

1987

Lawrence H. Lawrence v. Gann Brothers, Inc.  
(Uninsured) and/or Uninsured Employers Fund  
and/or Workers' Compensation Fund of Utah and  
Seond Injury Fund : Brief of Appellant

Utah Court of Appeals

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Elliot Morris, Erie V. Boorman, Suzan Pixton, Barbara Elicerio; Attorneys for Defendants.

Leroy K. Johnson; Attorney for Petitioner.

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**BRIEF**

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DOCKET NO. 870345-CA

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

LAVERNE H. LAWRENCE,

)

Petitioner/Applicant,)

vs.

)

GANN BROTHERS, INC. (UNINSURED)  
and/or UNINSURED EMPLOYERS FUND,

)

)

Respondents/Defendants,  
and

)

BRIEF OF THE APPELLANT

)

LAVERNE H. LAWRENCE,

)

Petitioner/Applicant,

)

vs.

)

GANN BROTHERS, INC. and/or  
WORKERS' COMPENSATION FUND OF UTAH  
and SECOND INJURY FUND,

)

)

)

)

Respondents/Defendants.

)

No. 6 870345 CA  
Cases No. 86000369  
86000475

Petition for Review of an Order of the  
Industrial Commission of Utah  
Timothy C. Allen  
Administrative Law Judge

LEROY K. JOHNSON  
311 South State Street, Suite 380  
Salt Lake City, Utah 84111  
Attorney for Petitioner/Applicant

ELLIOT MORRIS  
560 South Third East  
Salt Lake City, Utah 84111  
Attorney for Workers Compensation Fund

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ERIE V. BOORMAN  
160 East Third South  
Salt Lake City, Utah 84145  
Administrator, Second Injury Fund

SUZAN PIXTON  
160 East Third South  
Salt Lake City, Utah 84145  
Uninsured Employers

BARBARA ELICERIO  
160 East Third South  
Salt Lake City, Ut 84145  
Industrial Commission

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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

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 and/or UNINSURED EMPLOYERS FUND, )  
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 and )  
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LEROY K. JOHNSON  
311 South State Street, Suite 380  
Salt Lake City, Utah 84111  
Attorney for Petitioner/Applicant

ELLIOT MORRIS  
560 South Third East  
Salt Lake City, Utah 84111  
Attorney for Workers Compensation Fund of Utah

ERIE V. BOORMAN  
160 East Third South  
Salt Lake City, Utah 84145  
Administrator, Second Injury Fund

SUZAN PIXTON  
160 East Third South  
Salt Lake City, Utah 84145  
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LAVERNE H. LAWRENCE,	)	
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WORKERS' COMPENSATION FUND OF UTAH	)	
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JURISDICTION

This Petition is brought pursuant to Utah Code Annotated, 35-1-83 (1953, as amended 1987) which confers original jurisdiction in such motions for review on the Utah Court of Appeals.

### NATURE OF PROCEEDINGS

This Petition is for review of a final order of the Utah State Industrial Commission. The Findings of Fact, Conclusions of Law, and Order by the Administrative Law Judge of the Industrial Commission were entered March 4, 1987, (Exhibit "A"). A Motion for Review was filed by the Workmens' Compensation Fund of Utah on March 5, 1987, (Exhibit "B") which was denied by the Industrial Commission by Order dated April 1, 1987, (Exhibit "D"). A Motion for Review was filed by the Petitioner/Applicant on March 18, 1987, (Exhibit "C") which Motion was denied by order of the Commission dated June 24, 1987, (Exhibit "E"). It is the findings of Fact, Conclusions of Law, and Order that has been upheld by the Industrial Commission that is the subject of this Appeal.

### ISSUES

This case involves the application of Section 35-1-69, Utah Code Annotated (1953, as amended), which requires the Second Injury Fund to compensate employees for disability resulting from pre-existing conditions where a new injury either directly aggravates the pre-existing condition or results in an additional 10% permanent partial disability and total permanent partial disability from the industrial injury and pre-existing conditions is 20% or greater. In the instant case, an employee experienced two industrial incidents on separate days while working for the same employer. These two incidents cumulatively resulted in

medical treatment and a disability of 10%. However, this cumulative disability can be broken down so that each incident is deemed to have contributed less than 10% to the employee's total disability. The issue then is: should this 10% disability serve to trigger the requirements of Section 35-1-69, and require compensation to the injured employee from the Second Injury Fund for his pre-existing conditions.

#### FACTS

The applicant/appellant Laverne Lawrence, was employed by Gann Brothers, Inc. as a truck driver operating a heavy equipment transporter. On September 10, 1985, while attempting to lift the access ramp to a flat-bed trailer that was designed for carrying heavy equipment, he wrenched his back and had immediate low back pain in the vicinity of his belt line. Mr. Lawrence reported the incident, but sought no medical treatment, lost no time from work, and received no benefits pursuant to the Workers' Compensation statute.

While working for the same employer, on November 29, 1985, the applicant/appellant was again required to lift the loading ramp of his flat-bed trailer. As he did so he felt pain again in the same location in his low back. He reported the incident and received medical treatment from a chiropractor for approximately one week. These treatments were paid for by his

Workers' Compensation Insurance. On February 18, 1986, Mr. Lawrence's back became worse and he was ordered not to work by his physician. He was diagnosed as having a herniated disc, and on March 20, 1986, the disc at L3-4 was removed by Dr. Heiden at St. Benedict's Hospital in Ogden, Utah.

After a hearing, the medical issues were referred to a medical panel by the Administrative Law Judge. The Panel determined, and the Administrative Law Judge found, that as a result of these two industrial incidents and the surgery of March 20, 1986, the applicant had incurred a total of 10% permanent partial impairment. The Panel allocated 6.7% to the November incident and 3.3% to the September incident.

The Panel found that the applicant had a pre-existing laminectomy resulting in a 10% whole person disability, and a 5% whole person disability due to the removal of cartilage in his left knee. The Panel found that neither the September nor the November injuries aggravated either of these pre-existing conditions.

Based upon these findings the Administrative Law Judge determined that neither the September nor the November incidents aggravated a pre-existing condition, and that neither, by itself, resulted in an additional 10% permanent partial impairment,

therefore the provisions of Section 35-1-69, were not applicable and the Second Injury Fund was not required to compensate the applicant for his pre-existing disability.

Gann Brothers, Inc. was insured by the Workers' Compensation Fund of Utah at the time of the September injury, but was uninsured at the time of the November injury, and later filed for protection in the Bankruptcy Court. As a result, the Administrative Law Judge ruled that the Workers' Compensation Fund of Utah was liable for 3.3% of the medical expenses, permanent partial disability, and temporary total disability and that the Uninsured Employers Fund was responsible for 6.7% of those expenses. The Second Injury Fund was deemed to have no liability.

#### SUMMARY OF ARGUMENT

The purpose of the provisions of Section 35-1-69, to encourage employers to hire individuals with pre-existing disabilities, is best served by finding that the 10% permanent partial disability that results from these two intimately related industrial incidents satisfies the requirement of that section and mandates compensation by the Second Injury Fund.



There are three possible ways of dealing with the events described in this case:

A. The events can be seen as two separate injuries. One occurring on September 10,, 1985, and the second occurring on November 29, 1985.

B. The events can be seen as a single injury that cumulatively resulted in a failure on November 10, 1985, and the need for surgery, a medical panel having allocated one-third of the responsibility for the surgery and subsequent disability to the September incident and two-thirds of the responsibility to the November incident.

C. The incidents can be viewed as one industrial injury occurring on November 29, 1985, that was preceded by an event on September 10, 1985, that does not come up to the standard required for an industrial injury, and is therefore a pre-existing condition.

The Industrial Commission in its ruling, upholding the Administrative Law Judge's decision, appear to have taken approach "A" to this situation, holding that there were two separate industrial injuries neither of which comes up to the required standard of producing a 10% permanent partial disability and invoking the compensation to the injured worker provided for in Section 69. For the reasons stated below, the ruling is in

error in its interpretation of Section 35-1-69 and is arbitrary and capricious in its application of Section 69 to the facts in this case.

ARGUMENT

POINT I

THE PURPOSE OF THE SECOND INJURY FUND, TO ENCOURAGE EMPLOYERS TO HIRE PERSONS WITH PRE-EXISTING DISABILITIES, IS BEST SERVED BY TREATING THE INCIDENTS OF SEPTEMBER 11, AND NOVEMBER 29, 1985, AS A SINGLE INJURY FOR PURPOSES OF APPLICATION OF SECTION 35-1-69.

Under the first paragraph of Section 35-1-69 (1), the Second Injury Fund is to compensate an employer for pre-existing conditions if a new injury either (a) aggravates that pre-existing condition or (b) meets the threshold requirement that the new injury add an additional 10% permanent partial disability, and that the new injury plus the pre-existing conditions result in a total permanent partial disability of 20%. Section 35-1-69 (1), Utah Code Annotated. The principal case interpreting this issue is

The Second Injury Fund v. Streater Chevrolet, 709 P.2d 1176. Here the court gives a thorough analysis of the history and purposes of the Second Injury Fund and of the provisions of Section 69. The court states as follows regarding the purpose of Section 35-1-69:

"The legislature undoubtedly intended... to provide protection for men who had already been partially permanently disabled, but yet were able to do work. Without some provision of this kind, employers would be extremely hesitant in employing men partially disabled, since an injury resulting in partial permanent disability of the employee might well impose greater liability on the employer than a similar injury incurred by a person not previously disabled." Second Injury Fund v. Streater Chevolet, 709 P.2d 1176, 1179, quoting from Marker v. Industrial Commission, 37 P.2d 785, 787 (1934).

In this case Mr. Lawrence was already employed, even though he had pre-existing back and knee disabilities. At least in theory the purpose of Section 35-1-69 had been served, as the employer and his insurer could rest assured that they would not be held liable for any disability resulting from his pre-existing conditions.

After the incident that occurred on September 10, 1985, Mr. Lawrence had obviously had an insult to his back. However, this insult had not required any medical treatment or resulted in any lost work or disability. It is common knowledge among employers that once an individual has had an insult to his back, an additional injury is more probable and such injury is likely to result in significant disability. An employer might be inclined to dismiss Mr. Lawrence after such an insult to his back

to avoid being liable for this additional injury and subsequent disability. Surely it is an obvious corollary to the stated purpose of Section 69 and the Second Injury Fund, that the protections provided by the Fund should be extended to an individual who is already employed.

These protections can be so extended by finding that any insult that occurred on September 10, 1985, is itself a pre-existing condition to the November 29, 1985, event that triggered the medical expenses and disability. Or, this purpose could be supported by finding that since the first injury itself did not require any medical treatment, that, standing alone, it is not itself an "industrial injury", and does not become an injury until the second occurrence on November 29, 1985. But for the November 29th injury, there would have been no necessity of medical treatment or other compensation for the September 10th incident. But for the November 29th injury, there would have been no surgery, no lost wages, and no permanent partial disability.

#### POINT II

IT IS ARBITRARY AND CAPRICIOUS TO HOLD THAT THE  
SEPTEMBER 10, AND NOVEMBER 29, 1985, INCIDENTS  
REPRESENT TWO SEPARATE INJURIES FOR PURPOSES OF THE  
APPLICATION OF SECTION 35-1-69, REGARDING THE  
COMPENSATION OF AN INJURED EMPLOYEE.

The court in its discussion of the purpose of the

Second Injury Fund and the history of Section 69 in Streator Chevrolet, points out that prior to 1981, the statute required that the permanent incapacity resulting from the combined impairments be "substantially greater" than would have been the case had there been no pre-existing incapacity. In 1981, the statute was amended so as to give precise definition to the term "substantially greater". Thus, giving rise to the 10% and 20% threshold requirement. The court interpreted this threshold as "...no combination of impairments shall be deemed to be substantially greater, than the industrial injury impairment alone, unless the industrial injury impairment is 10% or more and the total impairment from all combined causes is 20% or more, Second Injury Fund v. Streator Chevrolet, 709 P.2d 1176, 1181 (Utah 1985). In ruling that these percentage thresholds were to be met based on the whole man rather than the partial man disability schedule, the court focused on the fact that "The amendments to Section 35-1-69, set the 10% and 20% thresholds in order to assure that both the industrial injury and the total impairments reach certain fixed levels of seriousness before any non-aggravating pre-existing impairments are compensated." Second Injury Fund v. Streator Chevrolet, 709 P.2d 1176, 1181, (Emphasis ours). The court goes on to point out that to rule

otherwise, "... would unfairly deny compensation to those who are most handicapped while granting it to the less severely handicapped."

Thus the court has made clear that the controlling principle in interpreting these thresholds, is the seriousness of the injury and the compensatory purpose of the statute. Given these principles, it is arbitrary and capricious to rule that the two incidents that occurred to Mr. Lawrence on September 10, and November 29, 1985, are in fact two separate injuries. Such a ruling serves no purpose other than to avoid the application of the compensation provisions of Section 35-1-69 (1), and thwart the purposes of the statute. It is arbitrary to find that the September insult to the back was in fact an industrial injury for purposes of this section. The applicant did not require any medical treatment or lose any time from work as a result of what happened on September 10, 1985. Although what occurred was clearly a reportable accident, had there not been a further insult to his back, no compensation in any form would have been paid.

Indeed, since the September 10, 1985, injury would have resulted in no compensation had it not been for the "lighting up" that resulted from the November 29, 1985, injury this case can be

seen as quite similar to the internal failure cases analyzed by the court in Allen v. The Industrial Commission, 729 P.2d 15 (Utah 1986).

The only meaningful difference between the instant case and these gradually developing, internal back failure cases, is that here we have only a single reported incident of pain that pre-existed the final failure in the back. Whereas, in the more gradual cases there are many insults to the back that precede the "last straw" accident. In the internal failure cases no issue is raised arguing that each prior incident where the injured employee may have experience prior back pain should be considered itself as a separate industrial accident. No one suggests that the percentage of disability should be broken down and allocated to each one of these incidents as well as the final accident. Such an analysis would be completely unworkable. In such cases as these, under the Allen analysis, we say that there is one industrial accident that occurs on the date and time of the accident that brings on the internal failure, and we use the whole man percentage that results from the treatment and disability subsequent to this last accident in applying the threshold requirements of Section 35-1-69 (1). There is no meaningful distinction between the instant case and these gradually developing cases.

### POINT III

THE MEDICAL ALLOCATION OF DISABILITY BETWEEN THE SEPTEMBER AND NOVEMBER INCIDENTS SHOULD BE USED TO ALLOCATE LIABILITY AMONG THE VARIOUS INSURANCE COMPANIES AND COMPENSATION FUNDS, NOT TO THWART THE COMPENSATORY INTENT OF SECTION 35-1-69.

Section 35-1-69 (1) presents two separate problems that have been treated quite differently by the Utah Supreme Court decisions. The first has to do with compensating an injured employee where the new injury either aggravates a pre-existing condition or meets the required threshold of severity. The second issue involves the proper apportionment of compensation between the employer and the Second Injury Fund to meet the stated purpose of the Second Injury Fund that "the liability of the employer for compensation...shall be for the industrial injury only and the remainder shall be paid out of the Second Injury Fund", Utah Code Annotated, Section 35-1-69 (1).

The issue of allocation of liability has been threshed out by the Utah Supreme Court in the cases of Jacobsen Construction v. Hair, 667 P.2d 25, and Richfield Care Center v. Torgerson, 773 P.2d 178. Hair stands for the proposition that for purposes of meeting the requirements of Section 69, it is appropriate to use a different form of disability rating than



that used for determining the amount of compensation due the applicant. For purposes of compensating an applicant, the "combined partial impairment" rating based upon the American Medical Association Conversion Tables is used. These tables combine the percentages of impairment attributable to the individual injuries so as "to avoid the possibility, in some cases, of separate whole man percentages adding up to a total impairment in excess of 100%." However, for apportioning liability between the employer and the Second Injury Fund, the "whole man" rating is to be used. Jacobsen Construction v Hair 667 P.2d 25, 27.

Torgerson applies Hair in the situation where two injuries occurring at different times both contributed to the aggravation of a pre-existing condition. In Torgerson the applicant was found to have had a pre-existing condition, prior to any industrial injury, that involved a whole man impairment of 2.5%. Then in 1980, the applicant had an industrial injury that required medical treatment and resulted in an additional 2.5% whole man impairment. In 1982, the applicant had another industrial injury that resulted in an additional 2.5% permanent partial impairment. The Commission ruled that Hair stood for the proposition that, "...the employer's portion of the liability for

compensation is equal to the percentage of the permanent physical impairment attributable to the industrial injury. Thus, the Commission must consider separate accidents serially in order to determine the percentage of impairment attributable to each accident and the proportion the pre-existing impairment bears to the total combined impairment." Richfield Care Center v Torgerson, 773 P.2d 178,180.

Thus, the court went on to apportion liability for the 1980 accident which had aggravated the first 2.5% impairment and added an additional 2.5%, one-half to the Second Injury Fund and one-half to the employer. The court applied these principles to the 1982 injury by treating the 5% permanent partial impairment that the applicant brought to this injury as a pre-existing impairment. When the 1982 injury added an additional 2.5% permanent partial impairment to the 5% pre-existing impairment, the allocation was one-third to the employer and two-thirds to the Second Injury Fund. Thus, for purposes of allocation, the first industrial accident and the impairment resulting from it became a pre-existing condition of the second industrial accident.

Despite ruling that the pre-existing industrial injury is a pre-existing condition for purposes of allocation under

Section 35-1-69 (1), the court ruled in David v. The Industrial Commission of Utah, 649 P.2d 82, that a prior industrial injury that had already been compensated, was not a "pre-existing condition" such that compensation from the Second Injury Fund was required under Section 35-1-69.

Thus, the court rulings make it quite clear that it is necessary to treat the issue of compensation to the employee and apportionment between employers and injury funds quite differently.

#### CONCLUSION

Since the creation of the Second Injury Fund two central principles have guided the case law interpreting the purposes of The Fund and the statutory rules governing it. First, to encourage employers to hire workers with pre-existing conditions by assuring them that they will be liable only for those injuries and disabilities that are associated with their employment, and secondly to encourage workers with pre-existing disabilities to find work by assuring them that they will be compensated for all their disabilities should a new injury result in a sufficiently severe total disability. This case requires the court to apply these guiding principles where an employee experienced two industrial injury incidents while working for the

same employer, the first one requiring no medical treatment or compensation of any kind, and the second one resulting in an internal failure to the back. The most rational way to deal with these incidents and the only way that rationally applies both of these guiding principles to these facts, is to find that the two incidents resulted in a single disability of sufficient severity to justify compensating the injured worker for the new injury and his pre-existing disabilities as required by Section 35-1-69.

To find that the two insults to the injured workers back represent two separate injuries arbitrarily divides a disability that would only have existed as a result of both events, and thwarts the second purpose of the existence of the Second Injury Fund. To find that the first injury represents a pre-existing condition as to the second injury thwarts both purposes of the Second Injury Fund, since the employer is relieved of responsibility for an injury that occurred while the employee was working for him and the employee is denied compensation for his total disability. Where, in reality, that total disability meets the required level of severity.

To interpret the two closely related insults to the back as a single industrial injury for purposes of the application of the thresholds of Section 35-1-69, both satisfies

the two primary concerns of the existence of the Second Injury Fund and of Section 69, and brings the interpretation of these incidents in accord with the medical events and with the court's reasoning in its interpretation of internal failure cases.

Accordingly, petitioner/applicant prays that this court order the Industrial Commission to amend its ruling of June 24, 1987, upholding the Findings of Fact and Conclusions of Law of the Administrative Law Judge, and Order the Commission to enter new Findings of Fact and Conclusions of Law, holding; (a) that the industrial injury/incident of September 10, 1985, and November 29, 1985, cumulatively resulted in a permanent partial disability to the petitioner/applicant of 10%; (b) that this represents a permanent partial disability that is "substantially greater" than the permanent partial disability that pre-existed these events; and, that since the pre-existing permanent partial impairment of the petitioner/applicant is in excess of 10% that the conditions set forth in Section 35-1-69 are satisfied; and, that the Commission order the Second Injury Fund to compensate the petitioner/applicant for his pre-existing disability.

DATED this 21st day of December, 1987.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Leroy K. Johnson", is written over a horizontal line.

LEROY K. JOHNSON  
Attorney for Petitioner/Applicant

CERTIFICATE OF MAILING

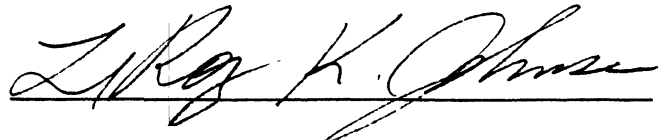
I certify that I mailed two copies of the foregoing Brief of the Appellant to the following parties by placing a true and correct copy thereof, postage prepaid, this 21st day of December, 1987, in an envelope addressed to:

Elliot Morris  
Attorney, Workmen's Compensation Fund  
560 South Third East  
Salt Lake City, Utah 84111

Erie V. Boorman  
Administrator, Second Injury Fund  
160 East Third South  
Salt Lake City, Utah 84145

Suzan Pixton  
Administrator, Uninsured Employers Fund  
160 East Third South  
Salt Lake City, Utah 84145

Barbara Elicerio  
Counsel for Industrial Commission of Utah  
160 East Third South  
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "L. Ray K. Johnson", is written over a horizontal line.

ADDENDUM

1. Statute 35-1-69, Utah Code Annotated (1953, as amended)
2. Findings of Fact, Conclusions of Law and Order .....
3. Workmen's Compensation Fund: Motion for Review .....
4. Petitioner/Applicant: Motion for Review .....
5. Workmen's Compensation Fund:  
    Denial of Motion for Review .....
6. Petitioner/Applicant: Denial of Motion for Review ....

## Training of employee.

(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund provided for in Subsection 35-1-68 (1), and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating. This combined impairment rating may not exceed 100%.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided in this Subsection (1), and (b) where there is no such aggravation, no award for combined injuries may be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. In determining the impairment thresholds and assessment of liability in favor of the employee and apportionment between the carrier or employer and the Second Injury Fund, the permanent physical impairment attributable to the industrial injury or the pre-existing condition or overall impairment, shall be considered on a whole person uncombined basis. If the pre-existing incapacity referred to in this Subsection (1)(b) previously has been compensated for, in whole or in part, as a permanent partial disability under this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the Second Injury Fund under this paragraph.

If the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this

section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the Second Injury Fund as provided for in this section, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made.

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition, whether due to accidental injury, disease, or congenital causes. The Industrial Commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and any amounts remaining to be paid shall be payable out of the Second Injury Fund. Medical expenses shall be paid in the first instance by the employer or its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the industrial injury shall be reimbursed to the employer out of the Second Injury Fund upon written request and verification of amounts so expended.

(2) The commission may increase the weekly compensation rates to be paid out of this special fund. This increase shall be used for the rehabilitation and training of any employee coming under this chapter as may be certified to the commission by the Rehabilitation Department of the State Board of Education as being eligible for rehabilitation and training. There may not be paid out of such special fund for rehabilitation an amount in excess of \$1,000.



LAVERNE H. LAWRENCE  
ORDER  
PAGE THREE

Sixteen years ago, the Applicant started having back problems after he got out of the service. He eventually received a laminectomy at the L4-5 level at the St. Francis Hospital of Topeka, Kansas.

With the file in this posture, the case was referred to a Medical Panel for its evaluation. The Medical Panel found that the surgery of March 20, 1986, was 2/3 the result of the industrial accident of November 29, 1985, and 1/3 the result of the industrial injury of September 10, 1985. The Panel concluded that these two injuries amounted to a new insult to the Applicant's back at a different location. The Panel also found that Mr. Lawrence reached a fixed state of recovery following his surgery of March 20, 1986, on October 20, 1986. As a result of the industrial accident of November 29, 1985, the Panel found a 6.7% permanent impairment due to the whole person, and a 3.3% permanent partial impairment of the whole person due to the industrial accident of September 10, 1985. With respect to the pre-existing laminectomy, the Panel found a 10% whole person rating as a result of that problem, and a 5% whole person rating due to the Applicant's pre-existing surgical removal of cartilage in his left knee due to a football injury of 1979. Finally, the Panel found that neither the industrial injury of September 10, 1985, nor November 29, 1985, aggravated a pre-existing condition. The Administrative Law Judge adopts the findings of the Medical Panel as his own.

Pursuant to the findings of the Medical Panel, the Applicant is entitled to receive payment for the surgery of March 20, 1986, with 2/3 of that surgery being the responsibility of Gann Brothers, Inc., since they were uninsured on November 29, 1985, and 1/3 of those expenses are the responsibility of the Workers Compensation Fund of Utah. In addition, the Applicant is entitled to temporary total compensation for the period February 18, 1986, through October 20, 1986, or a period of 35 weeks. As indicated previously, he is entitled to a 6.7% permanent partial impairment award of the whole person from his employer, Gann Brothers, Inc., and a 3.3% permanent partial impairment of the whole person from the Workers Compensation Fund. Pursuant to Section 35-1-69, the Second Injury Fund has no involvement in this case since there is no indication of any aggravation of a pre-existing condition by either of the industrial accidents, and further there is no satisfaction of the threshold requirement contained in Section 69. For the record, that Section requires that Second Injury Fund participation will be indicated if there is a 10% impairment of the whole person due to an industrial accident and an impairment of 20% or greater of the whole person from all causes and conditions including the industrial accident. In this case, the Applicant has sustained a 6.7% impairment of the whole person due to the industrial accident of November 29, 1985, and 3.3% impairment of the whole person due to the industrial injury of September 10, 1985, neither of which standing separately satisfies the threshold requirement.

At the evidentiary hearing of these matters, it was indicated by the Administrator of the Uninsured Employers Fund that the employer, Gann Brothers, Inc., has filed a Chapter VII Bankruptcy. Accordingly, pursuant to Section

Case Nos. 86000369 & 86000369

✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱ ✱

AND ORDER

Gann Brothers, Inc., did not appear.

LAVERNE H. LAWRENCE  
ORDER  
PAGE FOUR

35-1-107, the Administrative Law Judge finds and concludes that Gann Brothers, Inc., has insufficient assets to pay the Applicant's claim for the industrial accident of November 29, 1985, and they were uninsured for workers compensation purposes on that date. Accordingly, the Uninsured Employers Fund is liable for the Applicant's benefits which are due and owing as a result of his industrial accident of November 29, 1985. With respect to the payment of the medical expenses for the surgery of March 20, 1986, the Administrative Law Judge finds that as a matter of convenience, those bills should be paid in the first instance in full by the Workers Compensation Fund of Utah. The Workers Compensation Fund of Utah shall then be entitled to reimbursement from the Uninsured Employers Fund for 67% of the medical expenses incurred as the result of the surgery of March 20, 1986.

On September 10, 1985, and November 29, 1985, it would appear that the Applicant was earning \$9.00 per hour, working forty hours per week, and he was single with no dependents, thereby entitling him to temporary total compensation in the amount of \$240.00 per week, and permanent partial impairment benefits in the amount of the statutory maximum of \$215.00 per week.

CONCLUSIONS OF LAW:

LaVerne H. Lawrence sustained compensable industrial accidents on September 10, 1985, and November 29, 1985, while employed by Gann Brothers, Inc..

ORDER:

IT IS THEREFORE ORDERED that Defendants, Gann Brothers, Inc., and/or Workers Compensation Fund of Utah, pay LaVerne H. Lawrence \$2,772.00, which amount represents 33% of his temporary total compensation for the period February 18, 1986, through October 20, 1986; said benefits to be paid in a lump sum.

IT IS FURTHER ORDERED that the Defendants, Gann Brothers, Inc., and/or Workers Compensation Fund of Utah, pay LaVerne H. Lawrence compensation at the rate of \$215.00 per week for 10.296 weeks or a total of \$2,213.64, as compensation for a 3.3% permanent partial impairment of the whole person due to the industrial accident of September 10, 1985; these benefits to be paid in a lump sum.

IT IS FURTHER ORDERED that the Workers Compensation Fund of Utah, pay Lennard Stillman, attorney for the Applicant, \$3,016.20, for services rendered in this matter, the same to be deducted from the aforesaid permanent partial and temporary total compensation awards to the Applicant and remitted directly to his office.

LAVERNE H. LAWRENCE  
ORDER  
PAGE FIVE

IT IS FURTHER ORDERED that the Workers Compensation Fund of Utah shall pay all medical expenses incurred as the result of the surgery of March 20, 1986, in full in the first instance, with reimbursement to be had from the Uninsured Employers Fund for 67% of those surgical expenses. The reimbursement from the Uninsured Employers Fund shall be had upon the submission of a petition by the Workers Compensation Fund of Utah to the Administrator of the Uninsured Employers Fund indicating the amount expended by the Fund on behalf of Mr. Lawrence as a result of his surgery of March 20, 1986.

IT IS FURTHER ORDERED that the Administrator of the Uninsured Employers Fund prepare the necessary vouchers to pay LaVerne H. Lawrence \$5,628.00, which amount represents 67% of the temporary total compensation for the period February 18, 1986, through October 20, 1986; these benefits shall be paid in a lump sum

IT IS FURTHER ORDERED that the Administrator of the Uninsured Employers Fund prepare the necessary vouchers to pay LaVerne H. Lawrence compensation at the rate of \$215.00 per week for 20.904 weeks for a total of \$4,494.36, as compensation for a 6.7% permanent partial impairment of the whole person due to the industrial accident of November 29, 1985; these benefits to be paid in a lump sum.

IT IS FURTHER ORDERED that the Uninsured Employers Fund shall have full rights of subrogation against Gann Brothers, Inc., for benefits paid in this matter, pursuant to Section 35-1-107, Utah Code Annotated.

IT IS FURTHER ORDERED that Gann Brothers, Inc., shall also be liable for payment of attorney's fees in this matter in the minimum amount of \$250.00, with additional attorney's fees to be granted upon petition of the Uninsured Employers Fund to the Administrative Law Judge.

IT IS FURTHER ORDERED that the Defendant, Gann Brothers, Inc., shall also pay the Uninsured Employers Fund a penalty of 15% of the total award in this matter as required by Section 35-1-107, Utah Code Annotated.


IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

  
Timothy G. Allen  
Administrative Law Judge

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

4th day of March, 1987.

ATTEST:

  
Linda J. Strasburg  
Commission Secretary

CERTIFICATE OF MAILING

I certify that on March 4<sup>th</sup>, 1987, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of LaVerne H. Lawrence, issued March 4<sup>th</sup> 1987, was mailed to the following persons at the following addresses, postage paid:

LaVerne H. Lawrence, 1774 North 350 West, Sunset, UT 84015

Lennard Stillman, Atty., 211 South State, Suite 300, SLC, UT 84111

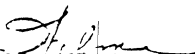
Elliot Morris, Atty., Workers Compensation Fund of Utah, 560 South 300 East, SLC, UT 84111

Erie V. Boorman, Administrator, Second Injury Fund

Susan Pixton, Administrator, Uninsured Employers Fund

Gann, Brothers, Inc., 1070 West 14600 South, Bluffdale, UT 84065

THE INDUSTRIAL COMMISSION OF UTAH

By   
Wilma



**Workers  
Compensation  
Fund**  
of  
Utah

Blaine C. Palmer, Director  
Rodney C. Smith, Assistant Director

560 South 300 East  
Post Office Box 45420  
Salt Lake City, Utah 84145-0420  
(801) 533-7834

March 5, 1987

EXHIBIT "B"

Timothy C. Allen  
Administrative Law Judge  
Industrial Commission of Utah  
160 East 300 South  
Salt Lake City, Utah 84145-0580

Re: Claimant: Laverne Lawrence  
File No.: 86-08158  
Inj Date: 09-10-85, 11-29-85  
Employer: Gann Brothers  
Case No.: 86000369 & 86000475

Dear Judge Allen:

I'm beginning to sound like a broken record (perhaps a voice crying in the wilderness), but not wanting to be inconsistent (even though, according to Emerson, such a desire might brand me as being among the feeble minded) I am writing to request a reconsideration or review of your apportionment of compensation benefits in your March 4, 1987 Order in this matter.

Actually, I'll settle for a modification of your order along the lines of my alternative argument below, but in order to preserve the issue should an appeal be necessary, I thought I ought to raise my standard objection to apportionment anyway. As you know, I am the last of a dying breed of practitioners in the area of Utah workers compensation law who believe that the Brown, Mountain States Steel, and Anderton decisions still outlaw apportionment of disability compensation between insurance carriers in serial accident situations. My tenacity in clinging to this doctrine promises to be either vindicated or ridiculed in the pending case of Lamb v. Jordan School District, et al. Until that landmark decision is rendered my head shall remain bloodied, but unbowed. ("The way of a fool is right in his own eyes..." Proverbs 12:15) I shall not trouble you with citations to the aforementioned authorities as these are well known to you but would merely ask that you note my manifold and enlightened arguments against apportionment in the Gilbert Lamb case which are incorporated herein by reference. Needless to say, you should have made the Uninsured Employers Fund and the Second Injury Fund pay the entire 10% PPD rating along with all of the TTC.

Motion for Reconsideration/Review  
LaVerne Lawrence  
Page 2

I am well aware that the non-apportionment rule is hard stuff to swallow. By adhering to these tenets, I do not endear myself to Susan Pixton and Erie Boorman. But at the risk of seeming to compromise my undeviating devotion to Brown, Mountain States Steel, and Anderton, I hereby submit an alternative position which I would ask you to consider. This, of course, is none other than the rule set forth in that recent Utah Supreme Court decision in Richfield Care Center v. Torgerson, No. 20412, filed February 12, 1987. Using the analysis mandated by the Court in Torgerson requires that the 3.3% PPI assessed to the September 10, 1985 accident be considered as a preexisting incapacity at the time of the November 29, 1985 accident for purposes of applying Section 69. Hence, the TTC after the last accident should be apportioned 2/3 to the Uninsured Employers Fund and 1/3 to the Second Injury Fund. Under this alternative position, the Workers Compensation Fund would not contest payment of the PPD attributable to the September 10, 1985 accident.

I appreciate your consideration of this Motion for Reconsideration/Review albeit its humble form. Your indulgence is all the more admirable when one considers the insufferableness of dogmatic zealots like myself (although someone else in the office has suggested it takes one to know one).

Very truly yours,

WORKERS COMPENSATION FUND OF UTAH

Elliot K. Morris  
Attorney at Law

cc: ✓ Lennard Stillman, Atty., 211 S. State, #303, SLC, UT 84111  
Erie V. Boorman, Administrator, Second Injury Fund  
Susan Pixton, Administrator, Uninsured Employers Fund

Johnson & Stillman  
ATTORNEYS AT LAW  
12 Exchange Place  
Salt Lake City, Utah 84111  
Phone (801) 364-7363

EXHIBIT "C"

LeRoy K. Johnson  
Lennard W. Stillman

March 18, 1987

Timothy C. Allen  
Administrative Law Judge  
Industrial Commission of Utah  
160 East 300 South  
Salt Lake City, Utah 84145-0580

Re: Claimant: Laverne Lawrence  
Inj Date: 9/10/85, 11/29/85  
Employ: Garn Brothers  
Case No.: 86000369 & 86000475

Dear Judge Allen:

Please accept this note as a request for reconsideration of your Order entered in the Laverne Lawrence matter on March 4, 1987. I must take some exception to the Order entered and that exception is in agreement with that provided to you by Elliot Morris of the Workers' Compensation Fund. In his letter of March 5, 1987, Mr. Morris correctly refers to the case of Richfield Care Center v. Torgerson, 52 UAR 22, which appears to present the appropriate resolution of the Lawrence case. In that case, the serial accidents were not considered together, however, were considered to be separate incidents in time and the first incident was considered, for the purposes of paying on the second incident, a pre-existing condition. That case appears to present a new rule for a disposition of this particular type of case. As an alternative resolution of this matter, I might propose something along the following lines:

According to the medical panel, Mr. Lawrence had a 15% whole person rating due to pre-existing conditions prior to the injury of September 10, 1985. Adopting the Torgerson rule for the purposes of the November 29, 1985 accident, the September 10 accident is also a "pre-existing condition". Therefore, implementing Section 69 the appropriate ruling would, no doubt be, that as of November 29 accident date Mr. Lawrence had a 15% whole man impairment, as well as a 3.3% whole man impairment due to the September 10 accident. The November 29 accident would constitute a "significant aggravation" of his pre-existing condition, that condition which existed prior to the November 29, 1985 accident. Insofar as the November 29 incident created a 6.7% permanent partial impairment, it should be indisputable that that constitutes a significant aggravation of a pre-existing condition. Adopting the Torgerson rule as well as the accurate analysis of the situation by Mr. Morris, it appears that the Second Injury Fund should be required to pay to Mr. Lawrence 18.0% whole man impairment with contribution from the Workers' Compensation Fund of 0.0%. Garn Brothers, by way of the Uninsured



Reconsideration  
Laverne Lawrence  
Page 2

Employers Fund, should be responsible for 6.7% permanent partial impairment due to the industrial accident of November 29, 1985.

I have no problems with the temporary total compensation order, nor do I have problems with the order requiring Gann Brothers, through the Uninsured Employers Fund, to pay 6.7% permanent partial impairment. But, it is apparent that adopting Torgerson the Second Injury Fund as well as the Workers' Compensation Fund of Utah are responsible to pay for his "pre-existing conditions" as of November 29, 1985. This adopts the appropriate analysis of Torgerson as well as Section 69, as well as the rationale behind the enactment of the paying schedule for the Second Injury Fund, to wit: that employers should be encouraged to retain people who have experienced injuries on the job or are otherwise handicapped. That was Mr. Lawrence's condition as of November 29, 1985.

Respectfully submitted,



LEONARD W. STILLMAN  
Attorney for Claimant

cc: Workers' Compensation Fund  
Second Injury Fund  
Uninsured Employers Fund  
Laverne Lawrence

THE INDUSTRIAL COMMISSION OF UTAH

Case Nos. 86000369 & 86000475

EXHIBIT "D"

LAVERNE H. LAWRENCE,

Applicant,

vs.

GANN BROTHERS, INC.  
(UNINSURED) and/or  
UNINSURED EMPLOYERS FUND,

Defendants.

and

LAVERNE H. LAWRENCE,

Applicant,

vs.

GANN BROTHERS, INC. and/or  
WORKERS COMPENSATION FUND  
OF UTAH and  
SECOND INJURY FUND,

Defendants.

\* \* \* \* \*

DENIAL OF  
MOTION FOR REVIEW

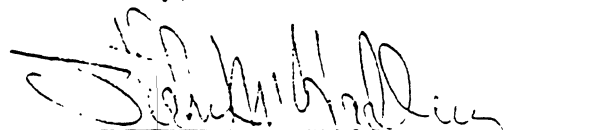
On or about March 4, 1987, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about March 9, 1987, the Commission received a Motion for Review from the Defendants, Workers Compensation Fund of Utah, by and through their attorney.

Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

LAVERNE H. LAWRENCE  
DENIAL OF MOTION FOR REVIEW  
PAGE TWO

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of March 4, 1987, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.



Stephen M. Hadley  
Chairman



Lenice L. Nielsen  
Commissioner

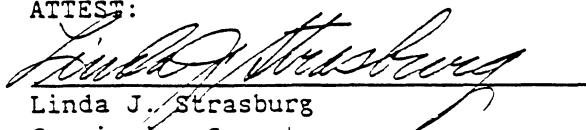


John Florez  
Commissioner

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

1st day of April, 1987.

ATTEST:



Linda J. Strasburg  
Commission Secretary

CERTIFICATE OF MAILING

I certify that on April 2, 1987, a copy of the attached Denial of Motion for Review, in the case of LaVerne Lawrence, issued ~~March 2~~ April 2 1987, was mailed to the following persons at the following addresses, postage paid:

LaVerne H. Lawrence, 1774 North 350 West, Sunset, UT 84015

Lennard Stillman, Atty., 211 South State, Suite 303, SLC, UT 84111

Elliot Morris, Atty., Workers Compensation Fund of Utah, 560 South 300 East, SLC, UT 84111

Erie V. Boorman, Administrator, Second Injury Fund

Susan Pixton, Administrator, Uninsured Employers Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Wilma  
Wilma

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 86000369 and 86000475

EXHIBIT "E"

LAVERNE H. LAWRENCE,

Applicant,

vs.

GANN BROTHERS, INC.  
(UNINSURED) and/or  
UNINSURED EMPLOYERS FUND,

and

LAVERNE H. LAWRENCE,

Applicant,

vs.

GANN BROTHERS, INC. and/or  
WORKERS COMPENSATION FUND OF UTAH and  
SECOND INJURY FUND,

Defendants.

\* \* \* \* \*

On March 4, 1987, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order awarding benefits to the applicant in the above-captioned case. Two 1985 industrial accidents were at issue. Both accidents occurred while the applicant was employed with the defendant Gann Brothers. Gann Brothers was insured by the Workers Compensation Fund for the first accident (September 10, 1985) and was uninsured for purposes of the second accident (November 29, 1985). The Administrative Law Judge awarded impairment related to the first accident to be paid by the Workers Compensation Fund (3.3%) and impairment related to the second accident to be paid by the Uninsured Employers Fund (6.7%). No award was made by the Administrative Law Judge for the 15% permanent partial impairment which pre-existed both injuries. The Administrative Law Judge found that the pre-existing impairment was not aggravated by and did not aggravate either of the industrial accidents. Also, the Administrative Law Judge found that neither industrial accident resulted in 10% impairment. Because there was no aggravation, and because the 10% industrial impairment threshold was not met, the Administrative Law Judge found that U.C.A. 35-1-69 did not provide for an award for the pre-existing impairment out of the Second Injury Fund.

On March 17, 1987, the attorney for the Workers Compensation Fund filed a Motion for Review objecting to the Administrative Law Judge's apportioning the permanent partial impairment benefits between the Workers Compensation Fund and the Uninsured Employers Fund. The attorney for the Workers Compensation Fund contends that this method of awarding benefits constitutes unauthorized apportionment of compensation between carriers. On March 18, 1987, the attorney for the applicant filed a Motion for Review agreeing with the Workers Compensation Fund's Motion for Review and also contending that the Administrative Law Judge should have awarded permanent partial impairment benefits out of the Second Injury Fund for the 15% permanent partial impairment which pre-existed both industrial injuries. On April 1, 1987, the Industrial Commission issued an Order denying the Workers Compensation Fund's Motion for Review but neglecting to mention the Motion for Review filed by the applicant. On April 24, 1987, the attorney for the applicant filed a Request for Ruling on the applicant's Motion for Review.

The Commission agrees that the issue regarding Second Injury Fund benefits has not been ruled on by the Commission. In the applicant's Motion for Review, the attorney for the applicant argues that the recent Supreme Court ruling in Richfield Care Center vs Torgerson, 52 Utah Adv. Rep. 22 (1987) requires that in adjudicating several accidents at one time, impairment related to a prior accident becomes pre-existing impairment for purposes of the following accident or accidents. The attorney for the applicant goes on to state that as result of this general principal, the Administrative Law Judge should have awarded benefits for the permanent partial impairment related to the condition pre-existing both industrial injuries.

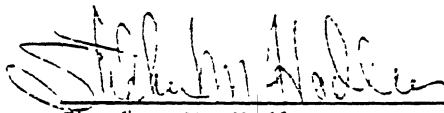
The Commission agrees with the Torgerson rational regarding impairment due to one accident becoming pre-existing impairment for purposes of a following accident. However, the Commission disagrees that this principal causes the Second Injury Fund to be liable for the 15% permanent partial impairment which pre-existed the two industrial accidents. The Torgerson case discusses only how to apportion liability for compensation between the Second Injury Fund and a workers compensation insurance carrier where several accidents are being adjudicated at once. The Court does not discuss when the Second Injury Fund will be found liable for any pre-existing impairment that may exist. Second Injury Fund liability for pre-existing impairment is ruled by U.C.A. 35-1-69. That statute provides that there must be aggravation of the pre-existing impairment or certain threshold percentages must result before the Second Injury Fund is liable to pay for the permanent partial impairment related to the pre-existing condition. In the instant case, the Administrative Law Judge found no aggravation per the Medical Panel Report (see Findings of Fact, Conclusions of Law and Order, page 3, last two sentences in second paragraph). As there was no aggravation of the pre-existing impairment, U.C.A. 35-1-69 states the Second Injury Fund would be liable for that pre-existing impairment only if the industrial injury caused


LAVERNE H. LAWRENCE  
ORDER DENYING MOTION FOR REVIEW  
PAGE THREE

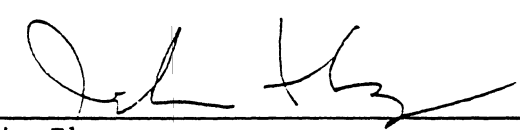
at least 10% permanent partial impairment. In looking at each accident separately or serially, as done by the Supreme Court in the Torgerson case, neither the September 11, 1985 accident, nor the November 29, 1985 accident caused permanent partial impairment amounting to 10%. As the threshold percentage is not met, no Second Injury Fund liability results. Consequently, the Commission must deny the applicant's Motion for Review requesting an award of permanent partial impairment out of the Second Injury Fund.

ORDER:

IT IS THEREFORE ORDERED that the applicant's March 18, 1987 Motion for Review is denied and the Commission Order affirming the Administrative Law Judge's March 4, 1987 Order, is hereby affirmed.

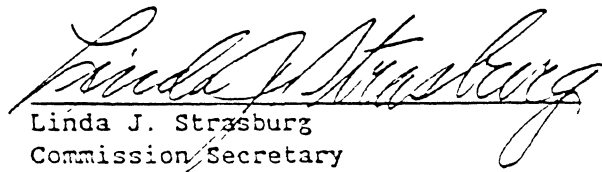
  
\_\_\_\_\_  
Stephen M. Hadley  
Chairman

  
\_\_\_\_\_  
Lenice L. Nielsen  
Commissioner

  
\_\_\_\_\_  
John Florez  
Commissioner

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this  
24th day of June, 1987.

ATTEST:

  
\_\_\_\_\_  
Linda J. Strasburg  
Commission/Secretary

CERTIFICATE OF MAILING

I certify that on June 24<sup>th</sup>, 1987, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of LAVERNE H. LAWRENCE was mailed to the following persons at the following addresses, postage paid:

Laverne H. Lawrence  
1774 North 350 West  
Sunset, UT 84015

REMAILED JUNE 6, 1987 TO:

Lennard Stillman  
Attorney at Law  
211 South State, Suite 303  
Salt Lake City, UT 84111

Lennard stillman  
Attorney at Law  
12 EXCHANGE PLACE  
SLC UT 84111

Elliot Morris  
Attorney at Law  
Workers Compensation Fund of Utah  
P.O. Box 45420  
SLC, UT 84145-0420

Erie V. Boorman, Administrator  
Second Injury Fund

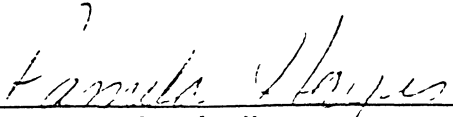
Suzan Pixton, Administrator  
Uninsured Employers Fund

Timothy C. Allen  
Administrative Law Judge

Janet L. Moffitt  
Administrative Law Judge

Richard G. Sumsion  
Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH

By   
Pamela Hayes