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Larsen Beverage and/or Global Indemnity Company v. Labor Commission of Utah; Employers' Reinsurance Fund; and Danna Hutchison : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARSEN BEVERAGE and/or GLOBE
INDEMNITY COMPANY,

Appellants,

v.

LABOR COMMISSION OF UTAH;
EMPLOYERS' REINSURANCE FUND;
and DANNA HUTCHISON,

Appellees.

Appellate Case No. 20091077

Labor Commission Case No. 04-0636

BRIEF OF APPELLEE EMPLOYERS' REINSURANCE FUND

APPEAL FROM THE ORDER OF THE UTAH LABOR COMMISSION

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STATEMENT OF JURISDICTION

Respondent-Appellee Employers' Reinsurance Fund ("ERF") agrees with the statement of jurisdiction contained in the brief of Petitioners-Appellants Larsen Beverage and/or Globe Indemnity Company (together "Larsen Beverage" or "Appellants"), except to clarify that the Court's jurisdiction is conferred by Utah Code Annotated section 78A-4-103 (2009), section 78-2a-3 having been recodified.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Issue: Whether the Utah Labor Commission ("Labor Commission") erred by affirming Administrative Law Judge La Jeunesse's ("Judge La Jeunesse" or "ALJ") Final Order of Permanent Total Disability ("Order") where Larsen Beverage had previously stipulated to the relief granted.

Standard of Review: ERF agrees with the standard of review set forth by Larsen Beverage.

2. Issue: Whether the non-inclusion of Larsen Beverage's Pre-Trial Disclosures in the Record violated Larsen Beverage's due process rights where: (a) the Pre-Trial Disclosures were on file with the Labor Commission; (b) Larsen Beverage had presented its position to the Labor Commission; (c) Larsen Beverage stipulated to the relief granted by the Labor Commission; and (d) Larsen Beverage's Motion to Supplement Record was granted, fully correcting any claimed error.

Standard of Review: ERF agrees with the standard of review set forth by Larsen Beverage.

Larsen Beverage has also raised a third issue for review in the argument section of its brief--i.e., the sufficiency of the Order's factual findings and conclusions of law. (Br. of Appellants at 38.) ERF does not believe this is a separate issue since Larsen Beverage stipulated to the result obtained, as discussed more fully below.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the interpretation of a stipulation between the parties regarding the payment of permanent total disability benefits to an employee injured in an industrial accident. Applicant Danna Hutchison was employed for Larsen Beverage and injured her back while performing her duties. The parties entered into a Stipulation and Order of Tentative Permanent Total Disability ("Stipulated Order") regarding the payment of benefits to Ms. Hutchison. Such stipulations were commonly made under Utah Code Annotated section 35-1-67(5), leaving open only the issue of possible rehabilitation. In this case, there was a clearly stated bargain: Larsen Beverage agreed to pay "all" of Ms. Hutchison's medical expenses related to the accident while ERF agreed to pay all permanent total disability benefits, accruing after March 1, 2004. The parties stipulated that Ms. Hutchison was entitled to a tentative finding of permanent total disability. The finding of permanent total disability (and ERF's payments based on that finding) was tentative because the law in effect at the time required that the injured worker be evaluated by the Utah State Office of Rehabilitation before a final order was entered.

Larsen Beverage now seeks to undo the Stipulated Order. It claims that the entire agreement was tentative, including its unconditional agreement to pay all of Ms. Hutchison's medical expenses. Larsen Beverage asked the ALJ and Labor Commission (and now asks this Court) to order ERF to reimburse it for Ms. Hutchison's medical expenses. However, the terms of the Stipulated Order are clear and unambiguous; they do not entitle Larsen Beverage to the relief it seeks. There is no provision in the Stipulated Order for a reevaluation of the division of liability between Larsen Beverage and ERF after the permanent total disability to which Larsen Beverage had stipulated was confirmed by the Utah State Office of Rehabilitation. Neither is there any provision in the Stipulated Order related to reimbursement by ERF of medical expenses. The only condition in the Stipulated Order was that Ms. Hutchison be evaluated by the Utah State Office of Rehabilitation and the effect such evaluation might have on the term of ERF's future payments. Both the ALJ and Labor Commission properly interpreted the Stipulated Order and held Larsen Beverage to the deal it made.

II. Course of Proceedings and Disposition Below

Ms. Hutchison initiated this action on July 1, 2004, by filing an Application for Hearing with the Labor Commission. (R. at 1.) Ms. Hutchison claimed permanent total compensation for an injury she sustained while working for Larsen Beverage. (R. at 1.) Following mediation in March 2005, the parties entered into the Stipulated Order. (R. at 52-56.) Counsel for all parties, including Larsen Beverage, reviewed and signed the

Stipulated Order, indicating their agreement. (R. at 55.) The Stipulation was then approved by Administrative Law Judge Donald L. George on April 29, 2005. (R. at 54.)

In the Stipulated Order, the parties agreed that Ms. Hutchison was “entitled to a tentative finding of permanent total disability” and that she would be referred to the Utah State Office of Rehabilitation for vocational rehabilitation training. (R. at 53.) The Stipulated Order required ERF to pay Ms. Hutchison permanent total disability compensation commencing March 1, 2004, “and continuing until further order of the Labor Commission.” (R. at 53.) Larsen Beverage unconditionally agreed to pay “all medical expenses resulting from the industrial accident” suffered by Ms. Hutchison. (R. at 53.)

Under the statute in effect at the time of Ms. Hutchison’s injury, a finding of permanent total disability was in all cases tentative until the injured employee completed vocational rehabilitation evaluation by the Utah State Office of Rehabilitation. *See* Utah Code Ann. § 35-1-67 (1993). The only condition in the Stipulated Order concerned Ms. Hutchison’s vocational rehabilitation. (*See* R. at 54.) The Stipulated Order provides that Ms. Hutchison would participate in vocational rehabilitation and, depending on the outcome of her rehabilitation efforts, the entitlement to permanent total disability compensation could be revisited by the Labor Commission. Larsen Beverage’s agreement to pay Ms. Hutchison’s medical expenses was not contingent upon any subsequent event and, thus, no conditions were recited in the order portion of the Stipulated Order. (*See* R. at 53-54.) In particular, the Stipulated Order did not provide

for any reimbursement of medical expenses to Larsen Beverage nor did it provide for an apportionment of future medical expenses incurred by Ms. Hutchison as a result of the industrial accident.

In March 2006, Judge George retired and Administrative Law Judge Richard M. La Jeunesse was assigned to the case. On March 15, 2006, Judge La Jeunesse entered an order terminating payment of permanent total disability benefits to Ms. Hutchison because she failed to cooperate with the Utah State Office of Rehabilitation. (R. at 64-65.) After later participating in the vocational rehabilitation process, Ms. Hutchison moved for reinstatement of her permanent total disability benefits. (R. at 69.) Judge La Jeunesse granted the motion and payment of benefits to Ms. Hutchison was “reinstated pursuant to the April 2005 Stipulation and Order approved by Judge Donald L. George.” (R. at 72.)

A hearing was held on January 29, 2007, to consider Ms. Hutchison’s vocational rehabilitation. (See R. at 102, 105. See also R. vol. 5 (hearing transcript).)¹ Prior to the

¹ Larsen Beverage claims that Judge George, not Judge La Jeunesse, presided at the January 2007 hearing. (Br. of Appellants at 15-16.) Nothing in the Record supports this contention. The notices of the hearing indicate that it was to be held before Judge La Jeunesse. (R. at 102, 105.) Larsen Beverage sent a letter to Judge La Jeunesse requesting that the original hearing date be rescheduled due to a scheduling conflict. (R. at 103.) Two weeks before the hearing, Larsen Beverage forwarded a copy of the supplemental medical exhibit to Judge la Jeunesse. (R. at 106.) Judge La Jeunesse is identified as the judge on the hearing transcript, (R. vol. 5), and he issued the Order following the hearing, (R. at 107-10). In his written opinions, Judge La Jeunesse was careful to distinguish between those portions of the case over which he and Judge George respectively presided. (See, e.g., R. at 108.) The Record indicates that Judge La Jeunesse was the

hearing, Larsen Beverage submitted its Pre-Trial Disclosure Form, asking for reimbursement from ERF of half of all medical expenses in excess of \$20,000, contrary to the prior agreement of the parties as set forth in the Stipulated Order. (R. at 105(b).) At the hearing, Larsen Beverage apparently requested reimbursement of medical expenses, contrary to the terms of the Stipulated Order. (R. vol. 5 at 4.) Notably, Larsen Beverage did not contest the permanent total disability status of Ms. Hutchison, the only issue left open by the Stipulated Order, and agreed that benefits to her “should be continued as they have been to-date.” (R. vol. 5 at 4:18-21.) Judge La Jeunesse indicated that he would issue an order of ongoing permanent total disability and appropriate reimbursement. (R. vol. 5 at 5.)

The order requested by Larsen Beverage was not issued. Instead, apparently having an opportunity to fully review the file, including the Stipulated Order, Judge La Jeunesse issued the Order, confirming and integrating the parties’ Stipulated Order. (R. at 107-10.) Judge La Jeunesse adopted the facts to which the parties stipulated in the Stipulated Order and determined that Ms. Hutchison could not be vocationally rehabilitated. (R. at 109.) Judge La Jeunesse also noted Larsen Beverage’s stipulation at the January 2007 hearing “that Ms. Hutchison’s permanent total disability compensation benefits should continue pursuant to the 2005 Order.” (R. at 109.) Based on those

only administrative law judge involved in the case after march 2006 (including at the January 2007 hearing). (*See* R. at 62-131.) It is unlikely that Judge George participated in the hearing over a year after his retirement.

findings, Judge La Jeunesse resolved the only tentative aspect of the Stipulated Order (i.e., Ms. Hutchison's vocational rehabilitation and its effect on ERF's payment of benefits), and ordered ERF to pay permanent total compensation to Ms. Hutchison. (R. at 109.) Judge La Jeunesse also ordered Larsen Beverage to pay Ms. Hutchison "all" medical expenses related to her industrial accident, as previously agreed in the Stipulated Order. (R. at 109.)

On May 9, 2007, Larsen Beverage moved for relief from the Order or, alternatively, to alter or amend the Order under Rules 59 and 60 of the Utah Rules of Civil Procedure. (R. at 112-15.) Larsen Beverage argued that Order contained legal errors. Specifically, it argued that the Stipulated Order was a tentative agreement and could not form the basis for the final determination of benefits to be paid to Ms. Hutchison. (R. at 115.) Larsen Beverage also argued that ERF should be ordered to reimburse Larsen Beverage for Ms. Hutchison's past medical expenses and for allocation of future medical expenses. (R. at 112.)

Before Judge La Jeunesse had a chance to rule on its motion, Larsen Beverage filed a Motion for Review with the Labor Commission, advancing the same arguments. (R. at 118-20.) ERF filed a Memorandum in Opposition to Motion for Review, arguing that Larsen Beverage stipulated to the division of liability adopted by Judge La Jeunesse. (R. at 125.) ERF also argued that the only condition in the Stipulated Order was the requirement that Ms. Hutchinson be evaluated by the Utah State Office of Rehabilitation

and that there was no provision for revisiting the allocation of responsibility as between ERF and Larsen Beverage. (R. at 126.)

On review, the Labor Commission held that the Stipulated was an enforceable agreement between the parties and that Larsen Beverage had agreed to pay all of Ms. Hutchison's medical expenses. (R. at 130-31.) The Labor Commission rejected Larsen Beverage's argument that it was entitled to reimbursement and allocation of medical expenses simply because the Stipulated Order left open the issue of vocational rehabilitation. (R. at 131.) Rather, the Stipulated Order "clearly shows that Larsen [Beverage] intended to be responsible for all medical expenses resulting from the accident." (R. at 131.) The Labor Commission further noted that "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 The evidence does not support Larsen[Beverage's] position that it agreed to be bound based on tentative conditions" (R. at 131.) The Labor Commission therefore affirmed the Order requiring "Larsen [Beverage] to pay all of Ms. Hutchison's medical expenses reasonably related to the accident." (R. at 131.) This appeal followed.

III. Statement of Facts

1. Ms. Hutchison injured her lower back in an industrial accident on August 23, 1993, while working for Larsen Beverage. (R. at 1.)

2. Ms. Hutchison previously suffered a back injury in 1984 that resulted in a 10% whole person impairment “based on the Labor Commission Impairment Guides.” (R. at 52.)

3. As a result of these injuries and several resulting surgeries, Ms. Hutchison was awarded a 20% whole person impairment on December 9, 1999. (R. at 23.)

4. Ms. Hutchison was again evaluated on March 4, 2004, and she was deemed “totally disabled.” (R. vol. 2 at 107.)

5. On July 1, 2004, Ms. Hutchison filed an Application for Hearing with the Labor Commission. (R. at 1.)

6. Following mediation, ERF and Larsen Beverage resolved the issues of responsibility for payment of medical expenses and ongoing permanent total disability benefits. Their agreement was set forth in the Stipulated Order which was approved by counsel for all parties. (R. at 52-55.)

SUMMARY OF ARGUMENT

ARGUMENT

I. The Labor Commission Properly Affirmed the Order Because Larsen Beverage Agreed to the Relief Granted.

Larsen Beverage first claims that the ALJ and Labor Commission erred by rejecting Larsen Beverage’s claim for reimbursement of medical expenses from ERF. (Br. of Appellants at 23.) Larsen Beverage argues that reimbursement was required

because its agreement in the Stipulated Order to pay Ms. Hutchison's medical expenses was tentative. Larsen Beverage argues, in essence, that the Stipulated Order is ambiguous. (Br. of Appellants at 30.) It is not. Essentially, Larsen Beverage's claim is that because the Stipulated Order contains the word "tentative," referring to Ms. Hutchison's disability status, all other provisions of the agreement are also tentative. This argument should be rejected because it contravenes the plain terms of the Stipulated Order.

Courts are ordinarily bound by stipulations between the parties. *Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 19, 20 P.3d 287. *See also Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979) (noting that "[s]ettlements are favored, and should be encouraged," and that "[i]t is quite well established" courts have authority to enforce settlement agreements). Similarly binding are stipulations entered into in administrative proceedings. *Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 19, 20 P.3d 287.²

² The *Yeargin* court also noted that courts are hesitant "to relieve a party from a stipulation negotiated and entered into with the advice of counsel" and that a stipulation should only be set aside under certain conditions, including a showing "that the stipulation was entered into inadvertently." *Yeargin, Inc. v. Auditing Div. of the Utah State Tax Comm'n*, 2001 UT 11, ¶ 21, 20 P.3d 287 (quotation marks omitted). Inadvertence, however, "cannot be the basis for repudiation when the mistake was due to failure to exercise due diligence, [or if it could] have been avoided by the exercise of ordinary care." *Id.*, 20 P.3d 287 (alteration in original and quotation marks omitted). The court stated that "it is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently." *Id.*, 20 P.3d 287 (quotation marks omitted).

As Larsen Beverage correctly points out, the general rules of contract interpretation guide a court's analysis of a stipulation or settlement agreement. A court's purpose in construing a contract is to ascertain the parties' intentions, which are controlling, and courts look to the writing itself to ascertain those intentions. *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶¶ 17-18, 54 P.3d 1139. Where the language used in the contract is unambiguous, "the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 21, 133 P.3d 428 (quotation marks omitted). A contractual term or 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." *Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269 (quotation marks omitted).

The terms of the Stipulated Order are plain and unambiguous; they clearly set forth the parties' intentions. After setting forth the underlying facts, the Stipulated Order provides that "based on her impairment from the accident of August 23, 1993, the parties conclude [Ms. Hutchison] is entitled to a tentative finding of permanent total disability." (R. at 53.) The parties acknowledged that Ms. Hutchison would "be referred to the Utah State Office of Rehabilitation Services for rehabilitation training as provided by Section 35-1-67." (R. at 53.) ERF agreed to place Ms. Hutchison on its payroll and pay her "permanent total disability benefits at the rate of \$227 per week commencing March 1, 2004 and continuing until further order of the Labor Commission." (R. at 53.) Larsen

Beverage agreed to “be responsible for all medical expenses resulting from the industrial accident of August 23, 1993.” (R. at 53.) In the order portion of the Stipulated Order, Judge George ordered ERF to pay Ms. Hutchison permanent total disability benefits with “[s]aid benefits to continue until further order of the Labor Commission.” (R. at 54.) He also ordered Ms. Hutchison to attend rehabilitation training. (R. at 54.) Significantly, counsel for all parties signed the Stipulated Order confirming their “APPROVAL OF STIPULATION AND ORDER.” (R. at 55 (emphasis added).)

There is no ambiguity with respect to Larsen Beverage’s obligation. It agreed to pay all of Ms. Hutchison’s medical expenses. This obligation was not conditional and “all” is not an ambiguous term, *see Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 28, 92 P.3d 768. Larsen Beverage points to the word “tentative” and the term “until further order of the Labor Commission” to argue that its duty was conditional. (*E.g.*, Br. of Appellants at 30, 33-34.) Each instance cited by Larsen Beverage, however, relates to an obligation of Ms. Hutchison or ERF regarding rehabilitation and permanent total disability benefits. The Stipulated Order does not provide Larsen Beverage’s obligation will continue until further order of the Labor Commission nor does it condition the obligation to pay medical benefits upon some future event. The Stipulated Order contains no provision allowing the parties to revisit their division of responsibility. The sole contingency was Ms. Hutchison’s obligation to attend vocational rehabilitation and the effect that might have on payments by ERF. Larsen Beverage has not advanced a contrary interpretation of the Stipulated Order that is reasonably supported by its terms.

See Daines v. Vincent, 2008 UT 51, ¶ 26, 190 P.3d 1269. It unambiguously agreed to pay all of Ms. Hutchison's medical expenses. As the Labor Commission held, "[t]he evidence does not support Larsen[Beverage]'s position that it agreed to be bound based on tentative conditions. (R. at 131.)

Larsen Beverage also argues that because the order portion of the Stipulated Order does not mention the obligation to pay medical benefits, such an obligation must not exist. (Br. of Appellants at 34.) This argument, however, proves too much. Under the law in effect in 1993, a finding of permanent total disability was in all cases tentative until the injured worker underwent an evaluation by the Utah State Office of Rehabilitation. Utah Code Ann. § 35-1-67(5) (1993). Thus, the finding of Ms. Hutchison's permanent total disability was tentative until she could undergo the evaluation. Judge George ordered her to do so. Because the finding of permanent total disability was tentative, the duration of ERF's promise to pay permanent total disability was left open, conditioned on the results of Ms. Hutchison's rehabilitation. Those were the only two provisions which were conditional and the only two that needed to be recited in the order portion of the Stipulated Order. The remaining terms of the parties' bargain, including Larsen Beverage's promise to pay all medical expenses, were already finalized and no further order was necessary.

Larsen Beverage's reliance on *Empey v. Industrial Commission*, 63 P.2d 630 (Utah 1937), and *Continental Casualty Co. v. Industrial Commission*, 210 P. 127 (Utah 1922), is misplaced. (See Br. of Appellants at 35 & nn.6-7.) While those decisions

provide that the Labor Commission does not have jurisdiction to reform an agreement, they did not hold that “the Commission does not even have the jurisdictional ability to enforce or interpret contractual provisions” as claimed by Larsen Beverage. (See Br. of Appellants at 35.) In fact, the *Continental Casualty* court expressly held that the Labor Commission has the authority to enforce a contract.³ The court there held that with respect to an insurance contract, “[t]he commission had no power to do otherwise than to enforce and apply its terms.” *Cont’l Cas. Co. v. Indus. Comm’n*, 210 P. 127, 129 (Utah 1922) (emphasis added). The court further stated that it is “the duty of the commission to enforce the letter of the contract.” *Cont’l Cas. Co. v. Indus. Comm’n*, 210 P. 127, 129 (Utah 1922) (emphasis added).

Larsen Beverage’s argument is further inapposite because it is based on the incorrect assumption that the ALJ and Labor Commission rewrote the Stipulated Order. They did not. They simply enforced the agreement as written, as they are empowered and, indeed, required, to do. Enforcement of the Stipulated Order will not discourage the provision of temporary benefits to injured workers as Larsen Beverage predicts. It may, however, encourage parties to be careful when entering into contracts.

Larsen Beverage also claims that the “confusion” regarding the interpretation of the Stipulated Order may have resulted from the transfer of the case from Judge George

³ The language quoted by Larsen Beverage in footnote 6 of its brief is itself a quotation by the *Empey* court of the holding in *Continental Casualty*. See *Empey v. Indus. Comm’n*, 63 P.2d 630, 635 (Utah 1937).

to Judge La Jeunesse. (Br. of Appellants at 29.) Larsen Beverage seems to argue that this transfer occurred after the January 2007 hearing. Nothing in the Record, however, supports the argument that Judge George presided at the January 2007 hearing. The Record suggests just the opposite--i.e., that it was Judge La Jeunesse who presided at the hearing. The transfer of the case to Judge La Jeunesse followed Judge George's retirement which occurred more than a year before the hearing. (*See supra* note 1.)

Even if Judge George did preside at the hearing, that fact provides no relief to Larsen Beverage. While the ALJ may have indicated at the hearing he would consider issuing an order of reimbursement, no order of reimbursement ever issued. Rather, after having a chance to carefully review the file, including the Stipulated Order, Judge La Jeunesse determined that Larsen Beverage already stipulated to payments that made reimbursement unnecessary and held Larsen Beverage to its agreement. Courts are free to reconsider or change their prior rulings at any time before final resolution of the case. *See, e.g.*, U.R.C.P. 54(b); *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310-11 (Utah Ct. App. 1994). Larsen Beverage's claim that the ALJ overlooked or was unaware of its claim for reimbursement is speculative at best.⁴ Larsen Beverage's stipulation made it unnecessary to make findings under the allocation statute--Larsen Beverage agreed "be responsible for all medical expenses resulting from the industrial accident." (R. at 53.)

⁴ Neither is their Record support for the claim that the Labor Commission overlooked Larsen Beverage's request for reimbursement. (*See* Br. of Appellants at 30.) The Labor Commission specifically addressed Larsen Beverage's argument "that it is entitled to reimbursement and allocation for medical expenses." (R. at 131.)

The Order was plainly not the effect of any confusion following the transfer of the case to Judge La Jeunesse.

The ALJ and Labor Commission had no obligation to order reimbursement of medical expenses under the statute because Larsen Beverage agreed to pay “all” of them. *See Pacheco v. Indus. Comm’n*, 668 P.2d 553, 555 (Utah 1983) (affirming Labor Commission’s enforcement of settlement agreement and decision not to award statutory interest available to claimants under the Workers’ Compensation Act where parties did not include a provision for interest in their agreement). Larsen Beverage has failed to identify any authority requiring reimbursement or application of section 35-1-67(5) (1993) in all cases.

In essence, Larsen Beverage waived its claim for reimbursement. Waiver is the intentional relinquishment of a known right. *Red Cliffs Corner, LLC v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶ 33, 219 P.3d 619. Larsen Beverage knew of the potential reimbursement for medical expenses prior to entering into the Stipulated Order--it had asserted such a claim in its Answer. (R. at 40.) Even so, Larsen Beverage expressly approved the Stipulated Order, demonstrating its intent to relinquish that right by agreeing unconditionally to pay “all” medical expenses.

II. The Court May Similarly Reject Larsen Beverage's Arguments Regarding the Adequacy of the Order and Due Process Violation.

A. The Court need not consider the remaining issues presented by Larsen Beverage because they are raised for the first time on appeal and inadequately briefed.

The Court need not consider the two remaining issues raised by Larsen Beverage.

The first is the alleged violation of Larsen Beverage's due process rights. (Br. of Appellants at 2, 39-40.) The other, although not identified as an issue presented for review, (*see* Br. of Appellants at 1-2), is Larsen Beverage's claim that Order's factual findings and conclusions of law are inadequate, (Br. of Appellants at 38). The Court may disregard these issues for a number of reasons.

First, Larsen Beverage raises both the adequacy of the Order and due process issues for the first time on appeal. It does not appear from the Record that these issues were argued before either the ALJ or Labor Commission. The Court need not consider an issue raised for the first time on appeal. *Ortiz v. Indus. Comm'n of Utah*, 766 P.2d 1092, 1094 (Utah Ct. App. 1989). *See also State v. Dudley*, 847 P.2d 424, 426 (Utah Ct. App. 1993) ("[T]he proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not . . . for the first time on appeal." (quotation marks omitted)). And Larsen Beverage has not argued that the exceptions to this rule (i.e., plain error or exceptional circumstances) are applicable in this case. *See State v. Hodges*, 2002 UT 117, ¶ 5, 63 P.3d 66.

In addition, Larsen Beverage has failed to comply with Rule 24(a)(5) of the Utah Rules of Appellate Procedure. Larsen Beverage did not identify the standard of review for its third issue (adequacy of the Order) as required by Rule 24(a)(5). Additionally, Larsen Beverage failed to comply with subsection (A) of Rule 24(a)(5) which requires a “citation to the record showing that the issue [presented for review] was preserved” below. None of the three issues identified by Larsen Beverage includes the required citation. (*See* Br. of Appellants at 1-2, 38.). Courts need not address the merits of a party’s argument if the party’s brief fails to comply with Rule 24. *See, e.g.*, Utah R. App. P. 24(k); *Burns v. Summerhays*, 927 P.2d 197, 198-99 (Utah Ct. App. 1996).

Beyond the deficiencies described above, Larsen Beverage provides no citation to any authority for either of the two remaining issues, rendering the arguments inadequate. *See State v. Lee*, 2006 UT 5, ¶ 22, 128 P.3d 1179 (“An adequate brief is one that fully identifies and analyzes the issues with citation to relevant legal authority.”); *Burns v. Summerhays*, 927 P.2d 197, 199-200 (Utah Ct. App. 1996) (“In this case, in which the appellant has failed to provide adequate legal analysis and legal authority in support of his claims, appellant’s assertions do not permit appellate review.”). For example, Larsen Beverage does not specify whether its due process claim is made under the federal or state constitution. “For the court to consider a . . . constitutional claim, a litigant must at least define the nature of that protection and provide some argument as to how legal precedent supports its position.” *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 74, 73 P.3d 334. “Mere allusion to . . . constitutional claims, unsupported by meaningful

analysis, does not permit appellate review.” *State v. Dudley*, 847 P.2d 424, 426 (Utah Ct. App. 1993). Larsen Beverage’s conclusory arguments do not permit appropriate review and the Court therefore need not consider them. Nevertheless, ERF addresses these issues below.

B. The Order contains adequate findings of fact and conclusions of law.

Larsen Beverage’s second point is that the Order does not contain adequate factual findings. (Br. of Appellants at 38.) Larsen Beverage also states that the Order is contrary to the evidence. (Br. of Appellants at 23.) But its argument is unavailing. “[F]indings of fact ‘must show that the court’s judgment or decree follows logically from, and is supported by, the evidence.’” *Strate v. Labor Comm’n*, 2006 UT App 179, ¶¶ 16, 21, 136 P.3d 1273. The Order follows logically from the evidence here, specifically the unambiguous terms of the parties’ written agreement. Further, if a litigant does not directly challenge any of the factual findings, appellate courts “will assume that they are supported by the record and [will] not disturb them.” *Ameritemps, Inc. v. Labor Comm’n*, 2005 UT App 491, ¶ 27, 128 P.3d 31.⁵

Judge La Jeunesse adopted in his Order the facts set forth in the Stipulated Order. The Stipulated Order clearly sets forth the underlying facts that resulted in a finding of permanent total disability and an award of benefits. (R. at 52-53.) The Stipulated Order

⁵ As the Court also noted in *Ameritemps*, even if Larsen Beverage had directly challenged the factual findings, it failed to satisfy its duty to marshal the evidence, risking the Court’s refusal to consider the argument. See *Ameritemps, Inc. v. Labor Comm’n*, 2005 UT App 491, ¶ 27 n.5, 128 P.3d 31.

describes Ms. Hutchison's industrial injury, prior injury, and attempts to treat them. (R. at 52.) The Stipulated Order also describes Ms. Hutchison's salary and the status of the parties to this case. (R. at 53.) Simply because the Stipulated Order does not contain a separate section titled "Findings of Fact," does not render the stipulated facts inadequate, as Larsen Beverage seems to argue. (*See* Br. of Appellants at 38.)

Moreover, there was no dispute as to the underlying facts--Larsen Beverage stipulated to them all. Larsen Beverage also stipulated that it would pay "all" of Ms. Hutchison's medical expenses. Larsen Beverage's complaint does not seem to be with the facts underlying the Order, but with the agreement it made by entering into the Stipulated Order. Its regret, however, provides no basis on which to claim that the factual findings in the Order are inadequate or to unwind the Stipulated Order. The facts set forth in the Stipulated Order and incorporated into the Order are "sufficiently detailed" and support the ultimate conclusion reached by Judge La Jeunesse. *See Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 21, 136 P.3d 1273.

The Order similarly sets forth adequate conclusions of law. After the parties entered into the Stipulated Order, the issue remaining for decision was the tentative finding of Ms. Hutchison's permanent total disability, which was conditioned on her vocational rehabilitation. The January 2007 hearing was held to address that issue. (*See* R. at 105 (providing notice of hearing to "Consider the Opinion of the Utah State Office of Rehabilitation").) Again, Larsen Beverage stipulated to the conclusions adopted in the

Order. Judge La Jeunesse then resolved the remaining issue concerning Ms. Hutchison's rehabilitation. (R. at 109.)

Judge La Jeunesse was aware of Larsen Beverage's argument regarding reimbursement, both from its Pre-Trial Disclosures and discussion at the January 2007 hearing. But he, and later the Labor Commission, determined that the Stipulated Order was controlling. They considered, and rejected, Larsen Beverage's claim for reimbursement. This is illustrated by the fact that Judge La Jeunesse indicated he would consider ordering but later determined to hold Larsen Beverage to the terms of its agreement. The Order even quotes paragraph 8 of the Stipulated Order, setting forth Larsen Beverage's agreement to pay "all" of Ms. Hutchison's medical expenses related to the industrial accident. The Order contains adequate conclusions of law and Larsen Beverage's renewed attempt here to undo the deal it bargained for must be rejected.

C. The due process claim is without merit.

Larsen Beverage's final argument is that the Labor Commission erred by omitting Larsen Beverage's Pre-Trial Disclosures from the Record. (Br. of Appellants at 39.) But Larsen Beverage has provided no authority suggesting that the exclusion of material from the Record constitutes a violation of due process rights. It seems instead that the issue is not whether Larsen Beverage was afforded due process, but whether Judge La Jeunesse and the Labor Commission were aware of Larsen Beverage's claim for reimbursement. (See R. at 40 ("[I]t would appear that ALJ LaJeunesse [sic] did not have all the necessary information to review the justiciable matters for review").) Stated another way,

because the Pre-Trial Disclosures were not included in the Record prepared for this appeal, Judge La Jeunesse must not have been aware of them when he issued the Order. This claim is baseless.

Judge La Jeunesse was well-aware of Larsen Beverage's argument regarding reimbursement. According to Larsen Beverage, the claim was presented in writing in both its Answer and Pre-Trial Disclosures. (Br. of Appellants at 10, 39.) Although the Pre-Trial Disclosures may have been omitted from the appellate Record, Larsen Beverage acknowledges that they were entered into the Labor Commission's system and therefore were part of the Labor Commission File. (R. at 40.)

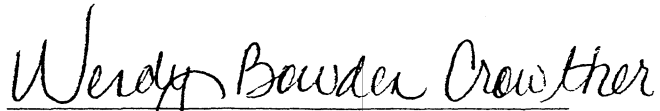
The reimbursement argument was again presented to the Labor Commission as it reviewed Judge La Jeunesse's Order. (R. at 118-20.) The Labor Commission reviewed and specifically addressed Larsen Beverage's claim. (R. at 131.) The omission of the Pre-Trial Disclosures from the Record on appeal in no way indicates that Judge La Jeunesse or the Labor Commission failed to consider Larsen Beverage's claim for reimbursement; Larsen Beverage's claims to the contrary are speculative. Larsen Beverage fails to show how the decisions of Judge La Jeunesse or the Labor Commission would have been different had the Pre-Trial Disclosures been included in the Record on appeal, particularly where those decisions all preceded the compilation of the Record. Further, and importantly, ERF agreed to the result sought by Larsen Beverage's motion to supplement the record. The motion was granted, thus correcting any purported error on appeal. Larsen Beverage's due process claim is therefore meritless.

CONCLUSION

For the foregoing reasons, ERF requests that the decision of the Utah Labor Commission be affirmed.

Dated this 25th day of August 2010.

CLYDE SNOW & SESSIONS

A handwritten signature in cursive script, reading "Wendy Bowden Crowther", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee Employers' Reinsurance Fund to be mailed, via U.S. mail postage prepaid, to the following this 25th day of August 2010:

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