees Utah Code Ann § 35-1-78 This continuing jurisdiction includes the authority to modify an award for medical benefits, and the doctrine of res judicata does not bar the Commission from making such a modification *Mannes-Vale, Inc v Vale* 717 P 2d 709, 712 (Utah 1986) This Court has specifically held that the continuing jurisdiction extends to modification of medical expense awards *Id see also Spencer v Industrial Comm'n,* 733 P 2d 158 (Utah 1987) *See generally Morrill v J & M Constr Co ,* 635 P 2d 88 (Utah 1981), *Ortega v Salt Lake Wet Wash Laundry,* 108 Utah 1, 156 P 2d 885 (1945), *Murray v Wasatch Grading Co* 73 Utah 430, 274 P 940 (1929) (FN2)

[18][19] Sheppick's complaint for a declaratory judgment does not give the district court jurisdiction to rule on a matter committed to the authority of another adjudicatory body District courts are authorized "to declare rights, status, and other legal relations " Utah Code Ann § 78-33-1 However, not only may a court decline to exercise this authority, but it must do so when it has no subject matter jurisdiction The Utah Code provides, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding " Utah Code Ann § 78-33-6 If the court had entered a judgment, it would have been a nullity

[20][21] Having decided that the Commission has exclusive jurisdiction not only to issue compensation awards authorized by the Act, but also to make the necessary factual findings upon which such awards may be made, we turn now to Sheppick's contention that he was entitled under the open courts provision of the Utah Constitution, Article I, section 11, to have his claim for a bad faith refusal to deal on the part of defendants adjudicated in the district court Such a claim, if cognizable, could be adjudicated only in the district court Such a claim is a common law cause of action, which the Commission ***776.** has neither the authority nor the jurisdiction to adjudicate

In this case, plaintiff asserts that he has had great difficulty in obtaining payment of medical expenses, that defendants have violated the Commission's order in not making prompt payment, and that they have acted in bad faith in "providing information regarding plaintiff to persons who are not authorized to receive same, by refusing to authorizing [sic] treatment prescribed by Plaintiff's physicians and otherwise using threats, intimidation, coercion and other unlawful means to violate Plaintiff's rights" under the Commission's original and supplemental orders

[22] Assuming, but not deciding, that a plaintiff might under certain circumstances have a common law action against a self-insured employer for refusal to pay a workers' compensation award made by the Commission, the facts plaintiff alleges still fail to establish district court jurisdiction to adjudicate such a claim The premise of plaintiff's theory of bad faith is that the claim for additional medical expenses was required by the Commission's original order of February 13, 1990, and its supplemental order of May 17, 1993 Whether those orders could be construed to

require defendants to pay medical expenses for plaintiff's L3-4 injury depends on whether that injury was caused by plaintiff's 1986 industrial accident or by some subsequent event. As stated above, that determination lies within the exclusive jurisdiction of the Commission. For that reason, the district court had no jurisdiction to adjudicate the claim. Plaintiff had every opportunity to seek a Commission ruling on the causation issue. Not only did he fail to obtain such a ruling, he apparently intended to preclude the Commission from making such a determination by withdrawing his petition before the Commission for such an adjudication. (FN3)

Affirmed.

ZIMMERMAN, C.J., and HOWE, DURHAM, and RUSSON, JJ., concur in Associate Chief Justice STEWART'S opinion.

(FN1.) Utah Code Ann. § 35-1-55 provides that certain employees and their employers are exempt from the provision of the Act under certain conditions. In addition, employers engaged in certain kinds of work activities are exempt from the provisions of the Act. *See* Utah Code Ann. §§ 35-1-42, -43.

(FN2.) The provision granting the Commission continuing jurisdiction emphasizes the exclusivity of the Commission's jurisdiction over workers' compensation claims. Under general common law doctrine, the entry of a judgment for damages based on personal injuries would bar subsequent actions based on the same injury. Such is not the case under the Act. The Commission is empowered to adjust the award in accordance with changes in circumstances. *See* Utah Code Ann. § 35-1-78. Such changes could include a deterioration of the former employee's condition or the discovery of a previously unnoticed injury. *See, e.g., Stoker v. Workers' Compensation Fund,* 889 P.2d 409, 412 (Utah 1994) (commission can reopen case if previously used conservative method of treatment proved ineffective); *Barber Asphalt Corp. v. Industrial Comm'n,* 103 Utah 371, 135 P.2d 266 (1943) (commission may reconsider case if there has been some new development that suggests award may have been excessive or inadequate); *Spring Canyon Coal Co. v. Industrial Comm'n,* 60 Utah 553, 210 P. 611 (1922) (commission authorized to alter award when amputated leg failed to heal sufficiently to use prosthesis).

(FN3.) We note that this Court has held that a cause of action for breach of the implied covenant of good faith and fair dealing under an insurance policy may be maintained only if there is privity of contract between the insured and the insurer. *Beck v. Farmers Ins. Exch.,* 701 P.2d 795 (Utah 1985). Recently in *Savage v. Educators Insurance Co ,* 908 P.2d 862 (Utah 1995), we held that an employee had no common law cause of action against an employer's workers' compensation insurance carrier for breach of the implied covenant of good faith and fair dealing because the worker had no contractual relationship with the insurer. In note 4 of that opinion, however, the Court stated:

> In holding that no duty of good faith and fair dealing is imposed upon an insurer running to a third-party claimant such as Savage, we do not foreclose the possibility that such a claimant could state a cause of action for an independent tort. For example, the law of this state recognizes a duty to refrain from intentionally causing severe emotional distress to others. Thus, intentional and outrageous conduct by an insurer against a third-party claimant could conceivably result in separate tort liability. As we indicated earlier, however, because Savage did not raise this issue in her petition for a writ of certiorari, we will not consider it here.
>
> *Id.* at 866 n. 4 (citations omitted).

In the instant case, Albertson's is self-insured, and therefore, no insurance company is involved in this case. Whether it could be said that plaintiff stands in privity with his employer for purposes of a claim for breach of an implied covenant of good faith and fair dealing is an issue that we need not decide for the reasons stated above, nor need we decide whether plaintiff would have a tort action for the conduct of a recalcitrant self-insured employer.

UNITED STATES SMELTING, REFINING & MINING CO. v. EVANS

No. 8216

Circuit Court of Appeals, Eighth Circuit

35 F.2d 459; 1929 U.S. App. LEXIS 2987

October 7, 1929

PRIOR HISTORY: [**1]

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

OPINIONBY:

COTTERAL

OPINION:

[*459] Before VAN VALKENBURGH and COTTERAL, Circuit Judges, and SCOTT, District Judge.

COTTERAL, Circuit Judge. The appellant, plaintiff in the District Court, filed an amended bill against the appellee to obtain a decree enjoining the enforcement by him of an award of compensation by the Utah Industrial Commission. On motion of the defendant the bill was dismissed; and this appeal challenges that decree.

The bill alleges that the plaintiff was incorporated in and a citizen of Maine and the defendant was a citizen of Utah, and that the amount in controversy exceeded $ 3,000, exclusive of interest and costs. The proceedings of the commission are set out [*460] at length, including the findings made, as well as the decision and award, and it was complained that the latter were contrary to and without authority of law, in excess of the jurisdiction of the commission, and would, if enforced, deprive the plaintiff of its property without due process of law; that plaintiff filed a petition for rehearing with the commission and it was denied; and [**2] that the plaintiff is without adequate remedy except by injunction, as prayed.

We note those proceedings as detailed in the bill. The appellee applied to the commission for compensation on account of an injury to his eyes while employed in appellant's mill. After a hearing, at which the parties appeared and filed an agreed statement of facts, the commission made a finding of those facts and rendered a decision, allowing appellee compensation for permanent and total disability. Added to this were necessary hospital and surgical charges, which have been paid. It was agreed and it was found as an ultimate fact that he had permanently lost the sight of his left eye, that without the aid of glasses he had less than 10 per cent. of vision in his right eye, but with glases his distant vision in that eye was limited and his near vision was normal, enabling him to read the finest print. The commission concluded that as a result of the injury he was "permanently industrially blind" in both eyes, and ence, permanently and totally disabled, as defined in sectiion 3139 of the State Industrial Act (Comp. Laws Utah 1917, § § 3061-3165), and awarded compensation therefor.

It is sufficient [**3] to state, without noticing the statutory schedule, that it allows and there was awarded in this case a greater rate of compensation that is authorized for a partial disability.

The act also provides the award of the commission is subject to certiorari or review in the state Supreme Court applied for within 30 days after an adverse decision or denial of petition for rehearing solely upon the certified proceedings and evidence before the commission, the scope of the review being to determine whether (1) the commission acted without or in excess of

its powers, (2) the findings support the award It is further provided by the act that the findings and conclusions of the commission on questions of fact shall be conclusive and final and the court shall enter judgment, either affirming or setting aside the award, that the state Code of Civil Procedure is applicable, but only the Supreme Court shall have jurisdiction to review, reverse, or annul any award or to sustain or delay the operation or execution thereof Provision is also made for docketing an abstract of the award in the District Court and the collection thereof by execution as upon a judgment

The grounds of the motion to [**4] dismiss the bill were (1) The court had no jurisdiction of the subject-matter or of the defendant (2) The suit is against the state, in violation of the Eleventh Amendment (3) Want of equity (4) Existence of a plain, speedy, and adequate remedy at law (5) The suit is contrary to the laws of Utah (3) It is a proceeding for review of the findings of the commission without any statutory jurisdiction therefor (7) The suit is violative of section 720 of the Revised Statutes of the United States (8) No jurisdiction exists in this court to award relief to plaintiff, as the defendant is not authorized to enforce an order of the commission

We may assume, and it is our opinion, from the cases cited that if the case before the commission might be reviewed on the merits in the federal courts, appellee, having only a partial loss of vision which was subject to correction by the use of glasses, did not sustain a total disability See 40 C J 98, *Cline v Studebaker Corp , 189 Mich 514, 155 N W 519,* L R A 1916C, 1139 The test of such disability is whether it prevents the employee from doing work for which he is adapted, and not that in which he was injured *Rockwell* [**5] *v Lewis, 168 App Div 674, 154 N Y S 893* Our inquiry, however, is whether the award of the commission was illegal in that it was beyond its jurisdiction and if enforced will constitute a taking of appellant's property without due process of law

We may notice at this point some objections to the suit in respect of procedure One is that it is violative of section 379, title *28, U S Code, 28* USCA § 379 (section 720, Rev St), forbidding a stay of proceedings in a state court The section is inapplicable, as the commission is not a court *Industrial Commission v Evans 52 Utah 394, 174 P 825, 832, Continental Casualty Co v Industrial Commission, 61 Utah 16, 210 P 127* Besides the commission is not a party Also, the suit is not premature, as was the case in *Prentis v Atlantic Coast Line Co , 211 U S 210, 29 S Ct 67 53 L Ed 150* There the legislative rates had not been brought to a finality by appeal Here the award of the commission was final, and, if the appellant has any cause of action at all, the judicial stage was reached *Bacon v Rutland R Co 232 U S 134 34 S Ct* [*461] *283 58 L Ed 538* And appellant had no other remedy except by [**6] injunction to prevent the collection of the award

Conceding these propositions, did appellant have a right in equity to have the award set aside by the District Court? If so, on what ground? Are the contentions sound the commission as alleged acted illegally and beyond its jurisdiction and the collection of the award would take appellant's property without due process of law?

The commission undoubtedly had exclusive jurisdiction under the Industrial Act to entertain, hear, and decide the complaint of appellee, and the act was valid legislation *Cudahy Packing Co v Parramore, 263 U S 418, 44 S Ct 153 68 L Ed 366, 30 A L R 532* The hearing was had on notice and appearance of the parties, conformably to the state law In these respects there was due process of law

In ascertaining the powers of the commission, we are bound by the decisions of the state courts which interpret them *Supreme Lodge v Meyer, 265 U S 30, 44 S Ct 432, 68 L Ed 885* The commission is an administrative body, and the Supreme Court of the state will review the record of the cases at least to determine whether its findings are supported by the evidence *Utah Copper Co v Industrial* [**7] *Commission, 57 Utah, 118, 193 P 24, 13 A L R 1367 Continental Casualty Co v Industrial Commission 61 Utah, 16 210 P 127 128.* In the latter case, it is said that "Some of its acts, in fact many of its acts, are quasi judicial, but it is in no sense a judicial body * * *" In Industrial Commission of Utah v Evans, supra, the powers of the commission were considered, and it appears that several of its functions partake of a judicial character In that case, after quoting from a decision of the Illinois Supreme Court to the effect that court review may not be denied to the extent of determining whether a board had acted illegally or without jurisdiction, it was held "The term 'illegally' does not refer to a mere error of judgment in a matter where jurisdiction is clear, but it refers to an act not sanctioned by law in any event "

The commission had the power and the duty to decide the controversy between the parties to this suit, and in doing that to apply the law to the stipulated facts They were held to make out a case of permanent and total disability The ruling was upon a matter of law, and it is supported by some authority, although, as we have said, not in our [**8] opinion by the weight of authority This was a plain exercise of its jurisdiction, not an action beyond or outside of it The award was clearly within the scope of the power of the commission

The jurisdiction of the District Court rests primarily on the diverse citizenship of the parties and the requisite amount in dispute It had jurisdiction to inquire into the complaint made of the commission's action But whether a cause of action was alleged in equity was a different matter We feel clear it was not otherwise awards of this commission may be constantly involved in litigation over mere errors of an administrative character, where no real contest appears as to its fundamental authority to dispose of the claims of the parties Certainly, we must conclude the commission in this case acted although mistakenly yet legally and within but not beyond its jurisdiction

Counsel for appellant cites many cases where the federal courts have enjoined administrative or legislative commissions from enforcing orders that are unreasonable in respect of regulation or requirements, or such as fix rates for public utilities that do not permit a fair return on capital, and therefore effectuate [**9] a taking of property without due process of law But those decisions are inapplicable There is no such contention or controversy in this case No authority is pointed out to sustain a complaint in equity predicated on a mere error of an administrative tribunal, when acting within the bounds of its jurisdiction, and when the most that can be said of its action is it erroneously exercised its jurisdiction

The appellant had to abide this award, or choose to obtain a review in the state Supreme Court Having waived that remedy, it is not entitled to collaterally invoke the equity powers of a federal court for relief The bill was properly dismissed by the District Court for want of equity, and its decree is accordingly affirmed

*1192 939 P.2d 1192

317 Utah Adv. Rep. 11

Supreme Court of Utah.

V-1 OIL COMPANY, aka V-1 Propane, Respondent,
v.
DEPARTMENT OF ENVIRONMENTAL QUALITY, Division of Solid and Hazardous Waste; Diane R. Nielsen, in her Capacity as Executive Director; Dennis R. Downs, in his Capacity as Director; Utah Solid and Hazardous Waste Control Board; Kent P. Gray, in his Capacity as Executive Secretary (UST); and David O. McKnight, in his Capacity as Hearing Officer, Petitioners.

No. 950244.

May 20, 1997.

Division of Environmental Response and Remediation (DERR) issued notice of violation and order to comply based on alleged petroleum release from underground storage facility. Following written request for formal agency action, petitioner moved for recusal of presiding officer, and motion was denied. Petitioner subsequently filed petition for extraordinary writ, seeking to compel recusal. The Court of Appeals, 893 P.2d 1093, granted petition with directions. Granting petition for writ of certiorari to review that decision, the Supreme Court, Stewart, Associate Chief Judge, held that Solid and Hazardous Waste Control Board did not violate due process by appointing presiding officer who also worked as part-time staff attorney within DERR, a division charged with investigating and prosecuting violations.

Reversed.

West Headnotes

[1] Mandamus ⚿7
250 ----
250I Nature and Grounds in General
250k7 Discretion as to Grant of Writ.

Court's decision to grant or deny petition for extraordinary relief in nature of mandamus is discretionary with court to which petition is brought, in sense that it is never matter of right on behalf of applicant.

[2] Certiorari ⚿64(1)
73 ----
73II Proceedings and Determination
73k63 Review
73k64 Scope and Extent in General
73k64(1) In General.

[See headnote text below]

[2] Mandamus ⚿187.9(1)
250 ----
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(1) Scope and Extent in General.

On certiorari or appeal from grant of extraordinary relief, legal reasoning of court granting writ is reviewed for correctness.

[3] Constitutional Law ⚿278.1
92 ----
92XII Due Process of Law
92k278.1 Health and Environmental Regulations.

[See headnote text below]

[3] Health and Environment ⚿25.5(9)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.5(9) Administrative Boards and Proceedings.

Solid and Hazardous Waste Control Board did not violate due process by appointing agency employee to preside at formal hearing to decide whether petitioner failed to remediate leakage from one of its underground storage tanks, even though appointed employee also worked as part-time staff attorney within division charged with investigating and prosecuting such violations; appropriate and sufficient separation of functions at individual level was accomplished by segregating employee from contact with investigative and prosecutorial activities. U.S.C.A. Const.Amend. 14; Utah Admin. Code R315-12-10; Code of Jud.Conduct, Canon 3.

[4] Constitutional Law ⚿251.1
92 ----
92XII Due Process of Law
92k251.1 Flexibility; Balancing Interests.

Requirements of due process depend upon specific

context in which they are applied, as due process, unlike some legal rules, is not technical conception with fixed content unrelated to time, place, and circumstances. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⚷251.1
92 ----
92XII Due Process of Law
92k251.1 Flexibility; Balancing Interests.

[See headnote text below]

[5] Constitutional Law ⚷251.5
92 ----
92XII Due Process of Law
92k251.5 Procedural Due Process in General.

Determining requirements of due process in any given context involves balancing of three factors: private interests that will be affected by official actions; risk of erroneous deprivation of such interest through procedures used and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including functions involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A. Const.Amend. 14.

[6] Administrative Law and Procedure ⚷382.1
15A ----
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak382 Nature and Scope
15Ak382.1 In General.

[See headnote text below]

[6] Administrative Law and Procedure ⚷441
15A ----
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak441 In General.

Generally, "legislative" decisions of administrative agency involve development of policies, principles, or rules that typically apply prospectively to large number of parties, whereas "adjudicative" decision attaches legal or other consequences to individualized past conduct.

[7] Constitutional Law ⚷251.5
92 ----
92XII Due Process of Law
92k251.5 Procedural Due Process in General.

[See headnote text below]

[7] Constitutional Law ⚷318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General.

Requirements of due process tend to vary in proportion to degree to which administrative decision is adjudicative in nature, as opposed to legislative; generally, procedural due process applies to adjudicative government decisions and not to legislative ones. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ⚷318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General.

Stricter and more specific due process requirements apply to adversarial, adjudicative decision-making by administrative agency than to legislative activities, the most fundamental requirement being opportunity to be heard at meaningful time and in meaningful manner, and necessary corollary to that opportunity is that affected parties must receive adequate notice and must be assured that their concerns will be heard by impartial decision maker. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law ⚷318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General.

Clear demonstration of partiality apparent on face of record or showing of direct, pecuniary interest automatically requires disqualification of decision maker on due process grounds. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law ⚷318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General.

For purposes of determining whether due process requires disqualification of adjudicator in administrative proceeding, presence of clear, substantial pecuniary benefit is one of most evident causes of either conscious or subconscious bias, and is type of temptation that inevitably compromises public confidence in process itself, undermining legitimacy of

any decisions so tainted U S C A Const Amend 14

[11] Constitutional Law ⚿318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General
For purposes of determining whether due process requires disqualification of adjudicator in administrative proceeding, presumed bias is not limited to cases where personal pecuniary benefit is present, but rather, such presumption ***1192** may also be applied in other circumstances where risk of bias is so great as to offend principles of due process U S C A Const Amend 14

[12] Administrative Law and Procedure ⚿314
15A ----
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak314 Bias, Prejudice or Other Disqualification to Exercise Powers

[See headnote text below]

[12] Constitutional Law ⚿318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General
Biasing influences on adjudicator in administrative proceeding, which are unacceptable under due process analysis, may arise from adjudicator's preconceived attitudes on disputed points of law or policy, though it is rare that such attitudes are sufficiently severe to justify disqualification U S C A Const Amend 14

[13] Constitutional Law ⚿318(1)
92 ----
92XII Due Process of Law
92k318 Administrative Proceedings
92k318(1) In General
Adequate separation of functions to satisfy due process concerns in administrative context can be accomplished internally, at individual, rather than at institutional, level U S C A Const Amend 14

***1193** Peter Stirba, Benson L Hathaway, Salt Lake City, for respondent

Jan Graham, Atty Gen , Carol Clawson, Solicitor Gen , Laura J Lockhart, Asst Atty Gen , Salt Lake City, for petitioners

ON CERTIORARI TO THE UTAH COURT OF APPEALS

STEWART, Associate Chief Justice

The issue before us is whether an administrative agency, in this case the Solid and Hazardous Waste Control Board (the "Board"), can appoint an agency employee to preside at a formal hearing to decide whether a party before that agency, in this case V-1 Oil Company, failed to remediate leakage from one of its underground storage tanks The officer appointed by the Board to conduct the hearing, David O McKnight, also worked as a part-time staff attorney within the division that was charged with investigating and prosecuting such violations Although his duties as staff attorney were structurally segregated from the branch of the division conducting investigations and prosecutions of underground storage leaks, ***1194** V-1 asserted that McKnight was biased and challenged his appointment The Board refused to order McKnight's recusal V-1 then petitioned the Utah Court of Appeals for an extraordinary writ That Court held that McKnight could not sit *V-1 Oil Co v Department of Envtl Quality* 893 P 2d 1093, 1097 (Utah Ct App 1995) ("*V-1 Oil Co I* ") We granted a petition for a writ of certiorari to review that decision 910 P 2d 425 (Utah 1995) We reverse

I BACKGROUND

The dispute in this case arose out of a report of contamination by a contractor performing a tank tightness test at one of V-1's service stations in Salt Lake County A number of administrative entities within the Department of Environmental Quality ("DEQ") became involved in the investigation of the contamination report As it is important to an understanding of our holding, we will briefly detail the nature of these entities and their relationship to each other

The Board is the agency head within DEQ for purposes of the Underground Storage Tank Act ("USTA"), Utah Code Ann §§ 19-6-401 to -427, Utah Admin Code R311-210-6(a) The Division of Environmental Response and Remediation ("DERR"), also within DEQ, has a variety of responsibilities relating to compliance issues detailed in the Hazardous Substances Mitigation Act, Utah Code Ann §§ 19-6-301 to -325, and the USTA *See id* §

19-1-105(1)(c) DERR is subdivided into branches, with the Underground Storage Tank Branch being responsible for investigating and prosecuting violations of the USTA

Any party subject to a USTA enforcement action may petition the Board for a formal adjudication Utah Code Ann § 63-46b-3, Utah Admin Code R311-210-4, -7 The Board may appoint a presiding officer, Utah Admin Code R311-210-6(2), and that officer is empowered to conduct a full formal hearing Utah Code Ann §§ 63-46b-6 to -11 The presiding officer makes findings of fact and conclusions of law but is not authorized to make a final, substantive decision Utah Admin Code R311-210-6(b), -17(a) Rather, the presiding officer's recommendations are referred to the Board, which may adopt or reject them in whole or in part, may make an independent determination based on the record, or may remand the matter for evaluation of further evidence *Id* R311-210-17

In this case, a contractor performing a tank tightness test reported contamination from an underground storage tank at one of V-1 Oil's service stations Following subsequent inspections, the agency sent compliance and reporting schedules to V-1 According to DERR, V-1 did not respond DERR issued a notice of violation and order to comply, and V-1 requested a formal adjudicative proceeding The Board granted this request and appointed David O McKnight as the presiding officer (FN1)

McKnight had previously been hired as a part-time staff attorney for DERR His responsibilities in that capacity did not involve any of the investigative or prosecutorial work conducted by the Underground Storage Tank Branch In fact, his work was confined exclusively to a separate branch within DERR He was thus effectively "walled off" from the investigative and prosecutorial activities related to underground storage tank enforcement conducted by the agency Nevertheless, on the basis of McKnight's status as a part-time attorney for DERR, V-1 moved for McKnight's recusal, alleging that his employment within DERR created a risk of bias in his role as an adjudicatory officer At the hearing on the motion, the nature of McKnight's employment by DERR was explained

> McKnight indicated that he was hired by DERR with the anticipation that he would act as a presiding officer and as a staff attorney He stated that DERR "hired me with the understanding that I'd be a presiding officer, and then I would help the Agency on matters that would not risk me being in the loop of [underground storage ***1195** tanks] and [leaking underground storage tanks] "

V-1 Oil Co I, 893 P 2d at 1094 (alterations in original) He further indicated that "in his work as staff attorney he [did] 'not involve [himself] in areas that would risk [his] being exposed to investigations and anything that would lead up to an issuance of an order in underground storage tank matters ' " *Id* McKnight concluded that V-1's objections to his multiple duties within the agency did not warrant his recusal On review, the Board declined to disqualify McKnight, stating that "V-1 ha[d] presented no evidence or suggestion of actual bias on the part of the Presiding Officer, either through his relationship to the Board or his status as an employee of the Division "

V-1 petitioned for an extraordinary writ from the Utah Court of Appeals The Court of Appeals stated that V-1 had alleged two grounds for McKnight's recusal (1) actual bias or prejudice, and (2) presumed bias due to his association with DERR as a staff attorney *V-1 Oil Co I,* 893 P 2d at 1096 The Court first held, "Petitioner has not demonstrated actual bias or prejudice " (FN2) *Id* The Court thus limited its treatment to the question of whether "McKnight should be disqualified based upon his employment as a staff attorney by DERR " *Id* The Court concluded that McKnight's appointment violated "[b]asic considerations of fairness and impartiality in agency proceedings " *Id*

II STANDARD OF REVIEW

[1][2] A court's decision to grant or deny a petition for extraordinary relief in the nature of mandamus is discretionary with the court to which the petition is brought, and it is discretionary in the sense that it is "never a matter of right on behalf of the applicant " *Renn v Board of Pardons,* 904 P 2d 677, 683 (Utah 1995) However, on certiorari or appeal from a grant of extraordinary relief, the legal reasoning of the court granting the writ is reviewed for correctness *Id* at 683-85.

III. BIAS AND ADMINISTRATIVE QUASI-JUDICIAL OFFICERS

[3] We begin by examining the foundation of the Court of Appeals' decision The proper starting point for any analysis of an asserted ethical conflict in an adjudicatory proceeding is by reference to the ethical

rules governing that proceeding In this case, the Utah Administrative Code and the State Officers and Employees Ethics Act provide rules that are directly applicable to administrative adjudicative officers Chapter 16 of title 67 of the Utah Code imposes ethical constraints on all public officers and is primarily concerned with personal conflicts of interest relating to financial transactions Neither V-1 nor the Court of Appeals has asserted that any provision of this chapter has been violated

Rule 315 of the Utah Administrative Code--specifically pertaining to the operation of agencies charged with regulating solid and hazardous waste--speaks more directly to the circumstances of this case It reads in pertinent part

> A member of the Board or other Presiding Officer shall disqualify him/herself from performing the functions of the Presiding Officer regarding any matter in which
>
> (a) He/she [or a closely related] person
>
> (2) Has acted as an attorney in the proceeding or served as an attorney for, or otherwise represented a Party concerning the matter in controversy,
>
> ..
>
> (b) The Presiding Officer is subject to disqualification under principles of due process and administrative law

Utah Admin Code R315-12-10

McKnight has not "acted as an attorney" in this proceeding, nor has he "represented a Party concerning the matter in controversy " He is, however, subject to disqualification if the principles of due process applicable to the particular administrative context of this case require it Because McKnight acted in ***1196** an administrative adjudicatory role, ethical rules governing other administrative adjudicative proceedings are relevant to the due process and fairness requirements in this case The Court of Appeals held that McKnight should be disqualified because bias had to be presumed under the Utah Code of Judicial Conduct, Canon 3, which states, "A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned " (FN3) Even though the Court of Appeals acknowledged that administrative decision makers are not "held to th[e] full standard of the canons," (FN4) it apparently construed the language in Canon 3 as a rigid principle of due process that was fully applicable in administrative proceedings Consequently, the Court held that "McKnight's own characterization of his dual role as presiding officer and DERR staff attorney creates the appearance of impropriety that erodes confidence in the basic fairness of the hearing process and must be avoided in quasi-judicial proceedings as diligently as in judicial proceedings " *V-1 Oil Co I* 893 P 2d at 1097

[4][5] In our view, the Court of Appeals' analysis fails to account for relevant distinctions between administrative and judicial proceedings The requirements of due process depend upon the specific context in which they are applied because "unlike some legal rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances " *Cafeteria Workers Union v McElroy,* 367 U S 886, 895, 81 S Ct 1743, 1748, 6 L Ed 2d 1230 (1961) Determining the requirements of due process in any given context involves a balancing of three factors

> first, the private interest that will be affected by the official action, second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

Mathews v Eldridge 424 U S 319, 335, 96 S Ct 893, 903, 47 L Ed 2d 18 (1976)

Administrative agencies engage in a variety of functions Certain administrative decisions are of a policy-making nature, such as the establishment of regulations pursuant to statutory authority, others resemble judicial decision making, such as the determination of whether a party or an entity has violated a regulation Commentators tend to categorize administrative decision making as either "legislative" or "adjudicative" in nature John R Allison, *Combinations of Decision-Making Functions, Ex Parte Communications and Related Biasing Influences A Process-Value Analysis* 1993 Utah L Rev 1135, 1160 [hereinafter Allison, *Process-Value Analysis*] Not all agency actions are easily pigeonholed as either purely

legislative or purely adjudicative, however *Id* at 1161 Rather, they may fall anywhere along a continuum between the two forms *Id*

[6][7] As a general rule, "[l]egislative decisions involve the development of policies, principles, or rules that typically apply prospectively to a large number of parties," whereas "an adjudicative decision attaches legal or other consequences to individualized past conduct" *Id* at 1160 The requirements of due process tend to vary in proportion to the degree to which an administrative decision is adjudicative in nature as opposed to legislative *Id* at 1160-62 "[A]s a general proposition procedural due process applies to adjudicative government decisions and not to legislative ones" (FN5) *Id* at 1162

***1197** In this case, McKnight's decisions were made as presiding officer in V-1's case Although those decisions are not final decisions, they are clearly adjudicative in nature The hearing concerned allegations that V-1 failed to investigate reports of leaking storage tanks and to submit a corrective action plan If proven, such failures could constitute violations of state and federal regulations and could ultimately result in sanctions

[8][9] Commentators have noted that accusatory proceedings, due to their similarity in both form and consequence to formal criminal proceedings, require particular attentionto due process concerns Allison, *Process-Value* at 1180 Therefore, stricter due process requirements apply to adversarial, adjudicative decision making than to legislative-type decision making The most fundamental requirement in this context is "the opportunity to be heard 'at a meaningful time and in a meaningful manner'" *Mathews,* 424 U S at 333, 96 S Ct at 902 (quoting *Armstrong v Manzo,* 380 U S 545, 552, 85 S Ct 1187, 1191, 14 L Ed 2d 62 (1965)) As a necessary corollary to this opportunity, affected parties must receive adequate notice, and they must also be assured that their concerns will be heard by an impartial decision maker *Mathews,* 424 U S at 325 n 4, 332-35, 96 S Ct at 898 n 4, 901-03 "Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decision making" Kenneth C Davis, Richard J Pierce, Jr, *Administrative Law Treatise* § 9 8, at 67 (3d ed 1994) Where a party to an adversarial proceeding can demonstrate actual impermissible bias or an unacceptable risk of an impermissible bias on the part of a decision maker, the decision maker must be disqualified

The latter principle concerns us here The Court of Appeals' holding was premised on the principle that McKnight's employment with DERR presented an impermissible bias in his role as an adjudicator, thereby violating the due process right of a party to a fair adjudicative proceeding

There are many different types of bias, however The Court of Appeals did not address the issue of which types of bias are so harmful as to necessitate disqualification in the administrative context (FN6) A clear demonstration of partiality apparent on the face of the record, *see Bunnell v Industrial Comm'n,* 740 P 2d 1331, 1333-34 (Utah 1987), or a showing of direct, pecuniary interest, *see Gibson v Berryhill,* 411 U S 564, 579, 93 S Ct 1689, 1698, 36 L Ed 2d 488 (1973), automatically requires disqualification of the decision maker In *Bunnell,* the rec ***1198** ord indicated that in numerous instances the administrative law judge had demonstrated active hostility toward the claimant in an employment disability benefits proceeding, while at the same time exhibiting favoritism toward the employer and the employer's counsel 740 P 2d at 1333-34 We ruled that such an atmosphere of partiality violated fundamental principles of due process *Id* at 1334, *see also Local No 3 v NLRB,* 210 F 2d 325, 329-30 (8th Cir 1954) (disqualifying examiner who uniformly rejected evidence offered to support company's point of view, while accepting evidence supporting union) *But see NLRB v Pittsburgh S S Co ,* 337 U S 656, 659, 69 S Ct 1283, 1285, 93 L Ed 1602 (1949) (holding "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact")

[10] In *Berryhill,* the United States Supreme Court disqualified a state licensing board of optometrists in Alabama, which was composed entirely of independent practitioners, from reviewing the licenses of optometrists who were employed by corporations The licensing board had interpreted a statute to preclude the practice of optometry by corporate employees The board commenced administrative proceedings for the purpose of revoking the licenses of corporate-employed optometrists and had also filed a civil suit against them Because nearly half of the practicing optometrists in Alabama were employed by corporations, it was obvious that the independent optometrists on the licensing board would receive more business, thereby reaping a substantial pecuniary gain, if the corporate-employed optometrists' licenses were revoked *Berryhill* 411 U S at 578, 93 S Ct at 1607-98 The presence of a clear, substantial pecuniary benefit is one of the most evident causes of

either conscious or subconscious bias, and perhaps more important, it is the type of temptation that inevitably compromises public confidence in the process itself, undermining the legitimacy of any decision so tainted Thus, the Supreme Court concluded that disqualifying bias will be presumed whenever the decision maker has a substantial pecuniary interest in the outcome (FN7) *Id* at 579-80, 93 S Ct at 1698-99, *see also Tumey v Ohio,* 273 U S 510, 531-35, 47 S Ct 437, 444-45, 71 L Ed 749 (1927) (judge received portion of fines and fees assessed in addition to his salary), *cf Ward v Village of Monroeville,* 409 U S 57, 57-59, 61-62, 93 S Ct 80, 81-83, 83-84, 34 L Ed 2d 267 (1972) (where mayor had obligation to maintain village finances, a major portion of which were derived from the fines levied by the mayor's court, mayor was disqualified from acting as judge) (FN8)

[11][12] Presumed bias is not limited to cases where a personal pecuniary benefit is present Such a presumption may also be applied in other circumstances where the risk of bias is so great as to offend principles of due process For instance, disqualifying bias may be presumed from a prior manifested prejudice against a person or group of persons *See Berger v United States,* 255 U S 22, 41 S Ct 230, 65 L Ed 481 (1921) (judge disqualified for comments demonstrating prejudice against German-Americans) Unacceptable biasing influences may also arise from an adjudicator's preconceived attitudes on points of law or policy that are topics of dispute before an adjudicator, although such attitudes are rarely severe enough to justify disqualification *See generally* Davis & Pierce, *Administrative Law Treatise* § 9 8, at 76-81

***1199** In this case, V-1 objects specifically to the agency practice of allowing an attorney to act as an adjudicator where other persons within the administrative division for which that attorney works have the responsibility for prosecuting the matter at which the adjudicator presides Although McKnight is not personally involved in investigating or prosecuting any of the cases which he adjudicates, he is employed by the same administrative agency which conducts those activities This raises a due process issue related to institutional combination of prosecutorial and adjudicative functions

In a typical adversarial administrative proceeding, agencies perform several different functions Generally, commentators divide those functions into three categories investigative, advocatory (or prosecutorial), and adjudicative Although there is little potential for bias when the investigative and advocatory functions are combined, the potential for impermissible bias when either the investigative or the advocatory function is combined with the adjudicative function is more readily apparent, *see* Allison, *Process-Value Analysis* at 1167-68, particularly as the case becomes more accusatory in nature *Id* at 1180 The natural suspicion is that adjudicators may be disposed to act favorably toward their employers In a formal criminal context, for instance, it would be inappropriate for an adjudicator to be employed as a part-time prosecutor *Cf State v Brown,* 853 P 2d 851, 856-57 (Utah 1992) (holding part-time prosecutor barred from acting as defense counsel)

Nevertheless, examining the question in the criminal context does not answer the question in the administrative context, where "any form of function combination occurring alone, without other exacerbating biasing influences, is very unlikely to violate procedural due process " Allison, *Process Value Analysis* at 1145 (citing *Marcello v Bonds,* 349 U S 302, 311, 75 S Ct 757, 762-63, 99 L Ed 1107 (1955)) In this respect, the analogy to the criminal context cannot be strictly applied As noted by Professors Davis and Pierce

> Critics of the U S system of administrative justice have long used the strict separation of functions among agencies in our criminal justice system as a paradigm for criticism of the fairness of administrative adjudication conducted by typical multi-function agencies The criticism is usually followed by a demand that the legislature assign the functions of investigation, prosecution, and adjudication to separate agencies, or that the courts hold unconstitutional any system of adjudication implemented by a multi-function agency
>
> Generally, both legislatures and courts have declined to accept these arguments for good reason--the analogy on which they are premised is weak at many points First, the strict agency-based separation of functions approach we have chosen in the criminal justice context is extremely expensive and inefficient It may be justified in that context because of the extraordinarily high value we place on avoiding the risk of erroneously incarcerating people It by no means follows, however, that we should select the least efficient and most costly institutional structure for adjudicating disputes concerning social security benefits, personnel decisions, utility prices, environmental regulation, etc

Davis & Pierce, *Administrative Law Treatise* § 9 9, at 92 (citations omitted), *see also* Michael Asimow, *When the Curtain Falls Separation of Functions in the Federal Administrative Agencies,* 81 Colum L Rev 759, 768 (1981) [hereinafter Asimow, *Separation of Functions*] ("Separation of functions in administrative agencies is, of necessity, far from the pristine system characteristic of criminal-law enforcement ")

This more lenient treatment of administrative decision making is primarily an acknowledgment of the third factor in the due process analysis set forth by *Mathews v Eldridge* "the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement[s] would entail " 424 U S at 335, 96 S Ct at 903 Administrative agencies are typically burdened with numerous duties and limited funding Moreover, to carry out their statutorily ***1200** mandated responsibilities with any semblance of unity of purpose, they must be allowed to combine essentially all their functions under the umbrella of a single, or group of, related entities (FN9) "In the context of an administrative agency or other multifunction decision-making organization we must permit certain combinations of functions or else dispense with these organizations altogether We cannot have it both ways " Allison, *Process-Value Analysis* at 1171 It would be literally impossible for many administrative agencies to function if all their adjudicative activities had to be given the same due process protections as in a criminal trial in terms of a rigid scheme providing for total structural independence of the adjudicator For example, agency decisions not to issue drivers' licenses, provide unemployment compensation benefits, etc , combine adjudicative and administrative functions in the same person The paralysis of basic governmental functions and the overwhelming expense caused by imposition of an uncompromising judicial model of complete structured independence of the adjudicator would have disastrous consequences for many essential governmental programs and functions

In fact, institutional combinations of functions afford certain benefits In performing multiple functions, an agency's rule-making activities inform its adjudicative actions and vice versa *See SEC v Chenery Corp* , 332 U S 194, 201-02, 67 S Ct 1575, 1579-80, 91 L Ed 1995 (1947) The ability of agencies to draw on specialized knowledge gained in a wide spectrum of activities, from rule-making to formal and informal adjudication, allows those agencies to develop an efficient and consistent manner of addressing and resolving the concerns and problems they are charged with administering Policy is developed and furthered on a relatively unified front rather than through the sometimes arbitrary and conflicting paths often pursued by organizations that are subject to formal separation of legislative, adjudicative, and other functions Further, the resulting increased efficiency and uniformity can enhance the respect an agency earns from the parties regulated by it and from the general public at large

[13] This does not mean that the due process concerns arising out of combinations of functions cannot be addressed in the administrative context Rather, it merely means that adequate separation of functions can be accomplished internally In particular, the separation takes place at the individual rather than the institutional level This is essentially the path that has been chosen by Congress in adopting the federal Administrative Procedures Act

> Early in the administrative era, some observers understandably took a monolithic view of agencies as decision makers, a view necessarily leading to the conclusion that the same decision-making agent is performing all functions This view generally did not prevail, however From its inception in 1946, the [Federal Administrative Procedures Act] has clearly recognized the individual as the decision-making agent, at ***1201** least at the staff level, and the statute takes the intermediate approach of limiting certain combinations among these individual functionaries

Allison, *Process-Value Analysis* at 1172 n 89 (citation omitted), *see also* Asimow, *Separation of Functions* at 761 ("Congress decided that internal separation of an agency's decisionmaking from its investigative and prosecutorial functions would achieve impartiality without incurring the costs of complete separation ") (FN10)

In the context of administrative agencies, internal separation of functions allows agencies the flexibility to perform the multitude of duties assigned to them while at the same time adequately protecting due process interests On this question, Professor Allison observes

> Despite the psychological effects of participating in an organization, the individual is still intellectually, emotionally, and morally autonomous to a meaningful degree Moreover, to view the

> decision-making unit as the organization necessarily leads to the conclusion that the same entity investigates, advocates, and judges If one is the least bit sensitive to process values, the organization-as-decision maker premise necessarily causes one to condemn the procedure as the worst kind of prejudgment This view is not only unrealistic in a modern world demanding complex government, but also is unnecessary Process concerns may be addressed by viewing the individual, or perhaps the small group (such as an advocatory staff), as the decision-making entity and then proceeding to optimize process values from that premise

Allison, *Process-Value Analysis* at 1171-72 (footnote omitted)

Echoing this sentiment, Professors Davis and Pierce comment

> Separation of functions can be implemented at the level of individuals rather than at the agency level To the extent that combining functions creates a conflict of interest, that conflict is largely a function of psychology and human emotions No one would want the district attorney who prosecutes him to decide whether he is guilty, because district attorneys prefer to "win" rather than to "lose" cases It is difficult for anyone who has worked long and hard to prove a proposition, e g , the defendant is guilty, to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively, e g , to decide whether the defendant is guilty That potentially powerful psychological conflict of interest is internal to an individual, however The potential for conflicts of interest to infect adjudicatory decisionmaking diminishes greatly if functions are separated at the individual level, i e , an individual cannot both prosecute a case and decide the case Separating functions within an agency is likely to cause the individuals in the agency to identify more by function than by agency, e g , "I am an agency prosecutor, or I am an agency adjudicatory decisionmaker "

Davis & Pierce, *Administrative Law Treatise* § 9 9, at 93-94

Similarly, in *Vali Convalescent & Care Institution v Industrial Commission,* 649 P 2d 33, 37 (Utah 1982) , we endorsed the practice of internal separation of functions as a means of balancing due process concerns within the administrative agency context "In administrative proceedings, the practice of an agency acting as prosecutor and judge is not unconstitutional, at least if those functions, with respect to discretionary matters, are kept separate within the agency '[M]any agencies have functioned for years, with the approval of the courts, which combine these roles' " *Id* (quoting *Brinkley v Hassig,* 83 F 2d 351, 357 (10th Cir 1936)) Thus, at least ***1202** at the lower levels of an agency's hierarchy, (FN11) internal or individual separation of functions adequately addresses most due process concerns that arise

Within some agencies, separation of functions is achieved by creating essentially a separate adjudicatory department within the agency These departments are typically composed of administrative law judges who enjoy a degree of autonomy within the agency somewhat comparable to that enjoyed by judges within the regular judicial branch of a traditional tripartite governmental system The Court of Appeals' opinion appears to treat such a system as the minimum due process requirement for all administrative adjudication (FN12) *V-1 Oil Co I,* 893 P 2d at 1097 n 3 However, such inflexibility fails to account for legitimate efficiency concerns which various administrative agencies confront and does not balance those concerns against the purported harm resulting from a failure to structure an agency in a manner designed to segregate adjudicatory employees completely from all other responsibilities

The record reflects that McKnight was hired to function as both an adjudicative officer and a staff attorney because "there may not be a heavy enough case load for a full time presiding officer " Evidently, the purpose behind assigning him multiple functions within the agency was an effort to maximize limited resources Although we do not have a sufficient record before us to make an independent judgment of the level of efficiency so achieved, the administrative officials who must actually run and staff their organizations are in a far better position to do so than is an appellate court which is largely unfamiliar with the agency's day-to-day operations

This is not to say that we are not concerned with, or that due process does not demand, serious attention to procedures designed to eliminate bias in accusatory administrative adjudications Instead, the various procedures designed to address due process concerns must be weighed, along with their costs, against the purported benefits and detriments that their implementation would engender

In this case, there was no strict segregation of all personnel with adjudicatory responsibilities from all other duties within the division DERR required McKnight to participate in certain staff attorney functions but took care to ensure that all his staff attorney ***1203** duties related to activities outside the branch of the division responsible for investigating and prosecuting underground storage tank violations In this regard, the Board determined that McKnight's

> position was implemented in a manner to insure that any staff attorney functions [he] performed would be completely independent of matters that could result in UST [underground storage tank] adjudications Accordingly, [he] has functioned as a staff attorney on matters such as procurement issues, drafting and reviewing legal documents such as CERCLA cooperative agreements and consent orders, drafting UST administrative adjudicative procedures, and working on standard forms for cost recovery [He] is kept completely detached from any DERR matters that could result in an UST order on owner/operators of USTs

V-1 argues that this degree of separation is insufficient, asserting that McKnight

> is paid by the Agency to represent their interests By assuming the role as the Agency's attorney, Mr McKnight assumed certain fiduciary duties towards the Agency and his conduct towards his client or employer is governed by strict rules of professional responsibility Among those duties is the requirement that Mr McKnight maintain a high degree of loyalty towards the Agency

This argument misconstrues the nature of McKnight's duties In fact, the converse is true His duty of loyalty toward his employer requires him to function as an impartial adjudicator According to the record, McKnight has no duty of partiality toward the Underground Storage Tank Branch of DERR--from which his activities as an attorney have been specifically segregated, whereas, when the merits of a case require McKnight to make findings and recommendations that are unfavorable to the Underground Storage Tank Branch's position, his failure to do so would constitute a serious breach of loyalty

If McKnight had actually served as an investigator or advocate in this particular case, V-1's argument would very likely have merit Where individuals have previously taken on an adversarial role with regard to a particular case, they tend to become psychologically committed to a particular view of contested issues One commentator has described this as "the will to win" (FN13) *See* Asimow, *Separation of Functions* at 770, 788 Where, on the other hand, an individual has not undertaken such a commitment, the risk of a similar bias is minimal *Id* at 770 V-1 nevertheless asserts that McKnight's status as a lawyer, as opposed to agency employees who are not lawyers, imposes on him a duty, born of the attorney-client relationship between him and his employer, to act in favor of all the branches and divisions of his employing agency We find no merit in this argument (FN14) We do not accept the proposition that the employing agency is a client or that McKnight owes the same duty of loyalty to that agency that he would owe to a client

We therefore hold that DERR accomplished an appropriate and sufficient separation of functions at the individual level by segregating McKnight from contact with the investigative and prosecutorial arm of DERR In this case, a workable scheme is created within the agency to prevent McKnight from engaging in multiple functions likely to bias his work as an adjudicator Due process is not violated by allowing ***1204.** McKnight to adjudicate V 1's hearing We accordingly reverse the Court of Appeals' decision

ZIMMERMAN, C J , and HOWE, DURHAM, and RUSSON, JJ , concur in Associate Chief Justice STEWART'S opinion

(FN1) Apparently, McKnight subsequently received a general appointment to "act as presiding officer on all contested orders issued by the DERR's Executive Secretary "

(FN2) V-1 conceded as much in its hearing before McKnight and does not now contest this holding on appeal

(FN3) Canon 3E continues

> including but not limited to instances where (b) the judge had served as a lawyer in the matter in controversy, *had practiced law with a lawyer who had served in the matter at the time of their association,* or the judge or such lawyer has been a material witness concerning it
>
> (Emphasis added)

(FN4) For instance, the canons specifically prohibit judges from practicing law, *see* Code of Judicial

Conduct Canon 4G, whereas the Utah Administrative Procedures Act carries no such prohibition

(FN5) Various commentators have offered a number of rationales to support this distinction For instance, legislative decision making tends to affect large groups of people or entities in a similar fashion, thus lessening the likelihood of "individualized oppression" and simultaneously increasing the publicity attending the decision and the likelihood that the affected groups may be able to exercise their collective power to reverse an unjust decision Allison, *Process-Value Analysis* at 1162 It is also less feasible in a legislative context to provide notice to all affected parties and invite their participation, parties are more inclined to expect rigid adherence to due process protections in an adjudicative context than in a legislative one, and the parties to an adjudicative proceeding are more likely to be privy to, and aware of, the facts relevant to that proceeding than are parties affected by a legislative-type proceeding *Id* at 1163 Kenneth C Davis & Richard J Pierce, Jr , *Administrative Law Treatise* § 9 5, at 55 (3d ed 1994)

(FN6) Professors Davis and Pierce have summarized the categories of biasing influences and their consequences as follows

(1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be (4) A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source, such partiality may be either animosity or favoritism (5) One who stands to gain or lose by a decision either way has an interest that may disqualify if the gain or loss to the decisionmaker flows fairly directly from her decision

Davis & Pierce, *Administrative Law Treatise* § 9 8, at 68

(FN7) This holding, however, does not create a blanket rule prohibiting *any* personal interest in the outcome of a decision "Many members of agency boards and commissions have some degree of economic interest in the subject they regulate General economic interest in the subject matter is [by itself] insufficient to disqualify a decisionmaker " Davis & Pierce, *Administrative Law Treatise* § 9 8, at 73 (citing *Friedman v Rogers,* 440 U S 1, 17-19, 99 S Ct 887, 898-99, 59 L Ed 2d 100 (1979))

(FN8) This case demonstrates that a pecuniary interest need not be personal to justify disqualification, but a nonpersonal pecuniary interest must clearly taint the decision-making process before it will result in disqualification In *Dugan v Ohio,* 277 U S 61, 63-65, 48 S Ct 439, 439-40, 72 L Ed 784 (1928), the mayor was only one member of a commission that exercised legislative power and did not participate when the commission exercised executive power In that case, the mayor was not disqualified from levying fines as a judge

(FN9) Davis and Pierce are of the opinion that whenever Congress has sought to segregate various functions under wholly separate administrative entities, the result has been disastrous For example, the

trio of agencies [charged with resolving occupational safety and health disputes] have performed their mission poorly The inefficient multi-agency structure Congress chose to implement this regime ranks high on the list of the many explanations for this poor performance OSHA and OSHRC frequently disagree on issues of law and policy[,] consequently, they expend a considerable portion of their limited resources litigating inter-agency disputes in the federal courts

Davis & Pierce, *Administrative Law Treatise* § 9 9, at 100, *see also* George Robert Johnson, Jr , *The Split Enforcement Model Some Conclusions from the OSHA and MSHA Experience,* 39 Admin L Rev 315 (1987) Furthermore, the legislative choice to externally separate functions often has more to do with the political environment in which the agency is constructed than with due process concerns "If political support for the program is weak and opposition is strong, the opposition can render the program ineffective by building high costs, delay, and inefficiency into the statutorily

mandated decisionmaking process" Davis & Pierce, *Administrative Law Treatise* § 9 9, at 100-01

***1204_** (FN10) In this regard, it is worth mentioning that statutory provisions such as the APA are typically more stringent than constitutional requirements As Davis and Pierce note

> The Supreme Court's constitutional floor is well below the APA approach to separation of functions Indeed, the Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated As a result, Congress has considerable discretion to depart from the APA in either direction [i e , to require more stringent or less stringent separation of functions within a given agency scheme]
>
> Davis & Pierce, *Administrative Law Treatise* § 9 9, at 98

(FN11) Numerous cases have made clear that full separation of functions is not required at the highest level of an agency "[A]gencies perform many interrelated functions and are organizationally complex, it is thus impossible and highly undesirable to insulate adversaries and decisionmakers, particularly agency heads, from one another for all purposes" Asimow, *Separation of Functions* at 765 Under the Federal APA, separation of functions is not required

> at the highest level of the agency, i e , the cabinet officer, administrator, or collegial body that has overall responsibility for the agency The APA permits the agency head to decide, for instance, whether to investigate a case, how much of the agency's resources to devote to an investigation, whether to prosecute a case, and how much of the agency's resources to devote to prosecution of a case Agency heads also decide cases APA [5 U S C] § 557(b) provides "On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule" The effect of this provision is to allow agencies to treat ALJ initial decisions as recommendations, with all ultimate decisionmaking power held by the agency head Most agencies operate in this manner The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision
>
> Davis & Pierce, *Administrative Law Treatise* § 9 9, at 97 A substantially similar process governs the manner in which DERR and the Board conduct hearings in underground storage tank matters

(FN12) The Court of Appeals' holding on this matter is not entirely clear On petition for an extraordinary writ, it simply held that McKnight must recuse himself In dicta, however, the Court opined that the present system (which allows agencies with investigatory and advocatory duties to employ ALJs or other adjudicatory officers) is problematic According to the Court of Appeals, those problems are "alleviated somewhat when administrative law judges have exclusively adjudicative functions and do not also undertake work as legal counsel for their employing agency" *V-1 Oil Co I,* 893 P 2d at 1097 n 3 But the clear implication was that the Court of Appeals believed that even that degree of separation would be inadequate The Court then proceeded to endorse a central panel system of ALJs which would presumably provide thoroughly independent and neutral ALJs to all, or a large group of, administrative agencies *Id*

(FN13) In the criminal context, for instance, prosecutors are likely to be biased because they have a

> personal and professional stake in a particular result, a will to win If a prosecutor thought that a charge lacked probable cause or that a miscarriage of justice was likely, professional duty would require abandonment of the prosecution Having committed himself intellectually and psychologically, as well as having committed institutional resources to the prosecution, a prosecutor may perceive the issues through a lens that distorts his perceptions in the state's favor
>
> Asimow, *Separation of Functions* at 788-89

(FN14) Arguably, McKnight's status as an attorney is actually *less* likely to engender concerns about bias At least one commentator has asserted, "Attorneys and others whose training, experience, and job description require them to present and support positions in a decision-making process undoubtedly may develop a facility for performing the task zealously while remaining personally detached" Allison, *Process-Value Analysis* at 1179

*582 748 P 2d 582

Court of Appeals of Utah

Gilbert R. WILBURN, Plaintiff,
v
INTERSTATE ELECTRIC, National Union Fire Insurance Company of Pittsburgh and Second Injury Fund, Defendants.
No 860292-CA
Jan 19, 1988

Claimant appealed from a decision of the Industrial Commission that a compromise and settlement agreement barred a claim for permanent total disability benefits The Court of Appeals, Orme, J , held that (1) the agreement was ambiguous with respect to whether it released only claims for temporary total disability and permanent partial disability benefits, or whether it also released permanent total disability claims, (2) extrinsic evidence supported the conclusion that the claim for permanent total disability benefits was barred, (3) evidence supported the administrative law judge's finding that the parties had a good-faith dispute about the compensability of the claim, so that the agreement was enforceable, and (4) the Commission should adopt a regularized procedure for the approval of settlement agreements, but the Commission's failure to do so did not warrant reversal

Order affirmed

West Headnotes

[1] Workers' Compensation ⚿1156
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(C) Review, Modification, and Cancellation
413k1156 Admissibility of Evidence
Compromise and settlement agreement was ambiguous as to whether it was release of claim for permanent total disability benefits, or just of claims for temporary total disability and permanent partial disability benefits, justifying consideration of extrinsic evidence U C A 1953, 35-1-1 et seq

[2] Contracts ⚿155
95 ----
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k155 Construction Against Party Using Words

[See headnote text below]

[2] Workers' Compensation ⚿1128
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(B) Construction, Operation, and Enforcement
413k1128 Construction
Doctrine that contract should be construed against drafter did not operate in dispositive fashion upon finding that compromise and settlement agreement was ambiguous with respect to whether parties intended to release only claims for temporary total disability and permanent partial disability benefits or whether agreement was intended to release claim for permanent total disability, doctrine of construing ambiguities in contract against drafter functioned only after consideration of all pertinent extrinsic evidence

[3] Workers' Compensation ⚿1158
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(C) Review, Modification, and Cancellation
413k1157 Weight and Sufficiency of Evidence
413k1158 In General
Extrinsic evidence supported administrative law judge's finding that compromise and settlement agreement was intended to release claims for permanent total disability benefits, not just claims for temporary total and permanent partial disability benefits U C A 1953, 35-1-1 et seq

[4] Workers' Compensation ⚿1115
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(A) Requisites and Validity
413k1115 In General
Settlements of workers' compensation claims are appropriate only when compensable nature of worker's injury is disputed and worker's right to recover is doubtful, when compensability of claim is not disputed, worker cannot waive his claim by agreement U C A 1953, 35-1-90

[5] Workers' Compensation ⚿1158

413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(C) Review, Modification, and Cancellation
413k1157 Weight and Sufficiency of Evidence
413k1158 In General

(Formerly 413k1157)
Sufficient evidence supported administrative law judge's finding that parties had good-faith dispute as to compensability of workers' compensation claim and, therefore, compromise and settlement agreement was enforceable U C A 1953, 35-1-90

[6] Workers' Compensation ⚿1124
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(A) Requisites and Validity
413k1122 Approval by Court, Board, or Commission
413k1124 Power and Duty of Court, Board, or Commission
Industrial Commission should implement regulations governing settlement of claims to safeguard against abuses that might otherwise occur if unscrupulous employer or carrier attempts to take advantage of unsophisticated worker seeking to settle claim without advice of counsel U C A 1953, 35-1-10, 35-1-16, 35-1-16(1)(e), 35-1-90

[7] Workers' Compensation ⚿1138
413 ----
413XV Agreements as to Compensation, Compromise, Settlement, and Release
413XV(B) Construction, Operation, and Enforcement
413k1134 Operation and Effect as to Particular Subject-Matters
413k1138 Extent of Disability and Amount of Compensation
Industrial Commission's failure to adopt regular process for review and approval of settlements was not so arbitrary and capricious as to warrant reversal of decision that compromise and settlement agreement barred application for permanent total disability benefits U C A 1953, 35-1-10, 35-1-16, 35-1-16(1)(e) , 35-1-90

***583** Michael E Dyer, Stephanie A Mallory (argued), Richards, Brandt, Miller & Nelson, Salt Lake City, for plaintiff

Stuart L Poelman (argued), Snow, Christensen & Martineau, Salt Lake City, for Interstate Elec & Nat'l Union

Erie V Boorman (argued), Second Injury Fund, Salt Lake City

Before GARFF, JACKSON and ORME, JJ

OPINION

ORME, Judge

Plaintiff Wilburn appeals from an Industrial Commission order denying his application for permanent total disability benefits under Utah's Workers' Compensation laws The Commission's decision was premised on the ground that plaintiff had previously compromised and settled his claim Plaintiff seeks reversal of the Commission's order and an award of permanent total disability benefits We affirm

***584** FACTS

Plaintiff worked at Interstate Electric as a heavy duty mechanic repairing and overhauling portable power plants, water pumps, and hydraulic telephone pullers On April 14, 1980, plaintiff injured his back while trying to lift a portable powerplant from the floor to his work bench Plaintiff continued working the remainder of the day as well as the two following days When the pain did not subside, he consulted a doctor After missing a few days of work, he continued working for the rest of the year with no other medical treatment

On February 2, 1981, Interstate Electric's insurance carrier, defendant National Union, had plaintiff submit to an independent physical examination, which resulted in a permanent partial impairment rating of 20% Fifteen percent of the impairment was attributable to preexisting causes, paid by the Second Injury Fund, and 5% attributable to aggravation of the preexisting condition by the industrial accident, paid by Interstate Electric Plaintiff continued working until he was laid off on July 31, 1981 Following another examination, he was placed on temporary total disability on August 18, 1981 On June 20, 1983, plaintiff was reexamined and received a permanent partial impairment rating of 36%, with 10% attributable to the industrial accident,

15% to preexisting problems in his lumbar and lumbosacral spine, and 15% to a non-industrial cervical spine condition

In late 1983, plaintiff consulted an administrative law judge who advised him to make a claim for permanent total disability Plaintiff contacted Interstate Electric's carrier, asserted his claim, and was referred to the carrier's attorney The attorney told plaintiff that if he claimed permanent total disability, Interstate Electric would raise several defenses, including the "no accident" defense, and if it prevailed, plaintiff would lose his claim for all additional compensation Plaintiff then agreed to settle for an additional 10% permanent partial disability Upon receiving a written Compromise and Settlement Agreement, plaintiff consulted with an Industrial Commission attorney, and as a result, asked that the agreement contain an additional $1,590 00 for temporary total disability benefits during the fall of 1983 The agreement was revised as requested, signed by both parties, and approved by the Industrial Commission in November 1984 Defendants then paid plaintiff as required in the agreement

Despite the agreement, in early 1986 plaintiff filed an application with the Industrial Commission seeking permanent total disability compensation from defendants A hearing was held on the application and the administrative law judge issued his "Interim Findings of Fact, Conclusions of Law and Order" on May 28, 1986, in which he expressed "no doubt" as to the compensability of plaintiff's claim, found him to be permanently and totally disabled, and imposed liability for permanent total disability upon defendants Defendants filed a "Motion for Review and Clarification" and the administrative law judge then issued his "Supplemental Findings of Fact, Conclusions of Law and Order," vacating his prior order Specifically, the judge found that, while he would have held that Wilburn sustained a "compensable accident," there was a bona fide dispute as to defendants' liability for plaintiff's alleged industrial injury The Compromise and Settlement Agreement was therefore binding and barred plaintiff's claim for permanent total disability compensation

On appeal, plaintiff argues that he did not release his claim for permanent total disability benefits upon signing the Compromise and Settlement Agreement and, if his claim was released by the agreement, that the settlement was void as against public policy and in violation of Utah Code Ann § 35-1 90 (1974)

SETTLEMENT AGREEMENT

We first address the issue of whether the agreement between the parties settled plaintiff's claim for permanent total disability benefits When a contract is unambiguous, its interpretation is a question of law *See e g Kimball v Campbell* 699 P 2d 714, 716 (Utah 1985), *Seashores Inc v Hancey* 738 P 2d 645 (Utah Ct App 1987) ***585** If it is ambiguous,--and the determination of whether or not a contract is ambiguous is itself a question of law--extrinsic evidence as to the parties' intent must be received and considered in an effort to glean what the parties actually agreed to *Seashores Inc v Hancey* 738 P 2d at 647 If a trial court interprets a contract as a matter of law, on appeal the trial court's resolution is afforded no particular deference *Id* On the other hand, if the contract is ambiguous and the trial forum finds facts respecting the intention of the parties based on extrinsic evidence, then appellate review is strictly limited and the findings and judgment of the trier will not be disturbed if based on substantial, competent, admissible evidence *Id* Utah R Civ P 52

[1] Accordingly, we must first determine, as a matter of law, whether the contract is ambiguous Plaintiff argues that the Compromise and Settlement Agreement is unambiguous in its release of only his claim for temporary total disability and permanent partial disability benefits since it does not specifically mention permanent total disability The difficulty with this position is that the contract does not refer specifically even to the claims defendant concedes were released by the document Thus, while it is clear the parties meant to settle something, it is unclear what claim or claims they meant to settle

Since the contract is ambiguous, it was appropriate for the administrative law judge to consider extrinsic evidence in an effort to find the intentions of the parties in entering into the agreement Plaintiff argues, however, that the extrinsic evidence in this case does not support a finding that the agreement contemplated a release of his permanent total disability claim In this regard, plaintiff urges application of the doctrine that ambiguities in a contract should be construed against the party responsible for its drafting

A *Construction Against Drafter*

[2] Plaintiff misapprehends the doctrine that contracts should be construed against the drafter (FN1) The doctrine does not operate in dispositive fashion simply because ambiguity has been found Once a contract is deemed ambiguous, the next order of business is to admit extrinsic evidence to aid in

interpretation of the contract It is only after extrinsic evidence is considered and the court is still uncertain as to the intention of the parties that ambiguities should be construed against the drafter (FN2) In other words, the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended This rule has been summarized as follows

> ***586** After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court If the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is less favorable in its legal effect to the party who chose the words
>
> 3 A Corbin, *Corbin on Contracts* § 559 (1960)

B *Extrinsic Evidence*

[3] In this case, the judge received extrinsic evidence, including testimony of the Commission's former legal counsel who approved the agreement, plaintiff's own testimony, and other testimony on the circumstances surrounding the execution of the Compromise and Settlement Agreement, and concluded, as a matter of fact, that the agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability benefits Although the evidence was in conflict, ample evidence supports the judge's findings in this regard

Reviewing the record, we have some doubt about whether the decision reached by the judge was the fairest or the most appropriate in view of the extrinsic evidence However, our approval or disapproval of the substantive decision reached is largely irrelevant "[W]e give maximum deference to the basic facts determined by the agency, which will be sustained if there is evidence of any substance that can be reasonably regarded as supporting the determination made " *Wilson v Industrial Comm'n* 735 P 2d 403, 405 (Utah Ct App 1987) (citing *Allen & Assoc v Industrial Comm'n* 732 P 2d 508, 508-09 (Utah 1987)) Deference, always due by appellate courts to fact-finders, is maximized where, as here the Legislature has comprehensively delegated responsibility over a particular subject to a specialized administrative agency Utah Code Ann § 35-1-16 (1987) *See e g , Department of Admin Servs v Public Serv Comm'n,* 658 P 2d 601, 608 10 (Utah 1983), *Central Bank & Trust Co v Brimhall* 28 Utah 2d 14, 16, 497 P 2d 638, 641 (1972)

SECTION 35-1-90

Notwithstanding the ambiguity of the contract and the findings of the administrative law judge, plaintiff argues that the agreement is nonetheless void as against public policy and in violation of § 35-1-90 of Utah's Workers' Compensation statutes Section 35-1-90 provides, in relevant part "No agreement by an employee to waive his rights to compensation under this title shall be valid " Utah Code Ann § 35-1-90 (1974)

[4] Under this provision, settlements are appropriate only when the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful *See Brigham Young Univ v Industrial Comm'n,* 74 Utah 349, 279 P 889 (1929) Conversely, when the compensability of a workers' compensation claim is not disputed, an employee cannot waive his claim by agreement *Barber Asphalt Corp v Industrial Comm'n,* 103 Utah 371, 135 P 2d 266 (1943)

[5] The administrative law judge in this case focused on the effect of these two cases on plaintiff's claim and determined that the settlement should be enforced only if there had been a bona fide dispute as to the compensability of plaintiff's claim Recognizing that the issue was not so much whether the judge believed the applicant sustained a compensable accident as it was a matter of what the parties believed and acted upon, the administrative law judge reversed his initial, tentative decision and found that the Compromise and Settlement Agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability, and was not in violation of § 35-1-90

While we would have no difficulty in finding the applicant's claim compensable, ***587** we agree with the administrative law judge that this determination cannot "supplant the judgment of those who earlier, in good faith, viewed this claim as one of doubtful compensability " (FN3) Since there is sufficient evidence to support the judge's finding that the parties had a good faith dispute as to the compensability of the

claim, we defer to that determination In view of that finding, § 35-1-90 is no bar to enforceability of the agreement

TOWARDS A MORE REGULAR PROCEDURE

[6] We acknowledge, as did the administrative law judge, the "harsh consequences" of this decision but agree that "compassion for the Applicant does not justify the erosion of a principle and policy pertaining to compensation agreements generally " The parties tell us that it has been the policy of the Industrial Commission to encourage the settlement of claims and that it has been the practice of the Commission to approve settlement agreements before their execution The Legislature specifically granted to the Industrial Commission the power and authority to promote the expedited resolution of claims under the Workers' Compensation statutes Section 35-1-16 provides

> It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority
>
> . .
>
> (5) To promote the voluntary arbitration, mediation and conciliation of disputes between employers and employees (FN4)
>
> Utah Code Ann § 35-1-16 (1974)

The Commission is likewise vested with the authority to promulgate rules for governing these procedures Utah Code Ann § 35-1-10 (1974) Clearly, then, the Commission has the prerogative to adopt regulations governing the settlement of claims Implicit in the Commission's practice of reviewing proposed settlements is the concomitant responsibility of the Commission to assure that an applicant is aware of the scope and consequences of his or her settlement agreement Moreover, when important rights are at issue, they should not be left to the vagaries of self-serving recall If it is true, as defendants suggest, that the Industrial Commission approves as many as fifty of these settlements a year, then the Commission should implement a process which will operate, as the administrative law judge stated, to "safeguard against abuses that might otherwise occur, if an unscrupulous employer or insurance carrier attempt[s] to take advantage of an unsophisticated worker seeking to settle a claim without the advice of counsel "

[7] It seems to us that the Commission should formalize its long-standing practice of getting involved in the settlement of claims Pursuant to its rule making authority, the Commission should adopt procedures defining its role in settlements To help avoid disputes like the instant one, it might, by rule, require the use of a standard, unambiguous form specifically delineating which claims are released and which, if any, are preserved by the agreement (FN5) While such a regularized process of review and approval of settlements by the Commission seems clearly preferable, we cannot say the failure heretofore to have adopted such a process is so arbitrary ***588.** and capricious as to warrant reversal in this case

The Industrial Commission's order is affirmed

GARFF and JACKSON, JJ , concur

(FN1) Several Utah cases have invoked the doctrine but have typically not elaborated on its proper role *See, e g , Sears v Riemersma,* 655 P 2d 1105, 1107 (Utah 1982) ("The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement "), *Parks Enters , Inc v New Century Realty, Inc ,* 652 P 2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against the drafter "), *In re Estate of Orris,* 622 P 2d 337, 339 (Utah 1980) (language of an ambiguous instrument should be construed most strictly against the party who drafted the instrument) The case of *Wells Fargo Bank v Midwest Realty & Fin , Inc ,* 544 P 2d 882 (Utah 1975), recognizes that where a document is ambiguous, it is appropriate to construe it "strictly against the party who wrote it," but also appropriate to "take extraneous evidence and look to the total circumstances to determine what the parties should reasonably be deemed to have understood thereby " *Id* at 885 While the opinion does not say so, it is obvious there is nothing left to construe--"strictly against the party who wrote it" or otherwise--if extraneous evidence clearly establishes "what the parties should reasonably be deemed to have understood" in executing an agreement

(FN2) There are arguable exceptions to this rule, including where insurance and surety contracts are concerned *See, e g , Shelter America Corp v Ohio Cas & Ins Co ,* 745 P 2d 843 (Utah Ct App 1987) However, such exceptions may be explained, at least in part, by the fact that such contracts are ordinarily not preceded by discussion or negotiation of specific terms and, thus, absent meaningful extrinsic evidence as to intent, recourse must be had directly to the maxim that ambiguities should be construed against the drafter

(FN3.) Interstate Electric's argument about the "compensability" of Wilburn's claim was not altogether implausible given the state of flux surrounding the definition of "accident" at the time plaintiff's claim was filed. *See, e.g., Allen v. Industrial Comm'n,* 729 P.2d 15 (Utah 1986).

(FN4.) Subsequent legislation has changed the format of, but not the language quoted from, § 35-1-16. *See* Utah Code Ann. § 35-1-16(1)(e) (1987).

(FN5.) The Commission has developed a "Compensation Agreement" form. "This form is used by the parties to a workers' compensation claim to enter into an agreement as to a permanent partial impairment award, and must be submitted to the Commission for approval." Workers' Compensation Rules and Regulations § R490-1-2(P) (effective March 4, 1986, as amended). The "Compensation Agreement," the Commission's Form 019, is used in situations where there is no dispute about the occurrence or compensability of an accident to document that a claimant "accepts the compensation and Medical payments paid to date and agrees with the permanent partial disability rating shown above."

SECTION D

Utah Court of Appeals

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February 26, 2004

Floyd W. Holm, Esq.
WORKERS COMPENSATION FUND
392 East 6400 South
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Dear Floyd:

We received the settlement documents and thank you for your efforts to resolve this matter. Your kindness, patience, attention to detail, and professionalism are greatly appreciated. Please thank Kim for her assistance in resolving the case as well. You both played a key role in the success of the process.

As indicated by the enclosed order, the appeal has been dismissed. A questionnaire about the Appellate Mediation Office is included if you wish to make comments.

It was a pleasure working with you. We hope to have the opportunity to work with you in the near future.

Regards,

Michele

Michele Mattsson,
Chief Appellate Mediator

MM/jm
Encls.