

2008

Wendy Gudmundson, Kay Gudmundson v. Del Ozone, Ozonesolutions, L.C. Johnson Controls, Inc., John and Jane Does 1-10 : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Wendy Gudmundson, Kay Gudmundson v. Del Ozone, Ozonesolutions, L.C. Johnson Controls, Inc., John and Jane Does 1-10*, No. 20080537.00 (Utah Supreme Court, 2008).

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IN THE SUPREME COURT OF THE STATE OF UTAH

WENDY GUDMUNDSON and KAY	:	
GUDMUNDSON,	:	
	:	
Plaintiffs and Appellants,	:	
	:	Supreme Court Case No. 20080537
v.	:	
	:	Trial Court Case No. 050916518
DEL OZONE, OZONESOLUTIONS,	:	
L.C., JOHNSON CONTROLS, INC.,	:	
and JOHN and JANE DOES 1-10,	:	
	:	
Defendants and Appellees	:	
	:	

BRIEF OF APPELLEE OZONESOLUTIONS, L.C.

**On Appeal From a Grant of Summary Judgment,
By The Third Judicial District Court, Salt Lake County, State of Utah
Judge Denise Posse Lindberg**

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FILED
UTAH APPELLATE COURTS
DEC 15 2008

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LIST OF PARTIES

1. Wendy Gudmundson, plaintiff, represented by Randall K. Edwards and Rick S. Lundell
2. Kay Gudmundson, plaintiff, represented by Randall K. Edwards and Rick S. Lundell
3. OzoneSolutions, L.C., defendant, represented by Heinz J. Mahler and Scott C. Powers of Kipp and Christian, P.C.
3. Del Ozone, defendant, represented by John R. Lund of Snow, Christensen & Martineau.
4. Johnson Controls, Inc., defendant, represented by Joseph E. Minnock and Sara N. Becker of Morgan, Minnock, Rice & James.

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JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to 78A-3-102(j) which states that the Utah Supreme Court has appellate jurisdiction over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction. *See* Utah Code Ann. § 78A-3-102(j) (2008).

STATEMENT OF ISSUES

The Plaintiffs/Appellants have presented two primary issues in this matter.

Issue No. 1: Whether the trial court erred in granting summary judgment to the defendants on the basis of collateral estoppel.

Standard of Review: A district court's grant of summary judgment is reviewed for correctness. *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858, 862 (Utah 2008).

Issue No. 2: Whether the trial court erred in denying Plaintiffs' Utah R. Civ. P. 56(f) motion for additional time to adduce evidence in opposition to Del Ozone's motion for summary judgment.

Standard of Review: A trial court's rule 56(f) ruling is reviewed under an abuse of discretion standard. *Price Development Co., L.P. v. Orem City*, 995 P.2d 1237, 1242 (Utah 2000).

DETERMINATIVE LAW

No constitutional provisions, statutes, ordinances, rules, or regulations are determinative.

However, the following provisions from the Utah Workers Compensation Act are relevant to the issues raised by Defendant relating to the scope of issues properly before the Workers' Compensation Court.

Utah Code Ann. § 34A-2-102 (Definitions)

Utah Code Ann. § 34A-2-105 (Exclusive remedy)

Utah Code Ann. § 34A-2-417 (Employee burden)

The full text of these statutes is contained in the Addendum.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action for personal injuries allegedly caused by Appellant Wendy Gudmundson's exposure to ozone while working at the Utah State Prison.

B. COURSE OF PROCEEDINGS

This action was originally filed on September 20, 2005. (ROA 1). After some discovery and depositions had been completed, defendant Del Ozone filed a Motion for Summary judgment on September 10, 2007. (ROA 297-298). Defendant Johnson Controls, Inc. filed its own Motion for Summary judgment on September 28, 2007. (ROA 299-301). OzoneSolutions filed its Motion for Summary Judgment on October 15, 2007. (ROA 370-

372). On March 3, 2008, after argument by the parties, the District Court granted summary judgment in favor of defendants Del Ozone and Johnson Controls. (ROA 1327). After oral argument, Defendant OzoneSolutions, L.C. filed an updated Supporting Memorandum on March 4, 2008 pursuant to the order of the court. (ROA 1328-1405). The District Court entered an Order Granting Summary Judgment on March 24, 2008 wherein the motions of Johnson Controls, Inc. and Del Ozone were granted. (ROA 1811-1814). The District Court entered an Order Granting Summary Judgment on May 28, 2008 wherein Ozone Solutions, L.C. was also granted Summary Judgment. (ROA 1845-1847).

Appellants first Notice of Appeal was filed on April 2, 2008. (ROA 1815-1817). Since the respective Motions for Summary Judgment of the defendants were granted at different times, Appellants filed an additional Notice of Appeal on June 28, 2008. (ROA 1856-1882).

C. DISPOSITION IN TRIAL COURT

In an Order dated March 24, 2008, the Third District Court granted Summary Judgment to defendants Johnson Controls, Inc. and Del Ozone based on their Motions for Summary Judgment, stating that issue preclusion barred Appellants claim since the Appellants had a complete, full and fair hearing before the Utah Labor Commissions wherein it was determined that the alleged injuries had not been caused by contact with ozone. (ROA 1811-1814). In a subsequent Order dated May 28, 2008, the Third District Court again granted Summary Judgment, this time in favor of OzoneSolutions, L.C., based upon issue

preclusion, stating that the determinative issue of whether the Appellants' injuries had been caused by ozone exposure had been fully and fairly adjudicated by the Utah Labor Commission. (ROA 1845-1847).

STATEMENT OF FACTS

1. OzoneSolutions entered into a contractual agreement with Johnson Controls, Inc. to install an ozone generating device connected to washing machines at the Utah Department of Corrections Wasatch Laundry Facility. *See* Deposition of John Downey (ROA 241). On or about December 9, 2004, an ozone generating machine was installed at the Utah Department of Corrections' Wasatch Laundry Facility. *See* Deposition of John Downey (ROA 241, 251).

2. After installation, the ozone generation equipment was tested and found to be functioning properly. *See* Deposition of John Downey (ROA 251).

3. The prison began using the laundry ozone system on Monday, December 13, 2004. *See* Deposition of John Downey (ROA 256).

4. Mrs. Gudmundson testified in her deposition that during the week that the ozone generator was installed, that she experienced headaches beginning on morning of Tuesday, December 14, 2004. *See* Deposition of Wendy Gudmundson (ROA 256-257). She described these headaches as "4" on a scale of "1" to "10". *Id.*

5. Mrs. Gudmunson left work on Friday, December 17, 2004 at approximately 2:30 after working a full shift. *See* Depo. W. Gudmundson (ROA 258-259).

6. On Saturday Morning, December 18, 2008, Mrs. Gudmunson went into the desert with her husband to go rock hunting. At approximately 2 pm, almost 24 hours after her last potential contact with ozone at work, Mrs. Gudmunson experienced an excruciating headache. *See Depo. W. Gudmundson (ROA 259-260).*

7. Two days later, on Monday, December 20, 2004, Mrs. Gudmunson went to the emergency room. *See Depo. W. Gudmundson (ROA 261).*

8. On Tuesday, December 21, 2004, Mrs. Gudmundson underwent a CT scan and MRI of her brain at Timpanogos Regional Hospital, both of which revealed normal findings. *See Timpanogos Regional Hospital Report (ROA 267-270).*

9. Over one month later, and never having returned to work, on January 27, 2005, Mrs. Gudmundson underwent an MRI of the cervical spine which revealed a Chiari I Malformation. *See Report of Central Utah Clinic (ROA 272).*

10. In their initial Complaint, Appellants alleged that Mrs. Gudmundson's "medical condition was caused by ozone overexposure due to the fact that the ozone generator in the Wasatch Laundry Facility lacked a ventilation system, a fresh air replenishing system, automatic shut-off, audible alarm, visual alarm, a recapture for the ozone, and other required equipment under OSHA guidelines." Complaint (ROA 6).

11. In their Amended Complaint, Appellants again alleged that Mrs. Gudmundson's "medical condition was caused by ozone overexposure due to the fact that the ozone generator in the Wasatch Laundry Facility lacked a ventilation system, a fresh air

replenishing system, automatic shut-off, audible alarm, visual alarm, a recapture for the ozone, and other required equipment under OSHA guidelines.” First Amended Complaint (ROA 125).

12. Neither the Complaint nor the Amended Complaint mentions “byproducts of ozone.” *See* Complaint, (ROA 1-18); Amended Complaint, (ROA 119-135).

13. Prior to December 2004 Mrs. Gudmundson had a history of alcoholism, smoking, anorexia, bulimia and anemia and had not participated in any exercise routine. *See* Depo W. Gudmundson (ROA 262-265).

14. Appellants now claim that Mrs. Gudmundson’s headache and other symptoms necessitated brain surgery, which was performed on March 2, 2005. *See* Complaint, (ROA 1-18); Amended Complaint, (ROA 119-135).

15. Appellants contend that “Mrs. Gudmundson’s brain surgery and resulting medical condition were caused by ozone overexposure.” Complaint (ROA 1-18); Amended Complaint, (ROA 119-135).

16. As a result of this alleged ozone overexposure, Appellants claim that they suffered physical, emotional, and financial injury. *See* Complaint (ROA 1-18); Amended Complaint, (ROA 119-135).

17. However, Mrs. Gudmundson was already in the process of adjudicating her claims before the Labor Commission. Mrs. Gudmundson filed an Application for Hearing with the Utah Labor Commission on May 13, 2005, seeking medical expenses and disability

benefits based on alleged contact with ozone at work. *See* Utah Labor Commission Order (ROA 281).

18. In order to evaluate Mrs. Gudmundson's injuries, the Utah Labor Commission requested an Independent Medical Examination, which was conducted by Dr. Edward Holmes on December 8, 2005. *See* Report of Dr. Holmes (ROA 295).

19. After his examination and review of the records, Dr. Holmes found that "[t]here is no medically demonstrable causal connection between her current condition and the December 17, 2004 ozone exposure." *Id.* (ROA 286) He further noted that "ozone half-life is generally considered about 12 hours, and she has no signs of pulmonary or ocular toxicity" and thus found that Mrs. Gudmundson's "symptoms can only be explained by her non industrial medical condition, in this case, the presence of a congenital Chiari 1 malformation." *Id.* (ROA 286-288).

20. Dr. Holmes concluded that:

Based on our review of the medical records, our examination of Ms. Gudmundson, a site visit and a literature review we think that she suffered of severe migraine headaches. These headaches may have been triggered or temporarily exacerbated by ozone exposure or have appeared due to the normal evolution of the Chiari malformation. There is no indication in the literature that the Chiari malformation could have resulted from ozone exposure ... Severe migraine headaches may lead to the discovery of the Chiari malformation, which was already present.

It is also important to note, that at no time, during our evaluation or in the medical records, did Mrs. Gudmundson report irritative symptoms to the eyes or lungs (a common first indicator of significant ozone exposure). In the case of an acute and significant exposure these respiratory symptoms are expected...

... In short, if she had sufficient dose of ozone to cause brain edema or swelling she would have had massive toxicity elsewhere, especially in her lungs, as would other workers in the area.

We think this patient presented with a real and painful medical condition (Chiari 1) requiring extensive medical and surgical treatment but it is not medically reasonable to conclude that the Chiari 1 malformation was caused by ozone exposure.

Letter of Edward B. Holmes (Emphasis added.) (ROA 295).

21. After the examination of Dr. Holmes, the parties to the workers' compensation case (including Mrs. Gudmundson) stipulated that the case be referred to a Utah Labor Commission medical panel. *See* Utah Labor Commission Order (ROA 282).

22. Accordingly, the matter was referred to a Utah Labor Commission panel chaired by Dr. Joseph Q. Jarvis, MD, MPH. *See* Utah Labor Commission Order (ROA 282). Dr. Jarvis reviewed the medical records, including the facts outlined in Dr. Holmes' report; reviewed Mrs. Gudmundson's MRI reports; and examined Mrs. Gudmundson. *See Id.* (ROA 282).

23. Dr. Jarvis and the medical panel found no evidence of brain swelling in their review of the December 21, 2004 MRI, thereby eliminating the possibility of ozone-induced brain swelling as a possible cause of Mrs. Gudmundson's condition. *See* Utah Labor Commission Order (ROA 282).

24. Dr. Jarvis and the medical panel further found that

“Based upon the reported toxicology of ozone (not a cause of serious CNS disorders), the lack of evidence of clinically significant exposure to ozone, and the actual court [sic] of events documents in the records of this case, the most likely explanation of Ms. Gudmundson's medical condition is

that it pre-existed before December 2004, became symptomatic during that month, requiring treatment and eventual surgery, with the ozone episode at work being only a coincidental, non-related event.”

See Utah Labor Commission Order (ROA 282-283).

25. Dr. Jarvis and the medical panel concluded, as had Dr. Holmes, that there is “no medically demonstrable causal connection between the applicant’s current condition and the alleged exposure of 12/17/04.” Report of Medical Panel Chaired by Dr. Jarvis (ROA 302-360). More specifically, Dr. Jarvis and the medical panel also noted that “ozone has a relatively short half life and exposure during the first part of December 2004 would not account for ongoing symptoms later in the month.” *Id.* (ROA 302-360).

26. Citing the conclusions of the multiple independent medical experts that ozone exposure did not cause or aggravate Mrs. Gudmundson’s medical conditions, the Utah Labor Commission denied and rejected Mrs. Gudmundson’s claim for workers’ compensation:

The preponderance of evidence does not support a medical causal connection between the petitioner’s exposure to ozone and the Chiari Malformation for which she was treated. Dr. Jarvis, acting as a neutral medical panel evaluator with expertise in occupational medicine, reviewed the medical literature and the medical records of this case and was unable to correlate the ozone exposure and the petitioner’s medical condition. The petitioner’s medical condition was not caused or aggravated by her exposure to ozone at work in December 2004 while employed by the respondent, State of Utah, Department of Corrections.

See Utah Labor Commission Order (ROA 283) (Emphasis added). In other words, after considering all the evidence the Labor Commission found no evidence that Mrs. Gudmundson’s injuries were caused by contact with ozone.

27. On November 1, 2006, Mrs. Gudmundson filed a Motion for Review by the Utah Labor Commission Appeals Board based on the Discovery of New Evidence. In this motion, Mrs. Gudmundson conceded that her injuries were not directly caused by exposure to ozone. She stated:

Petitioner believes exposure to levels of ozone above the OSHA permissible exposure levels caused her to suffer severe headaches, nausea, and vomiting. These symptoms, in turn, naturally led Petitioner's physician, Dr. Howard Reichman, to run tests on the Petitioner for meningitis, one of which involved performing a spinal tap. It was this spinal tap, in the course of routine diagnostic testing, that caused Petitioner's Chiari malformation, resulting brain surgery, and total disability, as illustrated by medical papers on acquired Chiari malformations due to lumbar punctures attached to this Motion for Review. **It is acknowledged that the ozone exposure did not directly cause Petitioner's neurological problems,** but in the course of being treated for ozone exposure, Petitioner was subjected to a reasonable, standard, routine, and even necessary diagnostic procedure to rule out meningitis, which, in turn triggered a Chiari malformation, required brain surgery, and ultimately left the Petitioner with serious, permanent neurological and physical handicaps. That said, the mechanism that started the entire chain reaction, was exposure to dangerous levels of ozone at work in the prison laundry.

Petitioner's Motion for Review, ROA 1339 (emphasis added).

28. Additionally, in her Motion for Review, Mrs. Gudmundson presented evidence of two depositions taken by her attorney, several medical journal articles regarding Chiari I malformation causation, and emails and other evidence from state prison officials and employees regarding Mrs. Gudmundson and the ozone generating machines that had been installed on the washing machines. *See* Petitioner's Motion for Review, ROA 1339-1346.

29. Despite the additional evidence and argument presented by Mrs. Gudmundson, the Utah Labor Commission again rejected Mrs. Gudmundson's claim, stating that:

The Appeals Board has reviewed the deposition testimony and the correspondence proffered by Ms. Gudmundson. A substantial portion of this information could have been obtained and should have been presented during the evidentiary proceeding conducted by Judge George. Even later, Ms. Gudmundson could have asked Judge Hann to reopen the evidentiary hearing to consider such information. Ms. Gudmundson took neither of these actions. But more importantly, the material is of little probative value. At best, even when considered as a whole, it serves as little more than a basis for speculation.

. . . [T]he existing facts, which are fully supported by evidence that was actually presented and accepted into the record, fully support the medical panel's opinion.

In summary, the Appeals Board concludes that the medical panel's report and, in turn, Judge Hann's decision, are supported by the evidence adduced during the evidentiary proceedings in this matter. The Appeals Board finds no sufficient reason to reopen the evidentiary proceeding. The Appeals Board therefore affirms Judge Hann's denial of Ms. Gudmundson's claim.

Order of Utah Labor Commission Appeals Board (ROA 358).

30. As such, the Utah Labor Commission's Administrative Law Judge and Appeals Board both rejected Mrs. Gudmundson's claim that contact with and/or exposure to ozone in the Wasatch Laundry Facility caused her injuries. Mrs. Gudmundson sought no additional appellate review of these findings, despite being expressly advised of her ability to do so. *See* Order of Utah Labor Commission Appeals Board (ROA 359).

31. In this action, after some discovery had been completed, defendant Del Ozone filed a Motion for Summary judgment on September 10, 2007 based on the finding of the

Utah Labor Commission that Appellant Wendy Gudmundson's alleged injuries had not been caused by ozone or ozone exposure. (ROA 297-298).

32. Defendant Johnson Controls, Inc. filed its Motion for Summary judgment on September 28, 2007 based upon these same grounds. (ROA 299-301).

33. OzoneSolutions also filed a Motion for Summary Judgment on October 15, 2007 based on the same issues raised by Del Ozone and Johnson Controls, Inc. in their Motions. (ROA 370-372).

34. After oral argument held on March 3, 2008, the Third District Court entered an Order dated March 24, 2008 granting Summary Judgment to defendants Johnson Controls, Inc. and Del Ozone based on their Motions for Summary Judgment, stating that issue preclusion barred Appellants claim since the Appellants had a complete, full and fair opportunity to present their claims before the Utah Labor Commissions wherein it was determined that the alleged injuries had not been caused by contact with ozone. (ROA 1811-1814).

35. In a subsequent Order dated May 28, 2008, the Third District Court also granted Summary Judgment in favor of OzoneSolutions, L.C., based upon issue preclusion, again finding that the determinative issue of whether the Appellants' injuries had been caused by ozone exposure had been fully and fairly adjudicated by the Utah Labor Commission. (ROA 1845-1847).

36. Appellants first Notice of Appeal was filed on April 2, 2008. (ROA 1815-1817). Since the respective Motions for Summary Judgment of the defendants were granted at different times, Appellants filed an additional Notice of Appeal on June 28, 2008.(ROA 1856-1882).

SUMMARY OF ARGUMENTS

I. The District Court correctly applied the law of collateral estoppel to the determination reached by the Utah Labor Commission that Mrs. Gudmundson's injuries were not caused by contact with and/or exposure to ozone.

A. Utah law, consistent with the law of other jurisdictions, supports the principle that collateral estoppel is properly applied to administrative adjudications of workers' compensation courts, specifically including adjudications relating to causation.

The Utah Labor Commission's determination that Mrs. Gudmundson's medical condition was not caused by exposure to ozone also fulfilled all of the requirements of collateral estoppel. These elements are met since (a) the issue of causation in this case, which is determinative of all Mrs. Gudmundson's claims, is identical to the issue of causation adjudicated before the Utah Labor Commission; (b) the Utah Labor Commission's determination, which was not appealed further by Mrs. Gudmundson, was a final judgment on the merits reached only after Mrs. Gudmundson had an opportunity to fully and fairly present her evidence and arguments; © Mrs. Gudmundson was a party to the adjudication of the labor commission and her husbands claims are subject to that adjudication as they are

based on the alleged injury to Mrs. Gudmundson determined by the Utah Labor Commission; and (d) Mrs. Gudmundson had an opportunity to fully and fairly present her claim before the Utah Labor Commission and the issue of causation was completely, fully and fairly adjudicated.

B. Additionally, public policy supports the application of collateral estoppel in this case. The public policy purposes behind collateral estoppel include (1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes and (2) promoting judicial economy by preventing previously litigated issues from being re-litigated. By applying collateral estoppel in this case, the District Court has ensured that the issues raised by Appellants in their civil lawsuit are consistent with the prior adjudication of the Utah Labor Commission and ensured that the issue of causation is not re-litigated.

The public policy grounds offered by Appellants and Utah Association for Justice as Amicus Curiae against applying collateral estoppel are also without merit.

First, the issue of causation was already fully adjudicated by the Utah Labor Commission under the same standard required in this case, namely preponderance of the evidence. Since the standard is the same, public policy supports the application of collateral estoppel in the subsequent action.

Second, the Utah legislature has, by statute, given the Utah Labor Commission authority and jurisdiction to determine causation in workers' compensation adjudications.

Because the Utah Labor Commission is a court of competent jurisdiction, collateral estoppel is properly applied to its findings.

Third, the Utah Workers' Compensation Act was enacted by the Utah legislature in order to assist injured workers in obtaining benefits for industrial injuries in a fair, albeit expedited, manner. Pursuant to this act, and others like it, courts have regularly held that adjudications before administrative agencies, specifically including workers' compensation courts are fair and adequate for purposes of applying collateral estoppel. Accordingly, public policy supports the application of collateral estoppel.

Fourth, applicants for workers' compensation benefits such as Mrs. Gudmundson, have every incentive to fully adjudicate the issues before the workers' compensation court. There is no "risk" associated with bringing a claim before a workers' compensation board, since the issues, incentives, and burden of proof are the same. If a party raises an issue, that party should be ready and willing to prove that issue, and should not be given a second chance when he or she fails to do so.

Finally, the principle of collateral estoppel ensures that the workers compensation and civil cases will not have inconsistent results. Indeed, this is one of the specifically enumerated public policy purposes behind the doctrine of collateral estoppel.

II. The Rule 56(f) continuance requested by the Appellants was properly denied. Since additional discovery would have done nothing to alter the District Court's application of collateral estoppel to the prior determination made by the Utah Labor Commission, the

District Court's denial of the Rule 56(f) motion did not exceed the limits of reasonability. Without a finding that the District Court exceeded the limits of reasonability, its denial of the Rule 56(f) extension should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED COLLATERAL ESTOPPEL TO THE ISSUE OF CAUSATION AS DETERMINED BY THE UTAH LABOR COMMISSION.

The District Court correctly applied the law of collateral estoppel to the determination reached by the Utah Labor Commission that Mrs. Gudmundson's injuries were not caused by ozone exposure. Appellants are asking this court to modify well-established legal principles and effectively grant them a second chance to prove an issue that has already been fully and fairly adjudicated by a Utah court of competent jurisdiction. Not only is the requested relief contrary to established principles of law, the effect of this relief would be to marginalize the determinations made by administrative law judges, diminish the effectiveness of administrative courts, and contravene the purpose of such courts in general.

A. COLLATERAL ESTOPPEL WAS CORRECTLY APPLIED BY THE DISTRICT COURT BECAUSE COLLATERAL ESTOPPEL APPLIES TO ADJUDICATIONS BY WORKERS COMPENSATION COURTS AND BECAUSE ALL OF THE ELEMENTS OF COLLATERAL ESTOPPEL WERE PROPERLY MET.

This Court should affirm the judgements entered by the District Court because (1) the application of collateral estoppel to an adjudication of the Utah Labor Commission is proper under Utah law and (2) the Labor Commission's adjudication and findings fulfilled all of the requirements of collateral estoppel.

1. Utah law, consistent with the law of other jurisdictions, states that collateral estoppel is properly applied to administrative adjudications of workers' compensation courts.

Collateral estoppel, also known as “issue preclusion,” prevents parties from re-litigating issues resolved in a prior, related action. *See Sevy v. Security Title Co.*, 902 P.2d 629, 632 (Utah 1995). The principle behind collateral estoppel is that once a party has had his or her day in court and lost, he or she does not get a second change to prevail on the same issues. *See Berry v. Berry*, 738 P.2d 246, 249 (Utah 1987).

Both this Court and the Utah Court of Appeals have, on multiple occasions, specifically held that collateral estoppel applies to administrative adjudications in Utah. *See Career serv. Review Bd. V. Utah Dep't of Corr.*, 942 P.2d 933, 938 (Utah 1997) and *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992) (res judicata and collateral estoppel apply to administrative adjudications).

In *Nebeker v. Utah State Tax Com'n*, 34 P.3d 180 (Utah 2001) this Court held that although res judicata was “initially developed with respect to the judgments of courts, the same basic policies, including the need for finality in administrative decisions, support application of the doctrine of res judicata to administrative agency determinations.” *See also Utah Department of Administrative Services v. Public Service Commission*, 658 P.2d 601, 621 (Utah 1983) and *Kirk v. Division of Occupational & Prof'l Licensing*, 815 P.2d 242, 243 (Utah Ct. App.1991) (“the principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy.”).

The principle that collateral estoppel applies to administrative adjudications is also well accepted among other courts across the country. *See, e.g., United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966) (“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”); *Second Taxing Dist. of the City of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C.Cir.1982) (affirming rule); *Anthran v. Professional Air Traffic Controllers Org.*, 672 F.2d 706, 709 (8th Cir.1982) (collateral estoppel held to apply to administrative adjudications); *Jeffries v. Glacier State Tel. Co.*, 604 P.2d 4, 8-9 (Alaska 1979) (affirming rule); *Re Kansas City Power & Light Co.*, 75 Pub.Util.Rep.4th (PUR) 1, 133 (Mo.Pub.Serv.Comm'n 1986) (same); *Cincinnati Bell Tel. Co. v. Public Utils. Comm'n of Ohio*, 466 N.E.2d 848, 852 (Ohio 1984) (affirming principle); *State ex rel. Utilities Comm'n v. Carolinas Comm. for Indust. Power Rates & Area Dev., Inc.*, 257 N.C. 560, 126 S.E.2d 325, 333 (1962) (affirming rule); *Public Util. Comm'n v. Coalition of Cities for Affordable Util. Rates*, 776 S.W.2d 224, 226-28 (Tex.Ct.App.1989) (same).

Collateral estoppel has been specifically applied by courts across the country to determinations reached by Workers' Compensation courts. *See, e.g., McCabe v. Zeller Corp.*, 690 N.E.2d 85 (3d Dist. Defiance County 1997) (Res judicata applies to administrative proceedings that are judicial in nature, like workers' compensation claims, since parties had opportunity to litigate issues); *Yonkers v. Donora Borough*, 702 A.2d 618

(Pa. Commw. Ct. 1997) (Decision of workers' compensation judge can have preclusive effect in subsequent workers' compensation proceedings, as well as later civil and administrative proceedings); *Ayers v. Genter*, 117 N.W.2d 38 (Mich. 1962) (Plaintiff in tort action held estopped from re-litigating issue of whether he was in course and scope of employment where same was determined by workmen's compensation appeal board); *Kohler v. McCrory Stores*, 615 A.2d 27 (Pa. 1992) (same); *Van Houten v. Harco Const., Inc.*, 655 A.2d 331 (Me. 1995) (claim precluded due to res judicata from workers compensation claim regarding course and scope of employment); *Magma Copper Co. v. Industrial Commission*, 566 P.2d 699 (Ariz. Ct. App. Div. 1 1977) (since worker did not assert claim of mental disability though he was hospitalized for mental condition immediately after accident and where, therefore, Industrial Commission found no work-related mental disability, claim raised 12 years later as to "new and previously undiscovered" mental injuries was barred by res judicata).

Most important, collateral estoppel has been specifically held to apply to administrative court decisions made regarding "causation." See *Lopez v. Union Carbide Corp.*, 83 F.Supp. 2d 880 (E.D. Mich. 2000) (decision that worker did not suffer from work-related disease precluded re-litigation of same question in worker's action against corporation arising out of his alleged exposure to toxic chemicals); *Valisano v Chicago & N. W. R. Co.*, 225 NW 607 (Mi 1929), (finding in workers compensation that accident had not caused injuries held to preclude later injury claim through collateral estoppel); *Drier v.*

Randforce Amusement Corp. 179 N.Y.S.2d 412, 413 (N.Y.Sup.1958) (same); *Sedore v. Sayre*, 119 N.Y.S.2d 204 (N.Y. Sup. 1953) (inherent determination by workers compensation board that employee was injured in course and scope of employment was held sufficient to preclude later claim against employer); *Nicklos v. firestone Tire & Rubber Co.*, 346 F. Supp. 185 (E.D. Pa. 1972), *aff'd*, 485 F.2d 680 (3rd Cir. 1973) (plaintiff collaterally estopped from raising issue of causation where plaintiff was unsuccessful in establishing causal relationship in workers compensation case); *Ponte v. Malina Co.*, 745 A.2d 127 (R.I. 2000) (issue of re-injury to neck barred by res judicata since lack of causation had been established in prior case); *Waller v. Industrial Commission*, 431 P.2d 689 (Ariz. 1967) (finding by industrial commission that surgery was not causally related to industrial injury was res judicata to causation); *Westmoreland Coal Co. V. Russel*, 520 S.E.2d 839 (Va. App. 1999) (once an award adjudicating causation in workers' compensation claim becomes final the doctrine of res judicata bars further litigation of the issue of causation); *AMP, Inc. v. Ruebush*, 391 S.E.2d 879 (Va. App. 1990) (in cases involving industrial accident, issue of causation is not issue subject to change; pursuant to doctrine of res judicata, once final judgment has been entered, that issue ordinarily should not be re-litigated).

Finally, it is noteworthy that the United States District Court of Utah, when considering nearly the same issue that was decided in this case, held that collateral estoppel applied to a factual determination made by the Utah Labor Commission and thereby precluded a later civil claim. *See Stokes v. American Express Co.*, 989 F.2d 508 (D. Utah

1993) (Unpublished table case stating that determination in workers compensation case precluded later Title VII claim). In *Stokes* the plaintiff made a federal discrimination claim under Title VII based on sexual harassment and age discrimination. *Id.* 1. The Utah Industrial Commission determined, after evidence had been taken and witnesses heard, that the plaintiff had not been sexually harassed. *Id.* at P. 2. The court held that since “the issue of whether sexual harassment occurred is the same in both actions” and “the issue was competently, fully, and fairly litigated,” the plaintiff’s Title VII claim based on sexual harassment was barred due to issue preclusion. *Id.*

In this case, the District Court granted Summary Judgment based on the final determination of the Utah Labor Commission that Mrs. Gudmundson’s medical condition and claimed injuries were not related to or caused by her contact with ozone at the Utah State Prison. After reviewing all of the evidence, including the recommendations and conclusions of several independent medical doctors, the Utah Labor Commission found no evidence that Mrs. Gudmundson’s condition and injuries were caused by contact with ozone. The Administrative Law Judge specifically concluded that “The petitioner’s medical condition was not caused or aggravated by her exposure to ozone at work in December 2004 while employed by the respondent, State of Utah, Department of Corrections.” *See* Utah Labor Commission Order (ROA 283). Although Mrs. Gudmundson appealed the initial adjudication, the Utah Labor Commission Appeals Board affirmed the decision reached by the Administrative Law Judge. Mrs. Gudmundson could have appealed the final order of the

Utah Labor Commission with the Utah Court of Appeals pursuant to Utah Code Annotated §78-2a-3(2)(a) (2004), however she chose not to do so.

After losing in her attempt to establish causation before the Utah Labor Commission, Mrs. Gudmundson has now filed civil claims based on this identical issue. The First Amended Complaint states, in pertinent part, as follows:

“Starting on or about December 9, 2004, Mrs. Gudmundson was exposed to ozone from an ozone generating machine newly installed at the Utah Department of Corrections . . . The ozone exposure triggered a series of events, eventually necessitating brain surgery. . . . Mrs. Gudmundson’s medical condition was caused by ozone overexposure due to the fact that the ozone generator in the Wasatch Laundry Facility lacked a ventilation system, a fresh air replenishing system, automatic shut-off, audible alarm, visual alarm, a recapture system for the ozone, and other required equipment under OSHA guidelines.”

First Amended Complaint (ROA 124-125). Although Appellants have attempted to differentiate the issues by now stating that their claims are based not only on contact with ozone, but also on contact with chemical byproducts of ozone, this argument is not based on the pleadings and was only raised by Appellants in response to the Motions for Summary Judgment. *See Id.* Indeed, Appellants attempt to re-badge the causation issue was noted by the District Court, which stated that the Appellants were trying to make their theory of causation a “moving target.” *See* Transcript from Hearing on Motions for Summary Judgment (ROA 1890).

Similar to *Stokes*, Mrs. Gudmundson has already had an opportunity to address the exact same issue and lost. This court has held that it is “axiomatic” that a plaintiff must

prove proximate causation in strict liability, breach of warranty, and negligence claims. *Interwest Const. v. Palmer*, 923 P.2d 1350, 1356 (Utah 1996). Therefore, since a necessary element of the Appellants' claims, namely causation, has already been fully and fairly determined by an Administrative Court, her claims were properly dismissed by the District Court.

2. The workers compensation court's determination that Mrs. Gudmundson's injuries were not caused by exposure to ozone fulfilled all of the requirements of collateral estoppel.

Under Utah law, a party seeking to invoke collateral estoppel must satisfy four requirements: (a) the party must show that the issue challenged in the case at hand is identical to the issue decided in the previous action; (b) the issue in the previous action must have been decided in a final judgment on the merits; © the issue in the previous action must have been competently, fully, and fairly litigated; and (d) the opposing party in the action at hand must have been either a party or privy to the previous action. *See Sevy v. Security Title Co.*, 902 P.2d 629, 632 (Utah 1995).

a. The issue of causation in this case is identical to the issue adjudicated before the Utah Labor Commission.

The Labor Commission has already decided the issue of "proximate causation," which is a necessary element of the Appellants' claims. In her application for an administrative hearing, Mrs. Gudmundson alleged entitlement to medical expenses, disability compensation, and other expenses "as a result of an occupational disease/industrial injury overexposure to ozone on December 17, 2004." *See Utah Labor Commission Order (ROA 281-283)*. In

ruling on Mrs. Gudmundson's claims, the Labor Commission found that her "medical condition was not caused or aggravated by her exposure to ozone in December 2004." Furthermore, the reports relied upon by the labor commission specifically address the injuries claimed by Mrs. Gudmundson and concluded that her injuries most likely "pre-existed before December 2004, became symptomatic during that month, requiring treatment and eventual surgery, with the ozone episode at work being only a coincidental, non-related event." Report of Medical Panel Chaired by Dr. Jarvis (ROA 302-360) .

Appellants' Complaint and First Amended Complaint both clearly allege that Mrs. Gudmundson's injuries were caused as a result of ozone exposure at the Wasatch Laundry Facility. Therefore, the specific issue of whether Mrs. Gudmundson's exposure to ozone while working at the Wasatch Laundry Facility caused her injuries, as alleged in her complaint, has already been squarely addressed and rejected by the Labor Commission.

b. The Utah Labor Commission entered a final judgment on the merits.

The key factors in determining whether a judgment will be considered "on the merits" are whether a party had notice and an opportunity to be heard. *See Dennis v. Vasquez*, 72 P.3d 135 (Utah Ct. App. 2003). Additionally, Utah Appellate Courts have specifically held that final determinations made by Utah Labor Commission Administrative Law Judges in accordance with statutorily granted authority constitute final determinations "on the merits." *See Duran v. Labor Com'n*, 182 P.3d 931 (Utah Ct. App. 2008) (default determination made by Utah Labor Commission ALJ was final judgment on the merits since it complied with

requirements of applicable statute). In this case, Mrs. Gudmundson had notice of the adjudication and had ample opportunity to be heard. After hearing opposing arguments from both parties, the Utah Labor Commission determined that Mrs. Gudmundson's "medical condition was not caused or aggravated by her exposure to ozone at work in December 2004 while employed by the respondent, State of Utah, Department of Corrections." *See* Utah Labor Commission Order (ROA 283) . The appeals board affirmed this determination. *See* Order of Utah Labor Commission Appeals Board (ROA 358). Mrs. Gudmundson did not appeal the findings of the Labor Commission. Accordingly, the ruling of the Utah Labor Commission is a fully litigated final judgment on the merits.

- c. **Mrs. Gudmundson was a party to the adjudication of the labor commission and her husband's claims are subject to that adjudication as they are based on her injury and issues and circumstances associated therewith.**

Both appellants are bound by the outcome of the adjudication before the Utah Labor Commission because the claims asserted are contingent on the injuries, and causation, of Mrs. Gudmundson. It is undisputed that Mrs. Gudmundson was a party to the proceedings before the Utah Labor Commission. Furthermore, it is well accepted that "when a person with a family relationship to one suffering personal injury has a claim for loss to himself resulting from the injury, the determination of issues in an action by the injured person for [her] injuries is preclusive against the family member" Restatement (Second) of Judgments § 48(2); *See also Eubanks v. Federal Deposit Ins. Corp.*, 977 F2d 166, 170 (5th Cir. 1992) (res judicata applied to bar claims of wife of injured husband); *Sanchez v. Martin*,

416 So.2d 15, 16 (Fla. Dist. Ct. App. 1982) (if wife's claim is defeated, derivative claim of spouse is defeated also); *Laws v. Fisher*, 513 P.2d 876, 878 (Okla. 1973) (collateral estoppel applied to claims of husband in privity with wife where claims of wife adjudicated in prior action).

Accordingly, since the claims of Mr. Gudmundson are derivative only and contingent on the claims of Mrs. Gudmundson, collateral estoppel applies to his claims as well.

d. The issue of causation was completely, fully and fairly adjudicated by the Utah Labor Commission.

Mrs. Gudmundson's claims were completely, fully and fairly litigated before the Utah Labor Commission. After having the opportunity to be heard, present facts and present oral argument, the Labor Commission rejected Mrs. Gudmundson's claim, finding that her injuries were not caused by her exposure to Ozone. After the first denial of her claims, Mrs. Gudmundson filed an appeal with the Utah Labor Commission. In her appeal, she modified her theory of causation, presented additional evidence uncovered in her civil lawsuit, and submitted several articles on neurosurgery to the Labor Commission. After considering this additional evidence, the Labor Commission found that the new evidence was of limited probative value and only served as a "basis for speculation." Order of Utah Labor Commission Appeals Board (ROA 358). This court has held that causation cannot be established through speculation. *See Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996).

Mrs. Gudmundson had a full and fair opportunity, as well as incentive, to establish causation. She presented evidence and argument on multiple occasions. Nevertheless, the

Utah Labor Commission twice determined that her condition was not caused by ozone exposure. After receiving the final determination of Utah Labor Commission Appeals Board, Mrs. Gudmundson chose not to pursue the matter any further. Accordingly, the issue of the causation of Mrs. Gudmundson's alleged injuries was completely, fully and fairly adjudicated by the Utah Labor Commission.

B. APPLYING COLLATERAL ESTOPPEL IN THIS CASE DOES NOT VIOLATE PUBLIC POLICY.

Utah Courts have held that the purposes of applying collateral estoppel include (1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being re-litigated; and (3) protecting litigants from harassment from vexatious litigation. *Buckner v. Kennard*, 99 P.3d 842 (Utah Ct. App. 2004). "Once a party has his or her day in court and lost, he or she does not get a second chance to prevail on the same issues." *Id.* This is precisely what has taken place in this case.

After losing her workers compensation case, Plaintiff now seeks another chance to try to establish that the ozone added to washing machines by equipment installed in her workplace caused her medical conditions and injuries. This issue has been fully and completely adjudicated and the underlying public policy behind collateral estoppel support its application in this case.

Appellants and the Utah Association for Justice as Amicus Curiae specifically argue that collateral estoppel should not apply because (1) there are differences in the rule of law,

(2) there are differences in jurisdiction, (3) that the workers' compensation system uses an expedited procedure, (4) that the value at stake is different in the different actions, and (5) the differences are such that different outcomes could result. As set forth below, these claims are without merit.

1. The issue of causation as determined by the Utah Labor Commission did not involve any difference in law.

The public policy concern that collateral estoppel should not apply due to a "difference in law," as raised by the Utah Association for Justice, is without merit. The issue of causation and standard of proof required are the same in both jurisdictions. Appellants' argument is based solely on cases involving nuanced workers' compensation determinations relating to scope of employment which are "exceptions" to the general rule that issues determined in workers' compensation courts are collaterally estopped from re-litigation in subsequent cases.

The cases cited by the UAJ are easily distinguishable. First, the case of *Salt Lake Citizens Congress* actually affirms the proposition set forth above that the doctrine of collateral estoppel has been applied to agency decisions since at least the 1950's. *See* 846 p2d at 1251. Although *Salt Lake Citizens Congress* contains a general statement that res judicata requires that the same set of facts must be applied to the same rule of law, nothing in this case states that a factual determination regarding causation can only be used for collateral estoppel purposes in the same cause of action. *See Id.* Indeed, were this the case, there would be little to distinguish claim preclusion from issue preclusion/collateral estoppel.

Similarly, the cases of *Ahlstrom v. Salt Lake City Corp.* 73 P.3d 315 (Utah 2003) and *Spencer v. VIP*, 910 A. 2d 366 (Me. 2006) are also inapplicable to this case since they deal with “scope of employment” determinations. In *Ahlstrom*, this Court held that the specific and unique workers compensation exceptions of “special errand” and “employer-provided transportation” cannot be used to establish an employer/employee relationship in a civil negligence claim. *Ahlstrom*. 73 P.3d at 319-320.

In this case however, the employment relationship of Mrs. Gudmundson is not in dispute and no unique workers compensation-specific rules, presumptions or doctrines are being applied. Instead, the denial of her workers compensation claim was based solely on the determination that her injury was *not* caused by her exposure to ozone at work. This determination was specifically made based upon a “preponderance of the evidence” which is the exact same standard applied to the issue of causation in district court. *See* Utah Labor Commission Order (ROA 283).

The same issue of whether Mrs. Gudmundson’s injury was caused by her exposure to ozone at work was also required to be established by Mrs. Gudmundson in the current case. Since the exact issue has already been adjudicated by the Utah Labor Commission under the same legal standard required in this case, public policy supports the application of collateral estoppel.

2. The difference in jurisdiction did not place any limitation on the determination of causation by the Workers' Compensation court.

Public policy supports the application of collateral estoppel because the Utah Labor Commission has implied and necessary jurisdiction to determine the issue of causation. In addition to the authority expressly granted by statute, Administrative Courts have any additional authority implied and necessary to exercise the power granted by statute. *See Utah Copper Co. v. Industrial Commission of Utah*, 193 P. 24, 27 (Utah 1920). The provisions of the Utah Workers' Compensation Act grant the Utah Labor Commission power to award benefits to employees who are found to have been injured in the scope of their employment. *See Utah Code Ann. § 34A-2-102* (2008) ((b) "Award" means a final order of the commission as to the amount of compensation due: (I) an injured employee . . . (j)(I) "Personal injury by accident arising out of and in the course of employment" includes an injury caused by the willful act of a third person directed against an employee because of the employee's employment); *Utah Code Ann. § 34A-2-401* (2008) (Compensation is required to be paid for personal injuries arising out of and in the course of employment); *Utah Code Ann. § 34A-2-417* (2008) (Employee has the burden of establishing entitlement to compensation).

As set forth above, the Utah Labor Commission is expressly granted power and authority to award benefits upon the showing, by the employee, by a "preponderance of the evidence," that benefits should be awarded for a personal injury that arose out of his or her employment. Establishing the "causation" of the alleged injury is a necessary part of said

adjudication. Accordingly, under Utah law, the Utah Labor Commission had authority to determine the “causation” of an alleged industrial injury. Public policy supports the application of collateral estoppel because the difference in jurisdiction does not place any limitation on the determination of the issue of causation as determined by the Workers’ Compensation court.

The UAJ also incorrectly argues that courts from other states refuse to apply “issue preclusion” to workers’ compensation proceedings. As cited above, courts across the country *routinely* apply collateral estoppel to the holdings of workers’ compensation proceedings. The few cases cited by the UAJ are not binding precedent, are distinguishable from the case at hand, and are contrary to the weight of authority supporting the application of collateral estoppel to adjudications by workers’ compensation Administrative Law Judges.

Finally, the UAJ argues that applying collateral estoppel somehow removes the Appellants ability to assert claims outside the realm of workers’ compensation. This argument is flawed, since it assumes that the Appellants have no obligation to prove their case before the Utah Labor Commission. This is contrary to the plain language of the Utah Workers Compensation Act which states that while workers are entitled to benefits for industrial injuries, the burden of proof for establishing entitlement to these benefits lies squarely on the injured workers’ shoulders. Nothing prohibits Appellants from asserting causes of action against other parties so long as Appellants carry their burden of proof.

The Utah Labor Commission is a court of competent jurisdiction to determine the issue of causation, which is the burden of the person seeking compensation. Once the issue of causation has been determined, Utah courts and those of other jurisdictions routinely and correctly apply collateral estoppel to the such determinations. Public policy supports the application of collateral estoppel in this case. There is no basis for marginalizing Administrative Law decisions as requested by the Utah Association of Justice.

3. The expedited procedure of the Workers' Compensation Act is fair and adequate.

The Utah Workers' Compensation Act was enacted by the Utah legislature in order to assist injured workers in obtaining benefits for industrial injuries in a fair, expedited manner. Regardless of the contentions of Appellants' and the UAJ, collateral estoppel has been routinely upheld as properly applied to issues determined by workers' compensation courts. Additionally, courts have repeatedly held that the forum of the workers compensation court provides the injured worker with a full and fair opportunity to present his or her claims. *See, e.g., Bailey v. Texas Instruments, Inc.*, 111 P.3d 321, FN 10 (Alaska 2005) ("core purpose of the workers' compensation act [is] to establish a quick, efficient, and fair system for resolving disputes") (Emphasis added); *Duran v. Industrial Claim Appeals Office of State of Colo.*, 883 P.2d 477, 484-485 (Colo. 1994) (same). The obscure and arguably misapplied comment and example concerning a summary eviction proceeding's ability to preclude later actions for past due rent from the Restatement (Second) of Judgments, as proffered by the UAJ, is simply insufficient to outweigh the specific, unambiguous determinations of the Utah

legislature, Utah Courts, and courts across the country that workers' compensation courts are sufficiently fair and final to comply with the requirements of collateral estoppel. The Restatement (Second) of Judgments § 26, comment e concerns situations when a "statutory scheme" presents "such inequities" that a second action is necessary to "correct those inequities," even though it would normally be precluded as arising upon the same claim.

There is no evidence of "inequities" in Appellants workers compensation hearings. In fact, Mrs. Gudmundson had ample opportunity to present her claim. After filing her application for benefits, the Labor Commission sent her to an Independent Medical Examiner who examined Mrs. Gudmundson and reviewed her records. Later, after Dr. Holmes, the IME doctor, expressed his opinion that Mrs. Gudmundson's injuries had not been caused by exposure to ozone, the parties to the case, including Mrs. Gudmundson, agreed to have the issue reviewed again, this time by a panel of medical experts. The panel of medical experts visited the site, reviewed the documents and medical records, and examined Mrs. Gudmundson. Upon investigating the matter, the medical panel issued an opinion, which concurred with that of the IME, Dr. Holmes, that Mrs. Gudmundson's medical condition was not related to her exposure to ozone at the prison. After a hearing and based on the findings of the medical experts, the Labor Commission Administrative Law Judge issued an Order denying Mrs. Gudmundson's application for benefits, specifically finding that her medical condition was not caused by or related to exposure to ozone while at the prison.

Mrs. Gudmundson thereafter appealed the decision of the ALJ to the Utah Labor Commission Appeals Board. In appealing the initial ruling of the ALJ, Mrs. Gudmundson presented additional evidence in the form of depositions, documents, and medical articles relating to her medical condition. The Appeals Board considered this new evidence and nevertheless affirmed the finding of the ALJ. Even then, Mrs. Gudmundson could have either asked for reconsideration of her case by the Labor Commission or filed an appeal with the Utah Court of Appeals. The Labor Commission advised her of this. However, she chose not to take either of these steps. Thus, during the course of Mrs. Gudmundson's workers' compensation case she was afforded multiple opportunities to present evidence and be heard. Nevertheless, on two separate occasions, the Labor Commission determined that her medical condition was not caused by her exposure to ozone while working at the state prison.

Furthermore, the UAJ's contention that workers' compensation claims will be "over-litigated" does not make sense. The UAJ apparently argues that an injured worker should not be required to make every reasonable effort to establish that he or she has suffered a compensable industrial injury. This argument is directly contrary to the statute that places the burden of establishing a compensable injury on the injured worker. *See* Utah Code Ann. § 34A-2-417 (2008) (Employee has the burden of proof).

4. Collateral Estoppel should apply since Appellants had every incentive to fully adjudicate the issues before the workers' compensation court.

The UAJ next argues that collateral estoppel should not apply since the Appellants stood to recover more in their civil action than they did in the workers' compensation case.

The UAJ thus asks this Court to allow the Appellants a second opportunity to prove their case based on the illogical argument that workers' compensation claimants should not be expected to seriously prosecute their workers compensation case because the potential recovery is lower than the potential recovery in their civil action. This contravenes the Utah Workers' Compensation Act and the vast amount of precedent supporting the application of collateral estoppel to workers' compensation adjudications. This court should not use the guise of public policy to allow Appellants, and other similarly-situated individuals, to disregard workers' compensation adjudications merely because they lost and may theoretically stand to recover more in an alternate forum. To the injured, workers' compensation is not "insignificant" and an injured employee has every incentive to vigorously prosecute his or her claim. There is no "risk" associated with bringing a claim before a workers' compensation board, since the issues, incentives, and burden of proof are the same. If a party raises an issue, that party should be ready and willing to prove that issue, and should not be given a second chance when he or she fails to do so.

Additionally, the narrative given by the attorney for the UAJ regarding his own personal experiences in workers compensation and the limited amount allowed for legal fees under statute is improper, not based on any fact on record, and without merit. Not only are these alleged experiences completely unsupported, they are insufficient to provide justification for this court to make a determination as to the reasonableness of the scheme set in place by the Utah legislature. In creating this legislation, the legislature has determined

that the limitation of compensation set forth in Workers' Compensation Act is adequate for the individuals involved to adjudicate their claims.

5. Collateral estoppel ensures that the workers compensation and civil cases will not have different results.

Appellants' argument that application of collateral estoppel would cause different results makes absolutely no sense. The very purpose of collateral estoppel is to ensure that the same result is reached in separate adjudications with regard to identical issues. *See Buckner v. Kennard*, 99 P.3d 842 (Utah Ct. App. 2004) (one goal of collateral estoppel is to preserve the integrity of the judicial system by preventing inconsistent judicial outcomes). The only way that there would be a different and/or inconsistent result would be if collateral estoppel is *not* applied.

Applying collateral estoppel in this case gives the parties an incentive to fully explore the issues raised if and when they are raised. After they have been adjudicated, collateral estoppel ensures that the issues are uniformly applied in subsequent actions, thereby ensuring consistent results. Thus, public policy supports the application of collateral estoppel in this case since doing so ensures consistent results.

II. APPELLANTS' RULE 56(F) REQUEST FOR ADDITIONAL TIME WAS PROPERLY DENIED SINCE SUMMARY JUDGMENT WAS GRANTED BASED ON THE APPLICATION OF COLLATERAL ESTOPPEL.

This court should affirm the District Court's denial of Appellants' Rule 56(f) request for additional time to conduct discovery since summary judgment was granted based on an application of collateral estoppel to a determination of a prior proceeding which would not

have been affected by additional discovery. This Court has held that it will not reverse a district court's decision to deny a rule 56(f) motion for discovery unless it “exceeds the limits of reasonability.” *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858, 866 (Utah 2008) (citing *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994)). The “limits of reasonability” is not a bright line test, but rather depends on factors including, but not limited to, whether the additional discovery sought will “uncover disputed material facts that will prevent the grant of summary judgment.” *Id.* In this case, the trial court granted summary judgment based on the application of collateral estoppel to the prior determination of the Utah Labor Commission that Mrs. Gudmundson’s medical condition was not caused by her exposure to ozone while working at the Wasatch Laundry Facility. Although Appellants now argue that the Rule 56(f) motion was necessary since they might uncover new “theories” as to Mrs. Gudmundson’s injuries, such is merely a disingenuous attempt to thwart the proper application of collateral estoppel by re-badging Mrs. Gudmundson’s claims as something other than what she has already alleged in her complaint.

The facts show that Mrs. Gudmundson was only in contact with the ozone generating equipment for one week and that she had been away from the work environment for approximately 24 hours when she experienced her debilitating headache, which she claims resulted in her injuries. Upon asserting her claims for alleged injuries resulting from ozone exposure, these claims were investigated and evaluated by the Utah Labor Commission. After a full and fair adjudication, the Utah Labor Commission determined that Mrs.

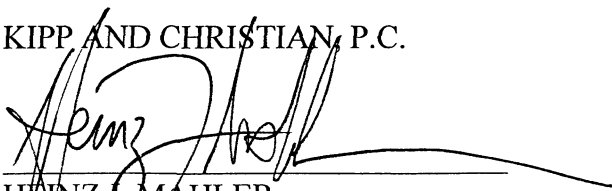
Gudmundson's injuries were not the result of her exposure to the ozone generating equipment installed at the Wasatch Laundry Facility. Summary Judgment was entered in this action based on an application of collateral estoppel to the finding of the Utah Labor Commission. Since additional discovery would have done nothing to alter the District Court's application of collateral estoppel to the prior determination made by the Utah Labor Commission, the District Court's denial of the Rule 56(f) motion did not exceed the limits of reasonability.

CONCLUSION

The lower court was correct in its ruling. The District Court took all arguments and relevant documents into consideration and stayed within the boundaries set by Utah law. Appellants seek to tread new legal ground by stating that the time-honored principle of applying collateral estoppel to determinations made by administrative agencies, specifically workers' compensation courts, should no longer apply. Public policy, however, does not support such a broad, sweeping result which would, in effect, marginalize administrative law courts. The lower court correctly followed well established Utah law. This appeal should be denied and the lower court's ruling should be affirmed.

DATED this 11th day of December, 2008.

KIPP AND CHRISTIAN, P.C.



HEINZ J. MAHLER
SCOTT C. POWERS

CERTIFICATE OF MAILING

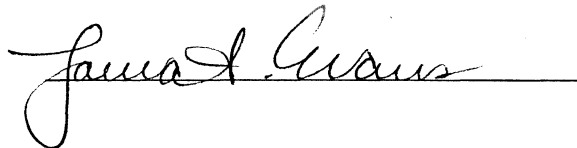
I hereby certify that I caused to be mailed, postage prepaid this 12th day of December, 2008, two true and correct copies of the foregoing, **BRIEF OF APPELLEE** to the following:

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A handwritten signature in cursive script, appearing to read "James A. Lund", is written over a horizontal line.

ADDENDUM

- A-1 *Stokes v. American Express Co.*, 989 F.2d 508 (D. Utah 1993)
- A-2 Utah Code Ann. § 34A-2-102 (Definitions)
- A-3 Utah Code Ann. § 34A-2-401 (Compensation to be paid)
- A-4 Utah Code Ann. § 34A-2-417 (Employee burden)

ADDENDUM A-1

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.

Betty L. STOKES, Plaintiff-Appellant,

v.

AMERICAN EXPRESS CO.; American Express
Travel Related Services, Inc.; Marie T. Grillo, De-
fendants-Appellees.

No. 92-4093.

March 16, 1993.

(D. Utah), No. 90-CV-211.

D.Utah

AFFIRMED.

Before TACHA and BALDOCK, Circuit Judges,
and BROWN,^{FN*} Senior District Judge.

FN* Honorable Wesley E. Brown, Senior
District Judge, United States District Court
for the District of Kansas, sitting by desig-
nation.

ORDER AND JUDGMENT ^{FN**}

FN** This order and judgment has no pre-
cedential value and shall not be cited, or
used by any court within the Tenth Circuit,
except for purposes of establishing the
doctrines of the law of the case, res ju-
dicata, or collateral estoppel. 10th Cir.R.
36.3.TACHA, Circuit Judge.

*1 After examining the briefs and appellate record,
this panel has determined unanimously that oral ar-
gument would not materially assist the determina-
tion of this appeal. See Fed.R.App.P. 34(a); 10th

Cir.R. 34.1.9. The case is therefore ordered submit-
ted without oral argument.

Plaintiff Betty L. Stokes appeals from an order of
the district court granting defendants' motion for
summary judgment in this action brought pursuant
to Title VII, 42 U.S.C. §§ 2000e-2000e-17. Upon
review of the record, the parties' briefs on appeal,
and the applicable law, we affirm, although, in part,
on different grounds than those relied upon by the
district court. See *Burk v. K Mart Corp.*, 956 F.2d
213, 214 (10th Cir.1991).

In her complaint, plaintiff alleged that defendants,
in particular defendant Grillo, her immediate super-
visor, sexually harassed her, discriminated against
her on the basis of her age, and retaliated against
her because she declined Ms. Grillo's sexual ad-
vances. As a result, plaintiff alleged she was
wrongfully discharged and caused severe emotional
distress.

We review the district court's grant of summary
judgment de novo, applying the same legal standard
used by the district court. See Fed.R.Civ.P. 56(c);
*Applied Genetics Int'l, Inc. v. First Affiliated Sec.,
Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990).

On appeal, plaintiff contests the district court's de-
termination that she was not subjected to either
quid pro quo sexual harassment or a hostile work-
ing environment due to sexual harassment. The dis-
trict court, addressing plaintiff's sexual harassment
claims on the merits, held that while plaintiff had
made a prima facie showing of sexual discrimina-
tion, she had not met her burden of showing that the
legitimate business reasons offered by defendants
for their actions were pretextual.

Defendants argue that the merits of this claim were
decided in plaintiff's state workers' compensation
claim and the state court's judgment is, therefore,
binding on this court. We agree.

The Supreme Court has held that Congress did not

intend that Title VII should supersede the principles of comity and repose as embodied in 28 U.S.C. § 1738.^{FN1} *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982).

FN1. 28 U.S.C. § 1738 provides that the record and judicial proceedings of any state court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken."

In her workers' compensation action, plaintiff alleged she was mentally and physically disabled as a result of sexual harassment in the workplace. Benefits were denied based on the finding that the alleged incidents had not occurred. Plaintiff appealed to the Utah Court of Appeals, which affirmed. *See Stokes v. Board of Review of Indus. Comm'n*, 832 P.2d 56 (Utah Ct.App.1992).

We are bound by this determination if the principle of issue preclusion applies. Issue preclusion "prevents the relitigation of issues that have been once litigated and determined in another action even though the claims for relief in the two actions may be different." *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983). *See Kremer*, 456 U.S. at 481-82 (federal court must look to state law to determine the effect of state judgment).

*2 The Utah Supreme Court has held that the following factors are to be examined in determining if issue preclusion applies:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently,

fully, and fairly litigated?

Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct.App.1987).

The issue of whether sexual harassment occurred is the same in both actions. *See Stokes*, 832 P.2d at 62 (issue of whether plaintiff's allegations of sexual harassment had actually occurred correctly reached because incidents were central to disability claim). The state appellate court entered final judgment upholding the Industrial Commission's determination on the merits that plaintiff had not been sexually harassed and that disciplinary procedures involving her had been handled appropriately in accordance with company procedures. The employer was a party in the state proceeding. Plaintiff's immediate supervisor, Ms. Grillo, while not a named party there, is in privity with the employer. The issue was competently, fully, and fairly litigated. Evidence was taken for seven days, testimony of nine witnesses was heard, and several volumes of medical and psychological reports were examined. *Id.* at 57, 59-60.

Therefore, plaintiff's Title VII claim for sexual harassment is barred due to issue preclusion. Plaintiff's derivative claims of retaliation and constructive discharge are likewise barred.

Petitioner argues that she proved her age discrimination claim. The district court found an insufficient basis to support this claim and held that defendants' stated reason for not including plaintiff in a specialized training program was a facially valid business reason which plaintiff failed to rebut. Upon review of the record, we agree with the district court that plaintiff failed to present credible evidence sufficient to create a genuine issue of material fact which would thereby preclude the entry of summary judgment in favor of defendants.

Plaintiff also argues that the Utah Workers' Compensation Act does not bar her emotional distress claim. We disagree. An action for emotional distress can only be brought in a state workers' com-

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989 F.2d 508, 1993 WL 76246 (C.A.10 (Utah))

(Table, Text in WESTLAW), Unpublished Disposition

pensation action unless the plaintiff can show intentional infliction of emotional distress. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058-59 (Utah 1991). Plaintiff has made no such showing here.

The judgment of the United States District Court for the District of Utah is AFFIRMED. Plaintiff's motion to supplement the record is DENIED. Defendants' motion to strike is GRANTED.

C.A.10 (Utah),1993.

Stokes v. American Exp. Co.

989 F.2d 508, 1993 WL 76246 (C.A.10 (Utah))

END OF DOCUMENT

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ADDENDUM **A-2**

Section	burial expenses — Artificial means and appliances.
34A-2-419.	Agreements in addition to compensation and benefits.
34A-2-420.	Continuing jurisdiction of commission — No authority to change statutes of limitation — Authority to destroy records — Interest on award — Authority to approve final settlement claims.
34A-2-421.	Lump-sum payments.
34A-2-422.	Compensation exempt from execution — Transfer of payment rights.
34A-2-423.	Survival of claim in case of death.

Part 5**Industrial Noise**

34A-2-501.	Definitions.
34A-2-502.	Intensity tests.
34A-2-503.	Loss of hearing — Occupational hearing loss due to noise to be compensated.
34A-2-504.	Loss of hearing — Extent of employer's liability.
34A-2-505.	Loss of hearing — Compensation for permanent partial disability.
34A-2-506.	Loss of hearing — Time for filing claim.
34A-2-507.	Measuring hearing loss.

Part 6**Medical Evaluations**

34A-2-601.	Medical panel, director, or consultant — Findings and reports — Objections to report — Hearing — Expenses.
34A-2-602.	Physical examinations.
34A-2-603.	Autopsy in death cases — Certified pathologist — Attending physicians — Penalty for refusal to permit — Liability.
34A-2-604.	Employee leaving place of treatment.

Part 7**Funds**

34A-2-701.	Premium assessment restricted account for safety.
34A-2-702.	Employers' Reinsurance Fund — Injury causing death — Burial expenses — Payments to dependents.
34A-2-703.	Payments from Employers' Reinsurance Fund.
34A-2-704.	Uninsured Employers' Fund.

Part 8**Adjudication**

34A-2-801.	Initiating adjudicative proceedings — Procedure for review of administrative action.
34A-2-802.	Rules of evidence and procedure before commission — Admissible evidence.
34A-2-803.	Violation of judgments, orders, decrees, or provisions of chapter — Grade of offense.

Part 9**Presumptions for Emergency Medical Services Providers**

34A-2-901.	Workers' compensation presumption for emergency medical services providers.
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Section	Workers' compensation claims by emergency medical services providers — Time limits.
34A-2-902.	
34A-2-903.	Failure to be tested — Time limit for death benefits.
34A-2-904.	Volunteer emergency medical services providers — Workers' compensation premiums.
34A-2-905.	Rulemaking authority — Rebuttable presumption.

PART 1**GENERAL PROVISIONS****34A-2-101. Title.**

This chapter shall be known as the "Workers' Compensation Act." 1997

34A-2-102. Definition of terms.

(1) As used in this chapter:

(a) "Average weekly wages" means the average weekly wages as determined under Section 34A-2-409.

(b) "Award" means a final order of the commission as to the amount of compensation due:

- (i) an injured employee; or
- (ii) a dependent of a deceased employee.

(c) "Compensation" means the payments and benefits provided for in this chapter or Chapter 3, Utah Occupational Disease Act.

(d) (i) "Decision" means a ruling of:

- (A) an administrative law judge; or
- (B) in accordance with Section 34A-2-801:
 - (I) the commissioner; or
 - (II) the Appeals Board.

(ii) "Decision" includes:

- (A) an award or denial of a medical, disability, death, or other related benefit under this chapter or Chapter 3, Utah Occupational Disease Act; or
- (B) another adjudicative ruling in accordance with this chapter or Chapter 3, Utah Occupational Disease Act.

(e) "Director" means the director of the division, unless the context requires otherwise.

(f) "Disability" means an administrative determination that may result in an entitlement to compensation as a consequence of becoming medically impaired as to function. Disability can be total or partial, temporary or permanent, industrial or nonindustrial.

(g) "Division" means the Division of Industrial Accidents.

(h) "Impairment" is a purely medical condition reflecting an anatomical or functional abnormality or loss. Impairment may be either temporary or permanent, industrial or nonindustrial.

(i) "Order" means an action of the commission that determines the legal rights, duties, privileges, immunities, or other interests of one or more specific persons, but not a class of persons.

(j) (i) "Personal injury by accident arising out of and in the course of employment" includes an injury caused by the willful act of a third person directed against an employee because of the employee's employment.

(ii) "Personal injury by accident arising out of and in the course of employment" does not include a disease, except as the disease results from the injury.

(k) "Safe" and "safety," as applied to employment or a place of employment, means the freedom from danger to the life or health of employees reasonably permitted by the nature of the employment.

- (1) "Workers' Compensation Fund" means the non-profit, quasi-public corporation created in Title 31A, Chapter 33, Workers' Compensation Fund.
- (2) As used in this chapter and Chapter 3, Utah Occupational Disease Act:
- (a) "Brother or sister" includes a half brother or sister.
 - (b) "Child" includes:
 - (i) a posthumous child; or
 - (ii) a child legally adopted prior to an injury. 2008

34A-2-103. Employers enumerated and defined — Regularly employed — Statutory employers.

- (1) (a) The state, and each county, city, town, and school district in the state are considered employers under this chapter and Chapter 3, Utah Occupational Disease Act.
- (b) For the purposes of the exclusive remedy in this chapter and Chapter 3, Utah Occupational Disease Act prescribed in Sections 34A-2-105 and 34A-3-102, the state is considered to be a single employer and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.
- (2) (a) Except as provided in Subsection (4), each person, including each public utility and each independent contractor, who regularly employs one or more workers or operatives in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, is considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act.
- (b) As used in this Subsection (2):
 - (i) "Independent contractor" means any person engaged in the performance of any work for another who, while so engaged, is:
 - (A) independent of the employer in all that pertains to the execution of the work;
 - (B) not subject to the routine rule or control of the employer;
 - (C) engaged only in the performance of a definite job or piece of work; and
 - (D) subordinate to the employer only in effecting a result in accordance with the employer's design.
 - (ii) "Regularly" includes all employments in the usual course of the trade, business, profession, or occupation of the employer, whether continuous throughout the year or for only a portion of the year.
- (3) (a) The client under a professional employer organization agreement regulated under Title 31A, Chapter 40, Professional Employer Organization Licensing Act:
 - (i) is considered the employer of a covered employee; and
 - (ii) subject to Section 31A-40-209, shall secure workers' compensation benefits for a covered employee by complying with Subsection 34A-2-201(1) or (2) and commission rules.
- (b) The division shall promptly inform the Insurance Department if the division has reason to believe that a professional employer organization is not in compliance with Subsection 34A-2-201(1) or (2) and commission rules.
- (4) A domestic employer who does not employ one employee or more than one employee at least 40 hours per week is not considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act.
- (5) (a) As used in this Subsection (5):
 - (i) (A) "agricultural employer" means a person who employs agricultural labor as defined in Subsections 35A-4-206(1) and (2) and does not include employment as provided in Subsection 35A-4-206(3); and

- (B) notwithstanding Subsection (5)(a)(i)(A), only for purposes of determining who is a member of the employer's immediate family under Subsection (5)(a)(ii), if the agricultural employer is a corporation, partnership, or other business entity, "agricultural employer" means an officer, director, or partner of the business entity;
- (ii) "employer's immediate family" means:

(A) an agricultural employer's:

- (I) spouse;
- (II) grandparent;
- (III) parent;
- (IV) sibling;
- (V) child;
- (VI) grandchild;
- (VII) nephew; or
- (VIII) niece;

(B) a spouse of any person provided in Subsection (5)(a)(ii)(A)(II) through (VIII); or

(C) an individual who is similar to those listed in Subsections (5)(a)(ii)(A) or (B) as defined by rules of the commission; and

(iii) "nonimmediate family" means a person who is not a member of the employer's immediate family.

(b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a member of the employer's immediate family.

(c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a nonimmediate family employee if:

(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was less than \$8,000; or

(ii) (A) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was equal to or greater than \$8,000 but less than \$50,000; and

(B) the agricultural employer maintains insurance that covers job-related injuries of the employer's nonimmediate family employees in at least the following amounts:

(I) \$300,000 liability insurance, as defined in Section 31A-1-301; and

(II) \$5,000 for health care benefits similar to benefits under health care insurance as defined in Section 31A-1-301.

(d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is considered an employer of a nonimmediate family employee if:

(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees is equal to or greater than \$50,000; or

(ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate family employees was equal to or exceeds \$8,000 but is less than \$50,000; and

(B) the agricultural employer fails to maintain the insurance required under Subsection (5)(c)(ii)(B).

(6) An employer of agricultural laborers or domestic servants who is not considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act, may come under this chapter and Chapter 3, Utah Occupational Disease Act, by complying with:

ADDENDUM A-3

PART 4

COMPENSATION AND BENEFITS

34A-2-401. Compensation for industrial accidents to be paid.

(1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:

- (a) compensation for loss sustained on account of the injury or death;
- (b) the amount provided in this chapter for:
 - (i) medical, nurse, and hospital services;
 - (ii) medicines; and
 - (iii) in case of death, the amount of funeral expenses.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:

- (a) on the employer and the employer's insurance carrier; and
- (b) not on the employee.

(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission. 1999

34A-2-402. Mental stress claims.

(1) Physical, mental, or emotional injuries related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's injury and employment.

(2) (a) Legal causation requires proof of extraordinary mental stress from a sudden stimulus arising predominantly and directly from employment.

(b) The extraordinary and sudden nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life.

(3) Medical causation requires proof that the physical, mental, or emotional injury was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional injury.

(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter.

(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter.

(6) An employee who alleges a compensable industrial accident involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence. 1997

34A-2-403. Dependents — Presumption.

(1) (a) The following persons are presumed to be wholly dependent for support upon a deceased employee:

- (i) a child under 18 years of age, subject to the conditions of Subsections (1)(b) and (2)(b);
- (ii) a child who is 18 years of age or older:
 - (A) if the child is:
 - (I) physically or mentally incapacitated; and
 - (II) dependent upon the parent who is the deceased employee; and
 - (B) subject to the conditions of Subsections (1)(b) and (2)(b); and

(iii) for purposes of a payment to be made under Subsection 34A-2-702(5)(b)(i), a surviving spouse with whom the deceased employee lived at the time of the employee's death.

(b) Subsections (1)(a)(i) and (ii) require that:

(i) the deceased employee be the parent of the child; or

(ii) (A) the deceased employee be legally bound to support the child; and

(B) the child be living with the deceased employee at the time of the death of the employee.

(2) (a) In a case not provided for in Subsection (1), the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury or death of an employee:

(i) except for purposes of a dependency review under Subsection 34A-2-702(5)(b)(iv); and

(ii) subject to the other provisions of this section.

(b) A person may not be considered a dependent unless that person is:

(i) a member of the family of the deceased employee;

(ii) the spouse of the deceased employee;

(iii) a lineal descendant or ancestor of the deceased employee; or

(iv) a brother or sister of the deceased employee. 2008

34A-2-404. Injuries to minors.

(1) A minor is considered sui juris for the purposes of this chapter and Chapter 3, Utah Occupational Disease Act, and no other person shall have any cause of action or right to compensation for an injury to the minor employee.

(2) Notwithstanding Subsection (1), in the event of the award of a lump sum of compensation to a minor employee, the sum shall be paid only to the minor's legally appointed guardian. 1997

34A-2-405. Employee injured outside state — Entitled to compensation — Limitation of time.

(1) Except as provided in Subsection (2), if an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of employment outside of this state, the employee, or the employee's dependents in case of the employee's death, shall be entitled to compensation according to the law of this state.

(2) This section applies only to those injuries received by the employee within six months after leaving this state, unless prior to the expiration of the six-month period the employer has filed with the division notice that the employer has elected to extend such coverage a greater period of time. 1997

34A-2-406. Exemptions from chapter for employees temporarily in state — Conditions — Evidence of insurance.

(1) Any employee who has been hired in another state and the employee's employer are exempt from this chapter and Chapter 3, Utah Occupational Disease Act, while the employee is temporarily within this state doing work for the employee's employer if:

(a) the employer has furnished workers' compensation insurance coverage under the workers' compensation or similar laws of the other state;

(b) the coverage covers the employee's employment while in this state; and

(c) (i) the extraterritorial provisions of this chapter and Chapter 3 are recognized in the other state and employers and employees who are covered in this state are likewise exempted from the application of

ADDENDUM A-4

- (1) a minor child:
 - (a) dies;
 - (b) marries;
 - (c) becomes 18 years of age; or
 - (d) is no longer dependent; or
- (2) the spouse of the employee:
 - (a) dies;
 - (b) divorces the employee; or
 - (c) subject to Section 34A-2-414 relative to the remarriage of a spouse, remarries. 2008

34A-2-416. Additional benefits in special cases.

- (1) Benefits received by a wholly dependent person under this chapter or Chapter 3, Utah Occupational Disease Act, extend indefinitely if at the termination of the benefits:
 - (a) the wholly dependent person is still in a dependent condition; and
 - (b) under all reasonable circumstances the wholly dependent person should be entitled to additional benefits.
- (2) If benefits are extended under Subsection (1):
 - (a) the liability of the employer or insurance carrier involved may not be extended; and
 - (b) the additional benefits allowed shall be paid out of the Employers' Reinsurance Fund created in Subsection 34A-2-702(1). 2008

34A-2-417. Claims and benefits — Time limits for filing — Burden of proof.

- (1) Except with respect to prosthetic devices or in a permanent total disability case, an employee is entitled to be compensated for a medical expense if:
 - (a) the medical expense is:
 - (i) reasonable in amount; and
 - (ii) necessary to treat the industrial accident; and
 - (b) the employee submits or makes a reasonable attempt to submit the medical expense:
 - (i) to the employee's employer or insurance carrier for payment; and
 - (ii) within one year from the later of:
 - (A) the day on which the medical expense is incurred; or
 - (B) the day on which the employee knows or in the exercise of reasonable diligence should have known that the medical expense is related to the industrial accident.
- (2) (a) A claim described in Subsection (2)(b) is barred, unless the employee:
 - (i) files an application for hearing with the Division of Adjudication no later than six years from the date of the accident; and
 - (ii) by no later than 12 years from the date of the accident, is able to meet the employee's burden of proving that the employee is due the compensation claimed under this chapter.
- (b) Subsection (2)(a) applies to a claim for compensation for:
 - (i) temporary total disability benefits;
 - (ii) temporary partial disability benefits;
 - (iii) permanent partial disability benefits; or
 - (iv) permanent total disability benefits.
- (c) The commission may enter an order awarding or denying an employee's claim for compensation under this chapter within a reasonable time period beyond 12 years from the date of the accident, if:
 - (i) the employee complies with Subsection (2)(a); and
 - (ii) 12 years from the date of the accident:
 - (A) (I) the employee is fully cooperating in a commission approved reemployment plan; and

- (II) the results of that commission approved reemployment plan are not known; or
- (B) the employee is actively adjudicating issues of compensability before the commission.

(3) A claim for death benefits is barred unless an application for hearing is filed within one year of the date of death of the employee.

- (4) (a) (i) Subject to Subsections (2)(c) and (4)(b), after an employee files an application for hearing within six years from the date of the accident, the Division of Adjudication may enter an order to show cause why the employee's claim should not be dismissed because the employee has failed to meet the employee's burden of proof to establish an entitlement to compensation claimed in the application for hearing.
 - (ii) The order described in Subsection (4)(a)(i) may be entered on the motion of the:
 - (A) Division of Adjudication;
 - (B) employee's employer; or
 - (C) employer's insurance carrier.

(b) Under Subsection (4)(a), the Division of Adjudication may dismiss a claim:

- (i) without prejudice; or
- (ii) with prejudice only if:
 - (A) the Division of Adjudication adjudicates the merits of the employee's entitlement to the compensation claimed in the application for hearing; or
 - (B) the employee fails to comply with Subsection (2)(a)(ii).

(c) If a claim is dismissed without prejudice under Subsection (4)(b), the employee is subject to the time limits under Subsection (2)(a) to claim compensation under this chapter.

(5) A claim for compensation under this chapter is subject to a claim or lien for recovery under Section 26-19-5. 2007

34A-2-418. Awards — Medical, nursing, hospital, and burial expenses — Artificial means and appliances.

(1) In addition to the compensation provided in this chapter or Chapter 3, Utah Occupational Disease Act, the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

(2) If death results from the injury, the employer or the insurance carrier shall pay the burial expenses in ordinary cases as established by rule.

(3) If a compensable accident results in the breaking of or loss of an employee's artificial means or appliance including eyeglasses, the employer or insurance carrier shall provide a replacement of the artificial means or appliance.

(4) An administrative law judge may require the employer or insurance carrier to maintain the artificial means or appliances or provide the employee with a replacement of any artificial means or appliance for the reason of breakage, wear and tear, deterioration, or obsolescence.

(5) An administrative law judge may, in unusual cases, order, as the administrative law judge considers just and proper, the payment of additional sums:

- (a) for burial expenses; or
- (b) to provide for artificial means or appliances. 1997

34A-2-419. Agreements in addition to compensation and benefits.

(1) (a) Subject to the approval of the division, any employer securing the payment of workers' compensation benefits for its employees under Section 34A-2-201 may enter into or continue any agreement with the employer's employees