

1990

Kamas Valley Co-op and National Farmers Union v. Industrial Commission of Utah and Employers' Reinsurance Fund : Brief of Defendant

Utah Court of Appeals

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Henry K. Chai II; Snow, Christensen and Martineau; Attorneys for Plaintiffs.

Erie V. Boorman; Employers' Reinsurance Fund.

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IN THE UTAH COURT OF APPEALS

KAMAS VALLEY CO-OP and
NATIONAL FARMERS UNION,

Plaintiffs/Petitioners,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH and EMPLOYERS' REINSURANCE
FUND,

Defendants/Respondents.

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Case No. 900182-CA

Priority No. 7

BRIEF OF DEFENDANT EMPLOYERS' REINSURANCE FUND

APPEAL FROM INDUSTRIAL COMMISSION OF UTAH DECISION

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Case No. 900182-CA

Priority No. 7

BRIEF OF DEFENDANT EMPLOYERS' REINSURANCE FUND

I. JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated, Sections 78-2a-3(2)(a).

II. STATEMENT OF THE ISSUES

In June, 1984 employer/carrier, with ready access to all relevant medical data, prepared and submitted for agreement by (1) injured employee, L. B. Cornell, (2) Second Injury Fund (now Employers' Reinsurance Fund), and (3) Industrial Commission a Compensation Agreement setting forth the allocation of compensation liability between the employer/carrier on the one hand and Second Injury Fund on the other. That agreement was approved for payment on June 22, 1984 (R. 18) and payments under the same were made by the employer/carrier and the Second Injury Fund.

The sole issue in this controversy:

Can the employer/carrier 5 (five) years later renege on that Compensation Agreement and assert as against the Second Injury Fund an entirely different percentage allocation of liability?

III. DETERMINATIVE STATUTE

This case arose pursuant to Section 35-1-78 Utah Code Annotated which read as follows:

The powers and jurisdiction of the Commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or Orders with respect thereto, as in its opinion may be justified, provided, however, that records pertaining to cases, other than those of total permanent disability or where a claim has been filed as in Section 35-1-99, which have been closed and inactive for a period of 10 years, may be destroyed at the discretion of the Commission.

Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

Plaintiff has asserted also that Utah Code Annotated Section 35-1-69, controls in the allocation of liability in this controversy. It is the position of Defendant Employers' Reinsurance Fund that 35-1-69 has no application in view of the Compensation Agreement referred to above as observed by all parties during the 5 (five) years since the Agreement was executed by the parties and as approved and ordered by the Industrial Commission.

IV. STATEMENT OF THE CASE

The basic pertinent facts in this controversy are not in serious dispute and essentially may be set forth as follows:

1. L.B. Cornell (hereinafter called "applicant") sustained an industrial accident while employed by Kamas Valley Co-Op (hereinafter called "Plaintiff") on January 30, 1984. According to applicant, he was on a short ladder helping to apply decals when "I slipped on the ladder rather violently and caught myself prior to hitting the ground, and immediately I had sharp pains into my hip and buttocks." (R. 43)
2. Applicant, upon instructions from Plaintiff, went first to his chiropractor in the Kamas, Utah area but received no relief from his pains (R. 46). Applicant finally requested referral to a medical doctor at the Heber Hospital, where he was attended for some time by treating physician, Dr. N.J. Burton (R. 47 & 168). The record of treating physician, Dr. Burton shows continued care and examination from date of admission February 7, 1984 through date of discharge February 21, 1984 (R. 168). That record obviously was at all times available to the Plaintiff employer, including several references in the one page Discharge Summary Report to applicant's prior history of peptic ulcer disease (R. 168).
3. The same discharge report shows also the referral of applicant to Dr. Thoen in Salt Lake City for neurological consultation.
4. The record shows applicant testified (R. 48, 49) of the visit to Dr. Thoen, the referral to Dr. Robert Lamb and finally the surgery performed on applicant's back by Dr. Lamb on February 24, 1984.
5. Plaintiff employer accepted compensation liability from the beginning on this case and paid temporary total disability benefits from January 31, 1984 through June 12, 1984. Plaintiff through its carrier (also called "plaintiff" hereafter) apparently reviewed its medical records on applicant and requested a permanent partial impairment rating from Dr. Lamb. Dr. Lamb's response, (attached hereto as Addendum 1), contained his overall evaluation - without any breakdown - of 35% permanent partial disability.
6. Plaintiff carrier, on May 30, 1984, requested Dr. Lamb for a breakdown of the permanent partial impairment rating and received by letter dated June 13, 1984, Dr. Lamb's opinion that 50% of applicant's disability was due to his pre-existing injury. (Addendum 2)

7. Plaintiffs thereupon prepared a Compensation Agreement providing for allocation between Plaintiff and Defendant of 50% each for a permanent partial disability rating of 35% and secured applicant's agreement to that Compensation Agreement. The Agreement was then presented to the Second Injury Fund which on June 22, 1984 approved the allocation of permanent partial disability to pre-existing conditions of 17.5% which was 1/2 of the permanent partial disability agreed upon. Since the Law requires and since the Compensation Agreement specifically provided "that this agreement becomes binding and effective only when it is approved by the Industrial Commission", the executed Compensation Agreement was presented for the approval of Industrial Commission which was obtained on June 22, 1984. (A copy of that Compensation Agreement is attached as Defendant's Addendum 3).
8. Pursuant to the approved Compensation Agreement, the then Administrator of the Second Injury Fund issued Order Requiring Payment from the Second Injury, which was passed by the Industrial Commission on June 29, 1984. That Order specifies payment by the Second Injury Fund of the pre-existing permanent partial impairment of 17.5% and further ordered reimbursement to plaintiff's of 50% . Finally, that Order specifically provides as follows:

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days from the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal. (That Order is attached as Defendant's Addendum 4).
9. In early 1988, applicant developed a reoccurrence of his back pain and discomfort (R. 55-58). According to his testimony, he got in touch with the Utah Industrial Commission who gave him permission to seek Arizona medical attention. He requested from the Industrial Commission a reinstatement of medical and other benefits. According to a letter from Plaintiff's Utah Counsel to the Industrial Commission dated November 28, 1988 (Defendant's Addendum 5), Plaintiff carrier resumed benefits to applicant and sought medical reports by way of verification. According to Plaintiff's November 28, 1988 letter, there was some medical evidence indicating a new injury to applicant in January, 1988 which prompted Defendant carrier to deny liability for any reinstatement of benefits. Moreover, as late as November 28, 1988, Plaintiffs referred to the Compensation Agreement as requiring 50% contribution by

the Second Injury Fund (defendant herein), thus indicating Plaintiffs continued intention to honor the provisions of the 1984 Compensation Agreement it had prepared and processed for approval and Order by the Industrial Commission.

10. Pursuant to the Application for Hearing filed by the applicant, a hearing was held before the Administrative Law Judge on February 10, 1989. (R. 39)
11. After the Hearing, Judge Allen referred the matter to a Medical Panel to determine whether or not applicant was entitled to additional permanent partial impairment compensation.
12. The Medical Panel Report (R. 273) did not endeavor to disturb the allocation already found in the Compensation Agreement with respect to the 35% permanent partial impairment agreed upon by the parties other than to say that there had been no increase in that impairment since the original Agreement.
13. Upon receiving the Medical Panel Report, Plaintiffs asserted, despite their prior Agreement as to allocation of responsibility, that the Medical Panel's finding of 10% impairment due to pre-existing peptic ulcer must be included in the apportionment formula. This assertion was made despite the fact that full knowledge of the peptic ulcer was available to the Plaintiffs prior to Plaintiff's preparation and processing - for Industrial Commission approval and Order - of the June 22, 1984 Compensation Agreement (R. 168 - See Dr. Burton's early reports following referral of applicant for treatment and subsequent surgery).
14. Defendant Employers' Reinsurance Fund filed its response to the claim of Plaintiffs for Amendment to the previously agreed reapportionment allocation in the Compensation Agreement (Defendant's Addendum 6).
15. On October 3, 1989, Judge Allen issued his Findings of Fact, Conclusions of Law and Order in which he found that the applicant was not entitled to additional permanent partial impairment and therefore, that there was no basis for changing the reapportionment set forth in the earlier Compensation Agreement (Addendum 7).
16. Applicant did not file a Motion for Review of Judge Allen's Order of October 3, 1989 and, thus was precluded from asserting any claim for additional permanent partial

impairment. However, on October 11, 1989, Plaintiff filed its Motion for Review asserting that it was entitled to a reallocation of the apportionment of liability because of the Medical Panel's findings (R. 294).

17. The matter was considered by the full Commission and on March 5, 1990, the Commission's Order Denying Motion for Review was issued (R. 303). On April 3, 1990, Plaintiffs filed with the Court of Appeals a Petition for Review of the Industrial Commission March 5, 1990 Order (R. 306, 309).

V. SUMMARY OF ARGUMENT

It is the position of defendant Second Injury Fund as follows:

1. There is no legal basis for any award of permanent partial disability benefits to the applicant. The Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge dated October 3, 1989 held that applicant was not entitled to any further benefits as the result of his industrial accident of January 30, 1984 (Defendant Addendum 7). As usual, that Order specified that "any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, . . and, unless so filed, this Order shall be final and not subject to review or appeal." No appeal was taken by applicant to that Order. In addition, the Order Denying Motion for Review which was filed by Plaintiffs Kamas Valley Co-Op and/or National Farmers Union, sustained the Order of the Administrative Law Judge on March 5, 1990. Applicant did not appeal that Order; therefore, for that additional legal reason this Court has no jurisdiction to change the Order of the Administrative Law Judge denying any additional benefits to the applicant. (See Retherford v. Industrial Commission, 739 P.2d 76, 80 (Utah App. 1987); see also Ring v. Industrial Commission, 744 P.2d 602, 603 (Utah App. 1987).
2. There is no legal basis, in law or in equity, which will support Plaintiffs renunciation of the June, 1984 Compensation Agreement prepared and processed by Plaintiffs and Plaintiffs demands that the said Compensation Agreement be amended with five (5) years retroactivity to provide an entirely different allocation of liability between Plaintiffs and Defendant Second Injury Fund.

VI. ARGUMENT

POINT I

APPLICANT'S FAILURE TO APPEAL EITHER THE ORDER OF THE ADMINISTRATIVE LAW JUDGE OR THE FULL COMMISSION'S ORDER DENYING BENEFITS LEFT THIS COURT WITH NO JURISDICTION TO REVERSE THE DENIAL OF ADDITIONAL BENEFITS TO APPLICANT IN THIS CASE.

As indicated above, applicant properly sought consideration by the Commission by virtue of the provisions of Sections 35-1-78 Utah Code Annotated, which permits such a reopening where the applicant believes his prior award to be inadequate due to changes in his condition. See Rhodes v. Industrial Commission, 681 P.2d 144 (Utah 1984), (Defendant's Addendum 8). However, following a Hearing, the submission of additional evidence, and referral to a Medical Panel, the Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order denying any additional benefits to the applicant (Addendum 7). Applicant did not file a Motion for Review to the Order of the Administrative Law Judge. In addition, following a Motion for Review by Plaintiffs, the full Commission issued its Order Denying Motion for Review wherein the Order of the Administrative Law Judge denying benefits to applicant was affirmed. Again, applicant failed to file any appeal to the Order of the Industrial Commission within the period prescribed by statute. Accordingly, pursuant to well established Utah Administrative and Workers' Compensation Law, the Court of Appeals has no jurisdiction to review the Orders issued by the Administrative Law Judge and the full Industrial Commission, respectively, denying additional benefits to the applicant in his

claim for benefits arising out of his 1984 industrial injury.

POINT II

AS BETWEEN THIS DEFENDANT AND PLAINTIFF EMPLOYER, THIS CASE INVOLVES A COMBINATION OF TWO WELL RECOGNIZED LEGAL PRINCIPLES:

1. The principle of Res Judicata, and
2. The binding effect of a legal agreement such as the Compensation Agreement entered into between Plaintiff and Defendant in this case and approved along with Order passed by the Industrial Commission.

(1) Res Judicata. It is established law in Utah and elsewhere that the principle of Res Judicata applies to Workers' Compensation as well as other areas of Utah Law. As this Court stated in Memorandum Decision Case Number 890675-CA, Merrill J. Bailey v. Industrial Commission of Utah: (Attached as Addendum 9)

The doctrine of Res Judicata is available in Workers' Compensation matters. See Larson, Workmen's Compensation Law, Section 79.72 (1989).

This doctrine has also been recognized by the Utah Supreme Court in cases such as Buxton v. Industrial Commission, 587 P.2d 121, 123 (Utah 1978); see also Spencer v. Industrial Commission, 733 P.2d 158, 161 (Utah 1987). Professor Larson in his treatise, supra, states that the normal rule of Res Judicata, which requires identity or privity between the parties to the proceeding producing the decision relied on and the parties in the proceeding in which it is invoked applies to compensation-related application of the doctrine. He states further that the "classical Res Judicata doctrine requires identity not only of parties but of issues, and this requirement is generally respected in cases involving Workmen's

Compensation." In this controversy, there was, of course, total privity and identity between and among all the parties including the applicant, the employer/carrier and the Second Injury Fund. Moreover, there was identity of issues i.e., the percentage of permanent partial disability to be awarded to the applicant and the allocation of liability as between the employer (Plaintiff herein) and the Second Injury Fund (Defendant herein).

Defendant is aware and as this Court said in the Merrill Bailey case, supra, that:

Application of Res Judicata must, however, be harmonized with the continuing jurisdiction of the Industrial Commission in Workers' Compensation to reopen cases and modify awards. . . . And further: The Utah Supreme Court has consistently interpreted the foregoing language to require "as the basis of modification, evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy." (Citing Buxton and Spencer cases, supra).

It should be pointed out that in all of the Utah cases cited and/or referred to where Res Judicata was held not to apply and reopening was permitted under the Provisions of 35-1-78, it was the applicant, who was the principal party involved in the alleged changes of condition or changes in disability which made the original Order or settlement, as the case may be, inadequate. In this case, applicant believed his back condition to have worsened since the 1984 Compensation Agreement and, thus was permitted to file for additional benefits. However, the Medical Panel as well as the Administrative Law Judge found that applicant had been adequately compensated for his back condition and, thus was not entitled to any further permanent partial disability award. As

mentioned above, applicant did not appeal either the Decision of the Administrative Law Judge or the Order of the full Commission with respect to the denial of additional compensation benefits to him. Therefore, the Order as to applicant is final and the reasons for permitting reopening by the applicant in the various other cases mentioned and cited have been removed. What we have left is a Compensation Agreement entered into at arm's length by the employer/carrier on the one hand and the Second Injury Fund on the other with respect to the allocation of responsibility for not only compensation but medical expenses. Plaintiff prepared the Compensation Agreement setting forth the allocation of responsibility; Plaintiff had all of the available medical records either in his possession or at his disposal. As mentioned before, the Discharge Summary of N. J. Burton, M.D. (R. 168) (Addendum 10), mentions not only in the provisional diagnosis section but in the final diagnosis section the "prior history of peptic ulcer disease" along with the basic questions with respect to applicant's lumbosacral problems. In addition, the peptic ulcer history is set forth in the paragraph entitled Course in Hospital with Complications, if any because of its influence upon the medication to be given to applicant. Thus, it is readily apparent that Plaintiffs either knew or certainly are charged with knowledge of applicant's peptic ulcer disease history which later was referred to in the 1989 Medical Panel Report as perhaps being responsible for an additional 10% permanent partial impairment.

For whatever reasons Plaintiffs may have had, the

Compensation Agreement was prepared and submitted for the approval of Defendant Second Injury Fund, showing a 50-50 split of responsibility for a 35% permanent partial disability rating for the applicant. This was done within six months following the accident and at the time when Plaintiffs had all the information necessary to make their own determination as to what percentage allocation they wished to submit to the Second Injury Fund. Plaintiffs may have overlooked the possibility of additional pre-existing impairment as the result of the information pertaining to the peptic ulcer passed difficulties of applicant; it may well be that in 1984, no rating was accorded to such peptic ulcer history. In any event, the Agreement was submitted to Defendants with applicant's signature and Plaintiffs' representative's signature. The then Administrator of the Second Injury Fund, for reasons of his own, may have considered the allocation satisfactory from his standpoint and, therefore, attached his approval to the Compensation Agreement. The Industrial Commission approved the Agreement on June 22, 1984, after which an Order was issued by the Administrator of the Second Injury Fund (Addendum 7), which Order by its specific language shows that it was "passed by the Industrial Commission of Utah".

In summary, it is the position of Defendant Second Injury Fund that as between Defendants and Plaintiffs herein all of the requirements of the doctrine of Res Judicata have been met and indeed were existing at the time Plaintiffs attempted to amend the Commission's Order and to recalculate the allocation of liability as between Plaintiffs and Defendant. Under the rationale of the

Merrill Bailey Decision, supra, as well as that found in the Supreme Court Decisions in Buxton and Spencer, supra, the Res Judicata doctrine clearly should be applied in this case and Plaintiffs should not be permitted to rescind or revise some five (5) years following approval by all parties and approval and Order by the Industrial Commission of the Compensation Agreement which was prepared by Plaintiffs. Some reference has been made to the Supreme Court Decision in Alvin G. Rhodes v. Industrial Commission, 681 P.2d 1244 (Utah 1984), in which applicant was permitted to reopen and both applicant and the employer/carrier were given the benefit of newly discovered pre-existing back conditions previously unknown to any of the parties involved as well as an additional pre-existing neurological impairment, also previously unknown to the parties. Clearly those salient features make the Rhodes Decision inapplicable to the issue between Plaintiffs and Defendant in this case, wherein Plaintiffs who prepared the Compensation Agreement were fully aware of the applicant's peptic ulcer history which history was the same as that later considered by the 1989 Medical Panel. To emphasize the difference between the Rhodes case and the instant controversy the following is found in the Opinion of the Supreme Court in the Rhodes case (681 P.2d 1244 at 1248):

In the instant case, Mr. Rhodes' pre-existing back condition was latent and did not manifest itself until the Settlement. The record indicates that none of the settling parties knew of the prior condition.
. . . (See Addendum 8)

Clearly in this case, applicant's peptic ulcer condition was not latent and it was apparent in all of the Medical Reports

particularly, the Discharge Summary after applicant's initial hospitalization following his injury of January, 1984. Defendant believes, therefore, that as between Plaintiffs and Defendant in this case, the doctrine of Res Judicata applies to the allocation of liability set forth in the Compensation Agreement approved and later passed as an Order by the Industrial Commission.

(2) As between Plaintiffs and Defendant, the Compensation Agreement of June 22, 1984 constitutes a binding contract as to the allocation of all compensation liability existing at that time.

In addition to the issue of Res Judicata, this controversy involves the very simple contract issue of the continued observance by Plaintiff as well as Defendant of the provisions of an Agreement entered into more than five (5) years before, i.e., the June 22, 1984 Compensation Agreement. That Agreement was prepared by Plaintiff who had access to all the relevant medical information necessary for its preparation, including not only the relevant information necessary for applicant's back evaluation and allocation but also the information clearly setting forth the existence of a prior peptic ulcer history on the part of applicant. (See R. 168 - copy attached hereto as Defendant's Addendum 10). That Compensation Agreement clearly was intended to set forth the allocation of compensation liability between Plaintiff and Defendant for all of applicant's pre-existing as well as industrial disability as of that date. Defendant agreed with the proposed allocation made by Plaintiff and the executed Agreement was submitted to and received the approval of the Industrial Commission. Indeed, it was later

reduced to Order passed by the Commission insofar as the allocation of responsibility was concerned. The Agreement was observed by both Plaintiff and Defendant in making the required payments. The record shows that as late as November 28, 1988, Plaintiffs referred to the Compensation Agreement by letter to the Industrial Commission as requiring 50% contribution by Defendant Second Injury Fund (see Addendum 5). Finally, it should be pointed out that the ultimate outcome as well as the final determination of the case was that there had been no increase in the impairment or disability of the applicant since the date of the June 22, 1984 Compensation Agreement. Under such circumstances, Defendant strongly believes that Plaintiffs' attempt to reallocate liability between Plaintiff and Defendant at this late date is improper, if not unconscionable.

That the Law generally encourages settlements is recognized in Utah as well as throughout the country. (See Rhodes v. Industrial Commission, 681 P.2d at 1248). Obviously, this applies in Workers' Compensation settlements, particularly whereas in Utah there is a special provision which requires Industrial Commission's approval of any such Settlement Agreement. (See Utah Code Annotated 35-1-62). Obviously, as held in the Rhodes case, once Commission's approval is obtained such a Settlement Agreement assumes the same statute as a Commission award. See also Larson, Workmen's Compensation Section 82.60 where it is stated:

If the Settlement is approved, it takes on the quality of an award, and the parties can no more back out of it than out of any other kind of award.

Such language is particularly applicable as between an

employer (Plaintiff herein) and the Second Injury Fund (Defendant herein), where the liability allocation is specifically agreed upon in view of the medical data existing at that time and available in this case to the employer/plaintiff. It has been determined in this case that there has been no change of conditions with respect to the permanent partial disability of the applicant since the date of the injury and the date of the original Compensation Agreement of June 22, 1984. Thus, we do not have in this controversy the change of conditions which have formed the basis for the reopening of Commission awards in all of the prior cases referred to by the Utah Supreme Court and the Court of Appeals. In addition, we do not have in this case the principal item referred to in the reopening of the Rhodes case, i.e., a pre-existing condition that was completely unknown to all of the parties at the time the original Settlement was executed. In the Rhodes case, half of the applicant's 20% permanent partial back impairment was a pre-existing condition which was latent and "did not manifest itself until after the Settlement". In this case, it is clear from the medical records (see Addendum 10 from applicant's treating physician) that was applicant's pre-existing back history available to Plaintiff but also his pre-existing peptic ulcer history. Thus, Plaintiff had all the necessary information for the preparation of the Compensation Agreement which he submitted for applicant's approval and then for the approval of Defendant Second Injury Fund. As mentioned before, the Agreement was approved after review by the Defendant and forwarded to the Industrial Commission for its final approval. It

has already been determined that there were no conditions which were changed or which increased Plaintiff's permanent impairment after his industrial injury or after the execution of the Compensation Agreement. Accordingly, there is no legal basis and there is no basis in justice to permit Plaintiff to reopen the case five (5) years later and attempt to alter the reapportionment formula which it presented to all the other parties and the Industrial Commission for approval. Plaintiffs should be bound by the terms of his contract either by virtue of Res Judicata or by means of observance of simple but uniform rules of contract law.

VII. CONCLUSION

Plaintiffs have attempted to utilize the continuing Commission jurisdiction provisions of Section 35-1-78 Utah Code Annotated as a means of avoiding the terms of a contract (Compensation Agreement) prepared by Plaintiff and submitted to all parties, including the Defendant and the Industrial Commission of Utah, for approval and execution five (5) years before. A final determination has been made that there has been no change in conditions since the execution of that Compensation Agreement on June 22, 1984; there has been no mutual mistake of fact which under ordinary contract principles conceivably would call for rescission or revision of that contract. That contract was approved by the Industrial Commission of Utah and subsequently became an Order of the Commission. (Addendum 4). It is the position of Defendant that Plaintiff is bound by the provisions of that contract by the well established

legal principle of Res Judicata as well as by application of simple but well established rules of contract law. Plaintiff's Petition to this Court, therefore, should be dismissed and the Decision of the Industrial Commission of Utah affirmed.

Respectfully submitted this 5th day of November, 1990

Erie V. Boorman, Administrator
Employers' Reinsurance Fund

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of Defendant's Brief were mailed this _____ day of November, 1990, to the following:

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INDUSTRIAL COMMISSION OF UTAH

By _____
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MAY 24 1984

May 24, 1984

National Farmers Union Life
300 South 564 East
Salt Lake City, UT

RE: L.B. Cornell

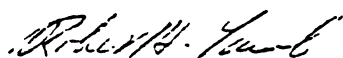
Gentlemen:

I think that the fusion which Mr. Cornell had in 1968 predisposed the early wear and tear of the disc space above the fusion. He also had a pseudoarthrosis of the L4-5 disc space which was decompressed during his recent surgery in February.

This patient has a 35% permanent partial disability of the man as a whole.

If I can furnish any further information regarding this patient, please let me know.

Sincerely yours,


Robert H. Lamb, M.D.

RHL:lc

ROBERT H. LAMB, M.D.
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June 13, 1984

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300 South 564 East
Salt Lake City, UT 84102

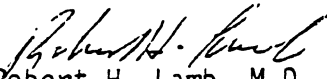
RE: L. B. Cornell

Dear Mr. Jackson:

We are in receipt of your letter of May 30, 1984 regarding Mr. Cornell. You asked for a rating percentage assessed to the pre-existing injury. I feel that 50% of his disability is due to his pre-existing injury.

If I can be of further help, please let me know.

Sincerely yours,


Robert H. Lamb, M.D.

RHL:lc

17.5%

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

L.B. CORNELL
(Applicant)

vs.
KAMAS VALLEY COOP
(Employer)

NATIONAL FARMERS UNION INS.
(Insurance Carrier)
Defendant
.....

COMPENSATION
AGREEMENT

WHEREAS, L. B. CORNELL sustained a personal injury by accident arising out of or in the course of his employment on the 30th day of January, 1984, while employed by Kamas Valley Coop; which accident has been duly reported to the Industrial Commission of the State of Utah. According to the physician's reports and agreement between the parties hereto, said Applicant sustained, as a result of said accident, temporary total disability and/or permanent partial disability, as well as incurring medical and/or hospital expenses, as hereinafter set forth:

1. Temporary total disability from 1-31-84 to 6-12-84; payable at the rate of \$ 300.00 per week for a total of \$ 5,700.00. has been incurred and the carrier/employer has paid a total of \$ 5,700.00 of which the following amount was taxed: \$ 0.
2. Permanent partial disability based on 54.6 weeks payable at the rate of \$ 200.00 per week beginning 6-12-84 for a total of \$ 10,920.00. and \$ 0 has been advanced thereunto of which \$ 0 was taxed. Said permanent partial disability consists of the specific loss as follows:

17.5 percent permanent partial disability-- due to back injury
17.5% pre-existing disability

3. Recapitulation of compensation benefits paid in connection with this claim:

(a) Medical, Hospital and Miscellaneous incurred	\$ <u>10,602.20</u>	
	Paid to date	\$ <u>10,602.20</u>
	Balance (if any) due	\$ _____
(b) Total Weekly Compensation Benefits due	\$ <u>16,620.00</u>	
	Paid to date	\$ <u>5,700.00</u>
	Balance (if any) due	\$ <u>10,920.00</u>
(c) Total Medical and Compensation due per this Compensation Agreement:		\$ <u>10,920.00</u>

NOW THEREFORE, in consideration of the payment of the amounts stated in Section 3 above as provided by law, the Applicant hereby accepts the compensation and Medical payments paid to date and agrees with the permanent partial disability rating shown above. However, the Industrial Commission of Utah shall retain continuing jurisdiction to modify awards as provided by law. Medical expenses incurred as the result of the industrial accident are the continuing obligation of the insurance carrier or employer.

It is understood that this agreement becomes binding and effective only when it is approved by the Industrial Commission.

APPROVED AND AGREED TO:
BY THE APPLICANT

L.B. Cornell
Signature of Applicant

NATIONAL FARMERS UNION INS./ KAMAS VALLEY
Signature of Insurance Carrier/Employer COOP

Approved this 2nd day of June, 1984.
Stuart Hordell
Local Counsel

By Robert J. Johnson
Claims Manager

*Supporting medical evidence of permanent partial disability must accompany this form.

**APPLICANT SHOULD NOTE THAT COMPENSATION IS TAX EXEMPT FOR SECTION 6336 (A)(1) OF SECTION 26, UNITED STATES CODE.

Orig. will be returned to carrier/employer and signed copy to employee.

THE INDUSTRIAL COMMISSION OF UTAH

Case No. NA

L. B. CORNELL,

Applicant,

vs.

KAMAS VALLEY COOP and/or
NATIONAL FARMERS UNION INS.
and SECOND INJURY FUND,

Defendant.

ORDER REQUIRING PAYMENT

FROM THE SECOND INJURY FUND

APPROVED FOR PAYMENT
SECOND INJURY FUND

7/29/84 *td*

* * * * *

WHEREAS, on or about June 22, 1984, the applicant in the above-entitled matter, L. B. Cornell, caused a Compensation Agreement to be filed with the Industrial Commission and the same indicated that the Second Injury Fund might be responsible for permanent partial disability benefits, and

WHEREAS, the carrier has paid temporary total compensation and medical expenses on behalf of the applicant for an industrial accident sustained on January 30, 1984, and

WHEREAS, the applicant has sustained a 35% permanent partial impairment of the whole body with 17.5% due to the aggravation of a pre-existing condition which is the responsibility of the Second Injury Fund, and


WHEREAS, the Administrator of the Second Injury Fund has reviewed the file, and pursuant to Section 35-1-68 (1) (a), the applicant is entitled to compensation for a 17.5% pre-existing impairment, and further the carrier shall be liable for any percentage of permanent physical impairment attributable directly to the industrial injury only.

NOW, THEREFORE, IT IS ORDERED that the Second Injury Fund prepare the necessary vouchers directing the State Treasurer, as custodian of the Second Injury Fund, to pay to L. B. Cornell compensation at the rate of \$200.00 per week for 54.6 weeks or a total of \$10,920.00, as compensation for a 17.5% permanent partial impairment attributable to pre-existing conditions, said benefits to be paid commencing July 5, 1984.

IT IS FURTHER ORDERED that reimbursement shall be based upon a 17.5/35 or 50% apportionment.

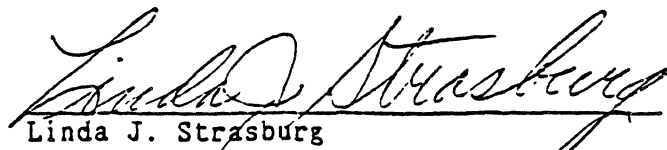
L. B. CORNELL
ORDER REQUIRING PAYMENT
PAGE TWO

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


Gilbert A. Martinez, Administrator
Second Injury Fund

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah this
29th day of June, 1984.

ATTEST:


Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on July 2, 19 84
a copy of the attached ORDER
was mailed to the following persons at the following
addresses, postage paid:

L. B. Cornell, 5328 East Taylor, Phoenix, AZ 85008

National Farmers Union Life, 300 South 564 East, SLC, UT 84102

Industrial Commission

THE INDUSTRIAL COMMISSION OF UTAH

By Madelyn

L.B. CORNELL

LAW OFFICES

SNOW, CHRISTENSEN & MARTINEAU

10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145
TELEPHONE (801) 521-9000
TELECOPIER (801) 363-0400

THURMAN & SUTHERLAND	1886
THURMAN, SUTHERLAND & KING	1888
THURMAN, WOODWARD & IRVING	1906
IRVING, LARSEN & THURMAN	1923
SKEN, THURMAN, WORSLEY & SNOW	1952
WORSLEY SNOW & CHRISTENSEN	1967

REED L. MARTINEAU	HENRY K. CHAI II
STUART L. POELMAN	BYRCE D. PANZER
RAYMOND M. BERRY	JODY K. BURNETT
M. JAMES CLEGG	STANLEY K. STOLL
MERLIN R. LYBBERT	DAVID J. CASTLETON
DAVID W. SLAGLE	PAMELA G. HEFFERNAN
A. DENNIS NORTON	DAVID W. SLAUGHTER
ALLAN L. LARSON	STANLEY J. PRESTON
JOHN E. GATES	THOMAS M. ZARR
R. BRENT STEPHENS	JOY L. SANDERS
KIM R. WILSON	R. SCOTT HOWELL
MICHAEL R. CARLSTON	SHAWN E. DRANEY
GEORGE A. HUNT	JERRY D. TENN
ELLIOTT J. WILLIAMS	CRAIG L. BARLOW
DAVID G. WILLIAMS	JOHN R. LUND
REX E. MADSEN	RYAN E. TIBBITTS
MAX D. WHEELER	ANNE SWENSEN
PAUL J. GRAF	ANDREW M. MORSE
PAUL C. DROZ	RICHARD A. VAN WAGONER
MICHAEL D. BLACKBURN	DAVID W. STEFFENSEN
ROBERT H. HENDERSON	LARRY R. LAYCOCK
STEPHEN ROTH	ROBERT C. KELLER
DENNIS C. FERGUSON	ELIZABETH KING BRENNAN
DAMIAN C. SMITH	DANIEL D. HILL
STEPHEN J. HILL	BARBARA J. DICKET
BRUCE M. JENSEN	JOHN L. WOOD

November 28, 1988

JOHN H. SNOW 1917-1980

OF COUNSEL
JOSEPH F. MOYER
GEORGE N. LARSEN

WRITER'S DIRECT NUMBER

322-9133

Barbara Elicerio
Industrial Commission of Utah
P.O. Box 45580
Salt Lake City, UT 84145-0580

Re: L.B. Cornell
Inj: 01/30/84
Emp: Kamas Valley Co-op

Dear Ms. Elicerio:

We represent the employer and its insurance carrier in this matter.

Defendants admit that the Applicant sustained an industrial accident on January 30, 1984. Benefits were paid pursuant to a Compensation Agreement approved by the Industrial Commission on June 22, 1984.

In 1988 Applicant requested a reinstatement of benefits. Defendants conditionally began paying benefits on January 31, 1988. Since Mr. Cornell was living in Arizona, he selected Dr. David A. Rand to provide his examination. On September 15, 1988, Dr. Rand concluded that the present symptoms of Mr. Cornell are not related to the industrial accident, but rather to a new injury occurring in January, 1988. Based upon Dr. Rand's opinion, benefits were terminated in September, 1988. Because these benefits were paid for a period related to a new injury and not to the original industrial accident, Defendants are entitled to an offset of the 1988 payments against any further benefits that may be awarded.

Barbara Elicerio
November 28, 1988
Page two

Defendants deny all allegations not specifically admitted.

Since 50% of the Applicant's back impairment is related to pre-existing conditions, the Employer's Reinsurance Fund should be joined as a Defendant.

Before this matter is scheduled for a hearing, the Applicant should be required to submit medical evidence connecting his recent problems with the industrial accident. As already mentioned, Applicant's last treating physician did not relate his problem to the industrial injury.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU


Henry K. Chai II

HKC:aw

cc: L.B. Cornell
Sandra Southern
Erie V. Boorman



Norman H. Bangerter
Governor

State of Utah

INDUSTRIAL COMMISSION OF UTAH

160 East 300 South
P.O. Box 510910
Salt Lake City, Utah 84151-0910
(801) 530-6880
Toll Free 1-800-426-0667
FAX 801-530-6804

Stephen M. Hadley
Chairman
Thomas R. Carlson
Commissioner
Dixie L. Minson
Commissioner

November 6, 1989

Timothy C. Allen
Administrative Law Judge
Industrial Commission of Utah
160 East 300 South
P. O. Box 510250
Salt Lake City, Utah 84151-0250

Re: L. B. Cornell
Inj: 1/30/84
Emp: Kamas Valley Co-op

Dear Judge Allen:

I have reviewed your October 3, 1989 Order in the above-entitled matter. I have also reviewed Mr. Chai's letter moving for the review of your Order and his request for an Amended Order. I note also that the applicant has made no motion for additional impairment in opposition to your Order of Denial and therefore, any application for increased benefits to the applicant appropriately is foreclosed as of this day. The same rationale, of course, applies to the suggestion by Mr. Chai that applicant appropriately is entitled at this stage for additional pre-existing impairment.

With respect to the remainder of Mr. Chai's request as to a reallocation of compensation liability as well as reimbursement liability, I know of no authority which will permit the employer/carrier responsible for the original Compensation Agreement to recant on that agreement on the basis of a medical opinion issued more than five and a half (5 1/2) years after the injury and more than five (5) years after the execution of the Compensation Agreement. It appears clear from the correspondence from the carrier's representative to Dr. Robert H. Lamb, that every effort was made to get a complete allocation insofar as pre-existing condition was made and that the Compensation Agreement was then prepared by the carrier, incorporating its own conclusions as to the appropriate liability of the employer/carrier on the one hand and the then Second Injury Fund on the other hand. Under such circumstances, it is unconscionable at this time for the carrier now to retrace its steps and attempt to get an entirely new evaluation and allocation of responsibility.

In addition to the above position, it should be pointed out that the so called hearing loss referred to as being a pre-existing condition in fact was experienced within a short time of the examination made in 1989. Accordingly, that loss would not qualify under any circumstances as pre-existing the 1984 industrial injury.

Judge Allen
November 3, 1989
Page Two

In conclusion, it is the position of the Employers' Reinsurance Fund that the employer/carrier is bound by the Compensation Agreement which it prepared and processed for execution by all parties, including the applicant and the then Second Injury Fund, and for ultimate Order by the Industrial Commission dated June 29, 1984, insofar as it applies to the compensation and reimbursement rights and benefits of the parties hereto and that the employer/carrier properly cannot attempt to revise those figures on basis of a 1989 Medical Panel examination. Therefore, we respectfully submit that your Order of October 3, 1989 should remain unmodified as it was issued.

Sincerely,

A handwritten signature in cursive script, reading "Ernie V. Boorman". The signature is written in dark ink and is positioned above the printed name and title.

Ernie V. Boorman; Administrator
Employers' Reinsurance Fund

EVB/tn

cc: Henry K. Chai, Atty., P. O. Box 45000, Salt Lake City, Utah 84145

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 88000896

L.B. CORNELL,

Applicant,

vs.

KAMAS VALLEY CO-OP and/or
NATIONAL FARMERS UNION

Defendants.

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*
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*
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FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

APPROVED BY SECOND DEPUTY CLERK

10/4/89

10/4/84
I don't know
Nov. 6 - fell
lost - not destroyed
Do not destroy
E
Do we have
a file on
this applicant
E

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on February 10, 1989 at 8:30 a.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: L. B. Cornell, PRO SE.

The defendants were represented by Henry K. Chai, Attorney at Law.

At the conclusion of the evidentiary hearing, the matter was taken under advisement and referred to a medical panel by the Administrative Law Judge. The medical panel report was received and copies were distributed to the parties. Fifteen (15) days having elapsed since the mailing of said medical panel report, and no objections having been received thereto, the medical panel report is admitted into evidence.

FINDINGS OF FACT:

In October of 1980, the applicant was hired by the Kamas Valley Co-Op as its general manager. The co-op is owned by farmers in the Kamas Valley area and is intended to provide livestock feed and other services to its members.

On January 30, 1984, the applicant was helping prepare a field delivery truck, and towards that end was applying decals to the truck. He was using a 4' step ladder, and was applying a decal on the side of the truck,

L.B. CORNELL
ORDER
PAGE TWO

when the ladder slipped and he started to fall. Mr. Cornell was able to avoid falling to the ground by grabbing hold of a railing on the truck. As he did so, he had an immediate sharp pain in his right hip and buttocks, which radiated across his back and down his right leg to his foot. The applicant testified that he thought he had dislocated something. The following day he reported to Dr. Kelly Jarvis in Heber City for chiropractic treatment. The chiropractor performed an x-ray and daily chiropractic manipulation upon the applicant for the next week. The applicant testified that following each adjustment, his condition worsened. Following the seventh treatment, the applicant could hardly walk, so Dr. Jarvis drove him to the Wasatch County Hospital on February 7, 1984. At that time, the applicant was seen by Dr. Burton, general practitioner, who prescribed physical therapy and Feldene. The applicant testified that each time following a physical therapy session in the hospital, he had to be wheeled back to his room. He continued this course of treatment until February 21, 1984, when he was discharged from the hospital. On February 22, 1984, he was admitted to the St. Mark's Hospital and the following day received a CT scan and on February 24, received a laminectomy at L3-4. The applicant was also informed that there was psuedo arthrosis at L4-5 by Dr. Lamb. Following the surgery, the applicant was eventually released by Dr. Lamb on June 12, 1984, to return to work.

Since the applicant's position was a working position, he did not return to that employment. Rather, he moved to Oklahoma and started selling land. On January 22, 1985, he was having some tightness in his back, so he reported to Dr. Butler in Oklahoma City. The doctor referred the applicant for physical therapy and the applicant reports that his condition improved as a result of that treatment. He continued selling land in Oklahoma until the oil market bust of approximately July or August of 1987. The applicant returned to Arizona in January of 1988.

In the course of moving to Oklahoma to Northern Arizona, the applicant noticed that the long drive started to bother his back. He noticed that each time he would leave his car, he would have more and more difficulty straightening up. By the time he reached Arizona, his condition had deteriorated. He contacted the Industrial Commission and was informed that he would need a change of doctor to receive medical treatment in Arizona. After the applicant went the rounds with the Industrial Commission, he finally decided to come to Salt Lake himself, and see Dr. Lamb rather than undergo any further delays in receiving the necessary authorization to see Dr. Eskay in Arizona. The applicant saw Dr. Lamb on March 26, 1988, and at that time received a CT scan at Western Neurological Associates. Dr. Lamb ruled out further surgery, gave the applicant pain medication, and told him he would need an EMG from Dr. Thoen. The applicant returned home and a week later came back to Salt Lake City and received the nerve conduction study from Dr. Thoen. At that time, the applicant was informed by his adjustor that they would require a second opinion following Dr. Lamb's examination, and that the

L.B. CORNELL
ORDER
PAGE THREE

applicant should take all of his x-rays home with him. The applicant was also placed on temporary total compensation benefits commencing effective March 26, 1988. Dr. Lamb, upon hearing that an LME would be performed, informed Mr. Cornell that no further treatment would be provided until the independent medical examination had been accomplished.

On May 23, 1988, the applicant was seen by Dr. Rand for the independent medical examination. He informed Dr. Rand that he had been keeping a low profile with respect to his activities, and that as the result he felt better. Dr. Rand informed the applicant that he was releasing him for light duty and that he should increase his activities as he could tolerate them. The applicant tried riding a three-wheeled vehicle to move some sprinklers on a friend's ranch, and was only able to do that for three days without having further problems. He returned to Dr. Rand one month later, and reports that he was in worse shape than he had been in initially. Dr. Rand then informed the applicant that he would need a myelogram to rule out the need for surgery. At this point, the applicant testified that he informed the doctor that Dr. Lamb had already had a CT scan performed and had ruled out surgery previously. Dr. Rand informed the applicant that he would still need an enhanced CT scan and a myelogram which might show some problem not identifiable on a regular CT scan.

The applicant was hospitalized at the John C. Lincoln Hospital in Phoenix, Arizona for the period July 28 through July 30, 1988. Dr. Rand informed the applicant that he could find nothing wrong with his back and that he did not understand what the applicant's problem was. He instructed the applicant to return in five days to his office. The applicant did so, and on August 4, 1988, the doctor reaffirmed that the myelogram was negative and that the applicant should return home and report back to the doctor in one month for further follow up. The applicant contacted his adjustor and complained about Dr. Rand and requested permission to see another doctor. The adjustor informed the applicant that she was in the process of having his case evaluated by the Arizona Rehabilitation Department, and was considering a permanent total disability dependent, of course, upon the rehabilitation report.

She further informed the applicant that he should keep his appointment with Dr. Rand. The applicant returned to Dr. Rand on December 15, 1988, and at that time the doctor informed the applicant that he did not have anything wrong with his back, but the applicant took issue with this finding indicating to the doctor that Dr. Lamb had already identified a bulging disc at L3-4 and that the disc was impinging on the applicant's nerve root. The applicant testified that he questioned the quality of the doctor's x-ray interpretation and the doctor apparently took umbrage with that challenge. The applicant left the doctor's office on less than amicable terms.

L.B. CORNELL
ORDER
PAGE FOUR

The applicant, upon arriving home, indicated that he was rather heated and contacted the adjustor and informed what had happened. She informed him that she was sympathetic and that she was still waiting to schedule him with the Arizona Rehabilitation Department. However, she further informed the applicant that he was not authorized to return to Dr. Lamb. On September 29, 1988, the defendant's wrote the applicant a letter informing him that pursuant to the report of Dr. Rand no further benefits would be due as the result of the industrial accident of January 30, 1984. Dr. Rand concluded that the applicant's problems were not a result of his industrial accident of January 30, 1984. Thereafter, the applicant had no further medical treatment until he saw Dr. Dowling on January 27, 1989. Dr. Dowling has recommended that the applicant continue to receive conservative care from Dr. Lamb.

The applicant's first back injury occurred in 1968, when he was cutting logs in Arizona. At that time the applicant had just completed the felling of a large pine tree, and as that tree fell to the ground it apparently dislodged a dead aspen tree. As a result, that tree fell as the applicant was "bucking" branches from the pine tree. The applicant testified that he was bent over and as he was removing those limbs, the large dead aspen fell across his back. The applicant eventually received a fusion from L4-S1 by Dr. Peterson at the Southside District Hospital in Mesa, Arizona. When the applicant moved in January of 1988, he was driving a pick up truck, which contained boxes of small odds and ends but no furniture.

With the file in this posture, the case was returned to the medical panel to determine if there had been any change in the applicant's prior rating of 17.5% of the whole person due to the industrial accident of January 30, 1984.

The panel found that the applicant has not been temporarily totally disabled as a result of the industrial accident of January 30, 1984, beyond September 12, 1988. The panel also found that the permanent impairment due to the industrial accident of January 30, 1984, has not increased beyond the 17.5% of the whole person previously awarded. The panel also found that there has been no increase in the pre-existing lumbar impairment rating of 17.5%. Finally, the panel concluded that future medical care as a result of the industrial accident of January 30, 1984, should include reasonable access to periodic orthopedic care. The panel concluded that the "applicant should have further instruction in back care and periodic advise as to management of his back problem from someone like Dr. Dowling or her associates who are near enough to him both physically and psychologically to be helpful." The Administrative Law Judge adopts the findings of the medical panel as his own.

Pursuant to the findings of the medical panel, the applicant is not entitled to any further benefits as the result of the industrial accident of January 30, 1984, at this time.

L.B. CORNELL
ORDER
PAGE FIVE

ORDER:

IT IS THEREFORE ORDERED that the claim of L.B. Cornell for additional temporary total compensation and permanent partial impairment benefits as the result of the industrial accident of January 30, 1984, should be, and the same is hereby dismissed.

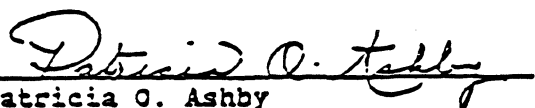
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.



Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
3rd day of ~~September~~, 1989.
October

ATTEST:



Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on ~~September~~ October 3, 1989 a copy of the attached ORDER in the case of L.B. Cornell issued ~~September~~ October 3 was mailed to the following persons at the following addresses, postage paid:

L.B. Cornell
P.O. Box 1944
Snowflake, Az 85937

Henry K. Chai
Attorney at Law
P.O. Box 45000
Salt Lake City, Utah 4145

National Farmers Union
5284 South 320 West #C144
Salt Lake City, Utah 84147

Employers Reinsurance Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Sherry Smith
Sherry Smith

"Contradictory testimony alone is not sufficient to disturb a jury verdict. To overturn a verdict on appeal for insufficiency of evidence, this Court must find that reasonable minds must necessarily entertain a reasonable doubt as to defendant's guilt." *State v. Watts*, Utah, 675 P.2d 566, 568 (1983); *State v. Petree*, Utah, 659 P.2d 443, 444 (1983). It is not our function to determine the credibility of conflicting evidence or the reasonable inferences to be drawn therefrom. *Watts, supra*.

[2] We find the record to contain sufficient evidence to identify, beyond a reasonable doubt, Bagley as the burglar and getaway driver at the Rainbo station. Smith's inability to immediately identify Bagley at the police station can be reasonably explained by his lack of sleep at the time. Most importantly, his momentary lapse does not diminish the accuracy of his prior identifications. Minutes after the burglary Smith identified the getaway truck at the scene of the accident. The truck was subsequently determined to belong to Bagley. At the accident scene Smith also identified the person whose photograph appeared on Bagley's driver's license as the burglar. Only two hours later he did so again.

Furthermore, Bagley's own claim that his truck had been stolen was refuted by Detective Bringham's testimony. Bringham testified that Bagley told him that at night he always left his wallet and one set of keys in his truck and in the morning used his spare key to get back in. However, at the scene of the accident the police found two ignition keys to the truck on its front seat. When Bagley's girlfriend attempted to retrieve the truck from the impound lot, she confirmed that these two were the only keys to it. Thus, even if Bagley's account of his parking practices had been believed by the trial judge, the presence at the scene of the accident of the only two keys to the truck, including the spare key that Bagley stated he kept in his possession, was highly persuasive in placing Bagley at the scene and refuting his claim that his truck had been stolen. Furthermore, the alibi evidence offered by

Bagley and several of his friends was vague, self-contradictory and unconvincing. We hold that there was sufficient evidence to convict Bagley of burglary, theft and filing a false report.

[3] Bagley also attempts to argue that Smith's in-court identification of him as the burglar was the result of what he characterizes as the "suggestive" prior encounter in Bringham's office and thus should have been inadmissible. Bagley, however, failed to object to Smith's identification either before or during trial. We therefore will not review this claim. Utah R.Evid. 103(a)(1); *State v. Malmrose*, Utah, 649 P.2d 56, 58 (1982).

Affirmed.

HALL, C.J., and OAKS, STEWART and HOWE, JJ., concur.



ALVIN G. RHODES PUMP SALES and
State Insurance Fund, Plaintiffs,

v.

INDUSTRIAL COMMISSION OF UTAH
and Second Injury Fund, Defendants.

No. 19163.

Supreme Court of Utah.

April 26, 1984.

In workmen's compensation case, State Insurance Fund sought reimbursement from the Second Injury Fund for medical and disability payments that State Insurance Fund made pursuant to a settlement with an injured employee of the insured. An administrative law judge refused to order reimbursement and the Industrial Commission denied a petition for review. State Insurance Fund and its insured brought original proceeding for judicial review.

The Supreme Court, Stewart, J., held that State Insurance Fund was entitled to apportionment between it and the Second Injury Fund of medical expenses, temporary total disability, and permanent partial disability payments paid to injured employee, even though the payments were made pursuant to a settlement to which the Second Injury Fund was not a party.

Reversed and remanded.

Hall, C.J., filed concurring and dissenting opinion.

Howe, J., filed concurring and dissenting opinion.

1. Workers' Compensation ⇐1030

Second Injury Fund may be liable for a part of a workmen's compensation settlement negotiated between an employee and the employer or its insurance carrier, when the employee, the employer, and its insurance carrier did not know at time of settlement that the Fund was liable. U.C.A. 1953, 35-1-69.

2. Compromise and Settlement ⇐1

The law generally encourages settlements.

3. Workers' Compensation ⇐1030

The Second Injury Fund can be held liable for its statutory liabilities in a workmen's compensation case even after the completion of a hearing to which it is not a party and the Fund is not insulated from its liabilities because circumstances giving rise to those liabilities were not foreseen.

4. Workers' Compensation ⇐1030

Intricate statutory pattern governing liabilities of the Second Injury Fund to workmen's compensation insurance carriers should be accorded due protection by procedural law, which must assure fairness to the Fund and also give effect to the basic statutory scheme for allocating liability for the payment of compensation, regardless of whether liability of the Fund is made pursuant to settlement or pursuant to an award made after a full dress hearing. U.C.A.1953, 35-1-69.

5. Administrative Law and Procedure ⇐669

Questions not raised in an administrative tribunal are not subject to judicial review except in exceptional cases.

6. Workers' Compensation ⇐1030.1(7)

Second Injury Fund was precluded from arguing to the Supreme Court that no workmen's compensation should be allowed for portion of employee's back injury found by a medical panel to be due to his chronic alcoholism, where the Fund raised the issue for first time in its respondent's brief without having cross-petitioned for review of the Industrial Commission decision, in its answer to State Insurance Fund's motion to review the order of the administrative law judge before the Industrial Commission, the Second Injury Fund neither disputed the award nor filed its own motion for review, and no circumstances of injustice compelled review of the issue.

7. Workers' Compensation ⇐1030.1(1), 1057

State Insurance Fund was entitled to an apportionment between it and the Second Injury Fund of medical expenses, temporary total disability, and permanent partial disability payments State Insurance Fund had paid to injured employee, even though the payments had been made pursuant to a settlement to which the Second Injury Fund had not been a party, where employee's preexisting back condition was latent and did not manifest itself until after the settlement, none of the settling parties knew of the prior condition, and Second Injury Fund was notified of its potential liability arising out of the settlement at earliest possible date. U.C.A.1953, 35-1-69.

James D. Black, Salt Lake City, Stephen W. Julien, Cedar City, for plaintiffs.

Gilbert Martinez, Admin. Second Injury, Frank Nelson, Asst. Atty. Gen. (Ind. Comm.), Salt Lake City, for defendants.

STEWART, Justice:

In this workmen's compensation case, the State Insurance Fund ("State Insurance") seeks reimbursement from the Second Injury Fund ("the Fund") for medical and disability payments that State Insurance made pursuant to a settlement with an injured employee of the insured. An administrative law judge refused to order reimbursement. The Industrial Commission denied a petition for review. We reverse and remand.

The administrative law judge found the following facts. Wilbur G. Rhodes was an employee of Rhodes Pump Sales. On two separate occasions, once on August 15, 1977, and later on May 1, 1978, he injured his back lifting heavy objects at work. Back problems and medical treatment ensued, causing Rhodes to miss several days of work, and causing a permanent back impairment. State Insurance paid for Mr. Rhodes' medical treatment and missed days of work as those expenses were incurred.

On approximately July 23, 1980, Mr. Rhodes signed a written settlement with State Insurance, in which he (1) accepted the payments to that date as payment in full for the medical and temporary disability benefits due him, and (2) agreed to accept \$6,676.80 as a settlement for his permanent partial impairment. Based on a medical report, the settlement agreement set the level of permanent partial impairment of Rhodes' back at 20%. At that time, no party knew that Rhodes had any pre-existing back conditions. Apparently for this reason, the Second Injury Fund was not a party to the settlement.

In 1981, Mr. Rhodes filed an application for an adjustment of his prior claim. He alleged that his back had deteriorated since the medical treatment was completed and thus sought an increased permanent partial impairment rating. He named Rhodes Pump Sales, the State Insurance Fund, and the Second Injury Fund as defendants.

As required by statute, U.C.A., 1953, § 35-1-69, the case was submitted to a medical panel for a medical examination. The panel found that Mr. Rhodes' back had

not deteriorated from the 20% impairment level previously determined. The panel allocated the causes of his impairment as follows:

- (1) Five percent for the May 1978 injury;
- (2) Five percent for the August 1977 injury; and
- (3) Ten percent for "previously-existing conditions" due to "degenerative arthritis and disk disease of the low back."

The finding as to the pre-existing conditions arguably made the Fund liable for part of the previously paid medical and disability benefits. § 35-1-69.

In addition, the medical panel also found that Rhodes had a pre-existing 5% neurological impairment, known as "sensory polyneuropathy," which was caused by chronic alcoholism that Rhodes had suffered prior to the industrial injuries. Based on these separate whole man impairment ratings, the medical panel arrived at a combined partial man impairment rating of 24%. See generally *Jacobsen Construction v. Hair*, Utah, 667 P.2d 25 (1983).

The administrative law judge initially denied Mr. Rhodes' request that his permanent impairment rating be increased. The judge reasoned that although the new impairment rating of 24% was 4% greater than the 20% rating agreed on in the settlement, the 4% increase was due to a condition (chronic alcoholism) which had existed at the time of the 1980 settlement. Thus, the judge held that Rhodes was not entitled to any additional benefits. The judge also refused to order the Fund to reimburse State Insurance for medical expenses, temporary total disability payments, or permanent partial disability payments.

Mr. Rhodes and the plaintiffs contested the order. Rhodes asserted that he was entitled to a 4% disability rating increase; the plaintiffs asserted that they were entitled to reimbursement from the Fund for $\frac{15}{20}$ of the medical and temporary total benefits they had paid to Rhodes and for $\frac{10}{20}$ of the permanent partial disability that they had paid. After negotiations be-

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Cite as 681 P.2d 1244 (Utah 1984)

tween the parties, the judge signed an amended order that: (1) increased Mr. Rhodes' permanent partial impairment rating by 4%; (2) ordered the Fund to pay Mr. Rhodes \$1,335.36 for the 4% increase; and (3) ordered the Fund to reimburse State Insurance for only $\frac{1}{2}$ of the temporary total disability and medical expenses it had paid.

Plaintiffs then filed a petition for review with the Industrial Commission. In denying the petition, the Commission referred to the above facts and stated: "The parties to the 1980 compensation agreement are bound by the terms of that document and no further changes in the apportionment should be permitted."

On appeal to this Court, State Insurance argues that the Fund is required by § 35-1-69(1) to reimburse State Insurance. That section defines the scope of the Fund's responsibility:

If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, [then] compensation and medical care ... shall be awarded on the basis of the combined injuries, *but the liability of the employer for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the [second injury fund]....* [Emphasis added.]¹

The Fund does not contend that the settlement amounts paid for medical expenses, temporary total disability or permanent partial impairment were excessive, nor does it contend that the findings of 10% impairment due to the prior disk disease and 5% impairment due to alcoholism were in error. Clearly, if the medical expenses, temporary total disability and permanent

partial impairment payments had been paid by State Insurance pursuant to an adjudicated award, § 35-1-69(1) would require the Fund to reimburse State Insurance for a portion of those expenses. *U.S. Fidelity & Guaranty Co. v. Industrial Commission*, Utah, 657 P.2d 764 (1983); *Intermountain Smelting Corp. v. Capitano*, Utah, 610 P.2d 334 (1980); *White v. Industrial Commission*, Utah, 604 P.2d 478 (1979).

The Fund argues that: (1) § 35-1-69(1) applies only to adjudicated awards, not to settlements, and (2) even if that section applies to settlements, it does not require the Fund to reimburse an employer for settlements to which the Fund was not a party.

The Fund relies on *Pacheco v. Industrial Commission*, Utah, 668 P.2d 553 (1983). The issue in *Pacheco* was whether the provision in § 35-1-78, which requires compensation awards made by the Industrial Commission to include interest, applies to settlements as well as to awards. We held that § 35-1-78 did not apply to settlements, stating:

Unlike an award, a settlement involves no factual determination by the Commission of liability or the amount of damages. In view of this distinction, we cannot presume that the Legislature intended the interest provision to apply to settlements.

Id. at 555.

The present case is distinguishable from *Pacheco*. The settlement in *Pacheco* concerned only the employee and the employer or its insurer. Our ruling that § 35-1-78 does not require the Commission to award interest on a settlement was consistent with an employee's being free to bargain for interest on the settlement amount.

[1] In contrast to *Pacheco*, the Second Injury Fund may be liable for a part of a settlement negotiated between an employee and the employer or its insurance carrier,

(Supp.1983).

1. This subsection has since been amended, but is still substantially the same. See § 35-1-69

when the employee, the employer, and its insurance carrier did not know that the Fund was liable. In this case, for example, the pre-existing condition was not known until after the settlement. Under such conditions, good reason exists to apply § 35-1-69(1) to settlements.

[2] The law generally encourages settlements. *Tracy-Collins Bank & Trust Co. v. Travelstead*, Utah, 592 P.2d 605, 607 (1979); *Reynolds v. Merrill*, 23 Utah 2d 155, 460 P.2d 323 (1969). If we were to rule, as the Fund requests, that § 35-1-69(1) does not apply to settlements, then insurance companies and employers might be deterred from settling any case in which reimbursement from the Fund might be an issue.

The Fund's back-up argument is that even if § 35-1-69(1) does apply to settlements, it applies only to settlements to which the Fund is a party.

[3] An insurance carrier cannot always know at the outset of a workmen's compensation case whether the Fund's interests are or might be involved. In *Paoli v. Cottonwood Hospital*, Utah, 656 P.2d 420 (1982), we held that if the Fund failed to receive proper notice in a workmen's compensation case, then it could, "where necessary, compel the reopening of [a] hearing to allow the Fund to submit evidence bearing upon its special interest and liability." *Id.* at 423. Thus, the Fund could be held liable for its statutory liabilities even after the completion of a hearing. The Fund is not insulated from its liabilities because the circumstances giving rise to those liabilities were not foreseen. In *Paoli*, the Court stated:

The circumstances that alert the parties ... to a potential payment from the Second Injury Fund are, of course, exceptional, and sometimes will not appear until the proceedings are underway. It is therefore inexpedient to require the Fund to be a participant or even a party in every proceeding before the Commission, and the statutes do not require this.

... [T]he Second Injury Fund need not be a party to every workmen's compensation proceeding that may ultimately affect its interests.

656 P.2d at 422, 423.

[4] The fundamental policy underlying *Paoli* is that the intricate statutory pattern governing the liabilities of the Fund to insurance carriers should be accorded due protection by the procedural law, which must assure fairness to the Fund and also give effect to the basic statutory scheme for allocating liability for the payment of compensation. These principles control the liability of the Fund as much when a compensation payment is made pursuant to settlement as when an award is made after a full dress hearing is conducted.

In the instant case, Mr. Rhodes' pre-existing back condition was latent and did not manifest itself until after the settlement. The record indicates that none of the settling parties knew of the prior condition. The medical report upon which the settling parties relied stated that except for some prior unrelated treatment in a V.A. hospital, Rhodes' "past history is not otherwise significant." The Industrial Commission stated in its denial of the motion for review that at the time of the settlement, "[p]re-existing conditions were not indicated as a part of the 20% permanent partial impairment."

The Fund was notified at the earliest possible date of its potential liability arising out of the settlement. The earliest time the parties knew or even suspected the existence of the pre-existing condition was when Mr. Rhodes applied for an increase in permanent partial disability.

Our ruling in this case is consistent with the position taken by other states. *American Standard, Inc. v. Stephen*, Ky.App., 565 S.W.2d 158 (1978), held that a failure to include Kentucky's "Special Fund" as a party to a settlement did not preclude joining it in a later action for increased benefits. As here, the employee did not know of a pre-existing condition until after the settlement. The court noted that the Spe-

cial Fund had been notified as soon as possible, stating:

Once the employee discovered the true nature and extent of his disability, he sought to make the Special Fund a party at his first opportunity to do so.

Under these circumstances, where there was no evidence that either party withheld any information from the other[,] ... we find that the board correctly reopened the award, made the Special Fund a party, and apportioned the award.

Id. at 162.

In *Subsequent Injury Trust Fund v. Alterman Foods, Inc.*, 162 Ga.App. 428, 291 S.E.2d 758 (1982), an employee settled with the employer and later received an additional award from an administrative law judge. The employer sought reimbursement from the Georgia counterpart to Utah's Second Injury Fund of all amounts (apparently including the settlement) paid after the injury had occurred. The Georgia second injury fund sought to avoid liability on the grounds that the prior proceedings between the employee and the employer were conclusive of the employer's right to reimbursement. The Georgia appellate court ruled that although the employer had not sought reimbursement in the prior proceeding, it had the right to do so now. See also *Arduser v. Daniel International Corp.*, 7 Kan.App.2d 225, 640 P.2d 329 (1982) (special fund required to reimburse insurer for an entire settlement). But see *Yocom v. Jordan Auto Parts Co.*, Ky., 521 S.W.2d 519 (1975) (reimbursement denied). See generally 2 A. Larson, *The Law of Workmen's Compensation* § 59.31(f) (1982).

We emphasize that in this case the employee, not the insurance carrier, sought to reopen the case after settlement. Therefore, this case does not necessarily mean that an insurance carrier may seek reimbursement after settlement, unless the employee reopens the case to obtain additional compensation for the same injury that was the subject matter of the settlement.

681 P.2d-28

The Fund contends that no compensation should be allowed Mr. Rhodes for his chronic alcoholism. In effect, the Fund requests affirmative relief by seeking a reversal of the 4% increase in the permanent partial disability rating. The Fund raises this issue for the first time in its respondent's brief without having cross-petitioned for review. Moreover, the Fund failed to raise the issue before the Commission. In the Fund's answer to State Insurance's motion to review the order of the administrative law judge before the Commission, the Fund neither disputed the 4% increase nor filed its own motion for review. Instead, the Fund in fact accepted the increase by taking the position that the "responsibility of the Second Injury Fund for reimbursement should be 1/2 ... of any medical expenses paid."

[5.6] Ordinarily questions not raised in an administrative tribunal are not subject to judicial review. *E.g.*, *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981); *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wash.2d 271, 525 P.2d 774 (1974); 2 Am. Jur.2d *Administrative Law* § 724 (1962); 73A C.J.S. *Public Administrative Law and Procedure* § 191 (1983). Even though that rule may not be applied in exceptional cases, see cases cited at 73A C.J.S. *Public Administrative Law and Procedure* § 191 n. 93 (1983), this is not such a case. The Fund had full opportunity to raise the issue of chronic alcoholism and failed to do so at two critical junctions. No circumstances of injustice compel review of the issue on appeal. In declining to address the issue on procedural grounds, we do not express any view whatsoever on the merits of the issue.

[7] In light of the above, we hold that State Insurance is entitled to have an apportionment between it and the Fund of the medical expenses, temporary total disability, and permanent partial disability payments it has paid to Mr. Rhodes. On remand, these payments should be appor-

tioned in the customary way as required by § 35-1-69.

Reversed and remanded.

OAKS and DURHAM, JJ., concur.

HALL, Chief Justice (Concurring and Dissenting):

I join the opinion of the Court, except the portion thereof that declines to address the contention of the Fund that no compensation shall be allowed Rhodes for his condition of chronic alcoholism.

Notwithstanding the fact that the Fund did not seek reversal of that portion of the award based upon chronic alcoholism, as a matter of law, Rhodes is not entitled to such an award.

This Court should exercise its prerogative to correct this obvious error in the application of the law and should, upon remand, order the reversal of the 4% increase in the permanent partial disability rating attributable to alcoholism.

HOWE, Justice (Concurring and Dissenting):

I dissent from that part of the majority opinion which requires the Second Injury Fund to reimburse the State Insurance Fund for part of the monies paid out by it under the settlement agreement of July 23, 1980. I agree that after Rhodes re-opened his claim and the medical panel found that part of his impairment was due to pre-existing conditions, the Second Injury Fund should bear its proper proportion of compensation thereafter payable to Rhodes.

The Second Injury Fund was not a party to the settlement agreement which was entered into by Rhodes and the State Insurance Fund upon competent medical evidence then before them. I think it unfair and unsupported by the law that the Second Injury Fund can now be made to bear part of past payments since it did not participate in the making of the agreement and there was no medical evidence then available that it had any liability.

The cases cited by the majority in support of its position do not appear to me to

be authority that reimbursement should be ordered under these circumstances. I have no quarrel with *American Standard, Inc. v. Stephen*, Ky.App., 565 S.W.2d 158 (1978) which permitted the Kentucky Special Fund to be joined in a re-opened claim for increased benefits. But there the Special Fund was not ordered to bear any part of the benefits already paid under the prior settlement to which it had not been a party. Likewise, in *Subsequent Injury Trust Fund v. Alterman Foods*, 162 Ga.App. 428, 291 S.E.2d 758 (1982) it does not appear that the Subsequent Injury Fund was required to reimburse the employer for any funds it had paid out pursuant to a settlement to which it had not been a party. The case holds that reimbursement could be sought against the Subsequent Injury Fund for monies paid out pursuant to an award but by statute the Fund was protected from the res judicata effect of the award to which it had not been a party. In *Arduser v. Daniel International Corp.*, 7 Kan.App.2d 225, 640 P.2d 329 (1982) it appears in the statement of facts that the Kansas Workmen's Compensation Fund was required to reimburse the employer and its insurance carrier for certain amounts but the question of reimbursement was not an issue in the case and is not discussed in the court's opinion.

I do not agree with the majority that denying reimbursement will discourage settlements. The settling parties are well protected since any of them may, as here, re-open the claim when new medical evidence is found. The Second Injury Fund may then be brought in and made to bear its proportion of future payments.



returned to work on August 17, 1982, based on his doctor's release. Bailey contended at the November 1986 hearing that both the employer's report of injury and Dr. Shore's medical records were incorrect in describing the June 1982 accident as a lifting accident. Evidence presented at the hearing also indicated that Bailey slipped and fell on oil in the vicinity of his press on December 5, 1977. Bailey maintained, however, that the injury described as occurring on December 5, 1977 actually occurred on June 30, 1982.

Bailey continued to work for Galigher Ash from August of 1982 until October of 1983 when he was laid off. In August of 1985, he sought medical treatment for problems with his legs and back, and it was discovered that Bailey had a syrinx on his spine. In December 1985, he underwent surgery to place a shunt in his back for the purpose of draining fluid off his spinal column. As of August 6, 1985, Bailey was found to be permanently disabled by the Social Security Administration.

In a decision dated November 21, 1986, the administrative law judge found, in relevant part:

Having had the opportunity to observe the demeanor of the applicant and his witness, and considering the employer's first report and the report of Dr. Shore, I can only conclude that the applicant is not telling the truth with respect to the events of June 30, 1982. Therefore, I conclude that he sustained an injury on June 30, 1982 but that injury was a back strain as diagnosed by Dr. Norman Shore, and that the applicant's injury of June 30, 1982 did not consist of a slip and fall.

. . . .

The applicant offered voluminous testimonial evidence concerning the presence of the symptoms he has been having. However, he has offered no medical evidence of a causal connection between the sprain of June 30, 1982 from which the applicant fully recovered as of August 16, 1982 and the applicant's subsequent syrinx, which was discovered in late 1985.

. . . .

[T]he Administrative Law Judge can only conclude that he sustained a simple back strain on June 30, 1982, from which he recovered and was released to return to work on August 17, 1982. The applicant then worked for over another year, at which time he was laid off due to a reduction in force. He then collected six (6) months of unemployment benefits in 1984, and also worked for approximately three (3) months for Bechtel Drilling Corporation. Once his syrinx became symptomatic, the applicant had an increase in symptoms, and finally sought medical treatment in August of 1985. There being no evidence in the file to support a causal connection between a low back sprain and a cervical and thoracic syrinx which was found some three (3) years later, I must conclude that the applicant has failed to meet his burden of proof.

Finally, there is no evidence in the file of any permanent impairment due to the industrial accident of June 30, 1982.

Based on the foregoing findings of fact, the administrative law judge concluded that Bailey had failed to meet his burden of proof "establishing that he is entitled to additional temporary total compensation, medical expenses or permanent impairment as a result of the industrial accident of June 30, 1982." The Board affirmed and adopted the administrative law judge's decision on December 16, 1986. Bailey then filed a petition for writ of review with this court, but that petition was dismissed on March 16, 1987 because it was not timely filed pursuant to Utah Code Ann. § 35-1-83.

On May 9, 1989, Bailey filed another application for hearing with the Industrial Commission concerning an accident occurring on June 30, 1982. This second application described the accident as a lifting accident, rather than a slip and fall and sought permanent and total disability benefits. Galigher Ash filed a motion to dismiss based on the doctrine of res judicata, which was granted by the administrative law judge on July 28, 1989 and affirmed by the Board on October 26, 1989. The administrative law judge concluded that "[a] present claim that the syrinx has resulted in permanent total disability must

fail where the causal link between the injury and the syringx has previously been adjudicated." The present petition for writ of review is from the 1989 proceedings.

These proceedings were commenced after January 1, 1988, and thus our review is governed by Utah Code Ann. § 63-46b-16(4) of the Utah Administrative Procedures Act. Section 63-46b-16(4)(d) provides, in relevant part, that an appellate court shall grant relief where a person seeking review has been substantially prejudiced because "the agency has erroneously interpreted or applied the law." We must determine if the Commission erred in dismissing the 1989 petition on the basis of res judicata.

The doctrine of res judicata is available in worker's compensation matters. See Larson, Workmen's Compensation Law § 79.72 (1989). Application of res judicata must, however, be harmonized with the continuing jurisdiction of the Industrial Commission in workers compensation to reopen cases and modify awards. Utah Code Ann. § 35-1-78 (1988) provides, in relevant part, that "[t]he powers and jurisdiction of the Commission over each case shall be continuing, and it may from time to time make such modification or change with respect to formal findings, or orders with respect thereto, as in its opinion may be justified." The Utah Supreme Court has consistently interpreted the foregoing language to require "as the basis of modification, evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy." Buxton v. Industrial Commission, 587 P.2d 121, 123 (Utah 1978); see also Spencer v. Industrial Commission, 733 P.2d 158, 161 (Utah 1987) (per curiam). In Buxton and Spencer, the Commission's original order found a substantial permanent partial disability based on a causal connection between an industrial accident and the claimant's injury. In each case, the Utah Supreme Court held the Commission erred by refusing to modify the award based on subsequent evidence that the employee was not employable and could not be rehabilitated. These cases are distinguishable from cases such as the present one where no causal relation between the injury and the industrial accident has ever been established. The finding of lack of causation is res judicata in a subsequent claim for recovery based on the same accident and injury. See, e.g., Hughey v. Industrial Commission, 394 N.E.2d 1164 (Ill. 1979); Reddel v. Industrial Commission, 131 Ariz App. 263, 640 P.2d 194 (Ariz App. 1982); Govan v. Industrial Commission, 23 Ariz. App. 261, 532 P.2d 533 (Ariz. App. 1975).

In the case now before us, Galigher Ash contends that "the prior adjudication in this case involved the same injuries as are alleged in this case." Bailey counters that the second application differs from the original one because he now claims a lifting accident rather than a slip and fall and he now claims permanent disability. He interprets the administrative law judge's 1986 decision as concluding that he had not sustained his burden of proving that a slip and fall occurred and states that the accident claimed in the May 9, 1985 application was "the accident and injury that was on the records instead of the alleged slip and fall accident". This case is similar to Houser v. Southern Idaho Pipe & Steel, Inc. 649 P.2d 1197 (Idaho 1982). The claimant in that case alleged a knee injury and in the course of the hearing, contended that he had sustained back injuries on two occasions when his knee went out. He appealed from the Industrial Commission's order that his condition had stabilized, resulting in a 10% permanent partial impairment. During the pendency of the appeal, claimant filed a second complaint alleging an injury to his back as a result of the knee injury and seeking additional compensation. The employer made a motion to dismiss on the basis that the back injury had already been considered. The Commission granted the motion and claimant appealed. The Idaho Supreme Court affirmed, concluding that "the proceeding in the instant case and in the prior proceeding arose out of the same operative facts between the same parties" and holding that the second application was properly dismissed on the basis of res judicata.

In the present case, Bailey initially contended he slipped and fell on June 30, 1982, and disputed the reports by his employer and doctor indicating that he was injured in a lifting accident, resulting in a back strain from which he fully recovered. The administrative law judge concluded that the accident was a lifting accident, and further concluded that no causal connection had been established between the compensable lifting accident and the syrinx. Petitioner presented no medical testimony in the 1986 hearing. Instead, petitioner's counsel argued that the onset of symptoms after the accident was in itself sufficient to establish prima facie causation and require submission to a medical panel, which the administrative law judge declined to do on the basis that there was no conflicting medical evidence. That decision became final with the dismissal of the original petition for review by this court.

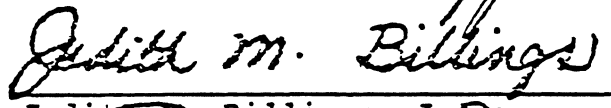
Petitioner attached a letter written by his treating physician and dated in December 1986 (one month after the original hearing) to his 1989 request for hearing. In the 1989 decision, the administrative law judge noted "for the sake of

discussion," that the letter from claimant's doctors was not sufficient to establish medical causation because it states, in part, that "[i]t would be impossible . . . to attribute the fall as to the origin of his syringomyelia."¹ Our review of the record and the 1986 decision leads us to conclude that any claim relating to injury from a June 30, 1982 accident has been fully adjudicated by the Commission. The claim that the June 30, 1982 accident caused the syringomyelia is now barred by res judicata, and the Commission did not err in dismissing the petition.²

We affirm the Board's order and dismiss the petition.

ALL CONCUR:


Regnal W. Garff, Judge


Judith M. Billings, Judge


Richard C. Davidson, Judge

1. The letter goes on to suggest that "it is possible that Mr. Bailey has had a small, asymptomatic syrinx within his spinal cord for many years that with repeated heavy lifting and straining may have gradually enlarged, eventually producing his weakness and spasticity." Appellant did not make this claim in either his 1986 nor his 1989 requests for benefits.

2. Much of petitioner's argument concerns alleged misrepresentation by his former attorney about the status of his first petition for judicial review. He contends that his attorney led him to believe that his petition was pending when it had actually been dismissed as untimely some eighteen months earlier. Although we would not condone such conduct, it does not support a different result in this case.