

1996

# James R. Dickinson v. Mayne Clingman : Brief of Appellant

Utah Court of Appeals

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John T. Cain; Richards, Caine & Allen; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

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JAMES R. DICKINSON,

:

Plaintiff/Appellant,

:

vs.

:

MAYNE CLINGMAN,

:

960508  
Case No. ~~960160~~-CA

Defendant/Respondent.

:

Priority No. 15

---

BRIEF OF APPELLANT

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This is an appeal from a decision rendered by Judge Judith Atherton sitting without a jury, in the Third Judicial District Court of Salt Lake County.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 960508-CA

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**FILED**

Utah Court of Appeals

JAN - 8 1997

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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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JAMES R. DICKINSON,	:	
Plaintiff/Appellant,	:	
vs.	:	
MAYNE CLINGMAN,	:	Case No. 960160-CA
Defendant/Respondent.	:	Priority No. 15

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This is an appeal from a decision rendered by Judge Judith Atherton sitting without a jury, in the Third Judicial District Court of Salt Lake County.

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IN THE UTAH COURT OF APPEALS

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Defendant/Respondent.	:	Priority No. 15

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JURISDICTION AND NATURE OF PROCEEDINGS

This is a direct appeal from a decision by the Court sitting without a jury granting Defendant's motion pursuant to Rule 41 of the Utah Rules of Civil Procedure to dismiss the case and from the Court's subsequent denial of Plaintiff's motion for a new trial. Jurisdiction is conferred upon this Court pursuant to Section 78-2a-3(2)(j) Utah Code Annotated, as amended 1953.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Whether the Trial Court erred in granting Defendant's motion pursuant to Rule 41 of the Utah Rules of Civil Procedure.
2. Whether the Trial Court erred in refusing to grant the Plaintiff a motion for a new trial.
3. Whether such error was based upon the Court's error finding that the

Defendant's answer to the first paragraph of Plaintiff's complaint was a general denial and following the presentation of the Plaintiff's case the Court failed to review the evidence in a light most favorable to the Plaintiff in determining that there was evidence of responsibility by the Defendant.

Standard of Review In this case the reviewing Court must review the case in the context of whether or not the Trial Court properly applied the law with respect to granting a Rule 41 motion and failed to review the evidence presented by the Plaintiff's in a light most favorable to the Plaintiff and resolving all inferences in favor of the Plaintiff and therefore abused its discretion. The Court must reject the findings as clearly erroneous. Southern Title Guarantee Company vs. Bethers, 761 P.2d 951(Utah App. 1988).

#### STATEMENT OF THE CASE

This is an appeal from a trial to the Court, Judge Judith Atherton sitting without a jury on the 28th day of September 1995.

Following the presentation of the Plaintiff's case, the Defendant made a motion to dismiss pursuant to Rule 41 of the Utah Rules of Civil Procedure, based upon the claim that the Court had no evidence regarding whether Mayne Clingman was the responsible party for the Plaintiff's injuries. The Court after hearing argument, granted the motion.

A timely motion for a new trial pursuant to Rule 50 of the Utah Rules of Civil Procedure was filed. Memorandum were submitted and a hearing was requested. The Court did not allow a hearing and signed an Order denying

Plaintiff's motion on February 6, 1996.

Notice of Appeal was filed on March 4, 1996. Following the Notice of Appeal, the Plaintiff filed a motion for summary disposition pursuant to Rule 10a(2) of the Utah Rules of Appellate Procedure on April 3, 1996. Following briefing on that motion, this Court denied the same and set the matter for full briefing.

### STATEMENT OF FACTS

This was an action filed by the Plaintiff against the Defendant arising out of an injury sustained while the Plaintiff was a tenant at the Aquarius Motel which was owned and operated by the Defendant, Mayne Clingman.

On two (2) different occasions, January 17, 1989 and February 11, 1989, the Plaintiff slipped and fell on ice and snow that had accumulated and not been cleared in the parking lot at the Aquarius Motel. (T.P. 44 - 45)

The Plaintiff paid his rent money to David Blanchard, the manager of the Aquarius Motel, (T.P. 29), and also told Blanchard of the injuries. At that time, Plaintiff was advised by Blanchard that the owner, Mayne Clingman, would not authorize expenditure of funds for cleaning up the parking lot (T.P.30, T.P. 37-38).

The Plaintiff was employed at the time as a fork-lift operator earning \$6.00 per hour (T.P. 24) and was significantly injured to the extent that he could no longer work and is now permanently disabled (T. P. 45-64).

David Blanchard testified in the trial that Mayne Clingman was his boss



(T.P. 88) and that he dealt with no one else at the motel and turned all rent monies over to him (T.P. 89).

Mayne Clingman neither appeared at the trial nor testified. The Defendant called no witnesses during the presentation of the evidence.

In Plaintiff's original complaint, Plaintiff's first paragraph contained the allegation that the Plaintiff resided in Weber County, State of Utah, and that the Defendant was the owner and operator of the Aquarius Motel. The specific reply to that paragraph by the Defendant was "Defendant is without sufficient information or knowledge to form a belief concerning the residency of the Plaintiff and therefore paragraph 1 is denied." ( see record on appeal "answer"). No other defense or any other response was made concerning the ownership and operation of the motel being that of the Defendant. No evidence was presented at the trial by the Defendant or his counsel that he was not the owner or the operator of the motel.

Plaintiff rested its case following the testimony of Blanchard with the Court allowing further presentation of documents concerning the Plaintiff's Social Security case pertaining to his injury to be held at a different time.

At the end of Plaintiff's case the Defendant moved to dismiss based upon the fact that there was no showing that Mayne Clingman was the responsible party. The matter was argued and the Court granted the motion to dismiss.

A motion for a new trial was made raising substantially the same issues as this appeal. The Court did not allow a hearing on the same and sustained

the judgment.

It is from both the initial dismissal and the failure to grant a new trial based upon the issues raised therein that the Plaintiff appeals.

### STATEMENT OF COUNSEL

I, John T. Caine, represent to the Court that I was the attorney who represented the Plaintiff at trial. I have caused the transcript to be prepared. I have prepared the docketing statement and have prepared the brief. I believe there are meritorious appellate issues and that this appeal is not frivolous.

### ARGUMENT

#### **THE DISTRICT COURT ABUSED ITS DISCRETION AND ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 41 OF THE UTAH RULES OF CIVIL PROCEDURE**

### POINT I

#### **THE DEFENDANT'S RESPONSE IN ITS ANSWER TO PLAINTIFF'S PARAGRAPH 1 WAS NOT A GENERAL DENIAL**

In the initial stages of this litigation, the Plaintiff filed a complaint (see record on appeal "complaint") in which it was alleged in paragraph 1 " Plaintiff is a resident of Weber County, State of Utah. The Defendant, Mayne Clingman, is a resident and operated a business in Salt Lake County, State of Utah, known as the Aquarius Motel." In the Defendant's answer (see record on appeal " answer") the Defendant provides only one response to that paragraph, " Defendant is without sufficient information or knowledge to form a belief concerning the residency of the Plaintiff and therefore paragraph 1 is denied."

There is no other reference to that portion of paragraph 1 dealing with the residency and ownership of the Aquarius Motel by the Defendant, Mayne Clingman nor is there any defense raised as an affirmative defense in any portion of the pleading.

The record from the time of the filing of the initial answer (to which no amendment was made) is completely void of any other response by the Defendant with respect to that issue.

The Defendant conducted discovery of the Plaintiff and raised other motions but never made a motion to dismiss based upon the lack of jurisdiction or any other type of motion relating to the non-responsibility of the Defendant in this matter based upon the fact that he was either not the owner or the responsible party or operator of the Aquarius Motel. The first time this issue was raised was at trial.

It was Defendant who did not bring his own client, the named party in the case, to the proceedings and presented no documentary evidence concerning the Defendant's ownership or lack thereof or his connection to the Aquarius Motel.

The Court, without any other evidence, concluded at the time of the Defendant's motion pursuant to Rule 41 to dismiss after the presentation of the Plaintiff's case, that the answer was a general denial and therefore put at issue the ownership or responsibility of the Defendant for the Aquarius Motel.

Notwithstanding the fact that there was additional evidence which

supported that allegation which will be discussed in Part b herein, the Court simply had no basis for determining that the response was a general denial pursuant to the standards adopted for purposes of Rule 41.

Viewing the evidence in the light most favorable to the Plaintiff and all inferences therefrom, the denial is very specific and applies only to that portion of the allegation that pertains to the Plaintiff's residency. The Court should have concluded that the denial was specific and therefore constituted an admission of the other allegation which would then leave no issue whatsoever at the time of the trial concerning responsibility.

The Court was clearly arbitrary in this determination. The Court's finding an inference in favor of the Defendant is contrary to the law and contrary to the express language of the denial. Were it a general denial of all the allegations, it should have specifically said that all other allegations contained in that paragraph were denied or an affirmative defense could have been raised which was not.

There was no basis for the Court concluding that it was a general denial and on that basis alone the case should be remanded and the Defendant should have to proceed with evidence if any there be, contradicting the clear inference that he was the responsible party.

## POINT II

WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO  
THE PLAINTIFF, THE EVIDENCE PRESENTED DEMONSTRATED  
THAT THE DEFENDANT WAS THE RESPONSIBLE PARTY

The Court compounded its error in determining that the response was a general denial by ignoring the uncontroverted testimony of the Plaintiff, Dickinson and the general manager of the Aquarius Motel, Dave Blanchard who clearly placed the responsibility for the maintenance of the Aquarius Motel at the feet of Mayne Clingman.

The Defendant offered no evidence to contest the statements made by both the Plaintiff and Blanchard but simply offered the argument that he had made a general denial in his answer and that there was no written or documentary evidence to show ownership or some other connection between Clingman and the Aquarius Motel.

Unfortunately, the Judge simply bought the argument without applying the standards required by all the Courts for this type of a motion. In fact, the only evidence the Judge had before the Court at that time, uncontested and uncontroverted, was that Mayne Clingman was the responsible party in connection with the Aquarius Motel.

The Plaintiff, Dickinson testified that he had been advised by the general manager that Mayne Clingman was the responsible party and owned the Aquarius Motel and secondly, Dave Blanchard testified that he reported to Mayne Clingman, that the rent was turned over to Mayne Clingman and that Mayne Clingman was responsible for the operation of the motel. This creates the presumption of legal liability.

The only rational inferences drawn from this testimony is that the

liability for the maintenance of the parking lot, which is the real issue in question, rests with Mayne Clingman.

This becomes even more compelling when one examines the law. This Court and the Utah Supreme Court have consistently ruled that in this type of circumstance in trial when the Court only has before it the evidence of the pleadings and the testimony of one side of the case and a Rule 41 motion is made, that the Court must view all of the evidence in a light most favorable and draw all the inferences in favor of the Plaintiff's position and to defeat the motion. Martin vs. Stevens ,121 Utah 484; 243 P.2d 747 ( Utah 1952); Wilson vs. Lambert, 613 P.2d 765 (Utah 1980); Sorenson vs. Kennecott Copper Corp. 873 P.2d 1141 (Utah App. 1994). The Court simply ignored this rather basic rule and chose to raise all inferences against the Plaintiff in its ruling.

In fact, there are no other inferences that could be drawn from the testimony taken other than the naked argument of the Defense which submitted no evidence with respect to the issue as to who was the responsible party. The language in the Bethers case supra is particularly appropriate wherein it indicates that "... the reviewing Court must find that the Trial Court's findings were clearly erroneous if they are against the clear weight of the evidence". Id. at 952.

The Court's error was even more compounded when the Court was given an opportunity based upon a motion for new trial to review the matter again and chose not to do so.

The Appellant recognizes that the above cases also require him to marshal all of the evidence in support of the Court's decision so that this Court can review the case on the basis of the clearly erroneous standard set forth above. In this case however Defendant offered no evidence to counter the testimony of both the Appellant and the witness Blanchard nor did defense counsel's cross-examination even touch on the issue. The only time the Defendant raised the issue was in his opening statement and in his argument in connection with the motion. These statements are not evidence.

The Appellant has attached hereto in the Addendum the portions of the testimony transcript dealing with the issue of whether the Defendant was the responsible party. There is no other evidence that can be marshaled for the Court's benefit.

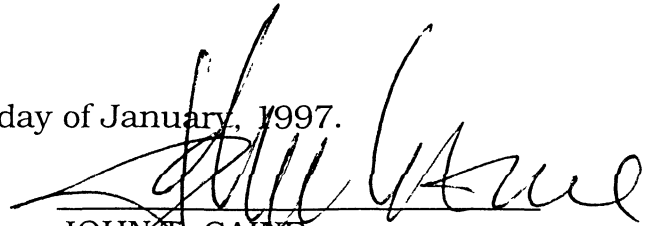
All inferences in the testimony before the Court were that the Defendant was the responsible party. The Defendant's motion was flawed. The Court's ruling was flawed and the matter should be remanded for a conclusion of the trial and then a ruling on the actual merits.

#### CONCLUSION

The Court in this case was extraordinarily precipitous in ignoring the basic law in Utah with respect to Rule 41 motions and in ignoring the evidence that was before it and in ignoring the only inferences that could be drawn in

favor of the Plaintiff's position to defeat the motion. As such, the Court abused its discretion, committed prejudicial error and the matter should be remanded for a full hearing on the merits.

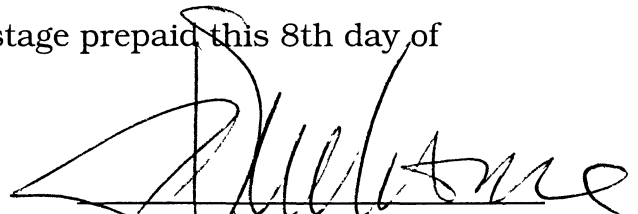
RESPECTFULLY SUBMITTED this 7th day of January, 1997.



JOHN T. CAINE  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to counsel for the Respondent, Joseph N. Nemelka, Jr., 202 E 4500 S, Murray, Utah 84107, postage prepaid this 8th day of January, 1997.



JOHN T. CAINE  
Attorney for Appellant



# ADDENDUM

**Rule 41. Dismissal of actions.****(a) Voluntary dismissal; effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of previously-dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Bond or undertaking to be delivered to adverse party.** Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

1 15th of February, 1989, do you recall that date?

2 A It's the last day I worked.

3 Q That's the last day you worked? Okay.

4 And that was at Westpak again?

5 A Yes, it was.

6 Q And did something happen coming home--well, let me  
7 ask you, did you go immediately from work back to the motel?

8 A I did.

9 Q Do you know approximately what time you left your  
10 work?

11 A Noon.

12 Q Okay. And that was it for the day?

13 A Uh huh.

14 Q Okay. And where did you go upon leaving work?

15 A Well, I stopped and bought me some Tylenol and  
16 then I went home.

17 Q Okay. How long did it take you to get home from  
18 where you worked?

19 A Oh, 15 minutes.

20 Q All right. Did you drive into your place?

21 A I did.

22 Q What was the condition of the parking lot as you  
23 drove in on that day at approximately 12:15?

24 A Well, the--the front area has always been shoveled  
25 and the north side, about half of it, had been melted, and

1 then the back part where I lived and the south side of it  
2 was--was the rotted ice.

3 Q Okay. You pulled in? What happened then after  
4 you pulled your car in?

5 A I went in my room, ate some lunch and about an  
6 hour later, I went out to empty the trash, which was up at  
7 the office and I went up there, emptied the trash and on the  
8 way back to my room, about in the middle of the parking lot,  
9 I slipped and fell again.

10 Q Okay. Now, the--let me ask you, did you have  
11 anything to drink at lunch?

12 A Tea, I think it was.

13 Q Okay. Any alcoholic beverages?

14 A No.

15 Q Okay. And you had lunch in your room, as I  
16 understand it?

17 A Right.

18 Q All right. Had you had anything to drink in terms  
19 of an alcoholic beverage earlier that morning?

20 A No. I worked that day.

21 Q Okay. After lunch, you indicated you had to take  
22 the trash up; was there a central place where you had to  
23 dump your trash?

24 A Yeah. There was a big dumpster up by the office.

25 Q All right. And you had to take it up there?

1           Q     Is it a motel that's open to the public or is it  
2 all rental units?  
3           A     It's a motel opened to the public with  
4 kitchenettes.  
5           Q     Okay. So, the nature of your room, tell us what  
6 that was.  
7           A     Well, it's a--had a kitchenette in it, a T.V.,  
8 couch and a bed.  
9           Q     Okay.  
10          A     And a bathroom.  
11          Q     And what was the monthly rent?  
12          A     Two eighty.  
13          Q     Two eighty a month? Okay.  
14                Who was that paid to?  
15          A     I paid it to Dave, the manager.  
16          Q     What was his last name, do you know?  
17          A     I can't think of it. I just--Dave--  
18          Q     Is he here today?  
19          A     Yes. He is.  
20          Q     Is this the gentleman in the blue shirt?  
21          A     Yes. That's Dave.  
22          Q     Is that who you'd give your rent to?  
23          A     Yes. It is.  
24          Q     And was he the owner of the place?  
25          A     No. He was the manager.

1 Q Who was the owner?  
2 A Mayne Clingman, I come to find out.  
3 Q And how did you know that?  
4 A Well, I--I knew his name was Mayne from Dave, but  
5 I didn't know his last name until after the suit was filed.  
6 Q Okay. Dave told you who it was?  
7 A His name was Mayne, yeah.  
8 Q Okay. And that that's who owned the motel?  
9 A Yes.  
10 Q Okay. Was the check--did you pay by check or  
11 cash?  
12 A Cash.  
13 Q All right. The--after moving in there--well, let  
14 me ask you one other thing about the lay-out. Was there a  
15 paved parking area--  
16 A There was.  
17 Q --in the motel area there?  
18 A Uh huh.  
19 Q Was it all paved?  
20 A Yes. It was.  
21 Q All right. Did you have a vehicle?  
22 A Yes. I did.  
23 Q What were you driving at the time?  
24 A I think it was like a '70 Ford.  
25 Q Okay. Were you assigned a parking space or--

1 Q Okay. Did you tell him why you were hurting?  
2 A Yeah. He knew.  
3 Q Okay. When you say he knew, did you tell him?  
4 A Oh, yeah. He knew I'd fell.  
5 Q All right. Did you tell him why you fell, at  
6 least in your view?  
7 A Fell on the rutted ice on the parking lot.  
8 Q Did you have a discussion about the rutted ice  
9 with him?  
10 A I did.  
11 Q What did you tell him?  
12 A I told him we needed to get a snowplow or  
13 something in here because it was dangerous.  
14 Q Did he respond to that?  
15 A He did.  
16 Q What did he say?  
17 MR. NEMELKA: Objection.  
18 MR. CAINE: Well, he's here to testify  
19 and this won't be for the truth of the matter, I'm offering  
20 it for what he was told.  
21 THE COURT: Okay. Overruled. He may  
22 answer.  
23 MR. CAINE: Go ahead.  
24 THE WITNESS: I asked him why we didn't  
25 do a snow removal job when I paid the rent. He said that

1 that cost money and Mayne wouldn't pay for it.

2 MR. CAINE: Okay.

3 Q (By Mr. Caine) You say that you didn't go to work  
4 for about three days?

5 A I didn't go to work for a week.

6 Q Did you seek any medical attention during that  
7 week period?

8 A Yeah. That weekend.

9 Q Okay. And what--what did you do?

10 A I got a ride up to the hospital and they took an X  
11 ray of my pelvis, I think it was; anyway, they just give me  
12 some pills for the pain.

13 Q Okay. Were you in pain during that whole period?

14 A No.

15 Q Did you return to work about a week later?

16 A A week later.

17 Q You felt well enough that you could do that?

18 A I had to go to work, the rent was coming due.

19 Q All right. And this was back at Westpak?

20 A Yes.

21 Q So that would have been roughly the 24th of  
22 January; would that be about right?

23 A About right.

24 Q Okay. Did you work continuously then for a period  
25 of time?



1           A     Per hour.

2           Q     Ultimately, you went to work for Westpak?

3           A     Yes.

4           Q     And where is that located?

5           A     Here in Salt Lake.

6           Q     And where did you begin--what--approximately when

7     did you begin working there?

8           A     I--July of '88.

9           Q     July of 1988?

10          A     Uh huh.

11          Q     And what were your duties there?

12          A     Well, it was running a line or forklift operator,

13     maintenance, just whatever needed to be done.

14          Q     Okay. And what was your rate of pay there?

15          A     \$6 an hour.

16          Q     Okay. Was this a 40-hour week?

17          A     Forty-plus.

18          Q     Okay. And who was the--your supervisor there, or

19     the owner, that you reported to?

20          A     Mick Havens.

21          Q     Mick Havens? He's here in the courtroom?

22          A     Right there.

23          Q     Okay. Let me ask you, prior to January of 1989,

24     during the period that you've been talking about, did you

25     ever sustain any kind of an injury or have any medical

1 then the back part where I lived and the south side of it  
2 was--was the rutted ice.

3 Q Okay. You pulled in? What happened then after  
4 you pulled your car in?

5 A I went in my room, ate some lunch and about an  
6 hour later, I went out to empty the trash, which was up at  
7 the office and I went up there, emptied the trash and on the  
8 way back to my room, about in the middle of the parking lot,  
9 I slipped and fell again.

10 Q Okay. Now, the--let me ask you, did you have  
11 anything to drink at lunch?

12 A Tea, I think it was.

13 Q Okay. Any alcoholic beverages?

14 A No.

15 Q Okay. And you had lunch in your room, as I  
16 understand it?

17 A Right.

18 Q All right. Had you had anything to drink in terms  
19 of an alcoholic beverage earlier that morning?

20 A No. I worked that day.

21 Q Okay. After lunch, you indicated you had to take  
22 the trash up; was there a central place where you had to  
23 dump your trash?

24 A Yeah. There was a big dumpster up by the office.

25 Q All right. And you had to take it up there?

1           A     Yeah.

2           Q     All right. And it's coming back from that, you

3     had to go through the parking lot to get back to your place?

4           A     Right.

5           Q     Was there any other way to get back there?

6           A     That was the best way, because like I say, the

7     sidewalks still had a foot of snow and ice on them.

8           Q     So, the sidewalks were covered too, going back?

9           A     Oh, yeah.

10          Q     All right.

11          A     So, I mean you could walk in the ruts, you know.

12          Q     Easier?

13          A     Easier, yeah.

14          Q     All right. The area you were walking was rutted

15     with ice?

16          A     Uh huh.

17          Q     All right. And what happened?

18          A     Well, I lost my footing again and fell again.

19          Q     Okay. And how did you fall this time?

20          A     Straight back, feet went out from under me and I

21     went back.

22          Q     Okay. Were you able to get back to your room, or

23     where--

24          A     Oh--

25          Q     --did you go after the fall?

1           A     --yeah, I went back to my room.

2           Q     Okay. Did you notify anyone at that time

3 connected with the motel that you'd fallen again?

4           A     Well, I think I told Dave the next day.

5           Q     Okay. And that was at your room, or where did

6 that take place?

7           A     I'm thinking it was when he come around to turn

8 the lights off again.

9           Q     Okay. So, without question then, you were living

10 at the Aquarius Motel on the 16th of February?

11          A     Oh, yeah.

12          Q     You were--

13          A     I--I--

14          Q     You were present here earlier in Court when Mr.

15 Nemelka gave his opening statement and at least said that

16 there's some claim that you were gone the first part of

17 February--

18          A     Well--

19          Q     --is that true?

20          A     --I--I moved out like the 2nd or 3rd or maybe the

21 4th of March, because I didn't have the rent and I told Dave

22 there's just no way I could come up with it, and he says,

23 well, it's the best thing if you move then, Jim, so I did

24 and I moved into the homeless shelter around the 4th of

25 March of '89.

1 Q All right. But you had paid rent the 1st of  
2 February for the month of February?  
3 A For the month of February, but I--  
4 Q And stayed there that entire month?  
5 A Right. But I didn't have enough to pay the--for  
6 March.  
7 Q All right.  
8 A So, I moved.  
9 Q Following the fall on the 16th of February, did  
10 you seek medical attention again?  
11 A I did.  
12 Q Okay. And when was that?  
13 A I don't remember the exact date, but I--I had to  
14 go to U-MAP, it's a--  
15 Q U-MAP?  
16 A Yeah.  
17 Q Okay. What is that?  
18 A It's run by the State, like if you're unable to  
19 work, they'll put you on general assistance and things like  
20 that and that's--  
21 Q All right.  
22 A --that's when they started doing that and after I  
23 was on it for about four months or so, that's when they had  
24 me apply for the Social Security.  
25 Q Okay. Before we get into that, briefly, did you

1 return to work after the 16th of February?

2 A No. No.

3 Q All right.

4 A The 16th's the last day I worked.

5 Q All right. Did you try to go back to work and try  
6 it for a day or two, or what--

7 A No.

8 Q --happened?

9 A No. I told Mick, I says, you know, I just--I just  
10 can't do it anymore. I looked around, hoping to find  
11 something easy where I could make a living, but you know, it  
12 didn't happen.

13 Q All right. So the--and the reason you didn't  
14 return to work was why?

15 A Because I couldn't do the work that I normally did  
16 any more and I sure couldn't stay on my feet all day.

17 Q Well, if you--if you stayed on your feet or sat,  
18 what would happen?

19 A Oh, when you stay on your feet like 15 or 20  
20 minutes, then I could stand for like ten minutes and I'd  
21 have pain, you know what I mean.

22 Q Okay. And where was the location of the pain  
23 after the 16th of February?

24 A Low back, left side, hips and legs.

25 Q Okay. Was there ever a fracture?

1           A     They said there's a mild--a T-8 mild fracture or  
2 something like that, in the back.  
3           Q     Okay.  
4           A     Whatever T-8 is.  
5           Q     And that was in the--all of the information that  
6 you accumulated that finally went to--  
7           A     Right.  
8           Q     --Social Security?  
9           A     Right.  
10          Q     The pain, though, stayed in the same location--  
11          A     Oh, yeah.  
12          Q     --all during this period?  
13          A     Well, it--they said--  
14          Q     You just tell me what you felt.  
15          A     Yeah.  
16          Q     I need--that's what we need to know.  
17          A     Yeah. Well--  
18          Q     Is that where the pain was?  
19          A     Right.  
20          Q     All right.  
21          A     For the first three years, it was miserable.  
22          Q     All right.  
23          A     Miserable. I mean, you know, half the time, the  
24 pain medication didn't work.  
25          Q     Okay. Tell me, are you in pain now?

1 A No. No, I take pain pills every day now.

2 Q All right. Before we get to that, you say the  
3 first three years, so '89 to '92, you had more significant  
4 pain than you do now?

5 A Oh, yeah.

6 Q And were you on pain medication during that  
7 period?

8 A I've been on pain medication since February of  
9 '89.

10 Q All right. Now, did there come a point--

11 MR. CAINE: If I could have this marked,  
12 please?

13 Q (By Mr. Caine) Did there come a point after you  
14 ceased to work at Westpak where you went through the process  
15 of obtaining what's called SSI, or Supplemental Security  
16 Income?

17 A Uh huh.

18 Q All right.

19 A After about four months, the welfare department  
20 told me to file for it, so that they could continue keeping  
21 me on general assistance while that was being--

22 Q Processed?

23 A --processed, yeah.

24 Q Were you on general assistance in those first four  
25 months?



1           A     Oh, I was on general assistance for like 15  
2 months, while they processed Social Security.  
3           Q     All right. And were you receiving then a monthly  
4 stipend or something from the State?  
5           A     I think it was like \$210 a month or something like  
6 that.  
7           Q     All right.  
8           A     Plus food stamps.  
9           Q     All right. Other than those two things in that  
10 initial period, did you have any other income coming in?  
11          A     No.  
12          Q     All right. Were you required, as part of this  
13 application, to go through any type of retraining to see if  
14 you could do something else?  
15          A     Oh, I--I had to go through voc rehab, it's a--a  
16 whole process you have to go through.  
17          Q     Right. Did you go through that process?  
18          A     I did.  
19          Q     You attended voc rehab sessions?  
20          A     I did.  
21          Q     Were they able to place you in any kind of work?  
22          A     No. They said retraining would not be necessary.  
23          Q     Okay. And all of that was in conjunction with  
24 your application to Social Security; is that right?  
25          A     Yes.

1 Q Okay. Let me show you a document which I--  
2 MR. CAINE: If I may approach the  
3 witness?

4 THE COURT: You may.

5 MR. CAINE: Thank you.

6 Q (By Mr. Caine) --which has been marked as  
7 Plaintiff's Exhibit No. 2 and ask you if you've ever seen  
8 that before?

9 A This is the award letter that I got--

10 Q Okay. First--

11 A --in the mail--

12 Q --Jim, just, have you seen it?

13 A Well, I--

14 Q Don't tell me what it is yet.

15 A Yeah.

16 Q Okay. And did you receive that in the mail?

17 A I did.

18 Q It's addressed to you, is it not?

19 A It is.

20 Q It's from the Social Security Administration; is  
21 that correct?

22 A It is.

23 Q And did you receive that following this process  
24 that you have talked about going through the--the vocational  
25 training or at least the attempts, seeing doctors and having

1 medical analysis done, was that the conclusion of that  
2 application for Social Security benefits?

3 A It was.

4 Q All right. And were you declared disabled?

5 A I was.

6 Q All right. Now, I want to ask you, during any of  
7 that process, was--were you ever asked to see a psychiatrist  
8 or a psychologist or anything of that nature, as part of  
9 that application?

10 A No.

11 Q Okay. The physicians you saw dealt with your back  
12 problem?

13 A That's correct.

14 Q And one of those was Dr. White? Richard White?

15 A I seen him because of the chest pains.

16 Q Okay. You saw Dr. Fred Brewer?

17 A I did.

18 Q Okay. Did you see any other doctors in connection  
19 with this application, that you can remember?

20 A Oh, yeah. Dr. Rasmussen.

21 Q Okay.

22 A And then I--there was two or three here in Salt  
23 Lake for U-MEP that I don't remember their names.

24 Q Okay. That's again from the State--

25 A Right.

1 Q --that they required you to see?

2 A When they first put me on the general assistance,  
3 while they was processing Social Security.

4 Q Okay. And following--well, let me ask you, when  
5 you got your disability award, how much did you receive  
6 pursuant to that?

7 A Well, I think it was like \$6,500 or something, but  
8 I had to--the general assistance money that I'd lived on for  
9 the 15 months--

10 Q Right.

11 A --I had to pay that back. So, I give welfare like  
12 \$4,000--

13 Q Of that?

14 A --that--that I'd received over the year-and-a-half  
15 that I was on general assistance, and I got one check for  
16 like \$2,500.

17 Q Okay.

18 A After I paid welfare back and all that.

19 Q All right. And the date of Plaintiff's proposed  
20 Exhibit No. 2 is--is dated October 4th, 1990; does that  
21 comport with approximately when this process finally  
22 resulted--

23 A Yeah.

24 Q --in an award to you? All right.

25 MR. CAINE: Your Honor, I'm going to

1 move, subject to what we agreed to do earlier, to admit  
2 Plaintiff's Exhibit No. 2. He did receive the letter. That  
3 will be the--in effect, the document that ends the entire  
4 list of documents that came with that application.

5 THE COURT: Okay. Mr. Nemelka?

6 MR. NEMELKA: Well, if it's part of the  
7 Social Security documents, I think we need to wait.

8 THE COURT: I'm not sure it's necessary.  
9 I--

10 MR. CAINE: On this one--

11 THE COURT: Any objection to admitting  
12 it now based on the plaintiff's testimony?

13 MR. NEMELKA: Let me look at it if I  
14 might, your Honor.

15 THE COURT: Sure.

16 (Off the record.)

17 THE COURT: Yeah. Why don't you--

18 MR. NEMELKA: --voir--voir dire?

19 THE COURT: --proceed?

20 VOIR DIRE EXAMINATION

21 BY MR. NEMELKA:

22 Q Now, you say this is the document you received,  
23 the original; is that correct?

24 A Uh huh.

25 Q And you gave it to your attorney?

1 A I did.

2 Q Well, I--I note the document isn't signed. Do you  
3 have any explanation as to why there's no signature on it?  
4 It shows--

5  
6 MR. NEMELKA: If I might approach, your  
7 Honor?

8 THE COURT: You may.

9 THE WITNESS: Is that the original? I--

10 MR. NEMELKA: Well, I don't know. You  
11 just testified that it is.

12 THE WITNESS: District manager--looks  
13 like what--what I got in the mail.

14 Q (By Mr. Nemelka) It looks like what you got in  
15 the mail?

16 A Uh huh.

17 Q But you don't--and you can't say why it wasn't  
18 signed or anything like that?

19 A You'll have to ask Social Security that, I guess.

20 MR. NEMELKA: I certainly have to  
21 object, your Honor, until we get somebody here to say that  
22 that was what was actually sent out. There's no signature  
23 on the document.

24 THE COURT: I'll admit it.

25 MR. CAINE: Thank you.

\*

1 DIRECT EXAMINATION (Continuing)

2 BY MR. CRINE:

3 Q Now, following that initial lump sum that you have  
4 testified to, part of which had to be repaid, did you  
5 receive then a monthly amount?

6 A I did.

7 Q And how much was that, initially?

8 A I think it was like 440.

9 Q Okay. Did you receive any other benefits in  
10 connection with--with the award?

11 A No, just Social Security. Once that was in, they  
12 took--the general assistance and everything stopped once I  
13 was approved for Social Security.

14 Q Okay. Four hundred and forty a month?

15 A Approximately.

16 Q Do you receive that to this day?

17 A It goes up \$12 a year cost of living.

18 Q So, today, what do you receive a month?

19 A Four-forty-three S.S.A. retirement, \$35 a month  
20 S.S.I. disability, Medicare and Medicaid.

21 Q Okay. Medicare and Medicaid meaning medical--

22 A Coverage.

23 Q --payment--coverage?

24 A Blue Cross Blue Shield.

25 Q Okay. And have you been receiving those amounts

1 subject to the increase and decrease for cost of living  
2 continuously since October of 1990?

3 A Correct. Every month.

4 Q All right. Has the continual receipt of those  
5 required that you submit yourself to any other medical  
6 examinations or any ongoing therapy to get that, or is that  
7 just a permanent award?

8 A That's just a permanent award. The S.S.A. is  
9 retirement and I will receive that the rest of my life--

10 Q Okay.

11 A --yes.

12 Q You have enough hours or enough--

13 A I had enough paid into the system, I had a record  
14 approximately working 25 years paying into the Social  
15 Security system.

16 Q All right.

17 A That's the reason I was able to get retirement,  
18 not just disability.

19 Q Okay. And that is the payment that will continue,  
20 I guess, for the rest of your life?

21 A For the rest of my life.

22 Q All right. During the period from October of  
23 1990, when you received the award up until now, have you  
24 worked?

25 A No.



1 Q Why not?

2 A Well, it's just--I'm just very limited what I can  
3 do anymore and what I've done all my life, I mean, that's  
4 history 'cause I--I--I just can't do it.

5 Q Can you work at any kind of construction job?

6 A No. I--I piddle around the house, make flower  
7 boxes, grow roses.

8 Q Okay. But you're not paid for that--

9 A No.

10 Q --or you sell those? All right.

11 What about sheet metal work, driving a forklift,  
12 the kinds of things you did at Westpak?

13 A Nobody will hire me with my disabilities because  
14 of insurance.

15 Q You've attempted to--

16 A Oh, I have, but the--I said two to four hours a  
17 day if I could sit down, you know, and didn't have to stay  
18 on my feet or something, you know; but nobody wants that.

19 Q Okay. You've made an attempt?

20 A Oh, with--when I first got hurt, yeah.

21 Q Okay.

22 A When I first got hurt, I--my whole life changed.

23 Q Okay.

24 A I don't like it, but that's the way it is.

25 Q Now, you've indicated that the pain is not as bad

1 now as it was two or three years ago?

2 A No.

3 Q You've been on continual--is that true?

4 A It's not as bad, no.

5 Q Okay. You've been on continual medication for it?

6 A Right. Pain killers controls the pain, yeah.

7 Q All right. What kind of medication do you take

8 now?

9 A I take Darvocet, Flexoril and Amitriptyline daily.

10 Q And this is all prescribed to you?

11 A Yes. It is.

12 Q Okay. And this is a daily requirement?

13 A Daily.

14 Q Okay. Does it still relieve all of the pain?

15 A No. In the evenings, I--I just take regular  
16 Tylenol because they don't want me to take more than two  
17 Darvocets a day, because of addiction; so around 5:00 in the  
18 evening, I'll take a couple Tylenols and sometimes that'll  
19 do it and then sometimes it won't, sometimes I'll take a  
20 couple more before bed.

21 Q All right.

22 A Depends on the pain that day.

23 Q All right. Even with the medication, if you take  
24 that consistently, do you still have pain, for instance, if  
25 you have to stand for a long period of time, or lift and

1 those kinds of things?

2 A Oh, I--I can't prolong stand any more, you know,  
3 like 15 minutes on my feet today, and I hurt.

4 Q Even with the medication?

5 A Even with the medication.

6 Q All right. What about lifting and those kinds of  
7 things?

8 A Little stuff. You know, I mean--

9 Q Are we talking under--

10 A Like I ain't going to be carrying no potatoes any  
11 more, put it that way.

12 Q Talking under ten pounds--

13 A Oh, yeah,--

14 Q --that kind--

15 A --ten pounds, something like that.

16 Q Okay. So that your entire income now is derived  
17 from essentially Social Security?

18 A Social Security.

19 Q All right. And you have had some rehabilitation,  
20 rehab kinds of things medically?

21 A Oh, yeah. I went through that and they've--they  
22 sent me, gol, it seems like it was about three months that  
23 they did physical therapy on me, but after that, they just  
24 finally come to the conclusion that although it helped at  
25 the time, that the pain always returned, so I think that's

1 when they diagnosed me with chronic pain.

2 Q In any of this process and the doctors you've  
3 seen, have you refused any kind of additional medical  
4 treatment or proposed surgery or proposed rehab; have you  
5 refused to do any of that?

6 A I do exactly what they tell me to do.

7 Q Okay. Has there ever been any other procedure or  
8 medical treatment suggested to you that might alleviate the  
9 problem more than it is that you have refused?

10 A No.

11 Q So, at least at this point, you've done  
12 everything, in your view, you can do?

13 A I've did everything I've been told to do.

14 Q All right. And was--was there ever a time prior  
15 to January of 1989 that you had the kind of pain associated  
16 with the lower back at any time in your life?

17 A Never.

18 Q Anything like that that prevented you from  
19 working?

20 A I've worked all my life.

21 Q All right. But any pain at all, either through  
22 any kind of infection, disease, accident, up until January  
23 or February of 1989, that caused you the kind of pain that  
24 you've had since then?

25 A Nothing.

1 Q Were never hospitalized for anything, sought  
2 medical treatment for any of that?

3 A Well, I was hospitalized back in the '60's for  
4 pneumonia. That's about it.

5 Q Okay. And following that, you didn't have any  
6 back problems?

7 A Huh uh.

8 Q All right. Thank you.

9 MR. CAINE: That's all the questions I  
10 have.

11 THE COURT: Okay. Let's--yeah, if you  
12 can give my clerk that for copying, we'll let Ms. Burton get  
13 out of here.

14 THE CLERK: Do you want both sides?

15 MR. CAINE: Yeah.

16 THE CLERK: Front and back?

17 MR. CAINE: Uh huh.

18 THE COURT: Two copies.

19 THE CLERK: Two copies, okay.

20 THE COURT: All right.

21 All right. Cross-examination, Mr. Nemelka.

22 MR. NEMELKA: Thank you, your Honor.

23 CROSS-EXAMINATION

24 BY MR. NEMELKA:

25 Q Mr. Dickinson, I'm a little confused about this

1 witness stand, and was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. CAINE

4 Q Would you give your name, please?

5 A David Blanchard.

6 Q Spell the last name.

7 A B-l-a-n-c-h-a-r-d.

8 Q And where do you reside, Mr. Blanchard?

9 A 734 West North Temple, Salt Lake City.

10 Q Okay. And back during the period of late 1938,  
11 early 1939, were you employed at the Aquarius Motel?

12 A Yes.

13 Q What was your position?

14 A General manager.

15 Q Okay. Did you have any ownership interest in the  
16 motel--

17 A No.

18 Q --at that time?

19 Did you know Jim Dickinson?

20 A Yes.

21 Q Did he rent or lease on a month-to-month basis a  
22 room there, for a period of time?

23 A He rented, yes.

24 Q He rented? Okay.

25 Who collected the rent?

1           A     I did.

2           Q     Okay. And who was the rent paid to?

3           A     The Aquarius Motel.

4           Q     Okay. Who was the owner of the Aquarius Motel at  
5 that time?

6           A     That, I'm not sure.

7           Q     Who is Mayne Clingman?

8           A     My boss.

9           Q     Your boss?

10          A     Yes.

11          Q     Is that who the rent was paid over to when you  
12 collected it?

13          A     Yes.

14          Q     Okay. Did you deal with anyone else in connection  
15 with the rent at the motel, other than Mayne Clingman?

16          A     No.

17          Q     Okay. Do you recall having a conversation with  
18 Mr. Clingman, in Mr. Clingman's presence and with him and an  
19 attorney by the name of Paul Halliday from Salt Lake, some  
20 time in July of 1989?

21          A     Yes.

22          Q     Okay. And Mr. Clingman was present at that time;  
23 is that right?

24          A     No.

25          Q     You were present?