2011

Sunnyside Coal Company v. Utah Labor Commission and Cecil Henningson : Brief of Appellant

Utah Court of Appeals

ORIGINAL

IN THE UTAH COURT OF APPEALS

SUNNYSIDE COAL COMPANY/ WORKERS COMPENSATION FUND; and EMPLOYERS' REINSURANCE FUND, Appellants/Petitioners, v. UTAH LABOR COMMISSION; and CECIL HENNINGSON, Appellees/Respondents.	Appellate Case No. 20110033-CA Labor Commission Case No. 07-0253

REPLY BRIEF OF APPELLANT EMPLOYERS' REINSURANCE FUND

APPEAL FROM AN ORDER OF THE UTAH LABOR COMMISSION

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I. MR. HENNINGSON'S UNTIMELY CLAIM IS BARRED

A. The Statute of Limitations Precludes the Labor Commission's Award of Permanent Total Disability Benefits

The statute of limitations plainly bars Mr. Henningson's claim against ERF. It reads:

> A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Utah Code Ann. § 35-1-98(2) (1993). The Utah Legislature expressly denied the Labor Commission the power to modify or change this statute of limitations "in any respect." Utah Code Ann. § 35-1-78(3)(b) (1993). Nevertheless, the Labor Commission affirmed an award of permanent total disability benefits to Mr. Henningson by asserting the very power to ignore the statute of limitations denied it by the Legislature.

Mr. Henningson was injured in October 1993. He knew at that time, and certainly by the following year, that he was permanently and totally disabled. His medical providers told him that he was permanently and totally disabled, and Mr. Henningson relied on those diagnoses when he successfully applied for Social Security permanent total disability benefits in 1994. He never attempted to return to work after his October 1993 accident. Yet, Mr. Henningson waited until February 2007 to file his claim for permanent total disability benefits under the Utah Worker's Compensation Act.

Mr. Henningson argues that his late filing is excused by *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207, and that *Vigos* supports the Labor Commission's retroactive award of permanent total disability benefits. But, as explained at length in the opening briefs filed by ERF and the other petitioners, Mr. Henningson and the Labor Commission ignored the plain language and logic of *Vigos* and relied on factual assumptions that are not supported by the Record.

In *Vigos*, an injured worker's permanent total disability claim was allowed to proceed although it was filed outside the limitations period because the substantial equivalent of filing a formal application had occurred before the statute had run. The Industrial Commission, predecessor to the Labor Commission, had obtained initial jurisdiction over the worker's claim because

> **[a]ll** interested parties had notice of Vigos' initial claim and knew the material and jurisdictional facts surrounding his accident. The required forms were filed, liability accepted, disability benefits paid, and medical expenses compensated well within the six-year period. In effect, both jurisdiction and liability were conceded by **all** concerned. . . . [T]he meaning, purpose, and intent of the Act were met.

Vigos, 2000 UT 2, ¶ 17, 993 P.2d 207 (emphasis added). Vigos' late-filing was excused by a plurality of the Court because the extent of his disability only became evident after nearly six years. Vigos' doctors had told him he could return to work without restrictions and he attempted to do so for years, and there was no indication that he was permanently and totally disabled prior to the filing of his application. "The full extent of [Vigos'] injuries became apparent only after several years." *Id.* ¶ 21, 993 P.2d 207. The *Vigos* court allowed the late-filed claim to proceed in part because "all" parties had notice of the

injury and had paid benefits before the statute of limitations had run. *Id.* ¶ 17, 993 P.2d 207. Each defendant in *Vigos* had notice of the injury, had accepted liability, and had paid benefits within the limitations period.

The same is not true here. Workers Compensation Fund ("WCF") and Sunnyside Coal Company ("Sunnyside") may have received notice of Mr. Henningson's injury and paid some benefits to him within the limitations period.[1] ERF did not. The Labor Commission improperly assumed that ERF had notice of Mr. Henningson's injury, accepted liability, and paid benefits to him within six years of his injury. (*See, e.g.*, Appellee's Br. at 12, 17; R. at 332.) In doing so, the Labor Commission erred. It is undisputed that ERF first received notice of Mr. Henningson's claim in 2007, when he first filed his application for hearing claiming permanent total disability. ERF was not previously aware of, had not accepted liability for, and had not paid benefits with respect to Mr. Henningson's injury.

Because of Mr. Henningson's late filing, ERF was denied the opportunity to timely investigate, evaluate or defend against the claim for permanent total disability, and was deprived of its statutory right to attempt to rehabilitate Mr. Henningson while he was young and assist him to return to the work force.[2] He argues ERF was not prejudiced because Sunnyside and WCF investigated the claim. (Appellee's Br. at 30.) Their

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[1] ERF notes, and joins in, the WCF and Sunnyside arguments that Mr. Henningson's claim is untimely for reasons other than lack of notice to ERF. By focusing here on the requirement of notice, ERF does not minimize the import of those arguments.

[2] Curiously, Mr. Henningson defends against ERF's equitable arguments, in part, by complaining that ERF failed to discharge its statutory mandate to attempt to rehabilitate him and did not advise him that he could seek permanent total disability benefits, all during a time ERF was unaware of his industrial accident. (Appellee's Br. at 26.)

investigations were not made with ERF's interests, however, or with the defense of a permanent total disability claim in mind.

As ERF noted in its opening brief, permanent total disability applications are scrutinized much more carefully than permanent partial and temporary total claims. (Appellant ERF's Br. at 28 n.7.) *See also* Utah Code Ann. § 34A-2-413 (2010). Permanent total disability awards are open-ended, lasting for the life of the claimant and are extremely costly to insurers.[3] By contrast, the temporary total and permanent partial disability benefits that Mr. Henningson initially sought and received are limited and are governed by different statutes with different burdens of proof.

When the other parties evaluated Mr. Henningson's claim and paid him all the temporary total and permanent partial disability compensation he applied for, they thought they had completed their obligations to him. They had no reason to treat his claim as if it had been filed under a different statute or anticipate that they would have to respond to a new claim to be filed 14 years later. It follows that they had no reason to protect ERF's interests relating to a future, unfiled claim. ERF was deprived of the opportunity to interview witnesses, conduct examinations, or rehabilitate Mr. Henningson and return him to the workforce while he was young, thereby potentially avoiding the permanent total disability claim altogether, because of Mr. Henningson's delay.

Mr. Henningson knew early on that he was permanently and totally disabled. He affirmatively represented to the Social Security Administration in 1994 that he was

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[3] In this case, Mr. Henningson's claim for permanent total disability benefits, retroactive to 1993, coupled with a now-punitive 8% statutory interest, exceeds $500,000.

permanently and totally disabled and has since accepted benefits based on his representation. He has not sought to return to work, diligently or otherwise. He justifies his fourteen year delay in filing a claim for permanent total disability benefits by arguing that the statute of limitations never bars claims for benefits of any kind, once the Labor Commission is notified of an industrial accident. That is not the law and it is not the teaching of *Vigos*.

Mr. Henningson does not seriously dispute that he knew he was permanently and totally disabled following his 1993 injury, but argues instead that awareness of his disability was irrelevant. (Appellee's Br. at 13-14.) He states that "nothing in the language of section 35-1-98(2) . . . that indicates that an injured worker's time limit for filing a claim is based upon when he knew or should have known he had a claim for additional compensation." (Appellee's Br. at 13.) He is correct. The workers' compensation statute of limitations is instead triggered by the date of the accident. Utah Code Ann. § 35-1-98 (1993).

> As a general rule, a statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action. Once a statute has begun to run, a plaintiff must file his or her claim before the limitations period expires or the claim will be barred. Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period.

Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 20, 108 P.3d 741 (quotation marks and citations omitted). The last, and indeed only, event necessary to trigger the statute of limitations at issue in this case was the October 1993 accident.

Mr. Henningson's knowledge is relevant in one regard, however. The Court has held that the statute of limitations will bar an untimely claim where the claimant "knew of the injury and could have filed for compensation within the statutory period." *Avis v. Bd. of Review of Indus. Comm'n*, 837 P.2d 584, 588 (Utah Ct. App. 1992). A lack of awareness of disability during the limitations period, coupled with ongoing rehabilitation efforts during the may entitle an injured worker to claim relief from the statute under *Vigos*, but Mr. Henningson does not qualify for that relief. He applied for Social Security disability benefits on May 2, 1994, successfully asserting that he had been totally disabled since the day after his October 13, 1993 accident and cannot now claim otherwise.

Mr. Henningson additionally cites *Mecham v. Industrial Commission*, *Christensen v. Spanish Fork City*, and *Utah Apex Mining Co. v. Industrial Commission*, for the proposition that an injured worker need not file a formal application for hearing within the limitations period to preserve his or her claim. (Appellee's Br. at 12.)
Mr. Henningson completely ignores the fact that these cases were decided **before** the Utah Legislature enacted a statute of limitations for permanent total disability claims, so they are of limited value here. To the extent they may apply, these cases, like *Vigos*, suggest that the Labor Commission may assert original jurisdiction only where the employee's permanent and total disability is not immediately apparent within the applicable limitations period, and so long as the respondent has timely notice of the claim and effectively concedes jurisdiction by accepting liability and paying benefits. *See Christensen v. Spanish Fork City*, 2000 UT 13, ¶ 2, 994 P.2d 1252 ("It is undisputed that

Christensen could not have realized that his original injury would lead to permanent total disability until the unsuccessful third operation, which occurred more than six years after his initial accident."); *Mecham v. Indus. Comm'n*, 692 P.2d 783, 786 (Utah 1984) ("[T]here is no need for any particular formality, as long as notice is given."); *Utah Apex Mining Co. v. Indus. Comm'n*, 209 P.2d 571, 573 (Utah 1949) (noting that the employer and insurance carrier had admitted liability and paid benefits, effectively conceding jurisdiction). Mr. Henningson has not, and cannot, establish any of these facts. He did not put ERF on notice of his injury until 2007, when he for the first time applied for permanent total disability compensation under Utah law. Having no notice of the accident, ERF could not have taken any action that could be construed as a concession of jurisdiction.

Mr. Henningson also cites *Mecham* for the proposition that there is "no set time limit" for filing a claim for permanent total disability benefits. (Appellee's Br. at 15.)[4] This argument fails for several reasons. First, as noted above, there was no statute of limitations applicable to *Mecham*. 692 P.2d at 785 ("Mecham's claim for permanent total disability is governed by section 35-1-67 which contains no limitation."). *See also Vigos*, 2000 UT 2, ¶ 14, 993 P.2d 207 ("Prior to enactment of this provision in 1988, the

[4] Mr. Henningson also cites a report attached as Addendum C to his brief in support of his claim that no statute of limitations exists. (Appellee's Br. at 15 n.6.) He is wrong, both because that report is not part of the Record and must be stricken for reasons explained below, and because the cited language is incomplete and therefore misleading. Many of the permanent total disability claims described in the report which ERF is called to defend arise before 1988, when there was no applicable statute of limitations. Claims against the ERF arising after 1988, however, are subject to the statute of limitations. Utah Code Ann. § 35-1-98(2) (1993).

Act had no statute of limitations for permanent total disability claims."). Moreover, the parties in *Mecham* were aware of and had litigated the issue of disability within only a few years of the injury. *Mecham*, 692 P.2d at 784. As mentioned previously, the *Mecham* court recognized that no particular formality is required to initiate a claim, "as long as notice is given." *Id.* at 785. Additionally, unlike Mr. Henningson, the plaintiff's injury in *Mecham* did not immediately result in a permanent total disability. Rather, "her permanent total disability resulted from a slow deterioration" over a period of approximately twenty years. *See Id.* at 784 & 786.

Vigos, *Mecham* and similar cases do not, as Mr. Henningson argues and the Labor Commission concluded, stand for the proposition that no statute of limitations ever applies to permanent total disability claims so long as the original injury is timely reported. These decisions have limited applicability to claims arising after 1988 and, even then, can be invoked only where the claimant is unaware of a permanent total disability within the limitations period and therefore had no reason to file a claim. *See Mecham*, 692 P.2d at 786. Here, as a basis for his claim, Mr. Henningson does not allege that his disability developed later, but rather seeks compensation beginning the day after his accident.

The Labor Commission's decision to hold ERF liable for the payment of permanent total disability benefits renders the statute of limitations completely meaningless. Mr. Henningson was paid the entire universe of benefits he applied for during the limitations period, which ran in 1999. He first put ERF on notice of the injury

in 2007, almost fourteen years after it happened.[5] If the statute of limitations is to have any meaning at all, it must bar this claim.

B. There is no Valid Justification for Mr. Henningson's Late Filing

Mr. Henningson excuses his late filing by offering alternative reasons he did not need to file a claim for permanent total disability. Each excuse demonstrates instead that the statute of limitations should be applied. He first suggests that he had no reason to file because he had to wait until he was medically stable. (Appellee's Br. at 16.) Mr. Henningson admits, however, that he was medically stable in 1994. (*Id.*) Then, he suggests that he did not need to file because he was receiving temporary total and partial permanent disability benefits. (*Id.*) He admits, however, that he received such benefits only until June 1995. (*Id.*)

Mr. Henningson next argues that it is necessary to apply for Social Security disability benefits before filing for permanent total disability benefits. (*Id.*) However, neither the Workers Compensation Act nor the Social Security Act requires an injured worker to first seek Social Security benefits. This argument also fails because Mr. Henningson admits that he began receiving Social Security total disability benefits in 1995, well before the end of the limitations period. (Appellee's Br. at 17.)

He also claims that he is now entitled to permanent total disability benefits because Sunnyside and WCF paid him only temporary total and partial permanent disability benefits within the limitations period. (*Id.*) Mr. Henningson received only

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[5] A delay that exceeds the current 6- and 12-year statutes of limitations and repose. Utah Code Ann. § 34A-2-417(2) (2010).

those benefits because those were the only benefits he sought following his injury. He did not ask for payment of permanent total disability benefits.

Last, Mr. Henningson dissembles that his failure to file a timely claim somehow served WCF's and Sunnyside's interests because he was "seek[ing] a more conservative disability award initially (e.g. temporary total, permanent partial, and social security disability benefits)." (*Id.*) This argument is completely undercut by the fact that he is now asking for an award of permanent total disability benefits not from the date of his new application but, with interest, dating back to 1993. Even assuming some validity to this list of interests, they were not the interests of ERF.

C. Waiver and Laches Likewise Bar Mr. Henningson's Claim

Mr. Henningson's claim also fails under the doctrines of waiver and laches. Laches is applicable where a party's delay has disadvantaged another party, *Mawhinney v. Jensen*, 232 P.2d 769, 773 (Utah 1951), while waiver is the intentional relinquishment of a known right, *Pasker, Gould, Ames & Weaver, Inc. v. Morse*, 887 P.2d 872, 876 (Utah Ct. App. 1994). Mr. Henningson's unreasonable delay in filing a permanent total disability claim to the prejudice of Appellants amply supports a finding that Mr. Henningson's claim for additional benefits has been waived or is barred by laches.

Mr. Henningson first argues that equitable defenses are not available in workers compensation cases. (Appellee's Br. at 25-26.) The *Bevans* case cited by Mr. Henningson, however, does not hold that equitable defenses are unavailable. In that case, the Court did not consider or address whether the defenses of waiver or laches were cognizable, it simply held that the Labor Commission did not possess the discretionary

authority to reduce compensation benefits except as allowed by statute. *Bevans v. Indus. Comm'n*, 790 P.2d 573, 577-78 (Utah Ct. App. 1990).

In its opening brief, ERF cited *Borland ex rel. Utah Dep't of Soc. Servs. v. Chandler*, wherein the plaintiffs argued, like Mr. Henningson, that "laches has no application to an action created by statute." 733 P.2d 144, 146 (Utah 1987). The Supreme Court rejected this notion, observing that this argument is tied to the common law distinction between law and equity that Utah has abolished. *Id.* at 146. ERF also cited *Hackford v. Industrial Commission*, in which the Utah Supreme Court addressed a defendant's claim of laches and concluded that the facts did not support the defense. 364 P.2d 1091, 1093 (Utah 1961). The court did not hold that the laches defense was unavailable in a workers' compensation case. Laches is routinely applied in workers compensation cases in other jurisdictions.[6] Laches and waiver are cognizable defenses in workers compensation cases and, under the facts of this case, bar Mr. Henningson's claim.[7]

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[6] *See, e.g., Daugherty v. Cherry Hosp./N.C. Dep't of Health & Human Servs.*, 670 S.E.2d 915, 919 (N.C. Ct. App. 2009) ("[W]e hold that the equitable law of laches applies in workers' compensation proceedings as in all other cases."); *Burke v. Indus. Claim Appeals Office*, 905 P.2d 1, 2 (Colo. Ct. App. 1994) (recognizing that in a workers' compensation case, "[t]he equitable defense of laches may be used to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom enforcement is sought.").

[7] Mr. Henningson also cites *Sandy City v. Salt Lake County*, 827 P.2d 227 (Utah 1992), and claims that "reserves that were not maintained in the face of a known risk of litigation cannot be used to support a claim of prejudice due to laches." (Appellee's Br. at 30.) He misses the point. Mr. Henningson's claim was not a "known risk" because he failed to put ERF on notice of his accident. ERF could not create reserves against this claim specifically because he did not file it.

In an ironic appeal, Mr. Henningson lastly argues that laches and waiver do not apply because ERF never informed Mr. Henningson about his potential permanent total disability claim and failed to perform the vocational rehabilitation for Mr. Henningson mandated by statute. (Appellee's Br. at 26.) His argument proves too much. ERF, of course, could not have informed Mr. Henningson of a permanent total disability claim (though it was under no obligation to do so) or provided Mr. Henningson with vocational rehabilitation precisely because he failed to advance his permanent total disability claim within the limitations period. Had he done so, ERF could have attempted rehabilitation and may have been able get Mr. Henningson back into the workforce. To the prejudice of ERF, much too much time has now passed for meaningful rehabilitation to occur, so his claim should be barred.

II. THE LABOR COMMISSION COULD NOT EXERCISE CONTINUING JURISDICTION BECAUSE IT DID NOT ACQUIRE ORIGINAL JURISDICTION OVER ERF AND MR. HENNINGSON HAS NOT ESTABLISHED THE REQUISITE BASES FOR MODIFICATION

The Labor Commission also erred by holding that its continuing jurisdiction authorized it to hold ERF liable for Mr. Henningson's permanent total disability benefits. The Labor Commission must first acquire initial jurisdiction over a party before it may exercise continuing jurisdiction. *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 586 (Utah Ct. App. 1998). This is the key first step that the Labor Commission and Mr. Henningson incorrectly assume to have been satisfied. Initial jurisdiction exists where the injured worker files a timely application for hearing or otherwise puts a party

on notice of its potential liability for the payment of benefits. *Id.* at 587. Mr. Henningson failed to provide such notice to ERF.

The Labor Commission may assert jurisdiction in situations such as *Vigos*, where all interested parties were given notice before the statute of limitations expires but where the worker's permanent total disability was not immediately apparent. *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶¶ 25-26, 993 P.2d 207. Here, Mr. Henningson and the Labor Commission base their assumption that the Labor Commission had original jurisdiction over ERF on another assumption that "all" of the parties were aware of Mr. Henningson's injury and had paid benefits to him within six years of his accident. (Appellee's Br. at 19.) This argument is without support. ERF was first given notice in 2007 of the 1993 accident and informed that temporary total and permanent partial disability compensation payments had been made to Mr. Henningson.

Mr. Henningson nevertheless argues that the Labor Commission's continuing jurisdiction is expansive enough that ERF can still be held liable. He quotes *Ortega v. Meadow Valley Construction* but ignores the very language he quotes. (Appellee's Br. at 18.) The court stated there that the Labor Commission's continuing jurisdiction may be exercised where the injured worker "has once complied with the six-year statute of limitations." *Ortega*, 2000 UT 24, ¶ 10, 996 P.2d 1039. Mr. Henningson did not comply with the six year statute of limitations.

The *Ortega* court explained that notice to a defendant within the limitations period is critical because it informs the defendant "that the continuing jurisdiction of the Commission is invoked, and at some time in the future, . . . the worker may request

another hearing if his physical condition due to the accident has worsened." *Id.* ¶ 13, 996 P.2d 1039. Proper notice allows the defendant to "provide for a reserve to pay any future benefits that may be awarded." *Id.* ¶ 13, 996 P.2d 1039. Here, ERF had no notice or opportunity to adjust or reserve for the claim.

Mr. Henningson's argument necessarily is that the Labor Commission's continuing jurisdiction overrides the statutes of limitations. The Utah Legislature, however, declared that the Labor Commission's continuing jurisdiction over properly filed claims cannot operate to revive time-barred claims. The continuing jurisdiction statute itself declares that "[t]his section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter" and that "**[t]he commission has no power to change the statutes of limitation . . . in any respect.**" Utah Code Ann. § 35-1-78(3)(a), (b) (1993) (emphasis added). The Labor Commission's determination in this case is violates the very statute on which it purports to rely.

Even assuming, however, that this matter was properly before the Labor Commission, Mr. Henningson failed to establish that he was entitled to a modification of his previous "award." Before the Labor Commission may modify a previous award of disability benefits, a claimant must establish "some significant change or new development in the claimant's injury or proof of the previous award's inadequacy." *Spencer v. Indus. Comm'n*, 733 P.2d 158, 161 (Utah 1987).

A. There is no Prior Award that can be Deemed Inadequate

Mr. Henningson has provided no proof that any previous award made against ERF was inadequate. In fact, the Labor Commission had made no previous award against ERF that could be modified. Sunnyside and WCF had previously paid to Mr. Henningson all of the permanent partial and temporary total disability benefits he asked for, and he has not asked for additional payments of such benefits. Where there is no award to modify, exercise of the Labor Commission's continuing jurisdiction is improper. *Workers Compensation Fund v. Labor Comm'n*, 2006 UT App 476, No. 20060103-CA, 2006 WL 3456315, at *2 (Nov. 30, 2006).

Mr. Henningson did not assert entitlement to permanent total disability benefits until 2007. If his prior "award" was inadequate, it was because Mr. Henningson failed to claim and demonstrate his entitlement to additional benefits.

B. Mr. Henningson has not Demonstrated a Significant Change in Condition

Mr. Henningson likewise failed to provide any medical evidence demonstrating a significant change in his condition. He applied for Social Security benefits in 1994, successfully asserting his permanent total disability. He now asks for an award of permanent total disability benefits dating back to 1993, not based on a later developing disability, and he asks the Court to make that award based on the same medical records and impairment ratings he used to support his entitlement to permanent partial disability compensation.

In order for the Labor Commission to reopen a case and exercise its continuing jurisdiction, it is Mr. Henningson's affirmative burden to prove a substantial change in condition and prove medical and legal causation of his disability. *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 588 (Utah Ct. App. 1998). Medical causation requires proof of a "medically demonstrable causal link". *Allen v. Indus. Comm'n*, 729 P.2d 15, 27 (Utah 1986). *See also Large v. Indus. Comm'n*, 758 P.2d 954, 957 (Utah Ct. App. 1988). Mr. Henningson offered no medical evidence in support of his claim of substantial change in condition. Instead, he points to a number of subjective complaints; but his measured level of impairment and his employment status remain unchanged since his injury. He also concedes that disability benefits are awarded on the basis of an inability perform the duties of his occupation, not physical impairment. (Appellee's Br. at 23.) He was advised in 1994 that he had suffered a permanent total disability and was unable to return to work. (R. at 9, 10, 337, p. 88A.) His disability status has not changed since that time.

Mr. Henningson also suggests that the Court should find that his permanent total disability is somehow now "more permanent" than he previously thought, and that such a finding would establish the requisite change in condition. (Appellee's Br. at 22.) A permanent total disability does not vary in degree; it is permanent by definition. And, if there were proof of a lengthy progression of his permanent disability until it reached a "more permanent" compensable stage, then Mr. Henningson would only be entitled to compensation from that later time, not from the date of injury as he claims.

Mr. Henningson contends that his limited education and age also support a finding of a change of condition. (Appellee's Br. at 23-24.) These factors instead illustrate the prejudice to ERF resulting from Mr. Henningson's late application for benefits. ERF has a statutory right to be involved in the rehabilitation and reeducation of injured employees. *See* Utah Code Ann. § 35-1-67 (1993). Mr. Henningson's long delay in filing a claim against ERF deprived it of any meaningful opportunity to provide training and counseling to address his limited education while he was young enough to be retrained.

III. MR. HENNINGSON'S ARGUMENTS REGARDING IMPUTED NOTICE ARE WITHOUT MERIT

Mr. Henningson attempts to excuse his failing to provide the required notice of his permanent total disability claim by arguing, with no legal or factual support, that ERF is not entitled to notice or, alternatively, that ERF's notice of the claim was imputed through other parties.[8] (*See* Appellee's Br. at 28-34.) The "authority" cited for this proposition by Mr. Henningson consists of excerpts from two documents, Addendum C and Addendum D to his brief, improperly presented for the first time on appeal.

A. The Documents on Which Mr. Henningson Relies are not Part of the Record and Must be Stricken

Addenda C and D to Mr. Henningson's brief are presented for the first time on appeal. "An appellate court's 'review is . . . limited to the evidence contained in the record on appeal'" and courts "will not consider evidence which is not part of the record." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (quoting *Wilderness Bldg. Sys.*,

[8] This argument assumes that notice of Mr. Henningson's permanent total disability claim was given to others within the limitations period, an assumption with no support in the Record.

Inc. v. Chapman, 699 P.2d 766, 768 (Utah 1985)) (striking evidence attached to appellant's brief that was outside the record on appeal) (omission in original). Utah appellate courts "do not permit the supplementing" of the record on appeal with materials that were not before the lower court. *Corbet v. Corbet*, 472 P.2d 430, 433 (Utah 1970).

The documents submitted by Mr. Henningson are also objectionable because they lack foundation and are incomplete. Beyond that, the documents do not stand for the propositions attributed to them by Mr. Henningson. Rule 24(k) allows the Court to disregard or strike such irrelevant and immaterial matters. *See* Utah R. App. P. 24(k). *See also Maughan v. Maughan*, 770 P.2d 156, 161 n.1 (Utah Ct. App. 1989) (striking the appellant's reply brief under Rule 24(k) because the appellant included documents with the brief that were not part of the record). The Court should strike Addenda C and D to Mr. Henningson's brief, as well as the arguments they are offered to support, and give them no consideration. *See State ex rel. Div. of Forestry, Fire & State Lands v. Six Mile Ranch Co.*, 2006 UT App 104, ¶ 32, 132 P.3d 687 (explaining that the Court will not consider documents outside of the record); *Broadbent v. Bd. of Educ. of the Cache County Sch. Dist.*, 910 P.2d 1274, 1276 n.2 (Utah Ct. App. 1996) (noting that the Court was "precluded from considering" a document attached to the party's brief on appeal "as [the document] was never made part of the record").

B. ERF is Entitled to Separate Notice

Regardless of the admissibility of these addenda, Mr. Henningson's argument that ERF is not entitled to notice is incorrect. Mr. Henningson claims that as a reinsurer, ERF "insures insurers" and is not entitled to notice of claims or to defend against them

because it merely reinsures the liability of employers and their insurers. (Appellee's Br. at 27.) He incorrectly claims that "ERF does not normally adjust, and does not initially defend or evaluate cases," and as a result, does not need timely notice of permanent total disability claims. (Appellee's Br. at 28-29.) He is wrong. When given notice, ERF always evaluates and, where appropriate, defends claims made against it.[9]

Mr. Henningson conflates ERF's statutory role and duties with those of commercial reinsurers. In that context, reinsurance is "[i]nsurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium." Black's Law Dictionary 1290-91 (7th ed. 1999). Notes to that definition specify that, in such matters, the first insurer "retains all contact with the original insured, and handles all matters prior to and subsequent to loss." *Id.* ERF's responsibilities, by contrast, are established by statute, not contract with private insurers, and it receives none of the premium collected by the commercial carriers.

ERF is a separate party to claims made against it and entitled to separate notice of a claim against it. *See Paoli v. Cottonwood Hosp.*, 656 P.2d 420 (Utah 1982). The court in *Paoli* observed that the Second Injury Fund was created so that employees who suffer from a pre-existing condition and a subsequent industrial injury can obtain compensation for their disabilities. 656 P.2d at 422. The "Fund's purposes are to encourage employers to hire handicapped workers and to broaden the base of responsibility for pre-existing conditions." *Id.* The legislature intended that the "Second Injury Fund have the capacity

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[9] The undersigned has evaluated and defended hundreds of claims made against ERF, more than a score of which have been advanced by Mr. Henningson's counsel.

to defend itself against claims." *Id.* Accordingly, the court has "consistently treated the Second Injury Fund as a separate entity for purposes of its defense of and liability for claims pursuant to . . . the statutes creating it." *Id.* "[O]nce the prospect of Second Injury Fund liability appears, the Fund is surely an 'interested party' or a 'party in interest' under the statutes. It is therefore entitled to receive [notice] in its own right . . . ." *Id.* at 422-23.

Mr. Henningson also cites *Mecham v. Industrial Commission*, 692 P.2d 783 (Utah 1984) and a Labor Commission case, *Nelson v. Utah Local governments Trust*, case no. 03-0037 (2005), (Appellee's Br. at 31-32), for the proposition that ERF need not be given timely notice of claims. His reliance on these cases is misplaced. *Mecham* is inapplicable here because: (i) no statute of limitations then governed permanent total disability cases, (ii) the issue of the claimant's disability had been extensively litigated within the limitations period, and (iii) the claimant's permanent total disability was revealed only after a slow deterioration. 692 P.2d at 784-86. *Mecham* does not indicate that the Second Injury Fund could be held liable absent notice. To the contrary, the court held that jurisdiction attaches where "notice is given." *Id.* at 785. *Nelson* (which was not appealed because of factors irrelevant here) is not controlling on this Court. Moreover, its holding is flawed by the same error committed by the Labor Commission in this case – it improperly used powers of continuing jurisdiction to modify or change the applicable statute of limitations.

ERF is not a contractual reinsurer that steps into the shoes of other insurers and is thus bound by their actions or knowledge. ERF is a separate party with separate rights

and liabilities. *See Paoli*, 656 P.2d at 422-23. *See also* Utah Code Ann. §§ 34A-2-702, 34A-2-703 (2010). ERF is entitled to defend permanent total claims and may raise defenses distinct from those of the employer or insurer. It must be given notice in its own right of any claims once the prospect of its liability appears.

C. ERF did not Receive Timely Notice of Mr. Henningson's Permanent Total Disability Claim

In an effort to save his untimely claim, Mr. Henningson claims that notice of his permanent total disability claim is imputed to ERF because ERF offices with the Labor Commission, and the Labor Commission received notice of Mr. Henningson's injury. (Appellee's Br. at 33-34.) Mr. Henningson also notes that the Director of the Industrial Accidents Division has served concurrently as the Administrator of ERF. These arguments are untenable.

First, the partial document submitted by Mr. Henningson in support of this argument, Addendum D, is not part of the Record must be stricken as explained above. But even if it were considered, the partial biography of the then-administrator of the Division of Industrial Accidents does not establish that ERF received earlier notice of Mr. Henningson's permanent total disability claim. The mere fact that an administrator may have shared supervisory duties is not sufficient, as a matter of law, to impute to ERF specific notice of the thousands of individual claims filed with the Division of Industrial Accidents, most of which do not involve ERF.

Moreover, the *Paoli* court already rejected this argument. There, the injured worker argued that the Second Injury Fund could not challenge an award of benefits

because it failed to file a timely motion for review after the administrative law judge made the award. *Paoli*, 656 P.2d at 422. The worker claimed that the Second Injury Fund had notice of the order because "the Industrial Commission had timely notice of the order, and . . . the Fund is 'nothing but a closely related arm of the Industrial Commission.'" *Id.* The court rejected this argument, explaining that the Second Injury Fund is a separate party entitled to separate notice "**in its own right and through its own authorized representative (rather than through the Industrial Commission generally).**" *Id.* at 423 (emphasis added).

Mr. Henningson's final argument in this regard is that Utah case law generally gave ERF implied notice of that permanent total disability claims might be asserted against it at a later date. (Appellee's Br. at 34.) This argument is meritless and taken to its logical extreme, would effectively nullify all statutes of limitations. Merely because a Utah court might allow one plaintiff for specific reasons to pursue a claim outside the limitations period does not relieve all subsequent plaintiffs of the statutory requirement to file their claims in a timely manner. Each plaintiff must meet his or her burden of proof, and each case must be decided based on its own facts.

IV. GENERAL POLICY CONSIDERATIONS CANNOT OVERRIDE EXPRESS LEGAL REQUIREMENTS

Mr. Henningson concludes by arguing that policy considerations independently justify the Labor Commission's award of benefits. (Appellee's Br. at 34-36.) Although it is clear that the Workers Compensation Act should be liberally construed, its specific requirements may not be disregarded. The Act establishes a carefully balanced

framework of rights and procedures. Among those rights and procedures is the requirement of timely notice of claims to ERF and other parties. As noted, the Legislature specifically prohibited the Labor Commission from using its continuing jurisdiction to modify or otherwise end-run the statute of limitations, a confirmation that policy considerations may not trump statutory mandates.

The Workers Compensation Act does not provide for strict liability. Neither does it include any presumption of entitlement to benefits. Rather, claimants bear the affirmative burden of establishing their entitlement to disability benefits, *e.g.*, *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶¶ 46-54, 164 P.3d 384, including compensation from ERF. If he wanted payment of permanent total disability benefits, Mr. Henningson had a duty to notify ERF and the other parties of his permanent total disability claim as soon as believe he was entitle to such benefits, but no later than six years after his accident. He could have done so, as he was then aware of all facts that he now alleges within the limitations period.

Mr. Henningson's argument also ignores the fact that the statutes of limitations are, themselves, policy considerations. "Statutes of limitations are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur." *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 22, 993 P.2d 207. "Limiting compensation claims to a . . . period from the date of the accident protects employers and the State of Utah Second Injury Fund from having to defend stale claims—a legitimate legislative purpose." *Avis v. Bd. of Review of Indus. Comm'n*, 837 P.2d 584, 588 (Utah Ct. App. 1992). The policy

behind statutes of limitations is precisely to prevent pursuit of untimely and prejudicial claims such as those advanced by Mr. Henningson.

CONCLUSION

For these reasons, the decision of the Utah Labor Commission should be reversed.

Dated this 26th day of August 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Reply Brief of Appellant Employers' Reinsurance Fund to be mailed, via U.S. mail postage prepaid, to the following this 26th day of August 2011:

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