

2009

Larsen Beverage and/or Globe Indemnity
Company v. Labor Commission of Utah;
Employer's Reinsurance Fund and/or Danna
Hutchison : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARSEN BEVERAGE and/or	:	
GLOBE INDEMNITY COMPANY,	:	
	:	Priority: 7
Petitioners/Appellants,	:	
	:	
vs.	:	Labor Commission No.:04-0636
	:	
LABOR COMMISSION OF UTAH;	:	
EMPLOYER'S REINSURANCE	:	Appellate Case No.: 2009-1077
FUND and/or DANNA	:	
HUTCHISON	:	
	:	
Respondents/Appellees.	:	

BRIEF OF APPELLANTS

Appeal from the Utah Labor Commission

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FILED
UTAH APPELLATE COURT

PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT JUN 29 2010
AND THAT THIS CASE BE REPORTED.

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellants, Larsen Beverage Company and/or Globe Indemnity Company, is from a final order of the Labor Commission of Utah dated November 30, 2009. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63G-4-403, and 78-2a-3(2)(a) (2010).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. **ISSUE FOR REVIEW:** Did the Commission commit error in failing to apply Utah Code Ann. § 35-1-69 (1993) in ordering medical and indemnity benefits to be paid in this case?

Standard of review: Under Utah Code Ann. § 63G-4-403 (4)(d), the Court of Appeals may grant relief from an agency action if the agency "has erroneously interpreted or applied the law." Whether an agency has properly interpreted or applied agency-specific law is reviewed for correctness. Harrington v. Industrial Comm'n, 942 P.2d 961, 963 (Utah Ct. App. 1997); Terry v. Ret. Bd., 2007 UT App 87, P7 (Utah Ct. App. 2007); Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

2. **ISSUE FOR REVIEW:** Did the Labor Commission's omission of the Pre-Trial Disclosures filed by Larsen Beverage from the record, which outlines the issue pending before the court including the argument for Employer's Reinsurance Fund reimbursement, violate Larsen's right to due process and require remand of this matter?

Standard of review: Due process challenges are questions of law that an appellate court reviews applying a correction of error standard. Color Country Mgmt. v. Labor Comm'n, 2001 UT App 370 (Utah Ct. App. 2001).

DETERMINATIVE LAW

The determinative law is Utah Code Ann. § 35-1-67 (1993). This section reads as follows:

35-1-67. Permanent total disability -- Amount of payments -- Rehabilitation.

- (1)
 - (a) In cases of permanent total disability caused by, industrial accident, the employee shall receive compensation as outlined in this section.
 - (b) Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised.
 - (c) The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f)(1) and (2), as revised.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66 2/3% of the employee's average weekly wage at the time of the injury, limited as follows:
 - (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
 - (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

- (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) (a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69.
- (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).
- (c) **Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.**
- (4) (a) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.
- (b) Employers Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69.
-
- (5) **A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:**
 - (a) (i) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall,

unless otherwise agreed by the parties, refer the employee to the Utah State Office of Rehabilitation under the State Board for Applied Technology Education for rehabilitation training.

- (ii) The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68(1), not to exceed \$3,000 for use in the rehabilitation and training of the employee.
- (b)
 - (i) If the Utah State Office of Rehabilitation under the State Board for Applied Technology Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation.
 - (ii) The parties may waive the right to a hearing.
 - (iii) If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits.
 - (iv) The period of benefits commences on the date the employee became permanently:: totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.
 - (v) In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability.

- (vi) An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

.....

Utah Code Ann. § 35-1-67 (1993) (Emphasis added).

Additionally, Utah Code Ann. § 35-1-69 (1993) provides in relevant part:

35-1-69. Payment from employers - Reinsurance fund.

- (1) If an employee, who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by accident arising out of and in the course of the employee's employment, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employer's Reinsurance Fund are liable for the payment as follows:
- (2) **The employer or its insurance carrier is liable for the first \$20,000 of medical benefits and the initial three years of permanent total disability as provided by this title.**
- (3) **Reasonable medical expenses in excess of the first \$20,000 shall be paid in the first instance by the employer or its insurance carrier. Then, as provided in Subsection (6), the Employer's Reinsurance Fund shall reimburse the employer or its insurance carrier for 50% of those expenses.**

- (4) After the initial three year period under Subsection (1), permanent total disability payable to an employee under this title becomes the liability of and shall be paid by the Employer's Reinsurance Fund.
- (5) If it is determined that the employee is permanently and totally disabled, the employer or its insurance carrier shall be given credit for all prior payments of temporary total, temporary partial, and permanent partial disability compensation made as a result of the industrial accident. Any overpayment shall be reimbursed by the Employer's Reinsurance Fund under Subsection (6).

. . . .

Utah Code Ann. § 35-1-69 (1993) (Emphasis added).

STATEMENT OF THE CASE

Nature of the Case

This appeal presents the question of whether the Commission erred in determining that an employer / carrier was responsible for all workers compensation medical expenses resulting from an accident that occurred on August 23, 1993, without any entitlement to reimbursement for any past or future payments of medical or indemnity benefits from the Employer's Reinsurance Fund, when the applicable statute clearly allows for reimbursement and contribution.

Statement of Facts

Dana Hutchison was injured in an industrial accident on August 23, 1993 while working for Larsen Beverage. (R., 1). Ms. Hutchison was lifting a fountain beverage machine into a company truck when she sustained injury to her low back. (R., 1)

Previously, in 1986 following a 1984 basketball injury, Ms. Hutchison had a discectomy at L5-S1 which qualifies for a 10% whole person impairment based on the Labor Commission Impairment Guides. (Utah Guides, 3.3b, II-C). This fact has remained undisputed throughout this litigation and has been stipulated to by the parties in this case (R., 52-54).

Ms. Hutchison failed conservative care following the August 23, 1994 accident and in January 1994 she underwent a two level discectomy and fusion from L4-5 through L5-S1 from Dr. Schleusener. (R., Vol 2, MRE, 67-71). She also underwent a surgery in December 1995 removing the hardware. (R., Vol. 2, MRE, 73). Dr. Prasad did a repeat fusion in February 1999. (R., Vol. 2, MRE, 48).

On December 9, 1999 Dr. Joseph Dall found that as a result of the industrial accident of August 23, 1993, Ms. Hutchison had a 20% permanent partial disability due to having three low back surgeries after this accident. (R., Vol. 2, MRE, 92).

On March 4, 2004 an Independent Medical Evaluation of Dr. Dall opined that Ms. Hutchison is "totally disabled". (R., Vol. 2, MRE, 107). Ms. Hutchison was paid compensation from Larsen through its worker's compensation carrier through February 2004.

Given Ms. Hutchisons' inability to continue gainful employment since the industrial accident, she filed an Application for Hearing for workers compensation benefits on July 2, 2004 through legal counsel, Timothy Allen.

Course of the Proceedings

On July 2, 2004, by and through counsel, Timothy Allen, Danna Hutchison filed an Application for Hearing claiming entitlement to permanent total disability compensation arising from an industrial accident on August 23, 1993 with Larsen Beverage. (R., 1).

On August 11, 2004, employer/carrier, Larsen Beverage and/or Globe Indemnity Co., (hereinafter "Larsen") by and through counsel, Mark D. Dean, filed an Answer admitting that Ms. Hutchison was permanently and totally disabled under Utah Code Ann. § 35-1-67 (1993) and submitted that reimbursements of medical expenses and compensation from the Employer's Reinsurance Fund was appropriate under Utah law. (R., 40).

In the Answer, Larsen noted that they have paid indemnity compensation of \$68,314.12 as a result of the August 23, 1993 accident and medical expenses of \$551.664. On this basis, under the applicable law, Utah Code Ann. § 35-1-69 (1993), Larsen requested indemnity reimbursement of \$32,902.02 and medical expense reimbursement of \$265,832.00.¹

¹ Since then, the amount has increased in medical expenses as Larsen has paid over \$986,000 in medical expenses.

The parties met on March 30, 2005 in a Labor Commission sponsored Mediation attempting to negotiate settlement prior proceeding on to an evidentiary hearing at the Labor Commission. The Employer's Reinsurance Fund participated in this Mediation. Larsen contended that Ms Hutchison had a 10% whole person permanent partial impairment from a low back surgery in 1986. Larsen, (as the employer and carrier for the claimed industrial accident) was seeking reimbursement and contribution by the Employer's Reinsurance Fund due to the application of Utah Code Ann. § 35-1-67 and 35-1-69 (1993). No final agreement was reached by the parties at the March 30, 2005 mediation.

Rather than leave Danna Hutchison in a suspended state without benefits during the worker's compensation litigation process, the parties agreed that the Employers Reinsurance Fund would pay permanent total disability benefits and the Larsen would continue to pay medical benefits on a **tentative** basis, until such time that the matter of permanent total disability benefits and reimbursement could be determined by the hearing process by an Administrative Law Judge. This document was drafted by Petitioner's attorney Timothy Allen.

On April 29, 2005 Administrative Law Judge, Donald George issued an order approving the parties *Stipulation and Order of Tentative*

Permanent and Total Disability (hereinafter the “Stipulation and Tentative Order”). (R., 52-55). In the Stipulation section of the Stipulation and Tentative Order, the parties agreed that Larsen shall be responsible for all medical expenses resulting from the industrial accident of August 23, 1993 subject to the fee schedule of the Labor Commission. (R., 53). This provision was not incorporated into the “Stipulated Order” section of the document.

The Stipulation and Tentative Order specifically states in relevant part:

STIPULATION:

....

4. ... parties conclude that the Applicant is entitled to a tentative finding of permanent total disability.

5. That the Applicant be referred to the Utah State Office of Rehabilitation Services for rehabilitation training as provided by Section 35-1-67, Utah Code Annotated.

6. That the Employer’s Reinsurance Fund place the Applicant on the fund payroll and pay permanent total disability benefits at the rate of \$227 per week commencing March 1, 2004 and continue until further order of the Commission. Accrued amounts shall include 8% interest.

....

7. That Globe Indemnity Company **shall be responsible for all medical expenses resulting from the industrial accident of August 23, 1993 subject to the Fee Scheduled of the Labor Commission.**

STIPULATED ORDER:

Based upon the foregoing Stipulation, and good cause appearing therefore,

IT IS HEREBY ORDERED that Employer's Reinsurance Fund pay Danna Hutchison permanent total disability compensation at the rate of \$227 per week commencing March 1, 2004, with accrued amounts due in a lump sum plus 8% interest, less attorneys fees to Timothy C. Alle in accordance with Labor Commission sliding scale. Said benefits to continue until further order of the Labor Commission.

IT IS FURTHER ORDERED that Applicant is hereby referred to the Utah State Office of Rehabilitation for rehabilitation training as provided in Section 36-1-67 Utah Code Ann (1993). Upon receipt of the rehabilitation report the Commission will hold such further proceedings as are indicated..

(R.53-54) (Emphasis added).

Despite the fact that the medical expense provision was not recited by the ALJ in the Stipulated Order page, Larsen has continued to pay ongoing medical expenses for this accident through the present time.

The Stipulation and Tentative Order was entered into to provide temporary medical expenses to Danna Hutchison while the pending permanent total disability was reviewed by vocational rehabilitation per the applicable 1993 law.² In addition, under the Stipulation and Tentative Order, the Employer's Reinsurance Fund was responsible for

² Under the 1993 law, a finding of permanent total disability is considered "tentative" and not final until an injured worker is evaluated by the Utah State Office of Vocational Rehabilitation. See Utah Code Ann. § 35-1-67 (1993).

payment of permanent total disability *until* further order of the court.

The Stipulation and Tentative Order did not address the issue of reimbursement of medical expenses to Larsen since it was only intended as a tentative order. Moreover, the actual Order page (R., 53) only orders the Employer's Reinsurance Fund to pay permanent total disability. It does *not* order Larsen to pay ongoing medical benefits at all.

Thereafter, Ms. Hutchison failed to present for evaluation for rehabilitation and the ALJ issued an Order terminating permanent total disability benefits. (R., 64-67). Eventually, Petitioner cooperated and the ALJ issued an Order Reinstating Permanent Total Disability compensation on April 12, 2006. (R., 71-73).

On September 25, 2006, Ms. Hutchison filed an Evaluation Report from Utah State Office of Rehabilitation. On October 5, 2006, the Labor Commission set a hearing for January 26, 2007 to consider the Opinion of the Utah State Office of Rehabilitation Pursuant to Utah Code Section 35-1-67(5)(6).

Prior to hearing, on December 15, 2006, Attorney Dean filed Pre-Trial Disclosures for Petitioners asserting that Larsen Beverage and/or Globe Indemnity Co. did not dispute that Petitioner was permanent total disabled but rather, Ms. Hutchison had a 10% pre-existing condition

prior to the August 25, 1993, which was agreed upon by all parties, pursuant to the Stipulation and Order of Tentative Permanent and Total Disability. The Employer's Reinsurance Fund did not file any pre-trial disclosures. At that time, Larsen noted they had paid compensation benefits related to the industrial accident totaling \$68,314.12 and medical expenses totaling \$551,664.16. Larsen specifically requested that the ALJ apply the specific statutory provisions which limit liability to 156 weeks for indemnity compensation and reimbursement of 50% of all excess past and future medical expenses from the Employer's Reinsurance Fund over the first \$20,000. (Upon checking out the appellate Record on January 18, 2010 for completion of the Docketing Statement, Larsen's legal counsel discovered that the Pre-trial disclosure form filed by Larsens is not contained in the Record, although proof of service is contained in Larsen's attorneys file and conversations with the Commission show that it was entered in their system). This was since corrected on appeal upon motion of Larsen. (R., 105a-b).

A hearing was later held on January 29, 2007 before Judge George pursuant to Utah Code Ann. § 35-1-67(5). Interestingly, the ALJ's Final Order of Permanent Total Disability lists that it was held "BEFORE: Richard M. LaJeunesse" which is not correct. At the hearing before

Judge Donald George, Larsen did not contest that Ms. Hutchison is permanent totally disabled. Larsen, through its counsel, Mark Dean, argued that the ALJ should apply the statutory provisions of 35-1-67 and 35-1-69 which allow for 156 weeks of compensation and medical reimbursement if the injured worker has at least a 10% pre-existing condition for any cause or origin which was well documented in the medical records. There was no disagreement from Danna Hutchison³ nor the Employer's Reinsurance Fund. In fact, the Employer's Reinsurance Fund and its counsel failed to participate in the hearing on this matter, despite its Attorney receiving proper notice. (See Hearing Transcript; Vol. 5, R. 102).

The January 29, 2007 Hearing Transcript reflects the following testimony with Judge Donald George:

THE COURT: This is a matter before the Utah Labor Commission. This is the case of Danna Hutchison versus Larsen Beverage and/or the Employers' Reinsurance Fund and Globe Indemnity Company. This matter was set for hearing to consider the opinion of the Utah State Office of Rehabilitation pursuant to Utah Code section 35-1-67 subsection 5 subsection 6. Previously in this case (inaudible) an order was entered with a tentative finding of permanent total disability in this matter. The only matter remaining to be considered was the opinion from the Office of Vocational Rehabilitation. I will note that present today we have Ms. Hutchison; is that correct?

³ Ms. Hutchison's attorney did not appear at the hearing.

MS. HUTCHISON: Yes.

THE COURT: And Mr. Dean, you're representing Globe Indemnity?

MR. DEAN: Yes, Your Honor.

THE COURT: I will note that Mr. Allen has not appeared in this case on behalf of Ms. Hutchison; and Mr. Barnes has not appeared either on behalf of Employers' Reinsurance Fund. Mr. Dean, go ahead and state the of Globe Indemnity in this case then.

MR. DEAN: Your Honor, in this case, the respondents [Larsen] have paid benefits out to-date, for indemnity benefits we have paid \$70,045. The compensation rate was stipulated to be \$227 per week. In addition, to-date Globe Indemnity has paid \$825,667.39 in medical benefits. Pursuant to our prior stipulation, the parties agreed that Ms. Hutchison was permanently and totally disabled pending referral to the state office of vocation rehabilitation. It's my understanding that she was cooperative with their efforts, that they have come back and said that they felt that she was not a candidate for rehabilitation at this time. It may be noted, previously she had gone through the state voc. rehab and attempted rehabilitation, but was unsuccessful. **At this point it's our position that we don't contest the perm total disability status of Ms. Hutchison, and believe the benefits should be continued as they have been to-date. On behalf of Globe Indemnity, we will be submitting for reimbursement of all benefits, medical benefits after the first 50 percent of medical benefits after the \$20,000, and reimbursement of indemnity benefits after the first 156 weeks pursuant to the Utah Code.** One other thing, Your Honor, and I know this can be a sticking point sometimes. But in this instance, we have tried to mediate this case; it was unsuccessful. **We are also seeking interest along with the other reimbursements that we're seeking.**

THE COURT: Well, I'm going to go ahead and enter an order of ongoing permanent total disability. I will order appropriate reimbursement under the statute. Since the ERF is not here to object to that, we'll go ahead and issue the order that it can be reimbursed. All right, anything else?

MR. DEAN: Nothing here, Your Honor.

THE COURT: Okay, thank you. **I will enter an order accordingly.** Thank you.

MR. DEAN: Thank you. (The hearing was concluded.)

(Vol 5 of Hearing Tr., 1-5) (Emphasis Added).

Upon the resignation of Judge Donald George, this matter was transferred to Judge LaJeunesse for further review who may have been unaware of the procedural history surrounding this case and who likely did not review the hearing record.

On April 24, 2007 ALJ LaJeunesse entered a *Final Order of Permanent Total Disability* (the "ALJ's Order"). It is unclear if Judge LaJeunesse had a copy of the properly filed pre-trial disclosures filed since the Appellate Record failed to contain them until recently when a motion was filed to supplement the record or whether he reviewed the hearing record. Contrary to the Judge George's bench ruling at hearing, Judge LaJeunesse concluded that Larsen was responsible for **all** medical expenses reasonably related to Danna Hutchison for her medical

problems caused by the August 23, 1993 industrial accident. ALJ LaJeunesse did not cite to any legal authority in the Order but simply indicated that he “adopted the Findings of Fact set forth in the 2005 Stipulated Order.” (Although there were no Findings of Fact in the 2005 Stipulated Order). Also, contrary to ALJ George’s oral bench ruling at hearing, ALJ LaJeunesse’s Order did not apply the statutory provision of Utah Code Ann. § 35-1-69 which allow for 156 weeks of compensation only and medical reimbursement of past and future medicals from the Employer’s Reinsurance Fund when there is found to be a 10% pre-existing impairment prior to the industrial accident as he indicated he would at the hearing. ALJ LaJeunesse’s Order also fails to give any reference to the defenses made in Larsen’s Answer, their Pre-Trial Disclosures and argument at hearing and fails to cite to the hearing record or mention Judge George’s bench ruling.

On May 9, 2007 Larsen filed a Motion for Relief from Order and/or Motion to Alter or Amend Judgment. (R., 112-17).

Since the motion was not ruled upon, on May 22, 2007, Larsen filed a Motion for Review of the ALJ’s Final Order of Permanent Total Disability. (R., 118-21). In the Motion for Review Larsen argued that the Stipulation and Tentative Order for Permanent Total Disability

approved by Judge George on April 29, 2005, was considered by the parties as a ***tentative*** agreement between the parties to ensure that Danna Hutchison received permanent total disability benefits and medical benefits as the parties moved forward with the litigation process. Larsen argued that they had paid more than 312 weeks of disability benefits prior to the initiation of Ms. Hutchison's litigation for permanent total disability, well above the amount required by law if one has a 10% permanent partial disability prior to an industrial accident. In addition, Larsen argued that they had paid well over \$825,000 in medical benefits and should be entitled to statutory reimbursement under Utah Code Ann. § 35-1-69.

On June 11, 2007 the Employer's Reinsurance Fund filed a Response to Motion for Review. The Employer's Reinsurance Fund argued that the parties are bound by the tentative stipulation. The Employer's Reinsurance Fund incorrectly noted that at hearing Larsen agreed that the parties should be bound to continue payments pursuant to the Stipulation. (In fact, the Employer's Reinsurance Fund did not even attend the hearing on this matter and at the time of making this statement likely did not know what occurred at hearing).

On November 30, 2009, the Commission entered its Order Affirming ALJ's Decision (the "Commission's Order"). The Commission found that despite the Stipulation and Tentative Order being temporary, Larsen is responsible for all medical expenses resulting from the accident, without any entitlement to reimbursement for any past or future payments. (R., 130-31). The Commission failed to consider Larsen's arguments regarding indemnity reimbursement. It is unclear if the Commission reviewed the hearing record on this matter as it is not cited in the Commission's Order.

On December 23, 2009 Larsen filed a Petition for Review of the November 30, 2009 Order of the Commission.

SUMMARY OF THE ARGUMENT

The Court of Appeals should reverse and remand the Commission's Order. It was never the intent of the parties for the Stipulation and Tentative Order to apply *permanently* to ongoing benefits without the right of reimbursement for Larsen's. Adoption of the Employer's Reinsurance Fund's position and affirmance of the Commission's Order will certainly hinder employers and carriers from advancing benefits in future cases to injured workers in similar circumstances for fear that they will not be able to urge the applicable Utah reimbursement laws.

The error committed by the Commission in this case is a costly one to Larsens. If section 35-1-69 is applied to this case, Larsen's liability is limited to 156 weeks of compensation totaling \$35,412 (227 x 156.00). Since Larsen has paid \$68,314.12 as a result of the August 23, 1993 accident in indemnity compensation, their right to reimbursement totals **\$32,902.02** in indemnity. Additionally, Larsen has paid medical expenses of over \$986,000. Under the applicable law, Larsen would be entitled to reimbursement of 50% after payment of the first \$20,000, resulting in reimbursement from the Employer's Reinsurance Fund of at least **\$483,000.**

ARGUMENT

POINT 1

THE ALJ AND COMMISSION ERRED IN FAILING TO APPLY UTAH CODE ANN. § 35-1-69 (1993) TO ORDER EMPLOYERS REINSURANCE FUND REIMBURSEMENT FOR PAYMENTS OF MEDICAL BENEFITS AND INDEMNITY COMPENSATION PAID BY LARSEN.

The Commission erred in entering an Order Affirming the ALJ's Decision in this case. In the Commission's Order, it ruled, without any citation to authority, that the parties agreed that the Tentative Stipulation was **permanently** binding and that Larsen agreed to indefinitely continue to make sole payment of medical expenses, without reimbursement by the Employer's Reinsurance Fund for these medical expenses or reimbursement of indemnity compensation.

The Commission's Order Affirming ALJ's Decision is deficient in several aspects. To wit:

- The Commission fails to correctly apply the applicable statute, Utah Code Ann. § 35-1-69 (1993).
- The Commission's Order is contrary to the evidence in the record, including the oral ruling by ALJ George made at the January 29, 2007 hearing and, in fact, misstates the hearing testimony.

- The Commission's interpretation of the Stipulation and Tentative Order is incorrect and misconstrues the document and intent of the parties.
- The Commission fails to recognize that a "tentative" stipulation cannot *ipso facto* be permanent and, in fact, fails to recognize that there is no provision in the Stipulated Order requiring Larsen / Globe Indemnity Company pay all medical expenses resulting from the August 23, 1993 accident.

The applicable law on the date of this accident, Utah Code Ann. § 35-1-69 (1993) permits Employer's Reinsurance Fund contribution and reimbursement of medical and indemnity compensation in this case. Contrary to the ALJ and Commission's Order, application of this statute was not waived by Larsen Beverage by entering into the Stipulation and Tentative Order as found by ALJ LaJeunesse and makes little sense to apply permanently given the clear language of this statute which allows for ERF reimbursement when a 10% pre-existing impairment is established. Indeed, this defense has remained justiciable throughout this litigation and has never been waived by Larsen. The Commission committed reversible error by failing to apply the relevant statutory

provision, Utah Code Ann. § 35-1-69 (1993) to this case in light of the evidence in the record and the testimony had at hearing.

Utah Code Ann. § 35-1-69 (1993) provides in relevant part:

(1) If an employee, who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by accident arising out of and in the course of the employee's employment, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employer's Reinsurance Fund are liable for the payment as follows:

(2) The employer or its insurance carrier is liable for the first \$20,000 of medical benefits and the initial three years of permanent total disability as provided by this title.

(3) Reasonable medical expenses in excess of the first \$20,000 shall be paid in the first instance by the employer or its insurance carrier. Then, as provided in Subsection (6), the Employer's Reinsurance Fund shall reimburse the employer or its insurance carrier for 50% of those expenses.

(4) After the initial three year period under Subsection (1), permanent total disability payable to an employee under this title becomes the liability of and shall be paid by the Employer's Reinsurance Fund.

(5) If it is determined that the employee is permanently and totally disabled, the employer or its insurance carrier shall be given credit for all prior payments of temporary total, temporary partial, and permanent partial disability compensation made as a result of the industrial accident. Any overpayment shall be reimbursed by the Employer's Reinsurance Fund under Subsection (6).

. . . .

Utah Code Ann. § 35-1-69 (1993).

On August 11, 2004, Larsen Beverage filed an Answer *admitting* that Ms. Hutchison was permanently and totally disabled under Utah Code Ann. § 35-1-67 and submitted that reimbursements of medical expenses and indemnity compensation from the Employer's Reinsurance Fund was appropriate under Utah law. (R., 40). Larsen's defense has remained constant on this reimbursement issue. In pre-trial disclosures filed on October 15, 2006, Larsen again submitted the reimbursement was appropriate under Utah law. (R., 105a-b). In addition and most significantly, in the January 29, 2007 hearing before Judge George (again the Final Order of Permanent Total disability lists that the hearing was before Judge LaJeunesse which is not correct), Larsen argued that the ALJ should apply the statutory provisions of Utah Code Ann. § 35-1-67, 69 which allows for 156 weeks of indemnity compensation and medical reimbursement (after payment of \$20,000) if the injured worker has at least a 10% pre-existing condition for any cause or origin which was well documented in the medical records. (Hearing Tr.). There was no disagreement from Danna Hutchison nor the Employer's Reinsurance Fund at this hearing. In fact, the Employer's Reinsurance Fund failed to participate in the hearing on this matter. (See Hearing Transcript).

The January 29, 2007 Hearing Transcript before Judge George reflects the following testimony:

THE COURT: This is a matter before the Utah Labor Commission. This is the case of Danna Hutchison versus Larsen Beverage and/or the Employers' Reinsurance Fund and Globe Indemnity Company. This matter was set for hearing to consider the opinion of the Utah State Office of Rehabilitation pursuant to Utah Code section 35-1-67 subsection 5 subsection 6. Previously in this case (inaudible) an order was entered with a tentative finding of permanent total disability in this matter. The only matter remaining to be considered was the opinion from the Office of Vocational Rehabilitation. I will note that present today we have Ms. Hutchison; is that correct?

MS. HUTCHISON: Yes.

THE COURT: And Mr. Dean, you're representing Globe Indemnity?

MR. DEAN: Yes, Your Honor.

THE COURT: I will note that Mr. Allen has not appeared in this case on behalf of Ms. Hutchison; and Mr. Barnes has not appeared either on behalf of Employers' Reinsurance Fund. Mr. Dean, go ahead and state the of Globe Indemnity in this case then.

MR. DEAN: Your Honor, in this case, the Respondents have paid benefits out to-date, for indemnity benefits we have paid \$70,045. The compensation rate was stipulated to be \$227 per week. In addition, to-date Globe Indemnity has paid \$825,667.39 in medical benefits. Pursuant to our prior stipulation, the parties agreed that Ms. Hutchison was permanently and totally disabled pending referral to the state office of vocation rehabilitation. It's my understanding that she was cooperative with their efforts, that they have come back and said that they felt that she was not a candidate for

rehabilitation at this time. It may be noted, previously she had gone through the state voc.rehab and attempted rehabilitation, but was unsuccessful. **At this point it's our position that we don't contest the perm total disability status of Ms. Hutchison, and believe the benefits should be continued as they have been to-date. On behalf of Globe Indemnity, we will be submitting for reimbursement of all benefits, medical benefits after the first 50 percent of medical benefits after the \$20,000, and reimbursement of indemnity benefits after the first 156 weeks pursuant to the Utah Code.** One other thing, Your Honor, and I know this can be a sticking point sometimes. But in this instance, we have tried to mediate this case; it was unsuccessful. **We are also seeking interest along with the other reimbursements that we're seeking.**

THE COURT: Well, I'm going to go ahead and enter an order of ongoing permanent total disability. I will order appropriate reimbursement under the statute. Since the ERF is not here to object to that, we'll go ahead and issue the order that it can be reimbursed. All right, anything else?

MR. DEAN: Nothing here, Your Honor.

THE COURT: Okay, thank you. **I will enter an order accordingly.** Thank you.

MR. DEAN: Thank you. (The hearing was concluded.)

(Hearing Tr., 1-5) (Emphasis Added).

Despite ALJ George's oral ruling at hearing that he was going to enter an order to allow for appropriate reimbursement under the statute, ALJ LaJeunesse's written Order attempts to *sua sponte* supercede and modify the ALJ's Bench Ruling and does not reflect what was agreed to

and ordered at hearing and fails to evaluate and even apply sections 35-1-67, 69 of the Utah Code. This confusion likely stems from the transfer of this case from Judge George, who presided at hearing, and Judge LaJeunesse, to whom this case was transferred. Additional confusion on may be from the fact that Employer's Reinsurance Fund counsel was replaced from Attorney Elliott Lawrence, the attorney who executed the Stipulation and Tentative Order, and replacement counsel, Edwin Barnes/Wendy Crowther who may not have understood the intent of the parties stipulation and who were not present at hearing.

The Commission incorrectly concluded that the Stipulation and Tentative Order was permanent. However, a tentative order and stipulation cannot *ipso facto* be "permanent".⁴ The Commission's evaluation of this matter is contrary to well-settled rules of contract interpretation. Indeed, Utah's courts have held that Utah rules of contract interpretation apply to settlement agreements. See Flying J, Inc. v. Comdata Network, Inc., 405 F.3d 821, 831-32 (10th Cir. 2005). This includes looking to the four corners of the agreement to determine

⁴ Moreover, the Commission fails to correctly recognize that it cannot enforce such a provision even *if* it was permanent since there is **no** provision in the Stipulated Order section of the document requiring Larsen / Globe Indemnity Company pay all medical expenses resulting from the August 23, 1993 accident. (R., 54).

the intent of the parties and looking beyond the four corners of the document to determine the intent of the parties if the agreement is ambiguous. Id.

Unfortunately, there is ambiguity in the Stipulation and Tentative as to the *duration* that Larsen was to pay ongoing medical expenses. The caption clearly indicates it a “tentative” stipulation; however, this is not memorialized with clarity in the Stipulation section and the liability of Larsens to pay medical expenses is not even mentioned at all in the Order section. (Moreover, Larsen’s right to reimbursement for indemnity was entirely overlooked by the ALJ and Commission both in their orders. Indeed, this issue still remains ripe for consideration.).

There is no question that the underlying intent of the original parties and their attorneys in entering into this Stipulation and Tentative Order was clearly to provide interim benefits to Ms. Hutchison pending the review process by rehabilitation. The parties’ rationale is perhaps better understood based upon review of Smith v. Mity Lite, 939 P.2d 684, 687 (Utah Ct. App. 1997) where the court held that:

finding by the commission of permanent total disability shall in all cases be **tentative and not final until** all of the following proceedings have occurred:

(a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall . . .

refer the employee to the vocational rehabilitation agency under [**9] the State Board of Education for rehabilitation training. . . .

Id. (citing Utah Code Ann. § 35-1-67(5) (1988) (emphasis added)).

Contrary to the Employer's Reinsurance Fund's past assertions, the Stipulation and Tentative Order does not supercede this statutory provision and in fact was intended by all parties, including the Employer's Reinsurance Fund and its prior counsel, to provide short-term benefits to Ms. Hutchison until rehabilitation could be evaluated under the terms of the applicable statute.

Indeed, on March 30, 2005, a Labor Commission sponsored Mediation was held attempting to negotiate settlement prior proceeding on to an evidentiary hearing at the Labor Commission. The parties were represented by Elliott Lawrence (attorney for the Employer's Reinsurance Fund), Mark Dean (Attorney for Larsen), and Timothy Allen (attorney for Ms. Hutchison). Larsen contended that Petitioner had a 10% whole person permanent partial impairment from a low back surgery in 1986. Larsen, as the employer and carrier for the claimed industrial accident argued that they were seeking reimbursement and contribution by the Employer's Reinsurance Fund due to the application of Utah Code Ann. §

35-1-67 and 35-1-69 (1993). No final agreement was reached by the parties at the March 30, 2005 mediation.

Instead of leaving Ms. Hutchison in a suspended state without benefits during the worker's compensation litigation process (ie., pending the rehabilitation review), the parties agreed that the Employers Reinsurance Fund would pay permanent total disability benefits and the Larsen would continue to pay medical benefits on a ***tentative*** basis (meaning temporary), until such time that the matter of permanent total disability benefits and reimbursement could be determined by the hearing process by an Administrative Law Judge. There was no agreement that this order continue indefinitely; in fact, this would make little sense for Larsen to take such a position since by law, the facts demonstrated that reimbursement (for past amounts paid in medical and indemnity) and contribution (for future medicals) would be appropriate after a finding of permanent total disability was ordered. The agreement, drafted by Ms. Hutchison's counsel is clearly noted to be a "Stipulation and Order of *Tentative* Permanent and Total Disability". By its own definition, the term "tentative" means "not fully worked out or developed; uncertain". See Merriam Webster Dictionary. The agreement was intended to be temporary until vocational rehabilitation was

completed and a final order of permanent total disability was entered. Any argument to the contrary by the Employer's Reinsurance Fund is disingenuous.

On April 29, 2005 Administrative Law Judge, Donald George issued an order approving the parties *Stipulation and Order of Tentative Permanent and Total Disability*. (R., 52-55). The Stipulation (but not the Stipulated Order section) states that Larsen shall be responsible for all medical expenses resulting from the industrial accident of August 23, 1993 subject to the fee schedule of the Labor Commission. The Stipulated Order section signed by the ALJ has no such provision. There was no dispute between the parties that the Stipulation and Tentative Order was entered into to provide **temporary** medical expenses to Danna Hutchison and **temporary** permanent total disability compensation while the pending rehabilitation was reviewed by the Utah State Office of Rehabilitation as provided for under Utah Code Ann. § 35-1-67.⁵ Indeed, this statute states that "A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the

⁵ Under the 1993 law, a finding of permanent total disability is considered "tentative" and not final until an injured worker is evaluated by the Utah State Office of Vocational Rehabilitation. See Utah Code Ann. § 35-1-67 (1993).

following proceedings have occurred: . . .” In addition, under the Stipulation and Tentative Order, the Employer’s Reinsurance Fund was responsible for payment of permanent total disability “*until* further order of the Labor Commission”. The Stipulation and Tentative Order did not address the issue of reimbursement of medical expenses to Larsen since it was only intended as a **temporary** order. (Moreover, as stated above this agreement did not mention reimbursement for indemnity benefits which Larsen hereby requests be addressed by this Court). Certainly if vocational rehabilitation would have found that Ms. Hutchison was not “rehabable” then the Employer’s Reinsurance Fund would clearly not agree that the tentative stipulation is final.

The Employer’s Reinsurance Fund has cited to Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm’n, 2001 UT 11, ¶¶19-20 (Utah 2001), to support their argument that all parties are bound by their stipulations unless relieved by the Court. While that statement of law is correct, general rules of contractual interpretation still apply. See Flying J., 405 F.3d at 831-32. It is evident that Commission erred in interpreting the Stipulation and Tentative Order when the parties intended the agreement to be **temporary** and to eventually include reimbursement by ERF if Ms. Hutchison was eventually found entitled to

permanent total disability. In other words, nowhere does the Stipulation and Order state that this is a permanent agreement and, in fact, states to the contrary. Hence the court cannot find contrary to the actual terms of the document. It was reversible error for the Commission to sua sponte *reform* the stipulated agreement outside the terms that were agreed by the parties.⁶ In fact, the Commission does not even have the jurisdictional ability to enforce or interpret contractual provisions.⁷

In any event, the Commission fails to correctly recognize that it cannot hold Larsen liable for the entirety of medical expenses (and part

⁶ Utah's courts have held that the Commission is an administrative body with limited jurisdiction.

For instance, in Empey v. Industrial Comm'n the Court held:
The Industrial [***19] Commission is an administrative body. **It is not vested with power to reform a contract or to make a new contract to conform with the intent of the parties.** That power belongs to another forum. * * * The commission was without authority to construe and apply the contract of insurance to include or cover workmen in the employ of either an individual or corporation not named as the insured in the policy of insurance. It follows, therefore, that the award made by the commission must be annulled.

Empey v. Industrial Comm'n, 91 Utah 234, 246 (Utah 1937).

⁷ See Utah Code Ann. §§ 34A-1-301; 34A-1-104. See, e.g., State Compensation Fund v. Industrial Comm'n, 657 P.2d 761, 763 (Utah 1983); Empey v. Industrial Comm'n, 91 Utah 234, 63 P.2d 630 (Utah 1937); Continental Casualty Co. v. Industrial Comm'n, 61 Utah 16, 210 P. 127, 128 (1922).

of the indemnity benefits) under the Stipulation and Order of Tentative permanent total disability since there is **no** provision in the Stipulated Order section of the document (page 54) requiring Larsen / Globe Indemnity Company pay all medical expenses resulting from the August 23, 1993 accident nor is there any agreement that Larsen was to be responsible for any indemnity. (R., 54). For such provision to be binding under Utah worker's compensation law, the provisions must be memorialized in the Order section and signed by an Administrative Law Judge. The former was not done in this case regarding Larsen's liability for either medical or indemnity benefits. In fact, the Stipulated Order states:

"STIPULATED ORDER:

Based upon the foregoing Stipulation, and good cause appearing therefore,

IT IS HEREBY ORDERED that Employer's Reinsurance Fund pay Danna Hutchison permanent total disability compensation at the rate of \$227 per week commencing March 1, 2004, with accrued amounts due in a lump sum plus 8% interest, less attorneys fees to Timothy C. Allen in accordance with Labor Commission sliding scale. Said benefits to continue until further order of the Labor Commission.

IT IS FURTHER ORDERED that Applicant is hereby referred to the Utah State Office of Rehabilitation for rehabilitation training as provided in Section 36-1-67 Utah Code Ann (1993). Upon receipt of the rehabilitation report

the Commission will hold such further proceedings as are indicated..

(R., 54).

The Court of Appeals should reverse the Commission's ruling on this matter since the Commission did not correctly evaluate this case under Utah Code Ann. § 35-1-67, 69 (1993) as required by law. Affirmance of the Commission's Order will certainly hinder employers and carriers from advancing benefits in future cases to injured workers in similar circumstances for fear that they will not be able to urge the applicable Utah reimbursement laws. The Court of Appeals should remand this matter to the Commission with instructions to evaluate this case consistent with the applicable statute – Utah Code Ann. § 35-1-67, 69 (1993) .

Under a correct application of this statute, the Commission should find, based upon the undisputed evidence, that Ms. Hutchison has a 10% pre-existing impairment prior to the claimed industrial accident. Given this impairment, and given that there is no dispute that Ms. Hutchison is permanently and totally disabled from this accident, Larsen's liability for indemnity benefits is limited to 156 weeks of

indemnity benefits and 50% of medicals after payment of the first \$20,000.00.

POINT 2

THE COMMISSION ORDER IS NOT SUPPORTED BY ADEQUATE FACTUAL FINDINGS.

In addition, the ALJ's Final Order of Permanent Total Disability is deficient since the Order fails to articulate adequate factual findings. In the brief two paragraph findings of fact, the ALJ indicates that he is adopting the Findings of Fact set forth in the 2005 Stipulated Order, however, there were no Findings of Fact in the Stipulated Order.

In addition, the ALJ's Final Order of Permanent Total Disability fails to provide adequate conclusions of law since the judge fails to recite the applicable law regarding reimbursement for medical and indemnity compensation. Since this issue was a defense raised by Larsen in their Answer, in pre-trial disclosures, and at hearing, this issue was one of a justiciable nature, necessary for ALJ determination. The ALJ's silence on this matter constitutes reversible error.

Finally, the ALJ and Commission's Order is also deficient since it does not address Larsen's right to reimbursement for indemnity benefits and overlooks that portion of Larsen's claim.

POINT 3

THE COMMISSION VIOLATED LARSEN'S RIGHT TO DUE PROCESS BY OMITTING NECESSARY PLEADINGS FROM THE RECORD WHICH OUTLINED THE ISSUES FOR ADJUDICATION.

The Commission also committed error in omitting the pre-trial disclosures from the record in this case since by the omission the new judge did not have all the necessary information to review the justiciable matters for review.

On December 15, 2006, Attorney Dean filed Pre-Trial Disclosures for Petitioners asserting that Larsen Beverage and/or Globe Indemnity Co. did not dispute that Petitioner was permanent total disabled but rather, Ms. Hutchison had a 10% pre-existing condition prior to the August 25, 1993, which was agreed upon by all parties, pursuant to the Stipulation and Order of Tentative Permanent and Total Disability. At that time, Larsen noted they had paid compensation benefits related to the industrial accident totaling \$68,314.12 and medical expenses totaling \$551,664.16. Larsen specifically requested that the ALJ apply the specific statutory provisions which limit liability to 156 weeks for indemnity compensation and reimbursement of 50% of all excess past and future medical expenses from the Employer's Reinsurance Fund over the first \$20,000. Upon checking out the appellate Record on

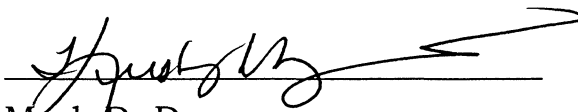
January 18, 2010 for completion of this Docketing Statement, Larsen's legal counsel discovered that the Pre-trial disclosure form filed by Larsens was not contained in the Record, although proof of service is contained in Larsen's attorneys file and conversations with the Commission show that it was entered in their system. Although the record has since been supplemented on appeal, it would appear that ALJ LaJeunesse did not have all the necessary information to review the justiciable matters for review which has prejudiced Larsens in this case.

CONCLUSION

The Court of Appeals should reverse the Commission's Order and remand this case for further findings.

Respectfully submitted this ^{29th} day of June, 2010.

BLACKBURN & STOLL, LC


A handwritten signature in black ink, appearing to read "Mark D. Dean", is written over a horizontal line.

Mark D. Dean

Kristy L. Bertelsen

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid and/or hand delivered on the 29th day of June, 2010, to:

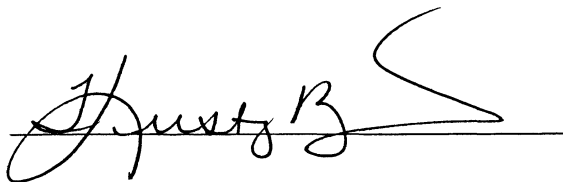
Utah Court of Appeals (8 copies, one w/ original signature) (Hand Delivered)

Scott M. Matheson Courthouse
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Alan L. Hennebold, General Counsel (1 copy) (Mailed)
Labor Commission of Utah
160 East 300 South
P.O. Box 1466
Salt Lake City, Utah 84114-6615

Timothy Allen (2 copies) (Mailed)
352 South Denver St., Ste 240
SLC, UT 84111

Edwin Barnes (2 copies) (Mailed)
One Utah Center 13th Floor
201 So. Main St
SLC, UT 84111

A handwritten signature in black ink, appearing to read "Justin B. S.", written over a horizontal line.

Tab A

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
Heber M. Wells Building, 3rd Floor
P O Box 146615
Salt Lake City UT 84114
(801) 530-6800

DANNA HUTCHISON,

Petitioner,

vs.

**LARSEN BEVERAGE and/or GLOBE
INDEMNITY CO.; EMPLOYERS
REINSURANCE FUND,**

Respondents,

**FINAL ORDER OF PERMANENT
TOTAL DISABILITY**

Case No. 04-0636

Judge Richard M. La Jeunesse

HEARING: Room 332 Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on January 29, 2007 at 8:30 a.m. Said Hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Dana Hutchison, was present at the hearing and
represented herself by necessity due to the unexplained absence of her
attorney Timothy Allen Esq.

The respondents, Larsen Beverage and Globe Indemnity Co., were
represented by attorney Mark D. Dean Esq.

The Employers Reinsurance Fund (ERF) failed to appear at the hearing.

I. STATEMENT OF THE CASE

Danna Hutchison filed an Application for Hearing with the Utah Labor Commission on July 2,
2004 and claimed entitlement to permanent total disability compensation. Danna Hutchison's
claim for permanent total disability compensation arose out of an industrial accident that
occurred on August 23, 1993.

00107

II. ISSUE.

Did Danna Hutchison's industrial accident on August 23, 1993 cause her to become permanently and totally disabled?

III. COURSE OF PROCEEDINGS.

Danna Hutchison filed an Application for Hearing with the Utah Labor Commission on July 2, 2004. On April 29, 2005 Judge Donald L. George issued an Order approving the parties Stipulation and Order of Tentative Permanent Total Disability (the 2005 Stipulated Order). The 2005 Stipulated Order provided the following:

IT IS THEREFORE ORDERED that Employers Reinsurance Fund pay Dana Hutchison permanent total compensation at the rate of \$227 per week commencing March 1, 2004, with accrued amounts due in a lump sum plus 8% interest, less attorney's fees to Timothy C. Allen in accordance with the Labor Commission sliding scale. Said benefits to continue until further order of the Labor Commission.

IT IS FURTHER ORDERED that the Applicant is hereby referred to the Utah State Office of Rehabilitation for rehabilitation training as provided in Section 36-1-67 Utah Code Annotated (1993). Upon receipt of the rehabilitation report the Commission will hold further proceedings as are indicated.

Paragraph 8 of the Stipulation portion of the 2005 Stipulated Order stated:

That Globe Indemnity Company shall be responsible for all medical expenses resulting from the industrial accident of August 23, 1993 subject to the fee schedule of the Labor Commission.

On March 15, 2006 I issued an Order Terminating Payment of Permanent Total Disability Benefits (2006 Termination Order) because of Ms. Hutchison's failure to present herself for evaluation at the Utah State Office of Rehabilitation. I issued an Order Reinstating Payment of Permanent Total Disability Compensation on April 12, 2006 (April 2006 Reinstatement Order).

On September 25, 2006 Ms. Hutchison filed an Evaluation Report from Utah State Office Rehabilitation. On October 5, 2006 the Labor Commissions sent all parties a notice of a Hearing on January 29, 2007 at 8:30 a.m. to Consider the Opinion of the Utah State Office of Rehabilitation Pursuant to Utah Code Section 35-1-67(5)(6).

Ms. Hutchison appeared at the hearing on January 29, 2007 without the benefit of her attorney's presence. Attorney Mark Dean appeared at the hearing on behalf of Larsen Beverage and Globe Indemnity Co. ERF failed to appear at the hearing.

IV. FINDINGS OF FACT

At the hearing on January 29, 2007 Larsen Beverage and Globe Indemnity Co. stated that they did not contest Ms. Hutchison's status as permanently and totally disabled. Larsen Beverage and Globe Indemnity Co. stipulated that Ms. Hutchison's permanent total disability compensation benefits should continue pursuant to the 2005 Order

I hereby adopt the Findings of Fact set forth in the 2005 Stipulated Order as if fully set forth herein. I further find Ms. Hutchison cannot be vocationally rehabilitated. The undisputed evidence in this case established that Ms. Hutchison's industrial accident on August 23, 1993 caused her to become permanently and totally disabled.

V. CONCLUSIONS OF LAW

I hereby adopt the conclusions set forth in the 2005 Stipulated Order as if fully set forth herein. I further conclude that Ms. Hutchison cannot be vocationally rehabilitated. Ms. Hutchison's industrial accident on August 23, 1993 caused her to become permanently and totally disabled.

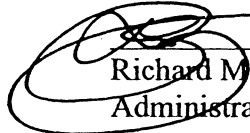
VI. ORDER.

IT IS THEREFORE ORDERED that Employers Reinsurance Fund shall pay Dana Hutchison permanent total compensation at the rate of \$227.00 per week commencing March 1, 2004, and continuing until further order of the Labor Commission. Employers Reinsurance Fund shall be granted credit for any permanent total disability benefits paid to date.

IT IS FURTHER ORDERED that the respondents, Larsen Beverage and/or Globe Indemnity Co., shall pay all medical expenses reasonably related to Danna Hutchison for her medical problems caused by the August 23, 1993 industrial accident. Medical expenses to be paid according to Utah Code §34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, plus interest at eight percent (8%) per annum.

DATED THIS 24th day of April 2007.

UTAH LABOR COMMISSION


Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Final Order of Permanent Total Disability, was mailed by prepaid U.S. postage on April 24, 2007, to the persons/parties at the following addresses:

Danna Hutchison
285 E 1450 N Apt 103
Bountiful UT 84010

Larsen Beverage
dba Pepsi Cola Of Ogden
2780 N Hwy 89
Ogden UT 84404

Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Globe Indemnity Co
Royal Insurance Co Of America
9800 S Meridian Blvd
Englewood CO 80112

Timothy Allen Esq
350 S 400 E Ste 113
Salt Lake City UT 84111

Mark D Dean Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

Edwin C Barnes Esq
One Utah Center 13th Fl
201 S Main St
Salt Lake City UT 84111

UTAH LABOR COMMISSION


Clerk

Adjudication Division

Tab B

UTAH LABOR COMMISSION

DANNA HUTCHISON,

Petitioner,

vs.

**LARSEN BEVERAGE and GLOBE
INDEMNITY CO; EMPLOYERS
REINSURANCE FUND,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 04-0636

Larsen Beverage and Globe Indemnity Co. ("Larsen") ask the Utah Labor Commission to review Administrative Law Judge La Jeunesse's division of benefits between Larsen and Employers Reinsurance Fund ("ERF") under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Ms. Hutchison claimed permanent total disability benefits for a low back injury from an accident on August 23, 1993 while working for Larsen. The parties submitted a stipulation and order for tentative permanent total disability benefits which the Commission approved on April 29, 2005. The stipulation provided that ERF pay Ms. Hutchison permanent total compensation, and Larsen pay her medical expenses resulting from the accident.

The stipulation and order also required Ms. Hutchison to appear before the Utah State Office of Rehabilitation for evaluation. Ms. Hutchison filed an evaluation report with the Commission, and Judge La Jeunesse held a hearing to consider the Office of Rehabilitation's opinion. During the hearing, Larsen did not contest Ms. Hutchison's status as permanently and totally disabled, and agreed that her compensation should continue according to the 2005 order.

Judge La Jeunesse adopted the findings of the 2005 order and determined that Ms. Hutchison could not be vocationally rehabilitated. Judge La Jeunesse therefore concluded that the accident caused Ms. Hutchison to become permanently and totally disabled, and ordered ERF to pay her permanent total compensation and Larsen to pay all medical expenses related to Ms. Hutchison's injuries from the accident as stipulated.

**ORDER AFFIRMING ALJ'S DECISION
DANNA HUTCHISON
PAGE 2 OF 3**

Larsen challenges the order by asserting that it only stipulated to an order for *tentative* permanent total disability benefits and did not intend for the agreement to become a final order. Larsen argues that the order should be amended to reflect reimbursement for past medical expenses and allocate future medical expenses pursuant to the statutory provisions in place at the time of the accident.

DISCUSSION AND CONCLUSION OF LAW

A stipulation between parties is enforceable by the Commission regardless of any changes in the applicable law. In this case, Larsen and ERF agreed that Ms. Hutchison was entitled to permanent total disability benefits. As part of this stipulation, Larsen agreed to pay for all of Ms. Hutchison's medical expenses reasonably related to the accident. The Commission approved this agreement as a stipulation and order of tentative permanent total disability. Larsen now argues that it is entitled to reimbursement and allocation for medical expenses because its agreement was only tentative.

The stipulation and order for tentative permanent total disability clearly shows that Larsen intended to be responsible for all medical expenses resulting from the accident. In fact, the only condition within the agreement based Ms. Hutchison's permanent total disability compensation on presenting herself for evaluation with the State Office of Rehabilitation, which she did. The evidence does not support Larsen's position that it agreed to be bound based on tentative conditions because the only condition within the stipulation was in regard to Ms. Hutchison's appearance before the Office of Rehabilitation. The Commission therefore concurs with Judge La Jeunesse's decision to adopt the conclusions of the 2005 order, which require Larsen to pay all of Ms. Hutchison's medical expenses reasonably related to the accident.

ORDER

The Commission affirms Judge La Jeunesse's decision of April 24, 2007, on this matter. It is so ordered.

Dated this 30th day of November, 2009.



Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

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ORDER AFFIRMING ALJ'S DECISION
DANNA HUTCHISON
PAGE 3 OF 3

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Danna Hutchison, Case No. 04-0636, was mailed first class postage prepaid this 30th day of November, 2009, to the following:

Danna Hutchison
2108 S 725 E
Clearfield UT 84015

Larsen Beverage
dba Pepsi Cola Of Ogden
2780 N Hwy 89
Ogden UT 84404

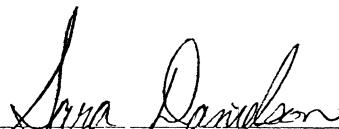
Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Globe Indemnity Co
Royal Insurance Co Of America
9800 S Meridian Blvd
Englewood CO 80112

Timothy Allen Esq
352 S Denver St Ste 240
Salt Lake City UT 84111

Mark D Dean Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

Edwin C Barnes Esq
One Utah Center 13th Fl
201 S Main St
Salt Lake City UT 84111


Sara Danielson
Utah Labor Commission

00132

Tab C

THE LABOR COMMISSION OF UTAH

Case No. 04-0636

DANNA HUTCHISON,

Applicant,

vs.

LARSEN BEVERAGE and/or GLOBE
INDEMNITY COMPANY; EMPLOYERS
REINSURANCE FUND,

Defendants.

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STIPULATION AND
ORDER OF TENTATIVE
PERMANENT TOTAL DISABILITY

* * * * *

The parties in the above-entitled workers compensation claim hereby stipulate, agree and request that the following STIPULATION and ORDER be entered awarding to the Applicant tentative permanent total disability benefits as follows:

STIPULATION:

1. That the Applicant, Danna Hutchison, date of birth March 19, 1966, was injured in a compensable industrial accident on August 2August 23, 1993, while in the course and scope of her employment with Larsen Beverage. The Applicant was lifting a drink fountain machine into a company truck, when she sustained an injury to her low back. In January 1994 she received a fusion from L4-5 through L5-S1 from Dr. Schleusner, and in December 1995 he removed the hardware. Dr. Prasad did a repeat fusion with cages in February 1999. In March of 2003 the Applicant received a spinal cord stimulator. Current pain management is provided by Dr. Lynn Webster. On March 4, 2004 the IME of Dr. Dall opined that the Applicant ". . . is totally disabled." The Applicant was paid weekly compensation by the workers compensation carrier for all lost time incurred through February 2004. On December 9, 1999 Dr. Dall found that as a result of the industrial accident the Applicant has a 20% whole person impairment due to the three (3) low back surgeries. In 1986 following a 1984 basketball injury, the Applicant had a discectomy at L5-S1, which would be 10% of the whole person based on the Labor Commission Impairment Guides.

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2. That Larsen Beverage was insured for workers compensation by Globe Indemnity Company on August 23, 1993.

3. That at the time of the industrial accident the Applicant was earning \$8.50 per hour, working 40 hours per week, which would entitle her to an award for permanent total disability of \$227 per week.

4. That the Applicant has not worked continuously or meaningfully in any line of substantial, gainful employment since February 2000, and based on her impairment from the accident of August 23, 1993, the parties conclude the Applicant is entitled to a tentative finding of permanent total disability.

5. That the Applicant be referred to the Utah State Office of Rehabilitation Services for rehabilitation training as provided by Section 35-1-67, Utah Code Annotated.

6. That the Employers Reinsurance Fund place the Applicant on the fund payroll and pay permanent total disability benefits at the rate of \$227 per week commencing March 1, 2004 and continuing until further order of the Labor Commission. Accrued amounts shall include 8% interest.

7. That the Employers Reinsurance Fund pay Applicant's attorney, Timothy C. Allen, an attorney's fees from the foregoing permanent total compensation award and interest in accordance with the Labor Commission sliding scale. Said fee to be deducted from the Applicant's award as each payment is made.

8. That Globe Indemnity Company shall be responsible for all medical expenses resulting from the industrial accident of August 23, 1993 subject to the Fee Schedule of the Labor Commission.

DANNA HUTCHISON
STIPULATION & ORDER
PAGE THREE

STIPULATED ORDER:

Based upon the foregoing Stipulation, and good cause appearing therefore,

IT IS THEREFORE ORDERED that Employers Reinsurance Fund pay Danna Hutchison permanent total compensation at the rate of \$227 per week commencing March 1, 2004, with accrued amounts due in a lump sum plus 8% interest, less attorney's fees to Timothy C. Allen in accordance with the Labor Commission sliding scale. Said benefits to continue until further order of the Labor Commission.

IT IS FURTHER ORDERED that the Applicant is hereby referred to the Utah State Office of Rehabilitation for rehabilitation training as provided in Section 36-1-67 Utah Code Annotated (1993). Upon receipt of the rehabilitation report the Commission will hold such further proceedings as are indicated.

APPROVED this 29th day of April, 2005.

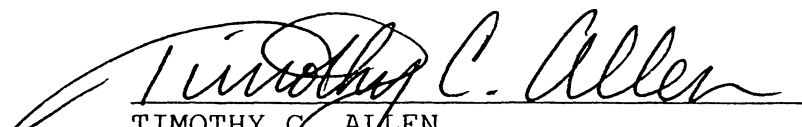


Honorable Donald L. George
Administrative Law Judge

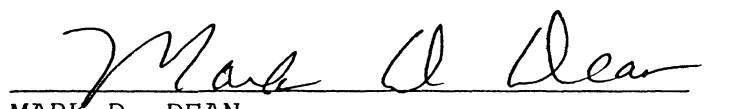
DANNA HUTCHISON
STIPULATION & ORDER
PAGE FOUR

APPROVAL OF STIPULATION AND ORDER

DATED this 29 day of April, 2005.


TIMOTHY C. ALLEN
Attorney for Applicant

DATED this 29th day of April, 2005.


MARK D. DEAN
Attorney for Larsen Beverage and Globe
Indemnity Company

DATED this 29th day of April, 2005.


ELLIOT R. LAWRENCE
Attorney for Employers Reinsurance Fund

00055

MAILING CERTIFICATE

I certify that on May 3, 2005, a copy of the attached Stipulation and Order, in the case of Danna Hutchison, was mailed to the following persons at the following addresses, postage paid:

Danna Hutchison
2478 N. 1050 W.
Layton, UT 84041

Timothy C. Allen
Attorney at Law
350 South 400 East, #113
SLC, UT 84111

Mark Dean
Attorney
257 E. 200 So., #800
SLC, UT 84111-2048

Elliot Lawrence
Attorney, ERF
P.O. 146600
SLC, UT 84114-6600

LABOR COMMISSION OF UTAH


Adjudication Division

00056

Tab D

ORIGINAL TRANSCRIPT

LABOR COMMISSION OF UTAH

DANNA HUTCHISON,)	
Petitioner,)	CD-recorded hearing
)	of:
vs.)	
)	January 29, 2007
LARSEN BEVERAGE,)	
EMPLOYERS' REINSURANCE)	
FUND, AND GLOBE)	Case No. 04-0636
INDEMNITY,)	Judge La Jeunesse
)	
Respondents.)	

Reporter: HEATHER WHITE, RPR
Notary Public in and for the State of Utah

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A P P E A R A N C E S

FOR THE RESPONDENTS:

Mark D. Dean, Esq.
BLACKBURN & STOLL
257 East 200 South, #800
Salt Lake City, Utah 84111
(801) 521-7900
Fax (801) 578-3504
mdean@blackburn-stoll.com

-oOo-

P R O C E E D I N G S

THE COURT: This is a matter before the Utah Labor Commission. This is the case of Danna Hutchison versus Larsen Beverage and/or the Employers' Reinsurance Fund and Globe Indemnity Company. This matter was set for hearing to consider the opinion of the Utah State Office of Rehabilitation pursuant to Utah Code section 35-167 subsection 5 subsection 6. Previously in this case (inaudible) an order was entered with a tentative finding of permanent total disability in this matter. The only matter remaining to be considered was the opinion from the Office of Vocational Rehabilitation.

I will note that present today we have Ms. Hutchison; is that correct?

MS. HUTCHISON: Yes.

THE COURT: And Mr. Dean, you're representing Globe Indemnity?

MR. DEAN: Yes, Your Honor.

THE COURT: I will note that Mr. Allen has not appeared in this case on behalf of Ms. Hutchison; and Mr. Barnes has not appeared either on behalf of Employers' Reinsurance Fund.

Mr. Dean, go ahead and state the position

1 of Globe Indemnity in this case then.

2 MR. DEAN: Your Honor, in this case, the
3 respondents have paid benefits out to-date, for
4 indemnity benefits we have paid \$70,045. The
5 compensation rate was stipulated to be \$227 per week.
6 In addition, to-date Globe Indemnity has paid
7 \$825,667.39 in medical benefits. Pursuant to our
8 prior stipulation, the parties agreed that
9 Ms. Hutchison was permanently and totally disabled
10 pending referral to the state office of vocation
11 rehabilitation. It's my understanding that she was
12 cooperative with their efforts, that they have come
13 back and said that they felt that she was not a
14 candidate for rehabilitation at this time. It may be
15 noted, previously she had gone through the state voc.
16 rehab and attempted rehabilitation, but was
17 unsuccessful.

18 At this point it's our position that we
19 don't contest the perm total disability status of
20 Ms. Hutchison, and believe the benefits should be
21 continued as they have been to-date.

22 On behalf of Globe Indemnity, we will be
23 submitting for reimbursement of all benefits, medical
24 benefits after the first 50 percent of medical
25 benefits after the \$20,000, and reimbursement of

1 indemnity benefits after the first 156 weeks pursuant
2 to the Utah Code.

3 One other thing, Your Honor, and I know
4 this can be a sticking point sometimes. But in this
5 instance, we have tried to mediate this case; it was
6 unsuccessful. We are also seeking interest along
7 with the other reimbursements that we're seeking.

8 THE COURT: Well, I'm going to go ahead
9 and enter an order of ongoing permanent total
10 disability. I will order appropriate reimbursement
11 under the statute. Since the ERF is not here to
12 object to that, we'll go ahead and issue the order
13 that it can be reimbursed.

14 All right, anything else?

15 MR. DEAN: Nothing here, Your Honor.

16 THE COURT: Okay, thank you. I will enter
17 an order accordingly. Thank you.

18 MR. DEAN: Thank you.

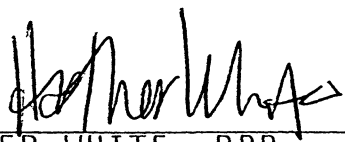
19 (The hearing was concluded.)
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1 REPORTER'S CERTIFICATE

2
3 STATE OF UTAH)
4 COUNTY OF SALT LAKE) ss.
5

6 I, Heather White, Registered Professional
7 Reporter for the State of Utah, do hereby certify
8 that the foregoing transcript was taken down by me
9 stenographically from an electronically recorded CD
10 and thereafter transcribed under my direction.

11 That the foregoing pages contain a true and
12 accurate transcript of the electronically recorded
13 proceedings, or requested portions thereof, and was
14 transcribed by me to the best of my ability from the
15 CD given me.
16
17
18
19
20

21 
22 _____
23 HEATHER WHITE, RPR
24 Notary Public
25 Residing in Salt Lake County

