

1992

Jamie Bacon v. Board of Review of the Industrial Commission of Utah, Intermountain Power Service Corporation, and Wausau Insurance Companies : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Bacon v. Board of Review of the Industrial Commission of Utah*, No. 920247 (Utah Court of Appeals, 1992).
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BRIEF

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3-1-1987

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DOCKET NO. 920247

IN THE UTAH COURT OF APPEALS

JAMIE BACON,

Petitioner/Appellant,

vs.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF
UTAH; INTERMOUNTAIN POWER
SERVICE CORPORATION; and
WAUSAU INSURANCE COMPANIES

Defendants/Appellees.

*
* Court of Appeals Case No.
* 920274-CA
*
*
*

* Priority No. 7
*
*

* Industrial Commission
* Case No. 91001038
*

APPELLEES' BRIEF

APPEAL FROM DISMISSAL OF A WORKER'S COMPENSATION
CLAIM FILED WITH THE INDUSTRIAL COMMISSION OF UTAH

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

JAMIE BACON, Petitioner/Appellant, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH; INTERMOUNTAIN POWER SERVICE CORPORATION; and WAUSAU INSURANCE COMPANIES Defendants/Appellees.	* * * * * * * * * * *	Court of Appeals Case No. 920274-CA Priority No. 7 Industrial Commission Case No. 91001038
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IN THE UTAH COURT OF APPEALS

JAMIE BACON,	*	
	*	Court of Appeals Case No.
Petitioner/Appellant,	*	920274-CA
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vs.	*	
	*	
BOARD OF REVIEW OF THE	*	
INDUSTRIAL COMMISSION OF	*	Priority No. 7
UTAH; INTERMOUNTAIN POWER	*	
SERVICE CORPORATION; and	*	
WAUSAU INSURANCE COMPANIES	*	Industrial Commission
	*	Case No. 91001038
Defendants/Appellees.	*	

JURISDICTION OF THE COURT

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. § 78-2a-3(2)(a) (1990) and Utah Code Ann. § 35-1-86 (1988).

ISSUES PRESENTED ON APPEAL

1. Whether Jamie Bacon's appeal must be dismissed in its entirety because the issues addressed in her brief were never preserved for appeal: The appellate issues advanced by Ms. Bacon were never brought to the attention of the Industrial Commission and have been asserted for the first time on appeal.

2. Whether the administrative law judge and the Utah Industrial Commission acted appropriately in dismissing Ms. Bacon's claim with prejudice because Ms. Bacon and her attorney wholly failed to cooperate in discovery, neglected to respond to defense motions, and ignored the Industrial Commission's direct

Order calling for the applicant to file an amended pleading specifying the factual basis of her industrial accident.

3. Whether Utah's "Open Courts" constitutional provision guarantees that a worker's compensation claim can never be dismissed with prejudice.

4. Whether the United States and Utah Constitutions guarantee effective assistance of counsel in non-criminal cases.

STANDARD OF REVIEW

Two standards of review are pertinent to Ms. Bacon's appeal:

1. As a threshold matter, the Utah Court of Appeals must determine whether any of the issues addressed in appellant's brief have been preserved for appellate consideration. This inquiry is governed by Pease v. Industrial Commission, 694 P.2d 613 (Utah 1984) and Johnson v. Department of Employment Security, 782 P.2d 965 (Utah App. 1989) which hold that all issues (even constitutional issues) which are not raised during the administrative proceedings below cannot be asserted for the first time on appeal.

2. An examination of the merits of Ms. Bacon's appeal will focus on the narrow inquiry of whether the Industrial Commission acted appropriately in upholding the sanction of a dismissal with prejudice. The propriety of such a dismissal is governed by an abuse of discretion standard of review, since trial courts are

afforded broad deference in conducting discovery matters and imposing sanctions for non-compliance with their orders and procedures. See, W. W. & W. B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977); G. M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244 (Utah 1975); Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991).

The standards for review cited in appellant's brief have nothing to do with this appeal because: (1) there was no "fact finding" entered below which the Utah Court of Appeals is called upon to review, and (2) no interpretation of any statute or constitutional provision was ever involved at any stage of the proceedings below.

DETERMINATIVE STATUTES AND RULES

The statutory and administrative procedural provisions governing this appeal (assuming that the Utah Court of Appeals rules that the issues contained in the appellant's brief have somehow been preserved for appeal) are the following:

1. Rule 37(d) of the Utah Rules of Civil Procedure (attached hereto as Addendum "A");
2. Utah Code Ann. § 35-1-88 (attached as Addendum "B"); and
3. Industrial Commission Procedural Rule R490-1-4 (attached hereto as Addendum "C").

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

Ms. Bacon claims she is entitled to worker's compensation benefits for an alleged January 17, 1991 industrial accident. At the time she signed and filed her Application for Hearing, Ms. Bacon (and her counsel) left the factual allegations section of the Application completely blank. Ms. Bacon and her attorney subsequently failed to respond to the defendants' Interrogatories and Motion for a More Definite Statement. Ms. Bacon and her attorney also failed to comply with an Industrial Commission Order which directed the applicant to file an Amended Application for Hearing. In the Amended Application (which was never filed), Ms. Bacon was to have specified the factual basis for her alleged industrial injury. Due to Ms. Bacon's failure to comply with the Industrial Commission Order, and given her general failure to prosecute her claim, the administrative law judge assigned to the case finally dismissed the Application for Hearing after a properly filed Motion to Dismiss had been submitted by the defendants.

Ms. Bacon and her attorney filed a Motion for Review with the Industrial Commission seeking a reversal of the administrative law judge's dismissal with prejudice. In her Motion, Ms. Bacon indicated that her condition of anxiety had precluded her from assisting her attorney in answering the

defendants' Interrogatories in a timely manner. The Motion for Review did not specify why the applicant and her attorney had not been able to respond to the Interrogatories for over four months, nor did the Motion for Review offer any suggestion as to why the administrative law judge's Order requiring the filing of a more definite statement had not been complied with. After considering the applicant's Motion for Review, the Utah Industrial Commission affirmed the dismissal with prejudice.

Ms. Bacon has now filed this appeal, contending that the administrative law judge and the Industrial Commission erred in dismissing her claim with prejudice. However, Ms. Bacon's appellate brief addresses, for the first time on appeal, issues which were not raised at any stage of the Industrial Commission proceedings below.

B. Statement of Facts.

The above-captioned matter arises from an industrial accident which allegedly occurred on January 17, 1991. (R. 13.)¹ Jamie Bacon, with the assistance of her counsel, filed her Industrial Commission Application for Hearing on April 16, 1991. (R. 13.) The Application, signed by both Ms. Bacon and her attorney, was (and is) incomplete. (See, Addendum "D.") Paragraph 2 of the one-page Application form, which requires a

¹"R. 13" refers the Court to page 13 of the Record on Appeal.

description of the alleged industrial accident, was left blank by Ms. Bacon and her attorney. (R. 13.) At the bottom of the Application form, the following warning is posted in bold text:

UNSIGNED OR INCOMPLETE FORMS WILL BE RETURNED
SIGNATURES CERTIFY READING OF INSTRUCTIONS
ON REVERSE SIDE OF THIS FORM

Ms. Bacon's Application for Hearing was submitted to defendants on October 15, 1991. (R. 33.) On November 14, 1991, defendants answered the Application. (R. 44-46.) In addition, defendants served Ms. Bacon's counsel with a Motion for More Definite Statement due to the complete absence of a description of the alleged industrial accident in paragraph 2 of the Application. (R. 41-43.) Interrogatories were also served upon counsel on November 14, 1991. (R. 34-40.) On November 22, 1991, Administrative Law Judge Timothy Allen issued a letter ordering Ms. Bacon and her attorney to file a more definite statement regarding the purported accident. (R. 47.) (See a copy of the letter attached as Addendum "E.") The letter was mailed both to Ms. Bacon and to her attorney. (Id.)

Ms. Bacon and her attorney ignored Judge Allen's Order and further failed to respond to defendants' Interrogatories which should have been answered no later than December 17, 1991. On January 15, 1992, defendants' counsel sent a letter to applicant's counsel advising that the Interrogatories must be responded to within a week or a motion to dismiss would be filed.

(R. 48.) After applicant ignored this request, defendants filed a Motion to Dismiss the Application for Hearing on February 6, 1992. (R. 82-85.) Applicant made no attempt to respond to this Motion. The Motion to Dismiss was granted by Judge Allen on February 13, 1992 dismissing the Application with prejudice for failure to state a definite claim as required by the Order issued November 22, 1991. (R. 86.)

Ms. Bacon filed her Industrial Commission Motion for Review seeking reversal of the dismissal on March 9, 1992. (R. 87-90.) The Motion argues that applicant's counsel had faced a good deal of difficulty in obtaining "the necessary recital of facts from the applicant." (R. 87.) (See a copy of the Motion attached as Addendum "F.") The Motion is supported by a letter, written by Ms. Bacon, which states that her attempts to consider answers to the Interrogatories had provoked a "two-day anxiety attack." (R. 91.) No satisfactory explanation is offered in the Motion as to why the Interrogatories could not have been answered in the nearly four months since they had been served. Further, no explanation is given as to why it was not possible for Ms. Bacon or her attorney to respond to Judge Allen's Order to provide a more definite statement (or even any statement at all) regarding the purported accident.

Subsequently, on March 23, 1992, Ms. Bacon filed Answers to Interrogatories notwithstanding the fact that this case had been

dismissed. Ms. Bacon has still made no effort to comply with Judge Allen's Order requiring a more definite statement.

SUMMARY OF ARGUMENT

Appellees contend that Ms. Bacon's appeal should be denied in its entirety because the three issues addressed in her appellate brief were never raised at any stage of the proceedings below. In her Motion for Review filed with the Industrial Commission, Ms. Bacon simply argued that she and her attorney had attempted to answer the defendants' Interrogatories and that any delay in conducting and prosecuting her case was essentially due to excusable neglect. This Motion for Review argument is not remotely similar to the three arguments advanced by Ms. Bacon on appeal. Accordingly, pursuant to well-settled Utah case law, this Court should reject the arguments advanced by Ms. Bacon in her brief because each of the issues in the brief has been raised for the first time on appeal.

Even if this Court chooses to decide any of the three issues raised by Ms. Bacon, her appeal still fails. Each of Ms. Bacon's three appellate issues clearly lack merit.

Ms. Bacon first contends that the administrative law judge and the Industrial Commission committed reversible error by dismissing her claim with prejudice. Quite to the contrary, utilizing its broad discretion to govern discovery proceedings and to sanction litigants for failing to comply with orders

issued during those proceedings, the Industrial Commission properly dismissed Ms. Bacon's claim. The dismissal with prejudice was entered only after Ms. Bacon and her attorney had (1) signed and filed the Application for Hearing without specifying any factual basis for the alleged industrial injury; (2) failed to respond to the defendants' Interrogatories; (3) failed to respond to the defendants' Motion for a More Definite Statement; (4) failed to comply with the administrative law judge's Order calling for the filing of an Amended Application for Hearing setting forth a more definite statement as to the nature of the alleged industrial accident; and (5) failed to respond to defendants' Motion to Dismiss. This course of misconduct and failure to prosecute her claim provides an ample basis for sustaining the dismissal with prejudice entered below.

Ms. Bacon next contends that the dismissal with prejudice deprived her of her constitutionally guaranteed access to open courts. Nothing could be further from the truth. Ms. Bacon was properly permitted the opportunity to file her Application pursuant to the legislatively mandated provisions of Utah's Workers' Compensation Act. Due to her own inactivity and failure to comply with the Industrial Commission's Order demanding the filing of a more definite statement, Ms. Bacon effectively forfeited her right to proceed with her workers' compensation claim. A litigant who has effectively forfeited her right to

pursue a remedy in Utah's open courts has absolutely no reasoned basis to contend that the sanctions she has brought upon herself somehow violate her constitutionally guaranteed access to open courts.

Finally, Ms. Bacon contends that the dismissal with prejudice entered against her should be set aside because it derived solely from the ineffective assistance of her workers' compensation counsel. Again, Ms. Bacon is incorrect. Utah does not recognize a Sixth Amendment right to effective assistance of counsel in civil and administrative proceedings. Furthermore, even if Ms. Bacon's ineffective assistance argument can be accorded any legal legitimacy, it is clear (as a factual matter) that Ms. Bacon's own inaction produced the dismissal with prejudice. At the time she signed her Application for Hearing, Ms. Bacon had an obligation to read the one-page form and ensure that the very minimal information requested on the form was complete and accurate. Despite the ease with which the one-page Application for Hearing can be filled out, Ms. Bacon simply chose to leave paragraph 2 of the form blank and, accordingly, provided neither the Industrial Commission nor the defendants with any clue as to the nature of her industrial accident. Further, Ms. Bacon's alleged two-day anxiety attack with respect to defendants' Interrogatories cannot possibly justify total inactivity on the part of Ms. Bacon and her attorney for over

four months. Indeed, the Interrogatory responses were never submitted to the defendants until after Ms. Bacon's claim had been dismissed with prejudice. Finally, Ms. Bacon made no attempt to comply with the Industrial Commission Court Order requiring her to file an Amended Application for Hearing setting forth a definite statement as to the nature of her industrial accident. This court Order was mailed directly to Ms. Bacon, but she made no attempt to communicate with the Industrial Commission. The failure to prosecute her claim appears to have arisen largely from her own anxiety and indolence. Accordingly, Ms. Bacon has no basis for requesting a reversal of the Industrial Commission's dismissal with prejudice.

Throughout her brief, Ms. Bacon laments that she will be left with no recourse should the Utah Court of Appeals uphold the dismissal with prejudice entered below. Ms. Bacon and her appellate counsel know that this is not true. Based upon her numerous allegations regarding her former counsel's misconduct, Ms. Bacon can certainly pursue other remedies against that attorney. For all of the foregoing reasons, Ms. Bacon's request for appellate relief should be denied.

ARGUMENT

POINT I

**JAMIE BACON'S APPEAL MUST BE DISMISSED IN ITS ENTIRETY
BECAUSE THE ISSUES ADDRESSED IN HER BRIEF WERE NEVER
PRESERVED FOR APPEAL: THE APPELLATE ISSUES ADVANCED BY
MS. BACON WERE NEVER BROUGHT TO THE ATTENTION
OF THE INDUSTRIAL COMMISSION AND HAVE BEEN
ASSERTED FOR THE FIRST TIME ON APPEAL**

The issues addressed in appellant's brief were never raised at any stage of the Industrial Commission proceedings below. Accordingly, those issues cannot now be advanced and addressed for the first time on appeal. Pease v. Industrial Commission, 694 P.2d 613 (Utah 1984) (petitioner has the responsibility to raise all issues that could be presented at the time, including constitutional issues, for the issues to be preserved for appeal); American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984); U.S.X. Corp. v. Industrial Commission, 781 P.2d 883, (Utah App. 1989); Ring v. Industrial Commission, 744 P.2d 602 (Utah App. 1987); Johnson v. Dept. of Emp. Security, 782 P.2d 965 (Utah App. 1989).

The Industrial Commission Motion for Review filed by Ms. Bacon and her attorney raised only one argument. In a nutshell, Ms. Bacon contended that her claim should not be dismissed because she and her attorney had been doing the best they could

to answer the defendants' Interrogatories.² This "due diligence" or "excusable neglect" argument is not now one of the issues raised by Ms. Bacon on appeal. Indeed, not one of the three issues raised by Ms. Bacon in her appellate brief was included in her Industrial Commission Motion for Review. Accordingly, none of the issues Ms. Bacon has chosen to brief has been preserved for appeal. As this Court observed in Johnson, supra:

We do not consider issues raised for the first time on appeal. Rekward v. Industrial Commission, 755 P.2d 166, 168 (Utah App. 1988). This general rule applies to constitutional issues first raised on appeal as well as to other issues. . . . [Citations omitted.]

For the foregoing reason, Ms. Bacon's Request for appellate relief must be denied.

²As indicated in the Statement of Facts above, the Motion for Review failed to adequately explain why the Interrogatories had not been answered in over four months. The Motion for Review also failed to address why neither Ms. Bacon nor her attorney had attempted to respond to Judge Allen's Order calling for the filing of a more definite statement.

POINT II

THE ADMINISTRATIVE LAW JUDGE AND THE UTAH INDUSTRIAL COMMISSION ACTED APPROPRIATELY IN DISMISSING MS. BACON'S CLAIM WITH PREJUDICE BECAUSE MS. BACON AND HER ATTORNEY WHOLLY FAILED TO COOPERATE IN DISCOVERY, NEGLECTED TO RESPOND TO DEFENSE MOTIONS, AND IGNORED THE INDUSTRIAL COMMISSION'S DIRECT ORDER CALLING FOR THE APPLICANT TO FILE AN AMENDED PLEADING SETTING FORTH THE NATURE OF HER INDUSTRIAL ACCIDENT

It is well settled in this state and in every other jurisdiction in the country that dismissal of a Complaint with prejudice is an appropriate sanction when a party (like Ms. Bacon in the present case) fails to cooperate in discovery, fails to generally prosecute her claim, and fails to abide by a direct Court Order which calls for the filing of an amended pleading. Ms. Bacon and her attorney committed each of the aforesaid acts during the pendency of the Industrial Commission proceedings below.

As outlined in the Statement of Facts on pages 5 through 7 of this Brief, Ms. Bacon and her attorney failed to file any response to the defendants' Motion for a More Definite Statement filed concurrently with the defendants' Answer. Further, Ms. Bacon and her attorney failed to answer the defendants' Interrogatories, which were also filed concurrently with defendants' Answer, until after Ms. Bacon's worker's compensation

claim had been dismissed with prejudice.³ To compound their problems, Ms. Bacon and her attorney then completely failed to respond to Administrative Law Judge Allen's November 22, 1991 letter which expressly requested that the applicant file an amended pleading setting forth a description of her alleged industrial accident. It should be highlighted that Judge Allen's letter calling for the filing of a more definite statement was sent to both Ms. Bacon and her attorney. Having received no response to Judge Allen's request for an amended pleading, defense counsel sent a letter dated January 15, 1992 requesting that Ms. Bacon submit her overdue response to the defendants' first set of Interrogatories. This letter also cautioned that a Motion to Dismiss would be filed by the defendants in the event the Interrogatories were not responded to in a timely manner.

Subsequently, on February 6, 1992, the defendants filed their Motion to Dismiss because the applicant and her attorney had taken absolutely no action to move the worker's compensation claim forward. Neither the applicant nor her attorney filed any response to the Motion to Dismiss. Finally, on February 13, 1992, the administrative law judge reviewed Ms. Bacon's course of conduct, weighed that conduct against Ms. Bacon's countervailing

³In her Motion for Review (R. 87), Ms. Bacon suggests that her "two-day anxiety attack" explains why the defendants' Interrogatories were not answered prior to the dismissal of her claim.

right to have her claim heard on the merits, and judiciously entered an Order dismissing Ms. Bacon's claim with prejudice.

Given the totality of the circumstances surrounding Ms. Bacon's failure to prosecute her Industrial Commission claim, and given her failure to respond to Judge Allen's November 22, 1991 Order (which was sent directly to the applicant herself), the Industrial Commission acted properly in dismissing Ms. Bacon's claim with prejudice. While such a dismissal is often viewed by the Courts as a measure of last resort, the inaction of Ms. Bacon and her attorney warrant the dismissal upheld by the Industrial Commission.

Both the Utah Supreme Court and the Utah Court of Appeals have upheld prejudicial dismissals of Complaints in cases similar to the present one. In Tucker Realty, Inc. v. Nunley, 396 P.2d 410 (Utah 1964), the Utah Supreme Court upheld the striking of a defendant's answer and the entry of judgment against that defendant where the defendant failed to comply with the pre-trial discovery order entered by the court. Similarly, in Amica Mutual Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989), this Court upheld a default judgment entered against a party who (even though not in violation of a court order) had "simply refused to cooperate in discovery." Id. at 962.

Consistent with Utah's case precedent, courts around the country have upheld prejudicial dismissals of workers'

compensation claims in fact situations similar to the present case. In Loosey v. Osmose Wood Preserving Co., 744 S.W.2d 402 (Ark. App. 1988), the Arkansas Court of Appeals held that an administrative law judge had appropriately dismissed a worker's compensation claim with prejudice due to the worker's failure to comply with an Industrial Commission discovery Order. In Loosey, the Industrial Commission administrative law judge established a date by which discovery was to be accomplished by the parties. When the applicant failed to respond to the defendants' Interrogatories within the permitted time, the administrative law judge dismissed the applicant's claim with prejudice. The Arkansas Court of Appeals upheld the administrative law judge's dismissal on the grounds that Rule 37(d) of the Arkansas Rules of Civil Procedure (which is identical to Rule 37(d) of the Utah Rules of Civil Procedure) permits dismissal as a sanction in the event that a party disobeys a Court discovery Order.⁴

Similarly, appellate courts have upheld the dismissal with prejudice of workers' compensation claims in the following cases: Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991) (dismissal was proper due to claimant's failure to abide by an

⁴The Court of Appeals should keep in mind that Utah's Rules of Civil Procedure can be, and routinely are, invoked at the discretion of Industrial Commission administrative law judges. See, Utah Code Ann. § 35-1-88 (1965) and Industrial Commission Rule R490-1-4(N) which provides that "the Industrial Commission shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas"

Industrial Commission discovery order); Mershon v. Oregonian Pub., 772 P.2d 440 (Or. App. 1989); Liggett v. State Indus. Ins. System, 661 P.2d 882 (Nev. 1983); Iaforaro v. Charter Builders, 557 So.2d 898 (Fl. App. 1990); Martin v. The South Coast Corp., 356 So.2d 500 (La. App. 1977); Smith v. Ballou, Johnson & Nichols Co., 437 A.2d 1090 (R.I. 1981); Regal Wood Products, Inc. v. Mendez, 432 So.2d 141 (Fl. App. 1983) (where the applicant made no showing of good cause for failure to prosecute, his workers' compensation claim had to be dismissed); Roberts v. Indus. Commission, 451 N.E. 2d 857 (Ill. 1983) (dismissal for lack of prosecution of claim was within the sound discretion of the Industrial Commission); Overstreet v. Home Indemnity Co., 747 S.W.2d 822 (Tex. App. 1987) (lower court did not abuse its discretion when it dismissed claimant's action with prejudice due to claimant's failure to comply with a court discovery order); Notman v. Indus. Commission, 579 N.E.2d 370 (Ill. App. 1991) (Industrial Commission has inherent authority to dismiss a claim due to claimant's failure to comply with an order requiring disclosure of income tax returns).

The facts of the present case and the facts of the Loosey case (cited on page 17 above) are indistinguishable, with the exception that Ms. Bacon's failure to cooperate in the discovery process and failure to abide by an express Industrial Commission Order are more egregious than the delay committed by the

applicant in Loosey. On the basis of the well-settled law in this and other jurisdictions, the dismissal of Ms. Bacon's claim should be affirmed by the Utah Court of Appeals.

The dismissal with prejudice upheld by the Industrial Commission is sanctioned not only by the case law cited above, but also by the rules of procedure governing practice before the Commission. (See, f.n. 4, *supra*.) Under the Utah Industrial Commission Rules in effect at the time Ms. Bacon filed her Application in this case, the Commission and its administrative law judges governed discovery proceedings according to the following general provision:

R490-1-4. Pleadings and Discovery.

H. Upon filing the Answer, the defendant may commence discovery with appropriate sets of interrogatories. . . . Failure of an applicant to comply with [defendants' discovery] request may result in the dismissal of a claim

This provision, particularly when read in light of Rule 37(d) of the Utah Rules of Civil Procedure, expressly sanctions the dismissal with prejudice entered by the administrative law judge and upheld by the Industrial Commission. The administrative law judge and the Industrial Commission acted appropriately and within the bounds of the Rules of Civil Procedure in dismissing Ms. Bacon's claim with prejudice due to her failure to participate in discovery and especially due to her failure to abide by or even respond to the express Order of the

Industrial Commission calling for the filing of an amended pleading setting forth a definite statement as to the nature of her alleged industrial claim. The propriety of the dismissal with prejudice is particularly evident, and should be affirmed by this Court, because Rule 37(d) vests trial courts with broad discretionary power to dismiss claims when a party disobeys a court order or refuses to cooperate in the discovery process. See, W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977); G. M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244 (Utah 1976); Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991); and Loosey v. Osmose Wood Preserving Co., 744 S.W.2d 402 (Ark. App. 1988).

Ms. Bacon argues that the Utah Court of Appeals' decision in Doubletree, Inc. v. Industrial Commission, 797 P.2d 464 (Utah App. 1990) somehow demonstrates that the Industrial Commission committed error in upholding the administrative law judge's dismissal with prejudice. The applicant's reliance upon Doubletree is completely misplaced. The Doubletree opinion contains a very narrow holding. Writing for the majority, Justice Orme simply specified in Doubletree that Utah Code Ann. § 63-46(b)-3(3)(d) (1989) of the Utah Administrative Procedures Act permits the Industrial Commission to dismiss a worker's compensation claim without prejudice. However, the Doubletree opinion does not suggest that the Industrial Commission is

without power to also dismiss workers' compensation claims with prejudice. Indeed, the Doubletree holding cannot be extended this far in light of Rule 37(d) and the foregoing case law analysis contained in appellees' brief. Accordingly, the Doubletree opinion has no precedential effect in the context of Ms. Bacon's appeal.

Ms. Bacon also contends that Bonneville Tower Condominium Management Committee v. Thompson Miche Assoc., 728 P.2d 1017 (Utah 1986) somehow demonstrates that the Industrial Commission erred in dismissing her worker's compensation claim with prejudice. Again, Ms. Bacon is mistaken. Bonneville Tower analyzes the propriety of dismissing a claim for failure to join an indispensable party. The dismissal reviewed in Bonneville Tower has nothing to do with a party's failure to prosecute her claim, failure to cooperate in discovery or failure to abide by a court Order. Accordingly, the facts and holding of Bonneville Tower are entirely inapposite in the context of the present appeal.

Ms. Bacon also argues in Point I of her appellate brief that the administrative law judge and Industrial Commission below somehow erred in determining that Ms. Bacon's Application for Hearing could not sustain an award on her behalf "under any set of facts which could be proved in support of [her] claim." (See p. 11 of Ms. Bacon's Utah Court of Appeals Brief.) Ms. Bacon's

assignment of error in this regard lacks merit for two reasons. First, by examining Ms. Bacon's Application for Hearing (attached hereto as Addendum "D"), the Court will observe that paragraph 2 of the Application flatly fails to advance any state of facts in support of the requested worker's compensation award.

Accordingly, the administrative law judge and the Industrial Commission could not examine the potential merits of Ms. Bacon's claim and thereby enter an order more favorable to her when absolutely no facts were ever advanced by Ms. Bacon in support of her hypothetical worker's compensation claim. For this reason, the notice pleading cases (Arrow Indus., Inc. v. Zion's First Nat'l Bank, 767 P.2d 935 (Utah 1988); Freegard v. First Western Nat'l Bank, 738 P.2d 614 (Utah 1987); and Christensen v. Lelis Automatic Transmission Service, Inc., 467 P.2d 605 (Utah 1970)) cited by Ms. Bacon on p. 11 of her brief have absolutely no bearing on the facts of the present case.

Second, Ms. Bacon has mischaracterized the basis upon which the dismissal with prejudice is premised. The administrative law judge and the Industrial Commission did not enter the dismissal solely on the basis of Ms. Bacon's failure to state a definite claim. Quite to the contrary, it was the following combination of inaction and misconduct which led to the prejudicial dismissal: (1) Ms. Bacon and her attorney failed to specify any factual basis for the alleged worker's compensation claim in the

body of the Application for Hearing; (2) Ms. Bacon and her attorney failed to respond to the defendants' Motion for More Definite Statement which was filed concurrently with the defendants' Answer on November 14, 1991; (3) Ms. Bacon and her attorney completely failed to respond to the defendants' Interrogatories which were also filed on November 14, 1991; (4) Ms. Bacon and her attorney failed to respond to the administrative law judge's direct Order (entered November 22, 1991) calling for the filing of an amended Application for Hearing setting forth the factual basis for Ms. Bacon's worker's compensation claim; (5) Ms. Bacon and her attorney failed to respond to or act in accordance with defense counsel's letter dated January 15, 1992 requesting the applicant's overdue response to the defendants' Interrogatories; and (6) Ms. Bacon and her attorney wholly failed to respond to the defendants' Motion to Dismiss filed on February 6, 1992. When the foregoing course of inactivity and misconduct is viewed in its totality, the Utah Court of Appeals should conclude that there was ample justification for the Industrial Commission's prejudicial dismissal of Ms. Bacon's worker's compensation claim.

POINT III

WHETHER UTAH'S "OPEN COURTS" PROVISION GUARANTEES THAT A WORKER'S COMPENSATION CASE CAN NEVER BE DISMISSED WITH PREJUDICE

Ms. Bacon contends that the Open Courts provision of the Utah Constitution has somehow been violated by virtue of the Industrial Commission's dismissal of her worker's compensation claim. This contention is entirely erroneous when applied to the facts of this case. Ms. Bacon was afforded the full benefit of the Open Courts constitutional provision when she was permitted to file and prosecute her industrial claim pursuant to Utah's Workers' Compensation Act. The fact that her own inactivity and misconduct has now led to the prejudicial dismissal of her claim has absolutely nothing to do with a Open Courts analysis.⁵ To use Ms. Bacon's logic, any time an Industrial Commission or civil litigant is sanctioned and dismissed for failing to prosecute a claim or abide by a court order, that litigant has inherently suffered a violation of his or her constitutional right to the access of Utah's open courts. This position is nonsensical. A litigant's constitutional guarantee of access to open courts can only go so far. If the applicant abuses or mistreats his or her constitutional right, then he or she may suffer the forfeiture of

⁵An Open Courts constitutional analysis arises when a statute (typically a statute of repose) operates to preclude or bar a litigant from filing her claim. See, Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). No such statute is at issue in this case.

that right by virtue of a court order dismissing his or her claim. It is a tortuous argument, at best, for that litigant to then turn around and contend that his or her forfeiture of the right to prosecute his or her claim is somehow tantamount to a constitutional deprivation of his or her open courts right.

Ms. Bacon is also mistaken in arguing that she will be left with no recourse should the Utah Court of Appeals uphold the dismissal with prejudice entered by the Industrial Commission. Indeed, according to her unilateral version of her course of dealing with her former attorney, she may well have a remedy against that attorney. In short, Ms. Bacon has been afforded the full benefit of her constitutional guarantee to the access of an open court, and that access is still wide open should she choose to proceed against her former attorney whom she claims so severely prejudiced her rights.

POINT IV

THE UNITED STATES AND UTAH CONSTITUTIONS DO NOT GUARANTEE EFFECTIVE ASSISTANCE OF COUNSEL IN NON-CRIMINAL CASES

Ms. Bacon's contention that her claim should be remanded because she was denied effective assistance of counsel during the administrative proceedings below is incorrect for two reasons.

First, under Utah law, Ms. Bacon has no basis for asserting an ineffective assistance of counsel argument in the context of this Industrial Commission case. The Utah Court of Appeals has

expressly held that "ineffective assistance of counsel is a sixth Amendment right limited to criminal law." Richins v. Delbert, Chipman & Sons Co., Inc., 817 P.2d 382, 386, f.n. 2 (Utah App. 1991). Pursuant to this legal standard, Ms. Bacon's claim of ineffective assistance of counsel is without merit. Indeed, the Pennsylvania cases relied upon by Ms. Bacon on page 17 of her appellate Brief readily concur with the holding announced by this Court in Richins. In Bickel v. W. C. A. B., 538 A.2d 661 (Pa. Cmwlth. 1988) the Pennsylvania Court of Appeals explicitly stated that "the substantive due process right to effective assistance of counsel is not applicable to civil or administrative proceedings." (Emphasis added.) Id. at 663.⁶ Pursuant to both the Richins and Bickel standards, Ms. Bacon has no legal basis for asserting an ineffective assistance of counsel argument.

Second, even if Ms. Bacon's ineffective assistance of counsel argument is legally proper, the argument fails due to Ms. Bacon's role in producing the dismissal with prejudice entered

⁶The court in Bickel did decide that an examination of the effectiveness of a worker's attorney is relevant in the very narrow context of determining whether the Industrial Commission abused its discretion in refusing to allow the worker a rehearing of his claim. This narrow issue is not before the Utah Court of Appeals in the present case, because Ms. Bacon and her present appellate counsel never attempted to obtain a rehearing at any time during the Industrial Commission proceedings below.

below.⁷ At least three significant events, which occurred during Ms. Bacon's attempt to prosecute her worker's compensation claim, reveal that Ms. Bacon is as responsible as her former counsel for the dismissal with prejudice entered by the Industrial Commission.

As this Court is aware, Ms. Bacon signed her Application for Hearing which is dated April 16, 1991. At the bottom of the Application for Hearing, printed in bold text, the Application indicates "UNSIGNED OR INCOMPLETE FORMS WILL BE RETURNED." In signing the Application, Ms. Bacon must be charged with the responsibility of ensuring (along with her attorney) the accuracy of the information contained in the Application. By leaving paragraph 2 of the Application completely blank, Ms. Bacon and her attorney were simply asking that the Industrial Commission reject the Application for Hearing. Any applicant genuinely

⁷In the event the Utah Court of Appeals determines that it needs to review Ms. Bacon's course of conduct during the proceedings below, the Court should be aware of the following language from the California opinion cited on page 17 of appellant's Brief. In Orange Empire Nat'l Bank v. Kirk, 66 Cal. Rptr. 240, 244 (Cal. App. 1968) the court observed that:

. . . the law ordinarily charges the client with the inexcusable neglect of his attorney, and gives him redress against his counsel [citations omitted], . . . [but only] the client who is relatively free from personal neglect will be relieved from a default or dismissal attributable to the inaction or procrastination of his counsel. [Citations omitted.]

concerned with the adequate prosecution her claim will at least go to the trouble of describing the accident which forms the basis of that claim. To suggest that an applicant who signs an Application for Hearing is not responsible for misrepresentations and omissions contained on the simple one-page form, is to suggest that the Industrial Commission's streamlined, user-friendly process for initiating a worker's compensation claim is somehow overly burdensome.

Even if Ms. Bacon was not apprised of the defendants' Motion for More Definite Statement (which was served on November 14, 1991), Ms. Bacon at a minimum knew about Judge Allen's letter dated November 22, 1991 (attached hereto at Addendum "E"). Ms. Bacon took no action to either retain new counsel or ensure that the missing information in paragraph 2 of her Application for Hearing was filled in and provided to the Industrial Commission and the defendants. Ms. Bacon's own inactivity and carelessness in failing to respond to a direct Court Order has created the prejudice of which she now complains.

It is also interesting to note that Ms. Bacon's Motion for Review (attached as Addendum "F") specifies that she was aware of the need to provide Interrogatory answers to the defendants but that she had difficulty in doing so as a result of her anxiety. While it is true that Ms. Bacon's attorney could have taken a number of steps in an attempt to keep her claim alive, it appears

that Ms. Bacon's failure to assist her attorney in responding to the defendants' Interrogatories caused the principal delay which ultimately led to the dismissal with prejudice. Ms. Bacon argues on page 16 of her brief that her attorney "failed for two months to furnish [her] with defense Interrogatories so that additional information could be obtained." This assertion, however, is not supported by the record on appeal. Ms. Bacon's own Motion for Review, filed on March 9, 1992, reveals that her former attorney had experienced persistent problems in obtaining cooperation and information from Ms. Bacon so that the Interrogatories could be answered.

As with her open courts constitutional argument, Ms. Bacon is pointing a finger in the wrong direction when she contends that her worker's compensation claim should be remanded and adjudicated due to her allegation of ineffective assistance of counsel. Quite to the contrary, if Ms. Bacon feels so strongly that her former counsel has caused the prejudice she has suffered, then her proper avenue of recourse is against that attorney. Indeed, this is the only course of action which should be sanctioned by the Utah Court of Appeals because the Court cannot engage in speculation in an attempt to ascertain the veracity of Ms. Bacon's ineffective assistance of counsel allegations. The Court can discern from the record, however, that Ms. Bacon failed to properly execute her Application for


Hearing at the time she signed it, failed to in any way respond to Judge Allen's November 22, 1991 Order, and apparently impeded her attorney's efforts to answer the defendants' Interrogatories.

With these observations in hand, the Utah Court of Appeals can reject Ms. Bacon's ineffective assistance of counsel argument on any of three separate grounds. First, the argument has no basis in Utah law. Second, the issue was not preserved for appeal (Point I above). Or, third, the state of the factual record currently before the Court reveals that Ms. Bacon is at least as responsible as her own attorney for the dismissal with prejudice entered by the Industrial Commission.

For each of the aforesaid ~~reasons~~ ^{CONCLUSIONS}, appellees respectfully request that the dismissal entered by the Industrial Commission be upheld on appeal.

DATED this 13th day of October, 1992.

RICHARDS, BRANDT, MILLER
& NELSON


MICHAEL E. DYER
MICHAEL A. PETERSON
Attorneys for Appellees

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing instrument were mailed, first class, postage prepaid on this 13 day of October, 1992, to the following:

Sandra Dredge
Linda Anderson
2230 No. University Parkway
Suite 9-F
Provo, Utah 84604

Benjamin Simms
Board of Review
Industrial Commission of Utah
160 East 300 South
P.O. Box 510250
Salt Lake City, Utah 84151-0250

A handwritten signature in black ink, appearing to read "Michael A. Furman", is written over a horizontal line.

A D D E N D A

ADDENDUM A

their authenticity, to accept a copy of defendant's written admissions served upon plaintiff as compliance with the rules; where the trial court chose the latter option, it was proper to permit plaintiff to recite defendant's admissions into the record. *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982).

—**Failure to respond.**

—**Objectionable matter.**

Even if a request for an admission is objectionable, if a party fails to object and fails to respond to the request, then that party should be held to have admitted the matter. *Jensen v. Pioneer Dodge Ctr., Inc.*, 702 P.2d 98 (Utah 1985).

—**Prison inmate.**

When inmate served requests for admissions and interrogatories on prison officials in action for recovery of value of personal property taken from him, on failure of officials to respond to the requests, apply for extension of time, or move to amend or withdraw their admissions pursuant to Subdivision (b), all the facts were

deemed admitted and the inmate was entitled to judgment against the officials. *Schmitt v. Billings*, 600 P.2d 516 (Utah 1979).

—**Motion to dismiss.**

—**Tolling.**

Filing a motion to dismiss did not toll effect of Subdivision (a), which treats requests for admissions which are not answered within 45 days as if admitted and as a proper basis for summary judgment. *Schmitt v. Billings*, 600 P.2d 516 (Utah 1979).

—**Punitive damages.**

Where plaintiff requests an admission of punitive damages in an amount unrelated to actual damages, the court, as a matter of equity, must intervene and examine the admission. *Jensen v. Pioneer Dodge Ctr., Inc.*, 702 P.2d 98 (Utah 1985).

Cited in *Utah Sand & Gravel Prods. Corp. v. Salt Lake County Comm'n*, 14 Utah 2d 151, 379 P.2d 379 (1963); *W.W. & W.B. Gardner, Inc. v. Park West Village, Inc.*, 568 P.2d 734 (Utah 1977).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 325.

C.J.S. — 27 C.J.S. Discovery §§ 88 to 110.

A.L.R. — Continuance sought to secure testimony of absent witness in civil case, admissions to prevent, 15 A.L.R.3d 1272.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to request for admission of

facts not within his personal knowledge, 20 A.L.R.3d 756.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L.R.4th 489.

Key Numbers. — Discovery ⇌ 121 to 129.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance

with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure. (Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 37, F.R.C.P.

Cross-References. — Contempt generally, § 78-32-1 et seq.

ADDENDUM B

ing Workmen's Compensation Act. *Ellis v. Industrial Comm'n*, 91 Utah 432, 64 P.2d 363 (1937).

Attorneys' fees in compensation cases should be measured according to the workingman's station. *Ellis v. Industrial Comm'n*, 91 Utah 432, 64 P.2d 363 (1937).

Review by Supreme Court.

Industrial Commission not only has power to fix attorneys' fees in cases before it, but it also has power to fix fees for services rendered on review in Supreme Court, Supreme Court only having power to review matter of attorney's

fees in same manner and with same limitations as it may review any other decision of the commission. *Ellis v. Industrial Comm'n*, 91 Utah 432, 64 P.2d 363 (1937); *Thatcher v. Industrial Comm'n*, 115 Utah 568, 207 P.2d (1949).

Suspension of attorney from practice.

Attorney's indirect collection of fees from clients in excess of those awarded by Industrial Commission constituted unprofessional conduct resulting in one year's suspension from practice. *In re Hatch*, 108 Utah 446, 160 P.2d 961 (1945).

COLLATERAL REFERENCES

Utah Law Review. — Attorney's Fees in Utah, 1984 Utah L. Rev. 553.

C.J.S. — 101 C.J.S. Workmen's Compensation § 817.

A.L.R. — Handling, preparing, presenting,

or trying workmen's compensation claims or cases as practice of law, 2 A.L.R.2d 724.

Key Numbers. — Workers' Compensation ☞ 1981.

35-1-88. Rules of evidence and procedure before commission and hearing examiner — Admissible evidence.

Neither the commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act.

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

- (a) Depositions and sworn testimony presented in open hearings.
- (b) Reports of attending or examining physicians, or of pathologists.
- (c) Reports of investigators appointed by the commission.
- (d) Reports of employers, including copies of time sheets, book accounts or other records.
- (e) Hospital records in the case of an injured or diseased employee.

History: L. 1917, ch. 100, § 88; C.L. 1917, § 3148; R.S. 1933 & C. 1943, 42-1-82; L. 1965, ch. 67, § 1.

Meaning of "this act". — See same catchline in notes following § 35-1-46.

Cross-References. — Rules for procedure of commission, § 35-1-10.

ADDENDUM C

granted. Otherwise, compensation may not be allowed.

P. "Attending Physician's Statement — Form 043" — This form must be completed by employee and his last attending physician in the state to establish the medical condition of the employee. It must be accompanied by Form 044.

Q. "Compensation Agreement — Form 019" — This form is used by the parties to a workers' compensation claim to enter into an agreement as to a permanent partial impairment award, and must be submitted to the Commission for approval.

R. "Application for Lump Sum or Advance Payment — Form 134" — This form is used by an employee to apply for a lump sum or advance payment for a permanent partial impairment award.

S. "Release to Return to Work — Form 110" — This form may be used to meet the requirements of Rule R490-2-3E, as contained herein.

T. "Insurance Carrier or Self-Insured Employer Annual Statement of Losses — Form 117" — Parts (a) and (b) are to be submitted together by January 31st for the preceding calendar year. Part (a), an individual loss claim log, states the losses by individual claim and part (b) states the aggregate losses by the insurance carrier or self-insured employer for the preceding calendar year.

Carriers or self-insured employers wishing to submit a computer tape in lieu of the form must obtain prior written authorization from the Industrial Commission, Industrial Accidents Division.

U. "Disability Status Report — Form 206" — This report is required, as per Section 35-10-6, U.C.A., when an injured worker's temporary total compensation exceeds 90 days, or when it appears that the injured worker will be disabled, whichever comes first. The insurance carrier or the self-insured employer shall file this report with the Commission within 30 days thereafter.

V. "Request for Copies From Claimant's File — Form 205" — This form is used to request copies from a claimant's file in the Industrial Commission with the appropriate authorized release.

W. "Medical Records — Copies — Form 302" — This form is used by a claimant to request a free copy of his/her medical records from a medical provider. This form must be signed by a staff member of the Industrial Accidents Division.

X. The Director of the Industrial Accidents Division of the Commission may approve change of any of the above forms upon notice to all concerned parties. Carriers may print these forms or approved versions.

R490-1-4. Pleadings and Discovery.

A. For the purposes of Section 63-46b-3, U.C.A., all adjudicative proceedings for workers' compensation and occupational disease claims shall only be commenced by the injured worker or dependent filing a request for agency action with the Commission. The Administrative Law Judge is afforded discretion in allowing intervention of other parties pursuant to Section 63-46b-9, U.C.A. The Application for Hearing is the request for agency action. All such applications shall include supporting medical documentation of the claim where there is a dispute over medical issues. Applications without supporting documentation will not be mailed to the employer or insurance carrier for answer until the appropriate documents have been provided.

B. Whenever a claim for compensation benefits is denied by an employer or insurance carrier, the burden rests on the applicant to initiate the action by

filing an Application for Hearing with the Commission.

C. When an Application for Hearing is filed with the Commission, the Commission shall forthwith mail a copy to the employer or to the employer's insurance carrier.

D. The employer or insurance carrier shall have 30 days following the date of the mailing of the application to file a written answer with the Industrial Commission, admitting or denying liability for the claim. The answer should state all affirmative defenses with sufficient accuracy and detail that an applicant may be fully informed of the nature of the defense asserted. All answers shall include a summary and categorization of benefits paid to date on the claim. A copy shall be sent to the applicant or, if there is one, to the applicant's attorney by the defendant.

E. When an employer or insurance carrier fails to file an answer within the 30 days provided above, the Commission may enter a default against such employer or insurance carrier. The Commission may then set the matter for hearing, take evidence bearing on the claim, and enter an Order based on the evidence presented. Such defaults may be set aside by following the procedure outlined in the Utah Rules of Civil Procedure. Said default shall apply to the defendant employer or insurance carrier and shall not be construed to deprive the Employers' Reinsurance Fund or the Uninsured Employers' Fund of any appropriate defenses.

F. Where the answer denies liability solely on the medical aspects of the case, the applicant, through his/her attorney or agent, and the employer or insurance carrier, with the approval of the Commission or its representative, may enter into a stipulated set of facts, which stipulation, together with the medical documents bearing on the case in the Commission's file, may be used in making the final determination of liability.

G. When deemed appropriate, the Commission or its representatives may have a pre-hearing or post-hearing conference.

H. Upon filing of the Answer, the defendant may commence discovery with appropriate sets of interrogatories. Such discovery should focus on the accident event, witnesses, as well as past and present medical care. The defendant shall also be entitled to appropriately signed medical releases to allow gathering of pertinent medical records. The defendant may also require the applicant to submit to an independent medical examination to be conducted by a physician of the defendant's choice. Failure of an applicant to comply with such requests may result in the dismissal of a claim or a delay in the scheduling of a hearing.

I. Commission subpoena forms shall be used in all discovery proceedings and must be signed, unless good cause is shown for a shorter period, at least one week prior to any scheduled hearing.

J. All medical records shall be filed by the employer or its insurance carrier as a single joint exhibit at least one week before the scheduled hearing. Claimant must cooperate and submit all pertinent medical records contained in his file to the employer or its insurance carrier for the joint exhibit submission two weeks in advance of a scheduled hearing. Exhibits are to be placed in an indexed binder arranged by care provider in chronological order. Exhibits should include all relevant treatment records with the exception of hospital nurses notes.

K. The Administrative Law Judge must be notified one week in advance of any proceeding where it is

anticipated that more than four witnesses will be called, or where it is anticipated that the hearing of the evidence will require more than two hours.

L. Decisions of the presiding officer in any adjudicative proceeding will be issued in accordance with the provisions of Section 63-46b-5 or 63-46b-10, U.C.A.

M. Any party to an adjudicative proceeding seeking review of an Order by the Agency may file a written request for review in accordance with the provisions of Sections 63-46b-12, 13, 14, 15, and 16, U.C.A. A Motion for Review of any order entered by an Administrative Law Judge may be filed pursuant to the provisions of Section 63-46b-12, U.C.A. Unless so filed, the Order will become the award of the Commission and will be final. If appropriately filed, the Administrative Law Judge may:

1. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary,
2. Amend or modify the prior Order by a Supplemental order, or
3. Refer the entire case to the Commission for review under Section 35-1-82.53, U.C.A.

If the Administrative Law Judge enters a Supplemental Order, as provided above, it shall be final unless a Motion for Review of the same is filed with the Commission.

N. In formal adjudicative proceedings, the Industrial Commission shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas, except as the Utah Rules of Civil Procedure are modified by the express provisions of Section 35-1-88, U.C.A., or as may be otherwise modified by the presiding officer.

O. A request for reconsideration of a Commission's Order on Motion for Review may be allowed and shall be governed by the provisions of Section 63-46b-13, U.C.A. Any petition for judicial review of the Commission's Order on Motion for Review shall be governed by the provisions of Section 63-46b-14, U.C.A.

R490-1-5. Allowance for Mailing.

A. Whenever a notice or other paper requiring or permitting some action on behalf of a party is served on a party by mail, three days shall be added to the prescribed period as allowed under Rule 6 of the Utah Rules of Civil Procedure. This three day extension does not apply to notices sent by registered mail as required by Sections 35-1-46(3) and 35-1-46.30(2), U.C.A.

R490-1-6. Business Hours.

Pursuant to Section 35-1-9, U.C.A., the office of the Commission shall be open for receipt of official documents during business hours of 8:00 a.m. to 5:00 p.m. Any official document received after 5:00 p.m. shall be considered received on the next working day.

R490-1-7. Attorney Fees.

Pursuant to Section 35-1-87, U.C.A., the Commission adopts the following procedure to regulate and fix the fees for attorneys representing applicants before the Commission:

A. The concept of a contingency fee is recognized. However, a retainer in advance of a Commission approved fee will not be allowed.

B. In allowing the following amounts, the schedule presupposes a hearing based upon issues which results in a written Order by the Administrative Law Judge. Some discretion may be used by the Administrative Law Judge to vary from the following if the

result would be unconscionable to either the worker or his/her attorney.

1. 20% of weekly compensation generated for the first \$15,000.
2. 15% of the weekly compensation generated in excess of \$15,000 but not exceeding \$30,000.
3. 10% of the weekly compensation generated in excess of \$30,000.
4. In no case shall an attorney collect fees calculated on more than the first six years of any and all combinations of workers' compensation awards.
5. Attorney fees shall be allowed only when compensation is generated by the attorney. There shall be no attorney fees awarded for medical claims.
6. When an attorney takes an employee's case to the Court of Appeals and/or Supreme Court, and prevails, a fee will be determined in addition to the above schedule.

7. In all cases where settlement or admission of liability is obtained prior to a hearing, or where assistance is provided in preparing and filling out forms or making contacts with defendants or other services — short of a hearing — the usual and customary hourly charges for the attorney may be approved. However, all such charges must be approved by the Commission or one of its Administrative Law Judges prior to payment. Reasonable proof and documentation of additional gain of compensation by an attorney shall be provided to an Administrative Law Judge when requested.

R490-1-8. Witness Fees.

Each witness who shall appear before the Commission by its order shall receive from the Commission for his/her attendance fees and mileage as provided for witnesses by the Utah Rules of Civil Procedure. Otherwise, each party is required to subpoena witnesses at their own expense.

R490-1-9. Guidelines for Utilization of Medical Panel.

Pursuant to Section 35-1-77, U.C.A., the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where:

1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

(a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,

(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or

(c) Medical expenses in controversy amounting to more than \$2,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

ADDENDUM D

NOTE: PLEASE TYPE OR
PRINT IN BLACK INK

160 EAST 300 SOUTH, P. O. BOX 510250
SALT LAKE CITY, UT 84151-0250
USE REVERSE SIDE
IF MORE SPACE
NEEDED

Jamie Bacon
Applicant (Employee) *
v. *
Intermountain Power Service Corp. *
Employer *
Rt. 1, P.O. Box 864 *
Employer's Street Address *
Delta UT 84624 *
City/State/Zip *
Western Insurance Co. *
Employers' Insurance Carrier *

APPLICATION FOR HEARING

APPLICANT ALLEGES AND REQUESTS RESOLUTION CONCERNING THE FOLLOWING UNDER TITLE 35:

1. I sustained an injury by accident arising out of or in the course of employment with Defendant (employer) on the 17 day of January 1991,

Location (Give name & complete address or nearest junction, mile marker, etc.)

2. The accident occurred as follows: (Describe accident and resulting injuries)

3. The injury caused temporary total disability from 1-17-91 to Present
Date first off Date Return

4. Compensation has been paid for the following period(s): (Indicate weekly amount period(s) of time paid, and the last payment date) none

5. This Claim is filed because: (Please mark an X in the appropriate space(s))
A. ☒ Defendants have refused payment of medical expenses.
B. ☒ Compensation has not been paid for any/all periods of time off work.
C. ☐ Defendants have denied liability for permanent partial disability.
D. ☐ I am claiming Additional temporary total disability; additional medical benefits; additional permanent partial disability
E. ☐ I am claiming permanent total disability.
F. ☐ Other Reason (specify)

IN ADDITION, THE CLAIMANT ALLEGES: (Please fill in or mark appropriate blank)

6. My date of birth is 5-8-40. My wage at the time of injury was \$9.47 per hour x /day / week / month working 40 hours per week (specify method of payment) . I was x /was not married and had 2 children under age 18 dependent on me for support.

Date 11-18-91

Richard M. Lieb
Printed Name of Attorney

Richard M. Lieb
Signature of Attorney

730 So. State #10
Street address & Office # of Attorney

Delta UT 84658 1 224-2119
City/State/Zip Telephone

Jamie Bacon
Printed name of Applicant

Jamie Bacon
Signature of Applicant

1235 W. Main
Street Address of Applicant

Delta UT 84624
City/State/Zip of Applicant

864-2364 1 572-64-1710
Applicant's Telephone Social Security #

HEARING PREPARATION INSTRUCTIONS

(1) Formal notices of your hearing date will be mailed upon the Commission receiving a formal written denial of your claim by the Defendants.

(2) Cases must be completely prepared before the hearing. You should therefore begin immediately to prepare your case. All necessary witnesses, documents and medical reports must be ready at the hearing. Physicians normally supply copies of all medical reports to the Commission. However, the parties should verify that all medical reports have been submitted to our office prior to the hearing.

(3) Hearing notices will be mailed sufficiently in advance of your hearing to allow your adjusting appointments, getting time off work or clearing your calendar of any conflicts with the hearing date.

(4) The employee must know the exact dates that he has lost from work because of his injury.

(5) Witnesses are needed only to prove issues which are in dispute. If requested, subpoenas will be issued, but service of subpoenas must be arranged for and witness fees paid by the party making the request.

(6) It is optional with the employee whether he desires to be represented by an attorney, or not. In many cases an employee is at a disadvantage without advice and representation of expert counsel. The fees of attorneys representing an employee, or his/her dependent, will be fixed by the Commission. The fees are limited to 20% of the compensation award, exclusive of medical expenses.

(7) If you are not represented by an attorney and are in doubt as to what to do, communicate with the office of the Industrial Commission of Utah. When writing, always refer to the case by date of injury and the name of the insured employee and his/her employer. Please notify this Commission of any changes in your address following your initial application.

(8) If the claim is for additional compensation and/or medical benefits, the matter will not be set for hearing until a current medical report from the treating physician has been filed with the Commission indicating:

- a. The present disability is greater than the prior rating given and is due to the accident stated in paragraph (1) on the other side, and/or
- b. Additional medical treatment and/or hospitalization is required because of the accident stated in paragraph (1) on the other side.

ADDENDUM E



Norman H. Bangertter
Governor

Timothy C. Allen
Presiding Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH
ADJUDICATION DIVISION

160 East 300 South
P.O. Box 510250
Salt Lake City, Utah 84151-0250
(801) 530-6800
(801) 530-6804 (Fax)

November 22, 1991

Steven M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Dixie L. Minson
Commissioner

Randy M Lish
Attorney at Law
930 South State #10
Orem UT 84058

TCA
h

Re: Jamie Bacon
Inj: 01-17-91
Emp: IPP Service Center

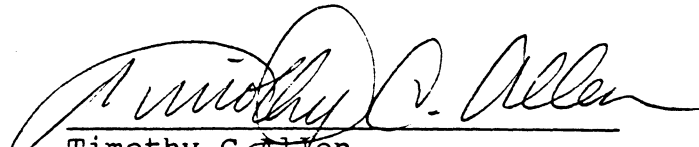
Dear Mr Lish:

Our office is in receipt of an answer to the Application for Hearing filed in the above matter. In reviewing the file, I note that it will be necessary for you to provide a more definite statement regarding what happened on January 17, 1991. Please be advised that no hearing will be scheduled in this matter until our office receives this information.

Please feel free to contact me if I can be of any assistance in this matter.

BY DIRECTION:

INDUSTRIAL COMMISSION OF UTAH


Timothy C Allen
Administrative Law Judge

TCA/mm

cc: Jamie Bacon, 1235 West Main, Delta UT 84624
Michael Dyer, Atty, P O Box 2465, SLC UT 84110-2465



ADDENDUM F

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RANDY M. LISH (3823)
MCCULLOUGH, JONES & IVINS
Attorneys for Applicant
930 South State Street, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

--BEFORE THE INDUSTRIAL COMMISSION OF UTAH--

Case No. 91001038

---oooOooo---
JAIME BACON, :
Applicant, : MOTION FOR REVIEW
vs. :
INTERMOUNTAIN POWER SERVICE :
CORPORATION and WAUSAU :
INSURANCE COMPANIES, :
Defendants. :

---oooOooo---

COMES NOW the applicant, Jaime Bacon, and submits her Motion
for Review of the Commission's Order of Dismissal.

STATEMENT OF FACTS

1. On November 22, 1991, Defendants requested a more
definite statement of the nature of the injury to the applicant and
how it occurred. Interrogatories were also served on applicant on
November 14, 1991.
2. In attempting to verify the necessary recital of facts
from the applicant, applicant's attorney found that reviewing the
details of the series of incidents leading up to applicant's injury
caused applicant serious distress (see exhibit "A"). Applicant



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5 finally did inform her attorney that she had filed a complete
6 statement with the claims adjuster for Wausau, Mr. Jim Lloyd.
7 Applicant's attorney contacted Mr. Lloyd by phone on January 9,
8 1992, as soon as he learned of the report, to request it be
9 released. Mr. Lloyd assured applicant's attorney that he would
10 contact his company's attorney as soon as he returned to the office
11 the following Monday.

12 3. Applicant's attorney contacted Defendant's attorney's
13 office and left a message requesting said attorney contact him upon
14 returning to his office. To date, applicant's attorney has not
15 been able to obtain a copy of the statement of facts given to the
16 adjuster.

17 ARGUMENT

18 Applicant's claim is for job-induced stress. In reciting
19 numerous times the specific incidents giving rise to the
20 applicant's inability to continue working, applicant has undergone
21 serious stress attacks (see exhibit "A"). Applicant's attorney has
22 attempted to obtain information already provided to one of
23 Defendants' employees in order to alleviate added stress to
24 applicant, but has been unsuccessful. It is applicant's contention
25 that the matter should not be dismissed considering that defendants
26 have a full statement of the details of the incidents leading up to
27 applicant's disability in their possession, and Applicant's
28 response is included with this response to the motion.

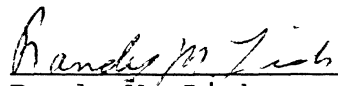
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Applicant has not intentionally ignored the Industrial Commission's requests, nor those of the Defendants, but has suffered severe stress in trying to verify for her attorney the specific details needed for the responses requested. Based on the circumstances of applicant, and the attempts to provide Defendants with the requested information, Applicant requests that the Commission reconsider its decision to dismiss Applicant's claim.

DATED this 9th day of March, 1992.

MCCULLOUGH, JONES & IVINS



Randy M. Lish
Attorney for Applicant

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Motion for Review by first-class mail, postage prepaid, this 4th day of March, 1992, to Michael E. Dyer, Attorney for Defendants, Key Bank Tower, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110-2465.

Handwritten signature



0100

Jan. 24, 1992

Dear Randy,

Enclosed is the form you sent me to fill out. This has been quite difficult for me. It caused an anxiety attack & I was out of it for 3 days. I have seen Dr. Washburn and he has documented the effect this had on me for his records and in the event he is called to Testify.

I called about some questions I had & have not heard from you so I hope this is what you wanted.

I have signed releases for the doctors I have seen since Wausau took their statement & I signed releases.

As the IPBC & Wausau attorneys are examining my personal medical records I believe I am entitled to know why Wausau denied my claim. Please do an interrogatory regarding this to them.

Jim