2011

Todd Flemal v. Utah Labor Commission, Chad Ewing, d.b.a. Italian Drywall, and Uninsured Employers' Fund : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

TODD FLEMAL,	:	
Petitioner,	:	
v.	:	
UTAH LABOR COMMISSION, CHAD EWING, d.b.a. ITALIAN DRYWALL, and UNINSURED EMPLOYERS' FUND	:	Case No. 20110022-CA
Respondents.	:	

BRIEF OF RESPONDENT UNINSURED EMPLOYERS' FUND

Appeal from the Final Decision of the Utah Labor Commission

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LIST OF ALL PARTIES

To the best of Respondents Uninsured Employers' Fund's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENT UNINSURED EMPLOYERS' FUND

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of this Court under Utah Code Ann. § 78A-4-103(2)(a) (West 2009).

STATEMENT OF ISSUE ON APPEAL

Mr. Flemal was injured on April 16, 2007. Flemal had been employed by Chad Ewing (d.b.a. Italian Drywall). The only disputed issue before the Utah Labor Commission was whether Flemal's employment had been terminated before he was injured. R. 145. The Commission determined that Ewing had terminated Flemal's employment before Flemal was injured. Is the Commission's determination supported by substantial evidence when viewed in light of the record as a whole?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: An agency's determination of fact will be overturned on appeal only if the petitioner has been substantially prejudiced and the determination is not "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63G-4-403(4)(g) (West 2009). "Substantial evidence exists when the factual findings support more than a mere scintilla of evidence . . . though something less than the weight of the evidence." Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶35, 164 P.3d 384 (internal citation and quotation marks omitted).

DETERMINATIVE STATUTES AND RULES

All such provisions are set forth verbatim in Addendum A to this brief.

STATEMENT OF THE CASE

On January 12, 2009, Flemal filed an application for hearing with the Commission. R. 1-8. Flemal sought workers' compensation benefits for an injury that he claimed occurred while he was working for Chad Ewing. R. 1. The Uninsured Employers' Fund contested Flemal's claim that his injury arose in the course and scope of his employment. R. 12. At the evidentiary hearing, Ewing and Nicholas Bassett testified that Flemal had been fired before the injury, and had been told not to perform any more work. R. 162 at 49-54, 58-65. The Administrative Law Judge held that Flemal was employed at the time of his injury because Ewing had failed to adequately fire him. "The preponderance of the evidence shows that Ewing attempted to terminate the Petitioner on the morning of April 16, 2007. Unfortunately he failed to escort the Petitioner off the premises." R. 77.

The Commission reversed the ALJ's decision, making a determination of fact that Ewing had terminated Flemal's employment before Petitioner's injury. R. 158.[1] Based in part on this determination, the Commission held that Flemal was not acting in the course of employment at the time of his injury. The Commission therefore denied Flemal's claim for benefits. R. 158-59. Flemal filed a timely petition for judicial review with this Court.

STATEMENT OF RELEVANT FACTS

Todd Flemal was employed by Chad Ewing to perform cleanup on job sites. R. 162 at 56. On April 16, 2007, Mr. Ewing fired Flemal for bringing drugs to the job site. Id. at 58-59. Both Ewing and Bassett testified that Flemal was fired and told not to do anymore work, but to wait until Ewing could give him a ride home. Id. at 49-54, 58-65. Bassett testified that Flemal was acting contrary to these instructions when he was injured. Id. at 50, 54. Flemal testified that he had not been fired. Id. at 24-25.

The only issue Flemal raised before the Commission was whether he had been fired before he was injured. R. 145.

SUMMARY OF ARGUMENT

The sole issue presented to the Commission was whether Flemal was employed by Chad Ewing at the time he was injured. R. 145. The Commission reviewed the testimony of Flemal, Ewing, and Bassett. It concluded that Bassett's testimony was the most

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[1] The record contains an unnumbered page before page 158. That page is relevant as well.

persuasive. R. 158. Weighing the evidence, the Commission made a determination of fact that Flemal had been fired and told not to perform anymore work prior to his injury. R. 158-59.

There is substantial evidence in the record to support the Commission's determination. Adopting an erroneous standard of review, Flemal argues that any doubt as to coverage should be resolved in favor of the injured worker. Seeking to place the burden of proof on the respondents to show the correctness of the Commission's decision, Flemal also fails to argue that there is no substantial evidence in the record to support the Commission's determination of fact. The Commission's decision should be affirmed on appeal.

ARGUMENT

SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE COMMISSION'S FINDING OF FACT THAT FLEMAL'S EMPLOYMENT WAS TERMINATED BEFORE HIS ACCIDENT

Flemal asks this Court to use the wrong standard of review in considering his challenge to the Commission's factual findings. Br. of Petitioner 9-16. Utah's Administrative Procedures Act states:

> The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . .
>
> the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

Utah Code Ann. § 63G-4-403(4)(g) (West 2009). See also Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶9, 148 P.3d 960.

The Commission determined that Flemal was not employed by Ewing at the time of his injury; that Flemal had been fired. Flemal doesn't claim that there is no substantial evidence in the record to support the Commission's determination. Instead, he asks this Court to use two other standards of review. First, Flemal claims that any doubts as to coverage should be resolved in favor of the injured worker. Br. of Petitioner at 9-11. His only support for this claim is a series of cases stating that Utah's Workers' Compensation Act should be liberally construed, id. at 9-10, however none use the standard of review for factual determinations urged by Flemal. Indeed, in one of the cases Flemal cites, the Utah Supreme Court held that it would "affirm the Commission on contradictory evidence, if there is substantial competent evidence to sustain it." Baker v. Indus. Comm'n, 405 P.2d 613, 615 (Utah 1965), abandoned in unrelated part, Allen v. Indus. Comm'n, 729 P.2d 15 (Utah 1986). Notably in Baker, the Court did not reject the Commission's factual determination because all doubts should be resolved in favor of the injured worker, but because there was no substantial evidence in the record to support the challenged determination of fact. Id. at 614-15.

And in Crafts v. Labor Commission, 2005 UT App 238,[2] this Court used the substantial evidence standard to review a challenge to the Commission's determinations

[2] Unpublished decisions of this Court are binding precedential authority. Grand County v. Rogers, 2002 UT 25, ¶16, 44 P.3d 734. See also Utah R. App. P. 30(f).

of fact. Id. at *1. Further, this Court held that the petitioner was not relieved of his burden to prove his injuries were covered by the Workers' Compensation Act by the requirement that the act be liberally construed in favor of finding coverage when the statutory terms reasonably permit such an interpretation. Id.

To further deflect this Court's attention, Flemal also tries to place the burden of proof on the respondents. Br. of Petitioner at 11-16. Without any citation to authority, petitioner asks this Court to, de novo, assess the credibility of the witnesses. It is not this Court's "prerogative on review to reweigh the evidence." VanLeeuwen v. Indus. Comm'n, 901 P.2d 281, 284 (Utah App 1995). Instead the reviewing court gives deference to the factual determinations of administrative bodies. The Commission's factual findings should be upheld if there is more than a mere scintilla of evidence that supports them in the record.

> Substantial evidence exists when the factual findings support "more than a mere scintilla of evidence . . . though something less than the weight of the evidence." An administrative law decision meets the substantial evidence test when "a reasonable mind might accept as adequate" the evidence supporting the decision.

Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶35, 164 P.3d 384 (citation omitted).

The only issue on appeal is the correctness of the Commission's fact determinations that Flemal was fired before his injury. That Flemal had been told not to perform any more work. The testimony of Chad Ewing and Nicholas Bassett supports these fact determinations. Their testimony was that Flemal was fired before his injury. Petitioner has failed to show that the Commission's determinations of fact are

unsupported by substantial evidence in the record.[3] The final agency action should be affirmed.

CONCLUSION

For the reasons set forth above, the Uninsured Employers' Fund asks this Court to affirm the final agency action.

Respectfully submitted this 28th day of September, 2011.

BRENT A. BURNETT
Assistant Attorney General
Attorney for Uninsured Employers' Fund

[3] The Uninsured Employers' Fund joins in Respondent Chad Ewing's argument that Flemal failed to marshal all of the evidence that supports the Commission's determinations of fact. Br. of Respondent Chad Ewing at 7-8. The Commission's decision should be affirmed for this additional reason.

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent Uninsured Employers' Fund, postage prepaid, to the following on this 28th day of September, 2011:

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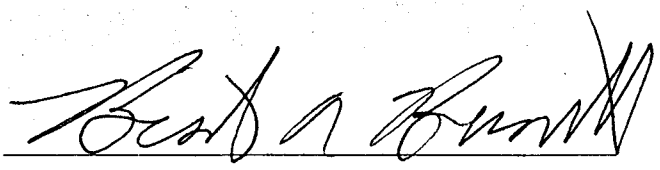

ADDENDUM "A"

Determinative Statutes and Rules

Utah Code Ann. § 63G-4-403 (West 2009)

Judicial review -- Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

ADDENDUM "B"

UTAH LABOR COMMISSION

TODD FLEMAL, **Petitioner,** **vs.** **CHAD EWING, d.b.a. ITALIAN DRYWALL, and UNINSURED EMPLOYERS FUND,** **Respondents.**	**ORDER REVERSING ALJ'S DECISION AND DENYING BENEFITS** **Case No. 09-0026**

Chad Ewing, a sole proprietor doing business as Italian Drywall, and the Uninsured Employers Fund ("UEF") ask the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Todd Flemal under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

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

BACKGROUND AND ISSUE PRESENTED

Mr. Flemal claims benefits for left-hand injuries resulting from an accident on April 16, 2007. According to Mr. Flemal, the accident occurred while he was working for Mr. Ewing, but Mr. Ewing asserts he had terminated Mr. Flemal's employment prior to the accident.

After an evidentiary hearing, Judge Marlowe concluded that an employment relationship continued to exist between Mr. Ewing and Mr. Flemal at the time of the April 16 accident and that Mr. Flemal's injuries arose out of and in the course of that employment. Judge Marlowe therefore ordered Mr. Ewing and the UEF[1] to pay workers' compensation benefits to Mr. Flemal.

Mr. Ewing's motion for review of Judge Marlowe's decision reiterates that Mr. Flemal was not Mr. Ewing's employee when the April 16 accident occurred; consequently, Mr. Flemal's injuries did not arise in the course of employment. Mr. Ewing also argues that, even if there was an employment relationship, the actions leading to the accident were outside the scope of Mr. Flemal's employment. Finally, Mr. Ewing contends the evidence does not support Judge Marlowe's determination of Mr. Flemal's compensation rate. The UEF joins in Mr. Ewing's arguments.

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[1] Pursuant to § 34A-2-704 (1) (a) of the Utah Workers' Compensation Act, the UEF assists in paying worker's compensation benefits to injured workers whose employers are uninsured and insolvent.

SUMMARY OF EVIDENCE AND FINDINGS OF FACT

Some of the material facts regarding Mr. Flemal's employment and accident are undisputed. On approximately March 1, 2007, Mr. Ewing, a drywall contractor, hired Mr. Flemal as a helper. Mr. Ewing paid Mr. Flemal in cash, without withholding any taxes or providing any wage statement or other documentation. Mr. Ewing also failed to maintain workers' compensation insurance coverage for his employees.

Because Mr. Flemal did not have a car, Mr. Ewing drove him to and from the various work sites. On the morning of April 16, 2007, Mr. Ewing drove Mr. Flemal to a drywall project in Syracuse, Utah. Mr. Bassett, another of Mr. Ewing's employees, was also working at the site. That day, as Mr. Flemal was standing on a crate to finish the basement ceiling, the crate gave way. Mr. Flemal fell and a 1½ inch screw lodged in left hand.

While the foregoing facts are not in dispute, other relevant facts are sharply disputed.

Mr. Ewing testified that after he and Mr. Flemal arrived at the job site, he observed Mr. Flemal with a hypodermic needle containing a substance Mr. Ewing believed to be a drug. Based on this observation, Mr. Ewing told Mr. Flemal "he wasn't needed anymore." Mr. Ewing then left Mr. Flemal at the job site because Mr. Ewing had to pick his children up from school.

Mr. Bassett, the other employee present at the accident scene, corroborates Mr. Ewing's statements. Mr. Bassett heard Mr. Ewing tell Mr. Flemal that his help wasn't needed anymore; that Mr. Flemal was not to perform any work; and that he would take Mr. Flemal home after he picked his children up. Mr. Bassett testified that after Mr. Ewing left the work site, Mr. Flemal said "since I'm here I'm going to sweep." Later, Mr. Bassett saw Mr. Flemal standing on the crate to work on the ceiling, and then fall from the crate.

Mr. Flemal tells a different story. He denies that Mr. Ewing terminated his employment or told him not to do any work on April 16. To the contrary, Mr. Flemal testified that, after he and Mr. Ewing arrived at the Syracuse job site on April 16, Mr. Ewing assigned various tasks to him. Mr. Flemal was in the process of performing his work when he fell from the crate and injured his hand. Mr. Flemal denied possessing a hypodermic needle at work that day. However, he was equivocal about his actual use of drugs that day and he admitted intravenous methamphetamine use and marijuana use before and after the day of the accident.

Mr. Flemal's version of events cannot be reconciled with the testimony of Mr. Ewing and Mr. Bassett. In considering which, if either, version is true, the Commission notes that both Mr. Flemal and Mr. Ewing have a financial interest in the outcome of this matter. Mr. Flemal's credibility is diminished by his admitted drug use and his unconvincing testimony regarding his use of drugs on the day in question. Mr. Ewing's credibility is diminished by his failure to comply with several state and federal tax and employment laws—in particular, his failures to document payment of wages,

maintain workers' compensation coverage, or withhold payroll taxes. Additionally, the fact that Mr. Ewing allowed Mr. Flemal to remain on the work site after his purported firing suggests that Mr. Flemal was never fired at all. However, that inference is rebutted by Mr. Ewing's explanation of his need to pick up his children from school before he could take Mr. Flemal home.

While the testimony of Mr. Flemal and Mr. Ewing is subject to doubt, Mr. Bassett's testimony is more persuasive. He has no direct personal interest in this matter. His testimony was direct and internally consistent. Although Mr. Bassett was not present in the hearing room to hear Mr. Ewing's testimony, his testimony corroborated Mr. Ewing's version of events. The Commission therefore accepts the testimony of Mr. Ewing and Mr. Bassett regarding the events leading to Mr. Flemal's accident on April 16.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-401 (1) of the Utah Workers' Compensation Act provides medical and disability benefits to employees injured "by accident arising out of and in the course of the employee's employment." The threshold issue in this case is whether, at the time of his accident on April 16, Mr. Flemal was still employed by Mr. Ewing so that his injuries can be said to arise "in the course" of that employment.

In *Walls v. Industrial Commission*, 857 P.2d 964, 967 (Utah App. 1993), the Utah Court of Appeals noted that

> . . . an injury occurs in the course of employment when it takes place (1) *within the period of employment*, (2) at a place where the employee reasonably may be in the performance of [the employee's] duties, and (3) *while [the employee] is fulfilling those duties or engaged in doing something incidental thereto*. . . . Moreover, all three criteria of time, place and circumstances must be fulfilled in order for a claimant to recover workers' compensation benefits."

(Citations and internal quotation marks omitted; emphasis in original.)

In *Walls, ibid*, the individual seeking workers' compensation benefits had stayed at her place of employment for several hours after her shift had ended in order to socialize. The Court of Appeals observed that courts of other jurisdictions "have consistently held that employees who remain on the work premises following their employment for their own social purposes are not entitled to workers' compensation benefits." *Walls* at 968. While Mr. Flemal did not remain at the work site in this case for "social purposes," but was instead waiting for a ride home, the Commission does not view that difference as significant. The fact remains that Mr. Flemal's employment had ended. His subsequent actions, which resulted in his accident and injury, were not within the period of his employment and, consequently, were not in the course of his employment. Consequently, his injuries are not compensable under § 34A-2-401 (1) of the Utah Workers' Compensation Act.

ORDER

The Commission sets aside Judge Marlowe's award of benefits in this matter. The Commission concludes that Mr. Flemal's injuries did not arise in the course of his employment and for that reason are not compensable under the Utah Worker's Compensation Act. Mr. Flemal's claim for benefits is therefore dismissed. It is so ordered.

Dated this 15th day of December, 2010.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

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

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Reversing ALJ's Decision and Denying Benefits in the matter of Todd Flemal, Case No. 09-0026, was mailed first class postage prepaid this 15th day of December, 2010, to the following:

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Utah Labor Commission

ADDENDUM "C"

Not Reported in P.3d, 2005 WL 1243759 (Utah App.), 2005 UT App 238

(Cite as: 2005 WL 1243759 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

Millard R. CRAFTS, Petitioner,
v.
LABOR COMMISSION; and Yellow Freight Systems, Inc., Respondents.
Case No. 20030712-CA.

May 26, 2005.
Original Proceeding in this Court.

Virginius Dabney, St. George, for Petitioner.
Alan L. Hennebold, Dori K. Petersen, and Kristy L. Bertelsen, Salt Lake City, for Respondents.

Before Judges DAVIS, GREENWOOD, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

DAVIS, Judge:

***1** Petitioner Millard R. Crafts seeks review of a decision of the Utah Labor Commission (Commission) affirming a decision of a Commission Administrative Law Judge, which denied and dismissed Crafts's Applications for Hearing requesting permanent total disability compensation benefits from Yellow Freight Systems, Inc. (Yellow Freight) for an alleged industrial accident that occurred in 1997 (the 1997 incident). We affirm.

Crafts argues that the Commission erred in denying his claim because (1) the signed and approved compensation agreement for permanent partial disability compensation (compensation agreement) he entered into with Yellow Freight is entitled to administrative finality status, permitting it to be final, appealable, and entitled to res judicata effect; and (2) he has satisfied the threshold requirement for a tentative finding of permanent total disability-that he was significantly impaired from the 1997 incident.

We will overturn the Commission's factual findings only if they are "not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah Ct.App.1989) (quotations and citation omitted). "[T]his court will not substitute its judgment as between two reasonably conflicting views...." *Id.* "It is the province of the [Commission], not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the [Commission] to draw the inferences." *Id.* "When an agency has discretion to apply its factual findings to the law, we will not disturb the agency's application unless its determination exceeds the bounds of reasonableness and rationality." *Smith v. Mity Lite*, 939 P.2d 684, 686 (Utah Ct.App.1997) (quotations and citation omitted).

Although, as Crafts notes, the Workers' Compensation Act (the Act), *see* Utah Code Ann. §§ 34A-2-101 to -803 (2001 & Supp.2004), is to be construed "liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction," *Heaton v. Second Injury Fund*, 796 P. 2d 676, 679 (Utah 1990), Crafts is not thereby relieved of the burden of proving that his injuries were caused by the 1997 incident. The Act provides that

> [t]o establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:
>
> (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident ...;
>
> (ii) the employee is permanently totally disabled; and
>
> (iii) the industrial accident ... was the direct cause of the employee's permanent total disability.

Utah Code Ann. § 34A-2-413(1)(b)(i)-(iii) (2001).

*2 Crafts argues that the executed compensation agreement conclusively establishes that he has a 3% permanent impairment resulting from the 1997 incident, and that Yellow Freight is barred by res judicata and estoppel from denying their previous stipulation to that effect. However, even assuming Crafts is correct on this point, and that the compensation agreement is conclusive as to the 3% impairment rather than merely being some evidence to that effect, with only a 3% permanent partial impairment Crafts has nonetheless failed to demonstrate that he "sustained a *significant* impairment or combination of impairments as a result of the industrial accident." Utah Code Ann. § 34A-2-413(1)(b)(i) (emphasis added). Crafts, therefore, is not entitled to permanent total disability compensation from Yellow Freight.

Even if we give the compensation agreement the legal effect Crafts urges, the Commission's determination that Crafts failed to provide sufficient evidence that he was *significantly* impaired as a result of the 1997 incident is unassailable. We decline to disturb the Commission's dismissal of Crafts's claim.

WE CONCUR: PAMELA T. GREENWOOD and GREGORY K. ORME, Judges.

Utah App.,2005.

Crafts v. Labor Com'n
Not Reported in P.3d, 2005 WL 1243759 (Utah App.), 2005 UT App 238
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