

2009

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

Utah Court of Appeals

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Timothy Allen; Alan L. Hennebold; Deputy Commissioner Labor Commission of Utah; Attorneys for Appellees.

Mark D. Dean, Kristy L. Bertelsen; Blackburn and Stoll, LC; Edwin Barnes; Attorneys for Appellants.

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FILED
SEP 23 2010
SALT LAKE COUNTY
DEPUTY CLERK

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.	:	

REPLY BRIEF OF APPELLANTS

Appeal from the Utah Labor Commission

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SLC, UT 84111

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FILED
UTAH APPELLATE COURTS
SEP 24 2010

**PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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ARGUMENT

Point 1: Larsen's Agreement to The Stipulated Order Does Not Preclude Medical Reimbursement From the Employer's Reinsurance Fund Under Utah Code Ann. § 35-1-69

The Employer's Reinsurance Fund argues that the Commission properly refused to allow reimbursement of medical benefits under Utah Code Ann. § 35-1-69 based upon a plain reading of the Stipulation and Order of Tentative Permanent Total Disability which it submits is an "unambiguous" contract. We believe that its argument lacks substantive merit.¹

The Employer's Reinsurance Fund argues that the Stipulation and Order of Tentative Permanent Total Disability is a contract and, is not ambiguous. As such, ERF argues that as an unambiguous contract, the parties intentions are governed by the plain meaning of the contractual language which, it believes, requires Globe / Larsen to pay 100% of the medical benefits on a permanent basis, without reimbursement from the ERF which would otherwise be permitted under Utah Code Ann. § 35-1-

¹ The ERF is correct that ALJ LaJeunesse was the presiding judge at the January, 2007 hearing. Larson Beverage / Globe Indemnity stands corrected on that point. What is striking about this, is that Judge LaJeunesse indicated at the hearing that he was going to issue an order allowing reimbursement of medical expenses and indemnity benefits. However, his Findings of Fact, Conclusions of Law and Order are directly contrary to his express statements and bench ruling.

69. We disagree and submit that there are several flaws in the ERF's analysis.

It is first debatable whether, under Utah law, the Utah Labor Commission has the authority to interpret a contract. Some Utah courts hold that the Commission is of limited jurisdiction and, as an administrative tribunal, has no authority to interpret contracts. See State Compensation Ins. Fund of Colorado v. Industrial Commission of Utah, 657 P.2d 761 (Utah 1983). More recently, however, the Utah Court of Appeals has opined that the Labor Commission has authority to interpret contracts, including, for instance the claims released in a Compromise Settlement Agreement. See Wilburn v. Interstate Electric, 748 P.2d 582 (Utah Ct. App. 1988). For instance, in Wilburn, the Court of Appeals was asked to evaluate whether a Compromise Settlement Agreement released a worker's claim for permanent total disability. The appellate court held that since the agreement was ambiguous the ALJ appropriately held a hearing and considered extrinsic evidence, including testimony of legal counsel, plaintiff's own testimony, and other testimony in an effort to find the intentions of the parties in entering into the agreement. See id., at 585.

Assuming that the ALJ and Commission, as the ultimate fact finder, had the authority to interpret the Stipulation and Order of

Tentative Permanent Total Disability, the ERF is incorrect in arguing that the agreement is *unambiguous* and that the court properly refused to allow extrinsic evidence to interpret this agreement. Under Utah law, a court may consider extrinsic evidence of the parties' intentions where a contractual provision is ambiguous. See Peterson v. Coca Cola United States, 2002 UT 42; See Wilburn v. Interstate Electric, 748 P.2d 582 (Utah Ct. App. 1988). In Peterson, the Court held that: "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" Id. The Utah Supreme Court has recently held that "[a] contractual term is ambiguous if, looking to the language of the contract alone, it is reasonably capable of being understood in more than one way such that there are tenable positions on both sides." See Deer Creek Ranch, LLC v. Utah State Armory Bd., 2008 UT 3, P13 (Utah 2008); Krauss v. Utah State Dep't of Transp., 852 P.2d 1014, 1019 (Utah Ct. App. 1993)

Viewed in the context of these principles, it is abundantly clear that the four corners and intent rules are not mutually exclusive and that there are tenable positions on both sides. The Stipulation and Order of Tentative Permanent Total Disability is "ambiguous" with regard to the duration of the payment of medical expenses by Larson /Globe and

whether the provisions of Utah Code Ann. § 35-1-69 applied to allow Larson /Globe to obtain ERF reimbursement of medical and indemnity compensation. The four corners of the document are insufficient to resolve this issue. Consider the following provisions in the agreement which give rise to this ambiguity:

- (1) the caption of the Stipulation indicates it is a “Tentative” agreement, meaning the terms are not permanent.
- (2) the Stipulation section of the agreement indicates that Larson/Globe is responsible for “all medical expenses resulting from the industrial accident of August 23, 1993 subject to the Fee Schedule of the Labor Commission”; and,
- (3) the Stipulation Order section of the document is completely silent as to any obligation of Larson / Globe regarding medical expenses and is also silent whether the agreement is tentative or permanent.

Unfortunately, these provisions, when read collectively lead to some uncertainty regarding the duration of the payment of medical expenses and whether reimbursement of medical and even indemnity benefits would be permitted under Utah law. On this basis, this Court should find that the Stipulation and Order of Tentative Permanent Total Disability is ambiguous and remand to the administrative law judge to

allow for submission of extrinsic evidence to aid in the interpretation of the agreement.²

Even if the ERF is correct, that the terms of the stipulation are not ambiguous, thus precluding submission of extrinsic evidence, the plain language of the stipulation indicates that the agreement was one of a **tentative** nature. The meaning of the term tentative means conditional or non-final. By *sua sponte* reforming the contract into a permanent or “final” agreement, the ALJ and Commission acted outside their authority

² Assuming that the Stipulation and Order of Tentative Permanent Total Disability is ambiguous, the Court should allow for the submission of extrinsic evidence to evaluate the intent of the stipulation. This should include admission of the attached documents, Attachment A - Affidavit of Mark D. Dean; Attachment B - Affidavit of Timothy Allen. Mark D. Dean is the attorney for Larson / Globe Indemnity and represented this party at the time Stipulation and Order of Tentative Permanent Total Disability was drafted, signed on their behalf and attended the hearing on January 29, 2007.

Attorney Dean indicates in his affidavit that the intent of the parties in entering into this agreement was to provide benefits to Ms. Hutchison on a temporary basis pending review by the Office of Vocational Rehabilitation. ERF and Larson/ Globe did not want to leave Ms. Hutchison in a suspended state without any medical and indemnity coverage during the evaluation by rehabilitation. Hence, the agreement was intended to allow her for short term medical and indemnity coverage pending that evaluation.

Likewise, Attorney Timothy Allen was an attorney for one of the parties to this agreement (for Ms. Hutchison) and the drafter of the Stipulation and Order of Tentative Permanent Total Disability. He confirms that the provisions regarding the payment of medical expenses were to be made on a short-term basis until Ms. Hutchison was reviewed by the Office of Vocational Rehabilitation. According to each of these attorneys, there was never any intention that by entering into this agreement Larsen / Globe was waiving their right to application of section 35-1-69, Utah Code.

as an administrative agency since the Commission clearly has no authority reform a contract or a make a new contract to conform with the intent of the parties . See Continental Casualty v. Industrial Commission, 61 Utah 16, 210 P. 127 (Utah 1922); See Empey v. Industrial Commission, 63 P.2d 530 (Utah 1937) (holding Commission is not vested with power to reform a contract or make a new contract to conform with the intent of the parties).

Point 2: Larson's Right to Reimbursement of Indemnity Compensation Was Completely Overlooked by Both the ALJ and the Commission in their Orders

The Employer's Reinsurance Fund argues that the issue raised regarding the adequacy of the Commission and ALJ's findings is improperly raised. Certainly, Larson has not had the opportunity to challenge the Commission's ruling until this juncture. Accordingly, there is no basis in arguing that it is improperly raised for the first time in this appeal with regard to the Commission's ruling. With regard to the ALJ's ruling, this issue was clearly raised in the Larson's Motion for Review in submitting argument that the ALJ erred in refusing to limit Larson / Globe's indemnity liability to 156 weeks as provided for under section 35-1-69, Utah Code. (R., 118-120). On this basis, this issue was properly raised.

It is also evident that the both the ALJ and Commission's factual findings regarding reimbursement of indemnity compensation are inadequate. Utah law requires that an agency make adequate factual findings. See Adams v. Board of Review, 821 P.2d 1, 4-5 (Utah Ct. App. 1991). Failure to do so is prejudicial to the appealing party and will require remand unless doing so is harmless. See LaSal Oil v. Department of Environmental Quality, 843 P.2d 1045, 1048 (Utah Ct. App. 1992). Here, the failure to do so is prejudicial since reimbursement would be allowed under Utah law since Larson / Globe have paid over 156 weeks of indemnity compensation and are entitled to reimbursement under statute.

Both the ALJ and the Commission fail to address Larson's maximum liability of indemnity compensation of 156 weeks under Utah statute and their right to reimbursement of indemnity compensation from the ERF which was an issue raised throughout the proceedings, including the January 29, 2007 hearing (where ERF counsel failed to attend despite proper notice) and in pre-trial disclosures. Indeed, both the ALJ and Commission's orders focus on the right to medical expense reimbursement but are both completely silent on Larson's liability for indemnity compensation. Both orders focus solely on the right of reimbursement for medical expenses based upon the Stipulation and

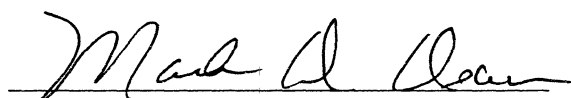
Order of Tentative Permanent Total Disability . Given this error, the Order must be remanded for adequate review and findings regarding Larsons' liability for indemnity compensation and reimbursement of indemnity compensation under Utah statute.

CONCLUSION

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

Respectfully submitted this *22nd* day of September, 2010.

BLACKBURN & STOLL, LC

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

Mark D. Dean
Kristy L. Bertelsen
Attorneys for Appellants

CERTIFICATE OF SERVICE

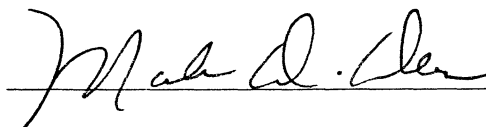
I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid and/or hand delivered on the 22nd day of September, 2010, to:

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Attorneys for Respondents

UTAH LABOR COMMISSION

STATE OF UTAH

* * * * *

DANNA HUTCHISON,)	
)	AFFIDAVIT OF MARK D.
Petitioner)	DEAN
)	
vs.)	
)	Case No. 04-0636
)	
LARSEN BEVERAGE and/or)	Judge Richard M. LaJeunesse
GLOBE INDEMNITY CO.;)	
EMPLOYER’S REINSURANCE)	
FUND,)	
)	
Respondents		

* * * * *

STATE OF UTAH)
:SS
COUNTY OF *SALT LAKE*)

1. My name is Mark D. Dean. I am a person over 18 years old and a resident of the State of UTAH. I have personal knowledge of the matters stated herein, am competent to testify thereto, and if called upon would so testify. Being first duly

sworn on oath, I state as follows:

2. I am an attorney at the law firm of Blackburn & Stoll, LC.
3. This file was previously handled by Attorney Henry K. Chai II in our office on behalf of Larsen Beverage and Globe Indemnity Company. This file remained inactive until early 2004 until I was contacted by the claims adjustor who asked me to evaluate this case and to evaluate future medical costs.
4. Following this, I reviewed this file including amounts paid to date at that time. Upon my review I discovered that this was a claim in which certain statutory provisions would likely allow my client to obtain reimbursement of both medical and indemnity compensation since Ms. Hutchison was a likely candidate for permanent total disability compensation. At that time I notice that over 156 weeks of indemnity compensation had been paid and significant amounts in medical expenses. If the applicant was declared by a judge permanently and totally disabled, my client would be permitted to obtain reimbursement of both medical and indemnity benefits from the Employer's Reinsurance Fund under Utah Code Ann. § 35-1-69 and be liable for only 50% of future medical benefits.
5. Under my calculations, assuming that Ms. Hutchison were declared permanent totally disabled, my client's right to reimbursement for payments made up through 2004 could be as much as \$32,902.12 in indemnity benefits and \$265,832 in medical expenses plus reimbursement of 50% of any future medical expenses paid under the applicable Utah statute.
6. I then contacted the claims adjustor at that time to inquire as to the claimant's current work status. I was told that she was not working and unable to work and that the Globe Indemnity was paying medical expenses for continued treatment of injuries from the claimed industrial accident.
7. Given the significant opportunity to obtain reimbursement, and the claimant's current inability to work from this accident, (a factor necessary to establish a claim for permanent total disability), I told the adjustor that we should encourage Ms. Hutchison to file a claim for permanent total disability. By filing such a claim Ms. Hutchison would obtain lifetime indemnity compensation, the liability of which after the first 156 weeks would be the responsibility of the Employer's Reinsurance Fund. The adjustor agreed with my logic.
8. In 2004 I contacted Ms. Hutchison and informed her of her ability to obtain

lifetime permanent total disability benefits. I informed her of her right to speak with an attorney and gave her the contact information of Attorney Timothy Allen, a competent and well respected applicant's attorney. Attorney Allen was also a former Administrative Law Judge at the Utah Labor Commission who is very knowledgeable in handling cases where the old 1993 law applies. I explained the current case posture to Attorney Allen. He agreed that given the claimant's impairment from the industrial accident, pre-existing impairments, and current inability to work due to this accident, Ms. Hutchison had a very strong case for permanent total disability. Attorney Allen seemingly recognized that my client's ability to obtain reimbursement was contingent upon his client successfully obtaining an order of permanent total disability for this accident.

9. On July 2, 2004 Petitioner, through her counsel, Timothy Allen, filed an Application for Hearing seeking entitlement to permanent total disability and a claim for recommended medical care.
10. On August 11, 2004 I filed an Answer on behalf of my client 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 indemnity compensation from the Employer's Reinsurance Fund was appropriate under Utah law. The Employer's Reinsurance Fund was joined in that case and filed an Answer. In my Answer I reserved the defenses under Utah Code Ann. §35-1-69 and indicated that appropriate reimbursements would be sought.
11. The parties, which included myself, Ms. Hutchison, Timothy Allen and Employer's Reinsurance Fund counsel, Elliott Lawrence, 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. At the mediation, I argued that Ms Hutchison had a 10% whole person permanent partial impairment from a low back surgery in 1986. Again, it was my position that Larsen/Globe (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). However, no final settlement agreement was reached by the parties at the March 30, 2005 mediation.
12. Rather than leave Danna Hutchison in a suspended state without benefits during the worker's compensation litigation process (which included evaluation by the Utah State Office of Vocational Rehabilitation), the parties entered into a Stipulation and Order of Tentative Permanent Total Disability. It was the intent of

this agreement 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 only 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, including the Order page, and signed by him. This agreement was signed by me on behalf of my client and also Elliott Lawrence on behalf of the Employer’s Reinsurance Fund.

13. While the Stipulated section of the agreement indicates that Larsen /Globe is responsible for “all medical expenses”, this provision was intended by all parties to last for a short duration, hence the term “tentative” in the caption of the agreement, until she was evaluated by the Utah State office of Vocational Rehabilitation which would evaluate and let the ALJ know if she was retrainable. After this evaluation, the parties’, including myself understood that per the statute that the judge would hold a hearing and evaluate whether Ms. Hutchison established the elements necessary to establish a claim for permanent total disability.
14. Despite the fact that the medical expense provision noted above 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.
15. 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. However, it was clear that at the time of the agreement, Larsen/Globe had no intention of waiving this significant benefit; in fact, it would make no sense to do so.
16. On September 25, 2006, Ms. Hutchison filed an Evaluation Report from Utah State Office of Rehabilitation. Following this 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).
17. On December 15, 2006, I filed Pre-Trial Disclosures for Larsen/Globe again 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. In this document I 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.

18. Upon review of the records I have no evidence that ERF filed any Pre-Trial Disclosures.
19. Upon checking out the appellate Record on January 18, 2010 for completion of the Docketing Statement, I discovered that the Pre-Trial disclosure form filed by Larsen 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. This was since corrected on appeal upon motion of Larsen.
20. A hearing was later held on January 29, 2007 before Judge Richard LaJeunesse pursuant to Utah Code Ann. § 35-1-67(5). Those present at the hearing included myself and Ms. Hutchison. ERF's new counsel and attorney Allen did not attend. At the hearing before Judge LaJeunesse, I did not contest that Ms. Hutchison is permanent and totally disabled. I 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 Hutchison nor the Employer's Reinsurance Fund.
21. At the hearing, I stated:

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.

22. The Court responded to me that they would “order appropriate reimbursement under the statute.”
23. On April 24, 2007 ALJ LaJeunesse entered a *Final Order of Permanent Total Disability* (the “ALJ’s Order”). Contrary to judge LaJeunesse’s bench ruling at hearing and statements to me 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. Contrary to the 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. It is my belief that the ALJ incorrectly modified Stipulation and Order of Tentative Permanent Total Disability without any authority by the parties’ to that agreement.
24. Given the error made by the ALJ I filed several motions. On May 9, 2007 I filed a Motion for Relief from Order and/or Motion to Alter or Amend Judgment.
25. Since the motion was not timely ruled upon, on May 22, 2007, I filed a Motion for Review of the ALJ’s Final Order of Permanent Total Disability. In the Motion for Review I 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. I 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, I argued that my client has paid well over \$825,000 in medical benefits and should be entitled to statutory reimbursement under Utah

26. The Commission interpreted the Stipulation and Tentative Order for Permanent Total Disability and ruled that medical expenses are not reimbursable and in fact, failed to make any ruling regarding reimbursement of indemnity compensation. I believe that this ruling oversteps the intent of the parties and is absolutely contrary to the purpose of that agreement.

DATED this 22nd day of September, 2010.

Mark D. Dean

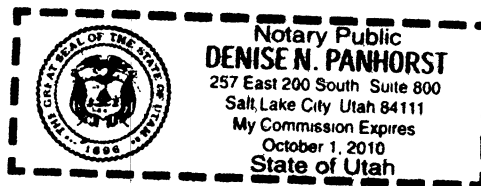
STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN before me this 22 day of September, 2010.

Darisi N Panfili

Notary Public
Residing in: Tooele County, Utah

October 1 2010
My Commission Expires:



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UTAH LABOR COMMISSION

STATE OF UTAH

* * * * *

DANNA HUTCHISON,)	
)	AFFIDAVIT OF
Petitioner)	TIMOTHY ALLEN
)	
vs.)	Case No. 04-0636
)	
)	Judge Richard M. LaJeunesse
LARSEN BEVERAGE and/or)	
GLOBE INDEMNITY CO.;)	
EMPLOYER’S REINSURANCE)	
FUND,)	
Respondents		

* * * * *

STATE OF UTAH)
	:ss
COUNTY OF <i>SALT LAKE</i>)

1. My name is Timothy Allen. I am a person over 18 years old and a resident of the State of UTAH. I have personal knowledge of the matters stated herein, am competent to testify thereto, and if called upon would so testify. Being first duly

sworn on oath, I state as follows:

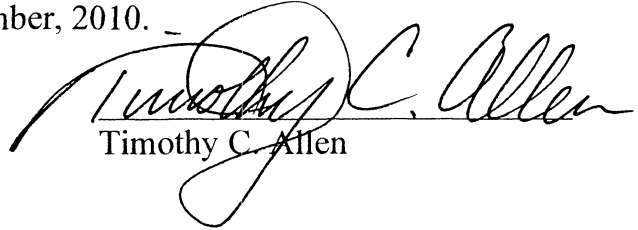
2. I am an attorney at the law firm of Timothy C. Allen.
3. I was contacted in 2004 by Attorney Mark Dean who suggested that I speak with Ms. Danna Hutchison regarding her worker's compensation claim of August 23, 1993 where she was lifting a fountain drink machine and sustained injuries to her low back. Attorney Dean explained to me that Ms. Hutchison may have a claim for permanent total disability and that if she did, his client, Larsen Beverage and/or Globe Indemnity would have a claim for reimbursement of medical and indemnity compensation.
4. I had a discussion with my client and determined that a case for permanent total disability was very strong.
5. Following my discussion with Ms. Hutchison, I filed an Application for Hearing on July 2, 2004 seeking recommended medical care and permanent total disability for the August 23, 1993 industrial accident.
6. A hearing on this matter was set before Judge Donald George on March 23, 2005 but was cancelled.
7. On March 30, 2005, the parties, which included myself, Ms. Hutchison, Mark Dean and Employer's Reinsurance Fund counsel, Elliott Lawrence met in a Labor Commission sponsored Mediation attempting to negotiate settlement prior proceeding on to an evidentiary hearing at the Labor Commission. At the mediation, Mr. Dean argued that Ms Hutchison had a 10% whole person permanent partial impairment from a low back surgery in 1986. It was his client's position that that Ms. Hutchison was permanently and totally disabled and that reimbursement and contribution by the Employer's Reinsurance Fund was applicable due to the application of Utah Code Ann. § 35-1-67 and 35-1-69 (1993). Unfortunately, no final settlement agreement was reached by the parties at the March 30, 2005 mediation, because the ERF was not willing to waive referral to the Division of Rehabilitation Services.
8. The parties did not want to leave Danna Hutchison in a suspended state without benefits during the worker's compensation litigation process (which included evaluation by the Utah State Office of Vocational Rehabilitation). Accordingly, the parties entered into a Stipulation and Order of Tentative Permanent Total Disability which was signed on April 29, 2005. This agreement was signed by me,

on behalf of my client, Mark D. Dean for Larsen / Globe and Elliott Lawrence for the Employer's Reinsurance Fund. There is no doubt that it was the intent of this agreement that the Employers Reinsurance Fund would pay permanent total disability benefits and the Larsen would continue to pay medical benefits on a provisional basis only 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 me.

9. The Stipulated section of the agreement indicates that Larsen /Globe is responsible for "all medical expenses". When the parties negotiated this provision it was intended by all parties that the benefits, including medicals, were not to last on a permanent basis, hence the term "tentative" in the caption of the agreement. They were intended to be paid until she was evaluated by the Utah State office of Vocational Rehabilitation which would evaluate and let the ALJ know if she was retrainable. After this evaluation, the parties', including myself understood that per the statute that the judge would hold a hearing and evaluate whether Ms. Hutchison established the elements necessary to establish a claim for permanent total disability.
10. Despite the fact that the medical expense provision noted above was not recited by the ALJ in the Stipulated Order page, Larsen has kindly continued to pay ongoing medical expenses for this accident through the present time.
11. The Stipulation and Order of Tentative Permanent Total Disability did not address the issue of reimbursement of medical expenses to Larsen since it was only intended as a tentative order. There was no reason to address reimbursement at that time given the nature of the agreement. It was clear to me that at the time of the agreement, Larsen/Globe had no intention of waiving their right to reimbursement and, in fact, it would make no sense for them to do so.
12. A hearing was later held on January 29, 2007 before Judge Richard LaJeunesse pursuant to Utah Code Ann. § 35-1-67(5) to consider the opinion of the Utah State Office of Rehabilitation. Those present at the hearing included Ms. Hutchison. I did not attend this hearing because vocational rehabilitation found that she was not retrainable. On this basis, the ALJ was mandated by statute to award permanent total disability compensation.
13. When I received the April 24, 2007 *Final Order of Permanent Total Disability* I was perplexed by the ALJ's ruling since the parties did not agree to modify the Stipulation to reflect a permanent order. I was also surprised that the judge failed


to apply the appropriate reimbursement provisions under Utah Code Ann. § 35-1-69. I believe that the ALJ's Order and Commission's adoption of it oversteps the intent of the parties and is contrary to the purpose of the Stipulation and Order of Tentative Permanent Total Disability.

DATED this 10th day of September, 2010. -


Timothy C. Allen

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN before me this 10 day of September, 2010.


October 1, 2010
My Commission Expires:

Notary Public
Residing in: Tooele County, Utah

