

1990

Kenneth L. Virgin v. Stateline Chevron, Workers Compensation Fund of Utah, Employers' Reinsurance Fund : Brief of Appellee

Utah Court of Appeals

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Richard G. Sumsion; Erie V. Boorman; Attorney for Respondent.

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**COURT OF APPEALS
BRIEF**

DOCUMENT
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IN THE UTAH COURT OF APPEALS
DOCKET NO. 900167-CA

KENNETH L. VIRGIN,

Plaintiff (Petitioner)

vs.

STATELINE CHEVRON and/or WORKERS
COMPENSATION FUND OF UTAH and
EMPLOYERS' REINSURANCE FUND,

Defendants (Respondents).

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Case No. 900167-CA

Priority No.: 7

BRIEF OF DEFENDANT EMPLOYERS' REINSURANCE FUND

**AN APPEAL FROM AN ORDER OF THE INDUSTRIAL COMMISSION
OF UTAH DENYING FURTHER PERMANENT PARTIAL IMPAIRMENT
BENEFITS AS WELL AS TEMPORARY TOTAL BENEFITS**

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TABLE OF CONTENTS

	<u>PAGE</u>
I. JURISDICTION	1
II. NATURE OF PROCEEDINGS	1
III. STATEMENT OF THE ISSUES	1
IV. CONSTITUTIONAL PROVISIONS, STATUTES & RULES.	2
V. STATEMENT OF THE CASE	2
VI. SUMMARY OF ARGUMENT	3
VII. ARGUMENT	4
Point I	4
Point II	6
VIII. CONCLUSION	8

ADDENDUM TABLE OF CONTENTS

	<u>Pages</u>
<u>ADDENDUM:</u>	11
A. Reports & Notes, F. Jackson Millet, M.D. . . .	12, 13, 14
B. Report of Medical Panel	15, 16
C. Order Granting Motion for Review	17, 18, 19

TABLE OF AUTHORITIES

Cases

PAGES

Grace Drilling v. Board of Review, 776 P.2d 63 (Utah App. 1989)	5, 8
Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977)	6
Second Injury Fund v. Streator Chevrolet, 709 P.2d 1176 (Utah 1985)	7
USX Corp. v. Industrial Commission, 781 P.2d 883 (Utah App. 1989)	5
Zimmerman v. Industrial Commission, 785 P.2d 1127 (Utah App. 1989)	7, 8, 9

Statutory Provisions

Utah Code Annotated, Section 35-1-69 (1986)	2, 6, 7
Utah Code Annotated, Section 35-1-86 (1988)	1
Utah Code Annotated, Section 63-46b-16(4)(1988)	1, 2
Utah Code Annotated, Section 78-2a-3(2)(a)(1988)	1

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Case No. 900167-CA

Priority No.: 7

BRIEF OF DEFENDANT EMPLOYERS' REINSURANCE FUND

I. JURISDICTION

This Court has jurisdiction to hear this matter under Utah Code Annotated, Sections 35-1-86 (1988), 63-46b-16 (1988) and 78-2a-3(2)(a)(1988).

II. NATURE OF PROCEEDINGS

Applicant has petitioned this Court for Review of a Final Order of the Utah Industrial Commission issued February 22, 1990 which denied his claim for injuries allegedly sustained in an industrial injury on June 15, 1986.

III. STATEMENT OF THE ISSUES

The issues in this controversy are two-fold:

(1) Whether the determinations of fact made by the Commission are supported by substantial evidence when viewed in the

light of the whole record before the Court?

(2) Whether the Commission has correctly interpreted and applied appropriate Utah Workers' Compensation Law to the facts so determined?

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Utah Code Ann., Section 35-1-69 (1986).
2. Utah Code Ann., Section 63-46b-16(4) (1988).

V. STATEMENT OF THE CASE

The basic pertinent facts in this controversy are not in serious dispute and essentially are set forth in the Brief of Respondent Workers Compensation Fund of Utah. By way of supplementation, however, as the recognized facts pertain to plaintiff's claims against Defendant Employers' Reinsurance Fund (hereafter called "ERF"), the following are particularly significant:

1. There is no medical opinion or evaluation in the record which attributes any permanent impairment to plaintiff's industrial accident of June 15, 1986:

- (a) Dr. F. J. Millet's records showing plaintiff's first medical treatment aside from the initial unreported examination by Dr. Morris clearly refers only to groin injury from his accident almost nine (9) months earlier. Dr. Millet does refer specifically, however, to aseptic necrosis disease in both of plaintiff's hips. His only etiology for that bilateral hip disease was plaintiff's past alcohol ingestion. (Addendum A)
- (b) The Medical Panel Report dated January 26, 1989, by Dr. Craig McQueen specifically states that the industrial incident of June 15, 1986 contributed no

permanent impairment to either of plaintiff's hips. Dr. McQueen further assessed each hip with permanent impairment of 40% (16% whole person) all of which was attributable to his avascular necrosis and was pre-existing to the June 15, 1986 industrial incident. (Addendum B).

- (c) Dr. McQueen's testimony at the August 30, 1989 hearing also supports the Commission's finding of no permanent impairment attributable to the second injury. On direct examination, Dr. McQueen reiterated his opinion expressed in the Panel Report that plaintiff's hip disease was bilateral and that all of the permanent impairment to plaintiff's hips was pre-existent and attributable entirely to the disease. When the Administrative Law Judge - after cross examination by plaintiff's counsel did not elicit any change in the Doctor's opinion - suggested the "possibility" that a 5% permanent impairment might reasonably be attributed to the 1986 industrial incident, Dr. McQueen responded that it "might be reasonable". However, on redirect examination, Dr. McQueen once more repeated his medical opinion that none of plaintiff's hip permanent impairment was attributable to his 1986 industrial injury. (R. 141, 142)
- (d) Even Dr. Morris' belated report of February 2, 1988 refers only to a groin strain in injury, with no indication that plaintiff was struck in the hip with "assessment of moderate to severe muscle contusion."

2. The record shows the Commission's factual determination was made after review of the entire record, including the Medical Reports and the Hearing testimony. (Addendum C)

VI. SUMMARY OF ARGUMENT

Defendant Employers' Reinsurance Fund refers to and adopts in its entirety the arguments set forth by defendant Workers' Compensation Fund of Utah in its Brief heretofore filed with This Court. In addition, however, this defendant emphasizes the following arguments which are directly applicable to the liability

of Employers' Reinsurance Fund in this case:

1. There is substantial - indeed overwhelming - evidence in the record when viewed as a whole to support the Commission's determination that there was no permanent impairment attributable to plaintiff's industrial injury of June 15, 1986.
2. It was a proper application of Utah Workers' Compensation Law that where there is no permanent impairment attributable to the industrial injury, there is no Employers' Reinsurance Fund liability for pre-existing impairment of any kind.

VII. ARGUMENT

POINT I

THERE IS SUBSTANTIAL - INDEED OVERWHELMING - EVIDENCE IN THE RECORD WHEN VIEWED AS A WHOLE TO SUPPORT THE COMMISSION'S DETERMINATION THAT THERE WAS NO PERMANENT IMPAIRMENT ATTRIBUTABLE TO PLAINTIFF'S INDUSTRIAL INJURY OF JUNE 15, 1986.

The Industrial Commission specifically found that "applicant's entire ratable impairment pre-existed the industrial accident of June 15, 1986, and that the accident did not contribute to applicant's impairment." (Addendum C)

The Commission also asserted that it had reviewed the entire file including the Medical Panel Report and the record of testimony at the Hearing on Objections to the Medical Panel Report. The Commission, having reviewed the entire file, the medical reports and the Medical Panel Report, as well as the testimony at the Hearing on Objections to the Medical Panel Report, determined to adopt the findings of the Panel Report. The Commission followed with its findings that plaintiff's industrial accident of June 15, 1986, did not contribute to his permanent hip impairment and denied

his claim for compensation benefits.

As indicated above, there is the requisite "substantial evidence" in the record to support the Commission's determination. The Commission's factual determination is supported by "substantial evidence when viewed in light of the whole record before the Court" within the requirements of the Utah Administrative Procedures Act and as set forth in Grace Drilling Company v. Board of Review, 776 P.2d 63, 66 (Utah Ct. App. 1989). See also USX Corp., v. Industrial Commission, 781 P.2d 883 (Utah Ct. App. 1989). There, as here, the Commission reversed a decision of its Administrative Law Judge and in doing so the Commission identified other evidence in the record which supported its contrary conclusion. Id. add 887. In that case, This Court affirmed the Commission's decision because the facts relied upon by the Commission reasonably supported its conclusion.

In summary, plaintiff has submitted no ratings or opinions which would support his contention that his industrial accident of 1986 in fact contributed to his permanent partial hip disability. On the other hand, defendants have set forth medical reports, including the Medical Panel Report, to the effect that all of plaintiff's ratable impairment pre-existed his 1986 industrial injury and that the industrial injury did not contribute to any of his permanent impairment. Since such factual determination is within the province of the Commission and since such determination also is within its area of particular expertise, the Commission's finding in this respect has fully satisfied the requirements

pertaining to review and its decision was both reasonable and rational within the review requirements pertaining to agency decisions. It is this defendant's position, therefore, that the Commission's determination should be upheld.

POINT II

IT WAS A PROPER APPLICATION OF UTAH WORKERS' COMPENSATION LAW THAT WHERE THERE IS NO PERMANENT IMPAIRMENT ATTRIBUTABLE TO THE INDUSTRIAL INJURY, THERE IS NO EMPLOYERS' REINSURANCE FUND LIABILITY FOR PRE-EXISTING IMPAIRMENT OF ANY KIND.

It is now well established Utah Workers' Compensation Law that there can be no recovery for pre-existing impairments under Section 35-1-69 Utah Code Annotated (since repealed) unless there is permanent impairment attributable to the industrial injury. In the first place, the language of former Section 35-1-69 clearly sets forth that requirement:

- (1) If any employee who has previously incurred a permanent incapacity by incidental injury, disease, or congenital causes, sustained an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only.

The above languages was interpreted as early as 1977 by the Utah Supreme Court in Intermountain Health Care, Inc., v. Ortega, 562 P.2d 617 (Utah 1977) where it was held that any measurable increase in permanent impairment will satisfy the

"substantially greater" test sets forth in the Statute. See also Second Injury Fund v. Streater Chevrolet, 709 P.2d 1176, 1181 (Utah 1985) where the Utah Supreme Court found that compensation is required under Section 35-1-69 (1). "If the industrial injury results in permanent impairment that is aggravated by or aggravates a pre-existing permanent impairment to any degree" (Emphasis supplied).

Finally, in the recent case of Zimmerman v. Industrial Commission, 785 P.2d 1127 (Utah App. 1989) where the Commission found - as here - that no permanent impairment was found to have resulted from the industrial injury itself or in combination with the prior existing conditions, This Court affirmed the denial of benefits saying:

Because the industrial accident did not result in a permanent impairment, the Board correctly denied Zimmerman permanent benefits. . . . If there had been any aggravation, or if a combination of pre-industrial accident conditions and industrial accident injuries met the requisite statutory percentages of impairment, Zimmerman would have been entitled to compensation However, the Commission found otherwise, and its findings are supported by substantial evidence.

It is the contention of defendant Employers' Reinsurance Fund that the legal principles involved in this controversy fall squarely within the rationale of the cases above set forth and that where, as here, there has been a determination that the industrial injury resulted in no permanent impairment, there can be no recovery for pre-existing impairment as contended by plaintiff in this case.

VIII. CONCLUSION

As previously set forth, defendant Employers' Reinsurance Fund agrees with and adopts the positions and arguments set forth in the Brief of Defendant Workers' Compensation Fund of Utah. However, with respect to the compensation liability directly affecting this Defendant, the principal issues are two-fold:

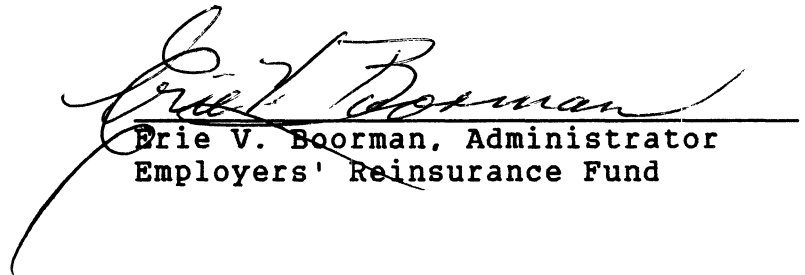
- (1) Whether or not there is substantial evidence in the record when viewed as whole to support the determination by the Commission that all of plaintiff's ratable permanent impairment was pre-existing to his June 15, 1986 industrial injury and that none of plaintiff's permanent impairment was attributable to that industrial injury; and
- (2) Whether there it was a proper application of Utah Workers' Compensation Law that where there is no permanent impairment attributable to the industrial injury there is no Employers' Reinsurance Fund liability for pre-existing impairments of any kind.

With respect to the first of those issues, the Commission made a clear cut determination that all of plaintiff's permanent impairment was pre-existing and that the industrial injury of June 15, 1986 contributed no permanent impairment. That determination was made by the Commission after a complete review of the entire record, including the Medical Reports, the Medical Panel Report, and the evidence presented at the Hearing on Objections to the Panel Report. There was in that record substantial evidence to support the Commission's determination; therefore, under the appropriate standards of review for this injury as set forth in the Grace Drilling Company Case, supra, as implemented by the recent Zimmerman v. Industrial Commission, supra, decision, the determination of the Commission properly should be upheld.

With respect to the second issue, the Commission properly applied established Utah Workers' Compensation Law in holding that where the industrial injury results in no permanent impairment there can be no recovery for any pre-existing impairment. The recent Decision of This Court in the Zimmerman case is direct and clear authority on this point.

In view of the above, defendant Employers' Reinsurance Fund respectfully submits that the Decision of the Industrial Commission in this controversy should be affirmed and that plaintiff's Petition for Review should be denied.

Respectfully submitted this 24th day of August, 1990.


Eric V. Boorman, Administrator
Employers' Reinsurance Fund

CERTIFICATE OF DELIVERY

I certify that I hand-delivered four (4) copies of the foregoing Brief of Defendant Employers' Reinsurance Fund to the following this 24th day of August, 1990.

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Attorney for Plaintiff
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Salt Lake City, Utah 84111

Richard G. Sumsion, Esq.
Attorney for Defendant WCFU
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P. O. Box 45420
Salt Lake City, Utah 84145-0420

INDUSTRIAL COMMISSION OF UTAH

By 

Erie V. Boorman, Administrator
Employers' Reinsurance Fund

A D D E N D U M

INDUSTRIAL COMMISSION OF UTAH
160 East 300 South, P.O. Box 45580
Salt Lake City, Utah 84145-0580

TO BE FILLED OUT BY EMPLOYER OR EMPLOYEE
pursuant to Sec. 35-1-98 Utah Code
and Rule 2 of the Industrial Commission's Rules and Regulations.

ORIG. IND. COMM. CC: INSURANCE CARRIER CC: EMPLOYEE

PHYSICIAN'S INITIAL REPORT OF WORK INJURY OR OCCUPATIONAL DISEASE

INSURANCE COMPANY (IF NAME NOT KNOWN CALL EMPLOYER) <i>Walter Comp. Fund</i>		Do NOT Use This Space CLAIM NO.	
ADDRESS			
PATIENT	1 WORKER'S FIRST NAME <i>KENNETH</i>	MIDDLE INITIAL <i>L</i>	LAST NAME <i>VIRGIN</i>
	2 STREET ADDRESS <i>Box 1088 Wendover</i>		STATE <i>UT</i>
	3 EMPLOYER (PRINT OR TYPE BUSINESS NAME) <i>STATELINE CHAIRMAN</i>		ADDRESS <i>P.O. Box 145 Wendover UT 89405</i>
HISTORY	4 DATE INJURED <i>6-15-86</i>	HOUR <i>PM</i>	5 LAST DATE WORKED <i>STILL WORKING</i>
	6 WAS THIS PART BEEN INJURED BEFORE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
	7 WORKER'S STATEMENT OF CAUSE OF INJURY OR ILLNESS <i>INSTALLING AN ENGINE IN A LINCOLN I PULLED A MUSCLE IN LEFT LEG</i>		
EXAMINATION	8 DESCRIBE COMPLAINTS <i>CAN HARDLY WALK, BEND KNEE.</i>		
	9 FINDINGS OF EXAMINATION <i>PMN hip - L > R</i>		
	10 X-RAYS? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO FINDINGS <i>Aseptic necrosis & collapse L > R.</i>		
TREATMENT	11 DIAGNOSIS <i>↑</i>		
	12 IS THE CONDITION REQUIRING TREATMENT THE RESULT OF THE INDUSTRIAL INJURY OR EXPOSURE DESCRIBED? <input type="checkbox"/> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> UNDETERMINED		
	13 DATE FIRST TREATMENT <i>9-8-87</i>		
DISPOSITION	14 TYPE OF TREATMENT <i>Eval + X-ray + meds</i>		
	15 IF HOSPITALIZED <input type="checkbox"/> IN <input type="checkbox"/> OUT <input type="checkbox"/> PATIENT <input type="checkbox"/> PATIENT		
	16 IF CASE REFERRED TO ANOTHER DOCTOR NAME AND ADDRESS		
DISPOSITION	17 IS CONDITION MEDICALLY STATIONARY? <input type="checkbox"/> YES <input type="checkbox"/> NO		
	18 IS ANY FURTHER TREATMENT REQUIRED? <input type="checkbox"/> YES <input type="checkbox"/> NO		
	19 WILL INJURY CAUSE PERMANENT IMPAIRMENT? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNDETERMINED		
DISPOSITION	20 HAS OR WILL THE INJURY CAUSE ONE OR MORE FULL DAYS WORK TO BE MISSED (BEYOND THE DATE OF INJURY)? <input type="checkbox"/> YES <input type="checkbox"/> NO		
	21 IF YES HAS OR WILL THE INJURY CAUSE FOUR OR MORE FULL DAYS WORK TO BE MISSED? <input type="checkbox"/> YES <input type="checkbox"/> NO		
	22 DATE RELEASED FOR WORK <i>9-25-87</i>		
23 REMARKS <i>Will need surgery sometime</i>			
24 TYPE NAME OF PHYSICIAN AND DEGREE <i>F. Jackson Miller, M. D.</i>		25 ADDRESS <i>745 East 300 South, SLC, UT. 84102</i>	
26 TELEPHONE NUMBER <i>328-7100</i>		27 MEDICARE PROVIDER NUMBER	
28 DATE <i>9-25-87</i>		29 SIGNATURE OF PHYSICIAN <i>[Signature]</i>	

GENERAL HISTOR.

DATE 7-8-87

NAME Vargen, Kenneth ADDRESS Box 1088 Phone 801 665-22
 Birth Date 6-20-45 Ref. by Wendover, Lt 8408
 Age 42 Sex M Civil State Utah Nativity Utah Occupation Mechanic
 Responsible Individual Ken State Line Chevron

Family History

Marital History

Menstrual History—Age onset Reg. Irreg. Duration of Irregularity Interval Duration of Flow

Pain Leucorrhea 0 1 2 3 4

Date of Last Period

Diseases Mumps Measles Chickenpox Whooping Cough Smallpox
 Diphtheria Scarlet Fever Pneumonia Typhoid Fever Tuberculosis
 Tonsillitis Rheumatic Fever Pleurisy Leus. Gun.

Former Operations

Urinalysis Specific Gravity Reaction Albumen Sugar Microscopic Exam.

Erythrocytes Leukocytes Hemoglobin Gm. Sed. Rate mm/hr. C. V.

Corrected mm/hr. B. En. St. Seg. L. Mon.

Chief Complaint allergic to Keflex, cortisone Height Weight Temp.

9-8-87 pulled muscle in L leg about June last year

42 year old gentleman gives a history of pain in the left leg since June 1986. At that time he was apparently trying to put an engine in a car, slipped and twisted and was diagnosed of pulling muscles in the left leg.

He has continued to having pulled muscles in the left leg. He has continued to have some symptoms, however, in the left leg particularly with activities, he denies any other trauma.

He takes medicines and vitamins for weight loss. He had a Cortisone shot remotely. Has been a heavy drinker in the past, but of late has not had as much to drink, two or three wine coolers per evening.

PE: Revealed a pleasant man, He has difficulty getting around, and pain with most motions of the left hip.

ROM is from 0-35° and he abducts to 40 and internally rotates about 10 with pain, externally rotates 35° with pain.

Pelvis - left hip and femur, show the patient to have severe aseptic necrosis of the the left femoral head and he also has aseptic necrosis of the right femoral head.

I have explained the situation to him and it is my feeling that this is probably on the basis of his alcoholism, and

ADV: I have suggested to him that total-hip-replacement should be performed when he feels symptoms warrant, or should postpone that as long as reasonable.

He will advise me as needed.

12/7/87 Hyman = 50 14.1122 2 gm/dl H
 12/23/87 Hyman = 50 14.1122 2 gm/dl H
 1/9/87 Hyman = 50 14.1122 2 gm/dl H
 1/30/87 Hyman = 30 14.1122 2 gm/dl H

9-18-87 VIRGIN, KENNETH
22780

I
By telephone on 9-18, I talked to Ken. He said he is having a lot of pain in his hips. He wants them both replaced. I didn't feel like he understood the potential problems of doing this in a 42-year-old and I've discussed these with him in some detail, first of all indicating that he should not have them replaced at his age until there is no other option. Secondary, notifying him that in some cases there is infection which presents a major problem and often loosening if he is too active. I've suggested that he treat this symptomatically I've given him a prescription of Naprosyn and Hycodapnen. He is going to advise me.

F. JACKSON MILLET, M.D.
TL 458

Back up!! 11/30/87 another page.

2/21/87 Hyphen #30 added 2/21/87

1/11/88 Hyphen #30 added 3/9/88

*2-1-88 James A. Cox, MD 119 Dr. David Johnson -
Carmichael, Nev*

FJM

1-2-88 VIRGIN, KENNETH 22780

Hx: --- No note on this one.

F. JACKSON MILLET, M.D./TL463/B-4

CRAIG W. McQUEEN, M.D.
DAVID E. CURTIS, M.D.
ROBERT P. HANSEN, JR., M.D.
GARY A. ZELUFF, M.D.

JOHN J. SPORTS MEDICINE CLINIC
ADULT & CHILDREN ORTHOPEDIC SURGERY & FRACTURES
MEDICAL TOWERS BLDG. SUITE 308
1060 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84102

HOURS OF APPOINTMENT
PHONE (801) 322-2451

January 26, 1989

Gilbert A. Martinez
Administrative Law Judge
INDUSTRIAL COMMISSION OF UTAH
P.O. Box 45380
Salt Lake City, Utah 84145-0580

530-50-4647
RE: Kenneth L. Virgin
EMP: Stateline Chevron
INJ: 6-15-86

Dear Judge Martinez:

Kenneth Virgin had an injury on June 15, 1986 when he was hit in the hip by an engine swinging on a chain. He was treated initially with a muscle relaxant, but he progressively worsened over the next year, saw Dr. Millet who told him that both of his hips were bad and then he was seen in Carson City, Nevada and apparently underwent a total hip replacement on the right. He had some temporary disability as a result of this, but apparently went to work about 1 month after his hip was replaced. His hip is doing well at the present time. He's had some loss of motion, but the other hip started acting up 4 months ago and this has been giving him some problems recently. He's had no history of illnesses of any significance. He's had no steroid therapy. He's done no underground work and I can find no etiology for this patient who seems to have some evidence of a bilateral femoral head avascular necrosis.

HE'S ALLERGIC TO KEFLEX, is taking Norgesic Forte, has had the previous hip and right arm surgery, no significant medical problems.

ON EXAMINATION he does have significant changes in his legs. On the left leg he has 45° of abduction, on the right 30° of abduction. On the left 20° of adduction, on the right 20° of adduction. On the left he has 0° of flexion and the right 0°. He has 90° of extension bilaterally. On the left he has 45° of internal rotation, on the right he has 0. He has 45° of external rotation on the right and 45° on the left. His right hip has a 30° flexion contracture. There's a 0° flexion contracture on the left. So he has bilateral hip disease.

AND, ON HIS X-RAY FILMS he has bilateral aseptic necrosis of the femoral heads with secondary degenerative changes.

I would say in question one that the patient did suffer an injury to his hip during the June 15, 1986 accident which aggravated his pre-existing avascular necrosis. So I do not feel that his May 25, 1988 surgery was necessitated by the industrial accident. I think perhaps it happened sooner than it would have had he not had an injury, but I feel he would have ultimately have needed surgery on this in spite of any industrial injury.

January 20, 1989

The period of time during which the applicant was temporarily totally disabled, I'd say following the initial injury that he would have had a period of time for 3 to 4 weeks where he could have had a temporary total disability, but I do not feel that the disability following his surgery was due to the industrial accident, and I think the period from May 18, 1988 to June 15, 1988 would have been a reasonable period of time for the injury due to the industrial accident.

Since I do not feel that he had an industrial injury that caused his hip problems I do not think that he had any permanent physical impairment directly caused by the industrial accident. The percentage of permanent physical impairment directly attributable to the pre-existing conditions would be approximately a 40% permanent partial impairment of the left hip. He would have the same on the right hip, but these would be pre-existing.

I do agree that the industrial accident of June 15, 1986 did aggravate his pre-existing condition, but was not causally related to his avascular necrosis.

Sincerely,


Craig H. McQueen, M.D.

CHM/js

Enclosure

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 88000646

KENNETH L. VIRGIN,

Applicant,

vs.

STATELINE CHEVRON and/or
WORKERS' COMPENSATION FUND, and
EMPLOYERS' REINSURANCE FUND

Defendants.

ORDER GRANTING

MOTION FOR REVIEW

The Industrial Commission of Utah on motion of the Defendants, Stateline Chevron and/or Workers' Compensation Fund and Employers' Reinsurance Fund of Utah, reviews the Order of the Administrative Law Judge in the above entitled matter dated September 5, 1989, pursuant to Utah Code Annotated, Sections 35-1-82.53 and 63-46b-12.

On September 5, 1989, an Administrative Law Judge of the Industrial Commission entered Findings of Fact, Conclusions of Law, and Order in the above captioned case awarding temporary total disability, permanent partial disability, and medical expense benefits to Applicant, Kenneth L. Virgin, and attorney fees to Applicant's counsel, LeRoy K. Johnson. On September 29, 1989, the attorney for Defendant Employers' Reinsurance Fund filed a Motion for Reconsideration and/or Motion for Review objecting to the allocation of 5% permanent partial impairment to the industrial accident and 35% to Applicant's preexisting medical condition. On October 3, 1989, the attorney for Defendant Workers' Compensation Fund of Utah filed a Motion for Review objecting to the award of temporary total disability and medical expense benefits and the award and allocation of permanent partial disability benefits. This latter Defendant also objected to the admission of medical testimony couched in terms of medical possibility rather than medical probability as constituting surprise which, because Defendant had no reason to anticipate, Defendant had no opportunity to rebut by expert medical opinion.

The Commission is of the opinion, based on the medical panel report and the record of testimony at the Hearing on Objections to the Medical Panel Report, that no industrial benefits are due on account of the injury for which Applicant now seeks compensation. A brief review of the file follows.

KENNETH L. VIRGIN
ORDER
PAGE TWO

Applicant was injured on June 15, 1986, in the course of his employment as a service station manager and mechanic. While he was reinstalling an automobile engine, the chain on which the engine was supported snapped, allowing the engine to swing into Applicant's left side and knock him down. Applicant experienced some soreness, but did not immediately seek medical assistance as there was no bleeding or breakage of skin. Three days later he sought medical advice from a physician's assistant at a local clinic and was treated for moderate to severe muscle contusion. Two to three months after the accident, he began to experience a gradual worsening of pain that culminated in total left hip replacement on May 26, 1988. Applicant paid for the medical expenses of the surgery from his own pocket.

On August 1, 1988, by and through counsel, Applicant filed an Application for Hearing with the Commission, claiming additional temporary total disability, additional medical benefits, and additional permanent partial disability. An evidentiary hearing was held on November 16, 1989, and the Administrative Law Judge referred the case to a Medical Panel for determination of medical causation. The Medical Panel Report, dated January 29, 1989, stated that while the industrial accident may have aggravated Applicant's pre-existing asymptomatic avascular necrosis, it was not causally related. It further stated that no permanent physical impairment was directly caused by the industrial accident and that the period of disability following the surgery was not due to the industrial accident. On March 10, 1989, Applicant filed Objections to Medical Panel Report, alleging that the lack of causal relationship between the accident and the preexisting condition is irrelevant where the accident "lights up" an asymptomatic preexisting condition. A Hearing on Objections to the Medical Panel Report was held on August 30, 1989. At that hearing, the chairman and sole member of the Medical Panel restated his opinion that all of Applicant's rateable impairment is due to his preexisting condition, although he agreed with the Administrative Law Judge's suggestion that of the 40% permanent disability, attributing 5% to the industrial injury "might be reasonable."

Because the Commission finds that no industrial benefits are due on account of Applicant's injury, the Commission hereby adopts the report of the Medical Panel that Applicant's entire ratable impairment preexisted the industrial accident of June 15, 1986, and that the accident did not contribute to Applicant's impairment.

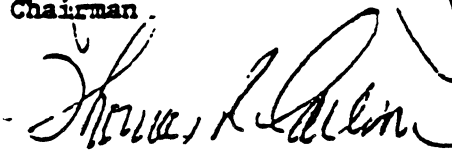
IT IS THEREFORE ORDERED that the Defendants' Motions for Review are hereby granted and the Administrative Law Judge's Order of September 5, 1989, is revoked in full.

KENNETH L. VIRGIN
ORDER
PAGE THREE

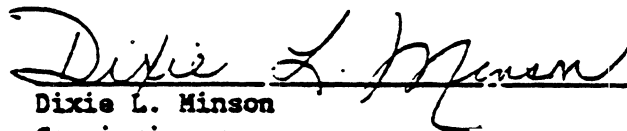
Any appeal shall be to the Utah Court of Appeals within thirty (30) days of the date hereof, pursuant to Utah Code Annotated Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. Any appeal to the Utah Court of Appeals requires a deposit with the Industrial Commission of the estimated dollar amount of the cost of the hearing transcript.



Stephen M. Hadley
Chairman



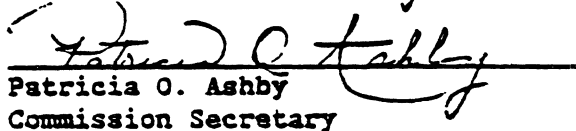
Thomas R. Carlson
Commissioner



Dixie L. Minson
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah this
22nd day of February, 1990.

ATTEST:


Patricia O. Ashby
Commission Secretary

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