

2003

Glenda W. Giles v. Utah Labor Commission,
Oakridge Country Club, Workers Compensation
Fund, Wasatch Crest Mutual Insurance Company,
Employers' Reinsurance Fund, IRS, Addeco, TAD
Technical Services Corporation, Liberty Mutual
Insurance Company, ConstitutionState Service Co.,
Transportation Insurance Company, and Pacific
Employers' Insurance Company : Brief of Appellant

Utah Court of Appeals

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STATUTES ARE CITED AT THEIR LOCATIONS IN THE BRIEF

GLENDA W. GILES,
)
)
) Petitioner/Appellant,
)
) COURT OF APPEALS
)
)
) vs.
)
) Appellate Court No. 20030577-CA
)
)
) UTAH LABOR COMMISSION et al
)
)
) Defendants/Appellees.
)

STATEMENT OF JURISDICTION

STATEMENT OF ISSUES ON APPEAL

Jurisdictional issues present a question of law, which this Court reviews under a correction-

of-error standard.

Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n, 658 P.2d 601, 608 (Utah 1983)

Issue 1(a) was preserved in Giles Request for Reconsideration and also preserved because jurisdictional issues are never waived and can be raised at any time. (R. Vol. 4 at 1106)

Issue 1(b) could not be raised before the Commission because it involves the Commission's Order Denying Request for Reconsideration. However, it was raised before this Court at the first opportunity, when Giles filed the Docketing Statement. (See page 12 of Docketing Statement).

2. Could Giles' occupational disease claim under statutes existing at the time legally be made a part of Giles' injury by accident claim?

General questions of law are reviewed by this Court under a correction-of-error standard.

Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n, 658 P.2d 601, 608 (Utah 1983)

This issue was preserved for review by being addressed in multiple documents before the Commission. (R. Vol. 2 at 479-480, 483, Vol. 3 at 614, 706, 779-780, 798-799, Vol. 4 at 933, 1010, 1104).

3. Are Oakridge, WCF, Wasatch Crest and ERF contractually prohibited from presenting the defense that Giles' has settled her occupational disease claim?

General questions of law such as contracts are reviewed under a correction-of-error standard.

Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n, 658 P.2d 601, 608 (Utah 1983)

This issue was preserved in Giles Request for Reconsideration dated 21 May 2003. (R. Vol. 4 at 1043, 1081-1086, 1097-1098).

4. Has the Commission shown favoritism to employers and insurance carriers by

promulgating Rules which favor these Respondents, not enforcing Statutes and Rules against Respondents, using inappropriate standards which favor Respondents, etc..

Since this issue involves questions of Rules, Statutes, and standards, this Court should review this issue for correctness, lending no deference to the Commission's decision.

Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n, 658 P.2d 601, 608 (Utah 1983)

This issue was preserved below by Giles at every step of the proceedings before the Commission.

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules, of which the full text as needed can be found in Addendum A, are determinative in this appeal.

Utah Constitution Article I, Section 7.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution Article I, Section 11.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Code Ann. § 35-1-16(1) (1994)

(1) The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this or any other title or chapter that it administers
...

Utah Code Ann. § 35-1-44 (1991)

The following terms as used in this title shall be construed as follows:

(7) "Order" means any decision, rule, regulation, direction, requirement or standard of the Commission, or any other determination arrived at, or decision made, by the Commission.

(8) (a) “Personal injury by accident arising out of and in the course of employment”

...
(b) ... does not include a disease, except as the disease results from the injury.

Utah Code Ann. § 35-1-82.53(2) (1988)

(2) The order of the Commission on review is final, unless set aside by the Court of Appeals.

Utah Code Ann. § 35-1-78(1)

(1) The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders. ...

STATEMENT OF THE CASE

(a) Nature of the Case

This appeal involves a full denial of benefits to Glenda W. Giles in an occupational disease claim, and is from a final Order of the Utah Labor Commission affirming the Presiding Administrative Law Judge’s Order, and denying the Appellant’s Motion for Review and Motion for Reconsideration.

(b) Course of the Proceedings

(1) Present Occupational Disease Claim

1. On 19 May 1995, Giles filed a Notice of Claim with the then Industrial Commission asserting the occupational disease of chemically induced porphyrinopathy sustained from exposure to multiple toxic fumes and substances during the course of her employment at Oakridge Country Club and TAD Technical Services Corporation. (R. Vol. 1 at 245-254).

2. On 27 May 1995, Giles also sent copies of her Notice of Claim by U.S. Postal

Service Certified Mail to Oakridge; Oakridge's insurance carrier, Workers' Compensation Fund of Utah (WCF); TAD Technical; and McDonnell Aircraft, whom Giles worked for under contract through TAD Technical. Giles received U.S. Postal Service Domestic Return Receipts acknowledging reception of her notice of claim by all of these parties no later than 31 May 1995. (R. Vol. 1 at 56-59, Vol. 2 at 383, 520, Vol. 4 at 1168-1169).

3. On 13 September 1995, Oakridge mailed its Employer's First Report of Illness, Commission Form 122, to WCF, Giles, and the Commission. (R. Vol. 3 at 741, 804-805, 958).

4. On 23 December 2000, by U.S. Postal Service Priority Certified Mail with Return Receipt requested, Giles mailed an Application for Hearing to the Adjudication Division, which was received by the Commission on 27 December 2000. (R. Vol. 1 at 96-117). Giles' complete Application packet was lost by the Commission, and not found again until 22 February 2001. (R. Vol. 1 at 119, 120, 122, Vol. 4 at 1174-1177).

5. On 23 February 2001, the Commission sent out a Request for Answer to WCF and Wasatch Crest Mutual Ins.. (R. Vol. 1 at 123-124). On 4 April 2001, Constitution State Service Co. involved itself in this action when it filed a Commission Form 089, Employee Notification of Denial of Claim, with the Commission and sent a copy to Giles. (R. Vol. 1 at 163-164). On 14 May 2001, the Commission sent out an Amended Request for Answer which was to be responded to by no later than 13 June 2001, and contained the note "(Amended to include additional parties.)". The additional parties included were: Oakridge, Employers' Reinsurance Fund (ERF), Internal Revenue Service (IRS), U.S. Attorney's Office, Adecco (f/k/a TAD Technical), Transportation Insurance Co., Pacific Employers Ins.

Co., and Liberty Mutual. (Vol. 1 at 195-196).

6. In response to the Amended Request for Answer, Pacific Employers and Transportation filed denials of claim using Commission Forms 089. (R. Vol. 2 at 322.) Subsequently, Giles challenged the appropriateness of filing Forms 089 in response to a Request for Answer, and Giles requested Entries of Default and made Motions for Summary Judgment against every party who filed a denial using Form 089, instead of filing an Answer. (R. Vol. 2 at 437-439, 440-442, 443-445, Vol. 3 at 673-678, 750-751, 760, 784, Vol. 4 at 994-1007). Neither the Respondent parties nor the Commission have ever denied that the Forms 089 were filed, but now Pacific Employers' and Transportation's Forms are missing from the record. So, these Forms are being included in Addendum B. Thereafter, Pacific Employers' requested Dismissal. (R. Vol. 3 at 623) Giles filed a timely response to this Request for Dismissal, and renewed her Request for an Entry of Default and Motion for Summary Judgment against Pacific Employers. (R. Vol. 3 at 673-678).

7. Most of the remaining parties filed 'Answers' of one sort or another in response to the Request or Amended Request for Answer. (R. Vol. 1 at 147-155, Vol. 2 at 340-344, 387-397, 418-420, 502-504, Vol. 3 at 663-672). In these 'Answers', most of the remaining Respondent parties also moved for Dismissal. (R. Vol. 1 at 147-148, Vol. 2 at 343, 387-389, 418, Vol. 3 at 663). However, the 'Answers' and Motions to Dismiss filed by Wasatch Crest and ERF were not timely. (R. Vol. 1 at 184-185, Vol. 2 at 387-397, 418-420, 477-489, 515-523, 609-622, 663-672, 679-685, 746).

8. On 8 June 2001, TAD Technical and Liberty Mutual (collectively TAD Technical) conducted Discovery by serving Interrogatories on Giles, with copies to the Respondent

parties. (R. Vol. 1 at 371-372). Giles timely responded with her Answers to the Interrogatories and faxed them to counsel for TAD Technical on 8 July 2001; filed a copy with the Commission; and, mailed copies to all the Respondent parties. (R. Vol. 3 at 765-766, 767, 769, 784, 888). With Giles' Answers to Interrogatories, and only therewith, Giles filed the Reports of Dr. Gunnar Heuser dated 21 June 1994 and 7 July 1994. (R. Vol. 3 at 739, 767, 769, 784, 888). Giles does not know why these Answers to Interrogatories and medical reports were omitted from the Record, but she is including them in Addendum C.

9. Giles filed timely responses to all the remaining Respondent parties' 'Answers' and Motions to Dismiss which she received. Giles also requested Entries of Default against most of the Respondent parties, moved for Orders Striking the Defenses and Answers of most of the Respondent parties, and moved for Summary Judgment against most of the Respondent parties. (R. Vol. 1 at 165-182, 184-185, Vol. 2 at 398-406, 477-489, Vol. 3 at 673-676, 679-683).

10. Only one Motion for Summary Judgment was filed by any of the Respondents in this matter, and it was filed by TAD Technical on 8 June 2001. (R. Vol. 2 at 345-370, 409-415). But upon closer scrutiny, the Summary Judgment was requested only regarding the single issue of the last injurious exposure doctrine. (R. Vol. 2 at 350). Dismissal was requested on the other two issues in the Motion. (R. Vol. 2 at 348, 351, 427 of 421-434). Giles responded to the one Motion for Summary Judgment on 18 June 2001. (R. Vol. 2 at 375-385.)

11. On 6 June 2002, PALJ Richard M. La Jeunesse issued his Ruling on Motions for Summary Judgment and Motions to Dismiss, wherein he dismissed with prejudice Giles'

Occupational Disease Claim against essentially all of the parties. (R. Vol. 3 at 720-735). On 5 July 2002, Giles filed with the Commission a Motion for Review of the PALJ's Ruling. (R. Vol. 3 at 736-789, Vol. 1 at 1-95 (Exhibits)). On 1 May 2003, the Commission issued its Order Denying Motion for Review wherein the Commission affirmed the PALJ's Ruling. (R. Vol. 4 at 1030-1036).

12. On 21 May 2003, Giles filed with the Commission a Request for Reconsideration. (R. Vol. 4 at 1037-1120). On 27 May 2003, the Commission issued an Order Extending Time for Reconsideration stating that the Commission would "issue its decision no later than June 30, 2003." (R. Vol. 4 at 1124-1125). However, it was not until 16 July 2003 that the Commission actually issued its Order Denying Request for Reconsideration, wherein the Commission affirmed its prior Order Denying Motion for Review. (R. Vol. 4 at 1231-1235).

13. On 17 July 2003, Giles filed a Petition for Review with this Court. (R. Vol. 4 at 1236-1237). And, on 23 July 2003, Giles filed an Amended Petition for Review with this Court. (R. Vol. 4 at 1239-1240).

(2) The Issue of an Independent ALJ

1. With her Application for Hearing mailed on 23 December 2000, Giles also mailed a request to the Commission that her case be assigned to an ALJ with absolutely no ties to the Commission, based on asserted bias and prejudice of the Commission and its ALJs. This letter was received by the Commission on 27 December 2000. (R. Vol. 1 at 96-97, Vol. 2 at 460-461).

2. On 22 February 2001, newly appointed PALJ Richard M. La Jeunesse prepared

a letter denying Giles' request for an independent ALJ. (R. Vol. 1 at 121-122, Vol. 2 at 463, Vol. 3 at 660, Vol. 4 at 1177, 1182).

3. On 8 March 2001, Giles filed a Motion for Review with the Commission regarding the appointment of an independent ALJ. (R. Vol. 1 at 129-132, Vol. 2 at 465-468). None of the Respondent parties filed a response to the Motion for Review.

4. On 30 April 2001, the Commission issued an Order Denying Motion for Review concerning Giles' request for an independent ALJ. (R. Vol. 1 at 192-194, Vol. 2 at 541-543, Vol. 3 at 631-633).

5. On 17 May 2001, Giles filed a Request for Reconsideration with the Commission regarding the appointment of an independent ALJ, which included a 25 page Summary and 24 separate Exhibits consisting of 81 Pages. (R. Vol. 1 at 199-319, Vol. 3 at 546-579). On 21 May 2001, the Commission issued an Order Extending Time for Reconsideration which allowed other parties to respond to the Request by no later than 29 May 2001, and stated that the Commission would issue a decision no later than 8 June 2001. (R. Vol. 1 at 320-321, Vol. 3 at 581-582).

6. On 11 June 2001, the Commission finally issued an Order Denying Reconsideration on the issue of an independent ALJ. (R. Vol. 2 at 373-374).

7. On 10 July 2001, Giles filed a Petition for Review with this Court on the issue of the appointment of an independent ALJ to preside over her case. (R. Vol. 2 at 416-417).

8. On 6 December 2001, this Court issued its Order dismissing the Petition for Review for lack of jurisdiction, without prejudice to a timely petition for review filed after entry of an order constituting final agency action. (R. Vol. 3 at 686-689, 716-718). Giles

requested Reconsideration from this Court, and when that was denied, Giles sought a Writ of Review from the Supreme Court which was ultimately denied. (R. Vol. 3 at 701-703).

9. On 9 May 2002, this Court issued the Remittitur. (R. Vol. 3 at 714-715).

(3) Prior Workers' Compensation Injury by Accident Claim

1. The following information is based solely on documents filed of Record in the present case. Giles retained counsel who filed an Application for Hearing with the then Industrial Commission on 9 June 1992, seeking workers' compensation benefits for an injury by accident involving a chlorine gas exposure sustained on 7 September 1991, while Giles was employed at Oakridge Country Club. (R. Vol. 1 at 2). The Respondents, Oakridge and/or WCF, denied Giles sustained a compensable injury, and also denied a chlorine gas leak occurred. (R. Vol. 1 at 238, 289, Vol. 2 at 339).

2. On 4 January 1993, a hearing was held before then PALJ Timothy C. Allen. (R. Vol 1 at 5, 36, 167, 170, 210, 221, 222, 226-229, 300, Vol. 3 at 727, 738, 752, 753, 757, 764, 772, 777-778, 800, 802, Vol. 4 at 960). Following the hearing, the PALJ issued preliminary Findings of Fact, and referred the case to a medical panel. (R. Vol. 1 at 3-13). The Medical Panel met with Giles in February 1993, and issued a report which was circulated to the parties in April 1993. (R. Vol. 1 at 14-35). On 15 July 1993, the PALJ issued his Findings of Fact, Conclusions of Law, and Order wherein he fully denied Giles' claim for benefits. (R. Vol. 1 at 36-49).

3. Giles thereafter retained new counsel who filed a Motion for Review which the Commission denied in its Order Denying Motion for Review dated 6 June 1994. (R. Vol. 1 at 50-52). On Monday, 27 June 1994, Giles submitted a Request for Reconsideration . (R.

Vol. 3 at 835-843). An Order Denying the Request for Reconsideration was issued by the Commission on 14 July 1994. (R. Vol. 1 at 53-54).

4. Giles then filed a Petition for Writ of Review with this Court on 12 August 1994. (R. Vol. 4 at 1103). On 9 September 1994, this Court issued a Sua Sponte Motion for Summary Disposition. The parties responded to the Motion within the time allowed, and the Motion was denied by this Court on 26 October 1994. (R. Vol. 4 at 967, 976).

5. Near the end of February 1995, an offer of settlement was made to resolve Giles' claim of injury by accident on 7 September 1991; and, a Settlement Agreement was executed by Giles, WCF, and the ERF. (R. Vol. 1 at 150-155, Vol. 2 at 360-365, 393-397, Vol. 3 at 666-671, 739, 752, 755, 757, 758-759, 777-778, 779-783, 828-833). A Stipulation to Remand Case for Approval of Settlement was also signed by the attorneys for the parties, but was left undated and was never executed by this Court. (R. Vol. 1 at 149). Without the case being remanded, the PALJ approved the Settlement Agreement on 8 March 1995. (R. Vol. 1 at 154, Vol. 2 at 364, 397, Vol. 3 at 670, 832). This Court finally issued an Order of Dismissal for failure to prosecute on 18 January 1996. (R. Vol. 3 at 845, Vol. 4 at 1117).

(c) Disposition at Agency

The PALJ dismissed with prejudice Giles' occupational disease claim against essentially all of the Respondent parties, which dismissal was affirmed by the Commission both on Review and Reconsideration. Further, the PALJ denied Giles' Request for an independent ALJ, which denial was upheld by the Commission on both Review and Reconsideration. Also, the prior PALJ had dismissed with prejudice Giles' *prior* Workers' Compensation Injury Claim, which dismissal was also affirmed by the Commission on

Review and Reconsideration. After Giles had petitioned this Court for Review of the Commission's prior Orders, and without the case being remanded back to the Commission, the prior PALJ approved a Settlement Agreement of the parties.

STATEMENT OF RELEVANT FACTS

1. From September 1985 to October 1990, Giles worked for McDonnell Aircraft in its office in the big hangars at Hill Air Force Base, under an employment contract with TAD Technical. Liberty Mutual was the workers' compensation insurance carrier for TAD Technical during this time. (R. Vol. 1 at 99, 246, Vol. 2 at 349, 376, 382, 423, 430, Vol. 3 at 853, Vol. 4 at 1055, 1181). While employed by TAD Technical, Giles was exposed on a daily work day basis to multiple toxic fumes and substances, some known and some unknown. (R. Vol. 1 at 246, Vol. 2 at 376, 377, 382, 398, 401, 402, 433-434, 492-493, 494-495, Vol. 3 at 764-765, 771-775, 785, Vol. 4 at 1055-1058, 1060-1061). During this employment, Giles had "chronic bronchitis and headaches and sinusitis". (R. Vol. 2 at 382, 501, Vol. 3 at 764, 772, 887, 888, 890). During her employment with TAD Technical, Giles complained of multiple health problems and symptoms to her physicians. (R. Vol. 1 at 8-9, 23, 24, 27, 40, 41; Vol. 3 at 766-767, 784-785, 786, 887, 888, 890).

2. Giles was first interviewed for employment with Oakridge in May 1991, and during her second interview, Club Manager Michael Whiteley noted that Giles had a chronic cough and watery eyes. (R. Vol. 1 at 5, 37, 101,). Giles worked as the Office Manager for Oakridge from the first of June to December 19, 1991. (R. Vol. 1 at 5, 20, 37, 98). All during her employment with Oakridge, Giles was sick as was testified to by at least three Oakridge employees at Giles' Hearing on her injury by accident claim, and as later found by

the Commission. (R. Vol. 1 at 5, 6, 37, 101). Giles was exposed to multiple toxic substances and materials in her employment with Oakridge. (R. Vol. 1 at 68-70, 100-102, 110, 112, 113, 245, 247, 248, 250).

3. On 9 June 1992, Giles filed an Application for Hearing on a claim for an alleged “injury by accident arising out of and in the course of employment with Oakridge” occurring “on the 7th day of September 1991” at “Oakridge” in “Farmington, Ut.” The accident was described as “chlorine gas exposure” allegedly “causing (s)eizures, memory loss, sinus, heart and lung injury”. (R. Vol. 1 at 2). A Hearing was held before Presiding Administrative Law Judge (PALJ) Timothy C. Allen on 4 January 1993 at the Commission’s offices in Salt Lake City, Utah. (R. Vol. 1 at 5, 36).

4. Subsequent to the Hearing, the PALJ made Findings of Fact, either personally or as a consequence of adopting the Findings of the Medical Panel appointed by him, and those Findings are incorporated in full herein by reference. (R. Vol 1 at 5-13, 15-35, 37-47). Particularly relevant to the present occupational disease case are the following portions of said Findings of Fact:

“... (Giles) had numerous medical problems . . . which necessitated her absence from her employer. . . .” (R. Vol. 1 at 5, 37).

“Having weighed all the testimony on this subject, I (the PALJ) find and conclude that there was no release of chlorine gas on September 7, 1991. Rather, there was a spill of superchlorinated water onto the ground. As testified to by both (Oakridge’s maintenance manager) and (the Utah Occupational Safety & Health Inspector), superchlorinated water is not the equivalent of chlorine gas. Rather, superchlorinated water is analogous to spilling liquid bleach on one’s floor, which is basically what occurred in this particular situation.” (R. Vol. 1 at 11-12 and 43-45). **“Therefore, I find that (Giles) was not exposed to chlorine gas, but rather smelled superchlorinated water which had spilled on the floor.”** (R. Vol. 1 at 45). (Emphasis added.)

“With the file in this posture, case was referred to the Medical Panel to

determine if (Giles') constellation of 29 complaints were medically related to the industrial incident of September 7, 1991. The Panel concluded and found that (Giles') constellation of complaints were not directly related to the industrial event of September 7, 1991." (R. Vol. 1 at 46). (Emphasis added.)

". . . The medical evidence stands for the proposition that (Giles') 29 complaints are of a long-standing nature, and were clearly complained or (sic) and treated prior to the events of September 7, 1991. (Emphasis added.)

"CONCLUSION OF LAW:

"(Giles) has failed to establish legal and medical causation in this matter, and as such her claim of an industrial accident on September 7, 1991 should be dismissed with prejudice.

"ORDER:

"**IT IS THEREFORE ORDERED** that the claim of Glenda Giles alleging a compensable accident on September 7, 1991 should be and the same is hereby dismissed with prejudice." (Emphasis added.) (R. Vol. 1 at 47).

5. Giles filed a Motion for Review that included new medical evidence. (R. Vol. 1 at 50-52, 79-95). On Review, the Commission adopted the findings of fact set forth in the PALJ's decision, and concluded the following. (R. Vol. 1 at 50)

"As noted by the (PALJ), the reasons for (Giles') reaction were not related to her employment. Furthermore, the medical evidence does not establish that her ailments are related to the incident. Consequently, (Giles) has failed to establish her right to workers' compensation benefits."

The Commission acknowledged receipt of the new medical evidence, but refused to even consider it. (R. Vol. 1 at 51).

6. Giles then filed a Request for Reconsideration, and submitted additional new medical reports from a neurotoxicologist/immunotoxicologist in California. (R. Vol. 3 at 835-843). (See Dr. Gunnar Heuser's reports attached to the Answers to Interrogatories included in Addendum C. On Reconsideration, the Commission stated as follows:

"As noted in the (PALJ's) decision:

. . . (Giles) may believe that she was exposed to chlorine gas, but that belief does not prove that an exposure actually occurred. Rather, the preponderance of the evidence indicates that (Giles) was not exposed to chlorine gas on

September 7, 1991.

“In light of the foregoing, the Commission reaffirms its prior decision in this matter and denies (Giles’) Motion for Reconsideration.” (R. Vol. 1 at 53-54).

The Commission failed to even acknowledge receipt of the new medical evidence. Giles subsequently sought Appellate Review with this Court. (R. Vol. 1 at 148, 149, 221; Vol. 3 at 845; Vol. 4 at 967-976, 1031-1032, 1117-1118).

7. On or about 5 January 1995, while the prior injury case was pending before this Court, Dr. Gordon Baker of Seattle, Washington notified Giles that she had the occupational disease of chemically induced porphyrinopathy, which he attributed to her exposure to multiple “toxic materials at work”. In his letter, Dr. Baker detailed the test results of the Mayo Clinic Medical Laboratories, and described the causes and symptomatology of porphyria. (R. Vol. 1 at 110-112, 248-250; Vol. 2 at 367-369). Many of the substances Giles was exposed to while employed by TAD Technical are also listed by Dr. Baker as causes of porphyria. (R. Vol. 1 at 110-112, 113, 247, 248-250, Vol. 3 at 771-775). Also, many of the health problems and symptoms Giles complained of to her physicians at the time she was employed by TAD Technical are also symptoms of porphyria as described by Dr. Baker. (R. Vol. 1 at 110-112, 113, 247, 248-250, Vol. 3 at 769-771, 774-775, 784-785, 786, 887, 890).

8. Because the Commission had determined that a chlorine gas exposure did not occur on 7 September 1991, and had also determined Giles suffered no injury from the leaking super-chlorinated water, Giles asked Dr. Baker if she could have developed porphyria from other exposures at work, even if she was not specifically exposed to chlorine gas. In response, Dr. Baker prepared a letter dated 3 May 1995, which stated in relevant part:

“ . . . (E)ven if she were not exposed to chlorine, she could very likely have developed the chemically induced porphyriopathy from her exposure to all these above-mentioned materials. I find nothing in her history to indicate a non-industrial source for her illness.” (R. Vol. 1 at 113, 247; Vol. 2 at 370).

9. Consequently, when an offer of settlement was made by WCF while her injury case was still pending before this Court, Giles accepted the offer to settle her claim of injury by accident on 7 September 1991, but only that specific claim. At that time, Giles was under extreme financial duress, and only accepted the offer because she knew she had been diagnosed with an occupational disease for which she could file a new and separate worker’s compensation claim. (R. Vol. 1 at 110-113, 248-254, Vol. 3 at 778, Vol. 4 at 1049, 1095-1096). A Settlement Agreement was prepared to Giles’ satisfaction so as to only resolve her claim for injury by accident on 7 September 1991. (R. Vol. 1 at 150-153, Vol. 2 at 360-365, 393-397, Vol. 3 at 666-671, 828-833). A Stipulation to Remand for Approval of Settlement was also prepared, but never executed by this Court. (R. Vol. 1 at 149). Without the case being remanded, and while this Court still had jurisdiction, the PALJ approved the Settlement Agreement on 8 March 1995, but that approval did not modify or change the Commission’s prior Findings in the injury case. (R. Vol. 1 at 154). At no point in the proceedings on the prior injury by accident claim were the Findings of Fact of the PALJ or the Commission modified or changed. (R. Vol. 1 at 36-48, 50-52, 53-54, 154). Neither did this Court set aside the Findings of Fact when this Court finally issued an Order of Dismissal for failure to prosecute on 18 January 1996. (R. Vol. 3 at 845, Vol. 4 at 1117).

10. In May 1995, in accordance with § 35-2-103(2), Giles filed timely notices of her newly diagnosed occupational disease claim with the Commission; Oakridge; Oakridge’s

workers' compensation insurance carrier, WCF; her prior employer, TAD Technical; and, McDonnell Aircraft. (R. Vol. 1 at 56-59, 96, 98, 166, 168, 173, 199, 210, 245-254, Vol. 2 at 376-380, 383, 398-399, 400, 401, 520, Vol. 3 at 737, 740-741, 743, 747, 762, 764-765, 772, 885, 901-903, Vol. 4 at 997-998, 1000, 1043, 1055-1058, 1060-1061, 1098, 1152, 1168-1169). The notice provided a brief statement of some of the materials and substances Giles was exposed to while working at Oakridge, and referred to numerous fumes at TAD Technical. (R. Vol. 1 at 246). Attached to the notice of claim were both of Dr. Baker's letters, and also objective test results from the Mayo Clinic Medical Laboratories and SmithKline Beecham Clinical Laboratories. (R. Vol. 1 at 247-254). Giles' original handwritten notice with an original signature was hand-delivered to the Commission by Giles, and it was date-punched "IC 5-19-95" by the receptionist, as was Giles' copy. (R. Vol. 1 at 245-254). The other notices were sent by certified mail with return receipts. (R. Vol. 1 at 56-59, Vol. 2 at 383, 520, Vol. 4 at 1168-1169). None of the Respondent parties nor the Commission have challenged the fact that Giles filed her Notice of Claim with the Commission on 19 May 1995, but the Commission has apparently lost the Original filing.

11. Despite being notified of Giles' occupational disease, TAD Technical never filed an Employer's First Report of Illness as required by statute, nor did TAD Technical provide Giles with the statutorily required statement of her rights and responsibilities relative to her occupational disease claim as required by statute. (R. Vol. 3 at 740-741, 885-902). Neither did TAD Technical nor Liberty Mutual, timely or otherwise, accept or deny Giles' occupational disease claim prior to the filing of her Application for Hearing some six years later. (R. Vol. 3 at 741-743).

12. On or about 15 June 1995, WCF, through its claims supervisor Gary Gourley, attempted to deny Giles' occupational disease claim based mainly on Item (8) of the Settlement Agreement which resolved Giles' claim of industrial injury by accident on 7 September 1991. (R. Vol. 1 at 179). On 17 June 1995, Giles' son prepared a letter in which he asserted that the prior claim and resultant Settlement Agreement did not bar Giles' present claim for an occupational disease. (R. Vol. 1 at 180-181). In his letter, Giles' son specifically referred Gourley to Item (8) of the Settlement Agreement, which was quoted in pertinent part, that limited the settlement to Giles' "worker's compensation claim of 7 September 1991" and "her alleged 7 September 1991 injury." Giles' son also referred Gourley to Items (2) and (3) of the Settlement Agreement, which were also quoted in the letter. Item (2) stated Giles' worker's compensation claim that had been settled involved an alleged exposure to "chlorine gas in the course of her employment with the Oakridge Country Club on September 7, 1991". Item (3) addressed the employer's and its insurer's denial that Giles was exposed to chlorine gas, and denial of any causal relationship between this incident and Giles' health difficulties. Giles' son also made the following pertinent statements in the letter, which was also signed by Giles:

"If you will re-read her letter and its enclosures, you will find she has submitted a claim for an occupational disease – not an injury – and, this occupational disease was incurred as a result of multiple exposures over a period of time while she was working at Oakridge Country Club, and not the result of a single exposure on one day.

"In light of the position of Oakridge Country Club and Workers Compensation Fund of Utah specifically denying Glenda Giles sustained an injury on September 7, 1991, it is obvious they believe her health problems were caused by something other than the events on September 7, 1991.

"However, her new occupational disease claim is not barred by the March 8, 1995, Order . . ." (Emphasis in letter). (R. Vol. 1 at 180-181).

13. In response, Gourley of WCF sent Giles a letter dated 1 September 1995, which stated in relevant part:

“Your recent letter has been read and reviewed by myself and our legal counsel. We will notify Oakridge Country Club of your request to file a claim for occupational disease regarding alleged exposure to various substances during your period of employment. We will request that they file an Employer’s First Report of Injury (or Disease) (Form 122) and provide copies to yourself, the Workers Compensation Fund, and the Industrial Commission.

“When the Employer’s First Report is received from Oakridge Country Club we will create a new file and assign a new claim number. . . .

“Enclosed are documents we request you complete and forward to us along with any pertinent medical records, to enable us to fully investigate your claim. This **new claim for occupational disease** related to alleged exposures at Oakridge Country Club will likely require extensive investigation to determine the extent and level of the exposure and the procurement of all pertinent medical records.

“Please inform me if you are currently represented by legal counsel regarding this claim.” (R. Vol. 1 at 182). (Emphasis added.)

Gourley’s letter did not preserve the right to later assert that the Settlement Agreement resolved Giles’ occupational disease claim. In fact, his letter was a complete reversal of WCF’s prior position, and acknowledged Giles’ occupational disease claim as a separate and distinct claim from Giles’ prior injury claim of September 7, 1991. Further, the letter indicated that this reversal was based on the advice of WCF’s legal counsel.

14. On 13 September 1995, Oakridge prepared and mailed the Employer’s First Report of Illness, Form 122, requested by WCF. (R. Vol. 3 at 741, 804-805, Vol. 4 at 958). In Item 36 of that document under the heading ‘Place of Occurrence’, Oakridge indicated the illness occurred on the employer’s premises. In Item 44 of that document, under the heading ‘Describe the Nature of Illness in Detail’, Oakridge acknowledged Giles’ notice of claim filed with the Commission by stating: “Refer to employees (sic) claim to industrial (sic) commission (sic) – employer unaware of occurrence prior to receiving letter from Ms (sic)

Giles on above date”. The date referenced is in Item 42, and listed by Oakridge as “5/30/95”. (R. Vol. 3 at 804-805, Vol. 4 at 958). On the back of that document was a statement of Giles’ rights and responsibilities regarding her occupational disease. (R. Vol. 4 at 1049). TAD Technical never filed an “Employer’s First Report of Injury or Illness” (Form 122), despite being notified of Giles’ porphyria. None of the Respondent parties nor the Commission have provided any evidence that Oakridge’s Form 122 was not filed with the Commission, but the Commission has apparently lost the Original filing.

15. On 18 January 1996 this Court dismissed Giles prior appeal on her injury by accident claim for failure to prosecute. (R. Vol. 3 at 845, Vol. 4 at 1117).

16. In a letter to Gourley dated 17 June 1997, Giles supplied the documents WCF had previously requested she complete and return. The letter explained the reason for delay in submitting those documents and stated Giles was not currently represented by counsel for her occupational disease claim. Also in that letter, Giles’ son reminded Gourley of WCF’s failure to abide by the Commission’s Rule regarding the timely acceptance/denial of a claim in Giles’ prior injury claim, and that he expected WCF to comply with said Rule in her current occupational disease claim. (R. Vol. 1 at 61-70). WCF, despite this notice, did not accept or deny Giles’ claim until after Giles’ filed her Application for Hearing some three and a half years later. Also attached to the letter was a three (3) page single-spaced detailed list prepared by Giles of materials and substances she was exposed to at Oakridge. (R. Vol. 1 at 68-70).

17. On 18 August 1997, Oakridge executed a Settlement Agreement and Release (SA/Release) with Giles to resolve Giles’ lawsuit for unpaid overtime filed in U. S. District

Court. (R. Vol. 4 at 1081-1086). In that document, which post-dated by more than two (2) years the Settlement Agreement of 8 March 1995 resolving Giles' prior worker's compensation injury by accident claim, Oakridge stipulated to the following facts:

(a) "Giles' claim . . . Commission No. 92-693, . . . was resolved through a settlement between Giles and Oakridge's workers' compensation insurance carrier";

(b) "on or about May 19, 1995, Giles filed a new worker's compensation claim with the Industrial Commission of Utah alleging that she suffered porphyria as a result of being exposed to dust, fumes, construction materials, and office equipment while employed by Oakridge, and that claim currently is pending before the Industrial Commission";

(c) "nothing . . . shall prohibit Giles from continuing to pursue her pending workers' compensation claim before the Industrial Commission of Utah, or from pursuing any claim arising from her workers' compensation claims";

(d) "The parties acknowledge and agree that Giles has not released or discharged her pending workers' compensation claim (neither in the Settlement Agreement dated 8 March 1995 nor in the SA/Release executed on 18 August 1997), or any claim arising out of her workers' compensation claims, and nothing . . . shall be construed to constitute a release or waiver of such claims";

(e) "the parties further represent that they have each made their own investigation into the facts giving rise to the dispute between the parties; that no representations, other than those contained herein, have been made to the parties to induce them to enter into this Agreement; and that they have not relied upon any representations of any other party in entering into this Agreement";

(f) "The parties fully understand that if any fact, with respect to any matter covered by this Agreement, is found hereinafter to be other than, or different from, the facts now believed by any of the parties to be true, each of the parties expressly accepts and assumes the risk of such possible difference in fact, and agrees that the release provisions hereof shall be and remain effective." (R. Vol. 4 at 1081-1086). (Parenthetical comment and emphasis added.)

The SA/Release further provided in Paragraph 9.4:

"This Agreement represents a complete and exclusive statement of the entire settlement agreement between the parties and supersedes all prior and contemporaneous promises and arrangements of any kind, as well as all negotiations and discussions between the parties hereto and/or their respective legal counsel with respect to the subject matter covered herein. No other agreements, covenants, representations, or warranties, express or implied, oral or written, have been made

by any of the parties hereto concerning the subject matter hereof. This is an integrated agreement.” (R. Vol. 4 at 1085). (Emphasis added).

The SA/Release contained extensive confidentiality clauses (see Paragraphs 4.1 and 4.3), and Giles made every effort to abide by the spirit thereof. (R. Vol. 4 at 1083-1084, 1097-1098). Accordingly, the SA/Release was not filed of Record in Giles’ occupational disease claim until she filed her Request for Reconsideration. (R. Vol. 4 at 1043, 1097-1098). Giles gave Oakridge every possible opportunity to voluntarily alter its position to comply with the terms of the SA/Release without having the terms of the SA/Release disclosed; but, by Reconsideration, Giles had no other option than to file portions of the SA/Release in order to preserve her rights under the SA/Release.

18. On 23 December 2000, Giles finally mailed a Commission Form 026, provided to her by the Commission to request a Hearing, in order to preserve her right to benefits because none of the Respondent parties, timely or otherwise, had denied her occupational disease claim. This Application for Hearing, which included medical documentation and all appropriate forms, was received by the Commission on 27 December 2000. (R. Vol. 1 at 96-117). The Application for Hearing was then promptly lost by the Commission for two months. (R. Vol. 1 at 119, 120, 122).

19. Giles requested that her claim be assigned to an ALJ with absolutely no ties to the Commission, but said request was denied by the Commission’s PALJ without making any Findings of Fact or citing any laws in support of his decision. (R. Vol. 1 at 122). Giles sought Review from the Commission, who denied her Motion for Review despite the fact that her Motion was unopposed, and despite the fact that the Review contained the following

statement:

“As a matter of constitutional and statutory law, as well as Commission practice, Ms. Giles is entitled to a fair hearing before an impartial ALJ, free of bias, prejudice or conflict of interest. The Commission would, if necessary, appoint an independent ALJ in any case where the Commission’s ALJs could not meet the foregoing standards of impartiality.” (R. Vol. 1 at 193)

Giles requested Reconsideration from the Commission, and supplied a packet which included a 25 page document entitled “Summary of Illegal Actions / Inactions and Documentary Evidence Indicating Bias, Prejudice and / or Conflict of Interest”, and 24 separate Exhibits consisting of 52 pages documenting violations of Commission law by the Commission and its employees; false and misleading, if not perjurious, testimony by a Commission employee; and, financial conflicts of interest between the Commission, the ERF, and WCF. (R. Vol. 1 at 199-319). In response to the Request, the Commission extended time for Reconsideration, and WCF filed a Response. WCF merely stated that “(t)his matter should be dismissed as against (WCF) regardless of the judge assigned”. (R. Vol. 1 at 323). The significance of this statement is that Giles’ Request remained substantially unopposed. In its Order Denying Request for Reconsideration, the Commission stated:

“There is nothing in Ms. Giles’ most recent submissions that *convinces* the Commission that its prior decision was in error. The Commission therefore reaffirms its decision not to appoint an independent ALJ to preside over Ms. Giles occupational disease claim.” (R. Vol. 1 at 373)

20. Giles never received any kind of “Hearing”, “fair” or otherwise, that the Commission’s Order had stated she was entitled to “(a)s a matter of constitutional and statutory law, as well as Commission practice”, before any kind of an ALJ, much less one that was “impartial” and “free of bias, prejudice and conflict of interest”.

21. Giles submitted new evidence and argument with her Motion for Review, which was not even mentioned by the Commission in its denial. However, information was gleaned from Giles' submissions and was used by the Commission in its 'Background and Issues Presented'. With her Motion for Review, which resides in the Record in Vol. 3 at 736-789, Giles' submitted copies of numerous documents and attached them as Exhibits. However, those Exhibits now reside in the Record in Vol. 1 at 1-95, instead of in Vol. 3 with Giles' Motion for Review. The Commission has surreptitiously moved those documents to the front of the Record, and redesignated them "Materials pertaining to the Accident Claim LC Case No. 92-693", apparently to make it appear that the record from the prior injury by accident claim and Giles' current occupational disease claim "are the same claim", as stated in all of the Orders issued in this present case. While Giles had stated in her Request to Supplement the Record that she believed that Pages 1-95 were actually the Exhibits from her Motion for Review, she was not able to verify the truth of her statement until she went to Utah and personally checked the record. It is obvious that the Commission received both the Motion for Review and the Exhibits; however, all 54 pages of the Motion for Review are date-punched, but none of the Exhibits are date-punched. Proof that Giles filed the prior Application for Hearing, and that the first 95 pages of the Record are her Exhibits, lies within her Motion for Review. In Vol. 3 of the Record on Page 738 and also on Page 753, Giles lists the documents filed in Exhibit 'A' with her Motion for Review. These documents correspond exactly with Pages 1-54 of Vol. 1 of the Record. Page 55 of Vol. 1 is entitled Exhibit 'B', and likewise is listed in R. Vol. 3 at 740, corresponding exactly with Pages 56-59; Exhibit 'C' is Page 60 and is listed in R. Vol. 3 at 743, corresponding exactly with Pages

SUMMARY OF THE ARGUMENT

DETAIL OF THE ARGUMENT

(For the sake of brevity, Giles will hereafter refer to the present occupational disease claim as the “present case”, and the prior injury by accident claim as the “prior case”.)

POINT I

The Commission Has Disregarded the Critical Issue of Jurisdiction in this Case

The Commission has shown a pattern of ignoring jurisdictional issues. In Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569 at 570, 571 (Utah App. 1989) this Court stated in relevant part:

“‘Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed.’ *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987). **If a court acts beyond its authority those acts are null and void. *Id.*** Therefore, the initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court’s jurisdiction it retains only the authority to dismiss the action. *Id.* The sources of jurisdictional limits may vary according to the type of court involved. However, it is basic that ‘the jurisdictional limits of a statutorily created court . . . are circumscribed by its empowering legislation.’ *Id.* It follows that the subject matter jurisdiction of a quasi-judicial administrative agency, such as the Industrial Commission, which is a statutory creation, would also be ‘fixed by statute.’ *Retherford v. Industrial Comm’n of Utah*, 739 P.2d 76, 80 (Utah App. 1987). Just as any court, **the Commission should first determine that it has jurisdiction and, if it does not, dismiss the matter. Any action beyond its jurisdiction is void. . . . Subject matter jurisdiction cannot be expanded by waiver or consent.**” (Emphasis added.)

Further, this Court stated in relevant part in In re Southern American Ins. Co. v. Utah Insurance Commission, 930 P.2d 276, 278, (Utah App. 1996):

“ . . . ‘acquiescence of the parties is insufficient to confer jurisdiction on the court, and a lack of jurisdiction can be raised by the court or either party at any time.’ *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323, 325 (Utah 1991.)

See: also generally, James v. Galetka, 965 P.2d 567 (Utah Ct. App. 1998) (the right to make an objection for lack of jurisdiction is never waived).

The Record of the proceedings before the Commission in the present case contains sufficient evidence to show the Commission disregarded the critical issue of jurisdiction: (a) when it made new findings concerning the prior case and resultant Settlement Agreement without re-establishing jurisdiction over the prior case; and, (b) when it issued its Order denying Reconsideration of Giles’ present case.

(a) New Facts Made in the Present Case Concerning the Prior Case and Resultant Settlement Agreement Without Re-establishing Jurisdiction Over the Prior Case

In the present case, the Commission has determined new facts concerning the prior case and resultant Settlement Agreement which were not previously found by the Commission in any of its Orders in the prior case. Indeed, these new facts are in diametric opposition to the facts previously determined by the Commission in the prior case. Such is clearly not permitted by law unless the Commission exerts its continuing jurisdiction by established procedures.

Utah Code Ann. 35-1-82.53(2) (as last amended by Chapter 72, Laws of Utah 1988), the law in effect when the Commission issued its Order on Reconsideration in the prior case, stated:

“The order of the commission on review is **final, unless set aside by the Court of Appeals.**” (Emphasis added).

§ 63-46b-10 (1988), in effect when the Commission issued its Order on Reconsideration in the prior case, stated in pertinent part:

“In formal adjudicative proceedings:

“(1) . . . (T)he presiding officer shall sign and issue an order that includes:

- (a) a statement of the presiding officer’s findings of fact based exclusively on the evidence of record in the adjudicative proceedings . . . ;
- (b) a statement of the presiding officer’s conclusions of law;
- (c) a statement of the reasons for the presiding officer’s decision; . . .”

Pursuant to this statute the Findings of Fact, Conclusions of Law, and the reasons for the decision are all integral parts of an Order of the Commission.

Although Giles petitioned the Court of Appeals to review the actions of the Commission in the prior case, the Court of Appeals **did not “set aside”** the Commission’s prior Orders on Review or Reconsideration. Since the Commission specifically adopted the PALJ’s Findings of Fact in its Order on Review, those findings are still valid. (R. Vol. 1 at 50).

Furthermore, Utah Code Ann. 35-1-16(1) (1994) (now 34A-1-301) states:

“The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this or any other title or chapter that it administers . . .”

Therefore, the parties who entered into the Settlement Agreement had no jurisdiction or authority to modify or change the Findings of Fact of the Commission in the prior case. In actuality, the Settlement Agreement merely contains recitals, allegations, denials, and stipulations. (R. Vol. 1 at 150-153).

Further, Rule R568-1-16(B) (1994), in effect when the Settlement Agreement was entered into, which governs settlement agreements, states in pertinent part: “ . . . the

Commission will look to the facts of the matter and will not be bound by mere recitations in the settlement agreement.” Thus, the Findings of Fact the Commission made prior to the execution of the Settlement Agreement were not tossed aside when the Settlement Agreement was executed.

This position is echoed in Barber Asphalt Corporation v. Industrial Commission, 135 P.2d 266 (Utah 1943), wherein Chief Justice Wolfe stated in his concurring opinion:

“A settlement between the parties approved by the Commission is tantamount to an award on the facts as they existed or were known at the time of the settlement and like an award would be subject to change.”

Nor did the PALJ modify or change his or the Commission’s former findings when he approved the Settlement Agreement. (R. Vol. 1 at 154).

Once the Commission issued a final order, the only legal method for the Commission to re-establish jurisdiction over the prior injury claim and modify or change its former findings was to exert its continuing jurisdiction as provided in § 35-1-78(1) (1990) (now § 34A-2-420), quoted below in pertinent part:

“The powers and jurisdiction of the commission over each case shall be continuing. The commission, **after notice and hearing**, may from time to time **modify or change** its former findings and orders.” (Emphasis added).

Webster’s New World Dictionary, Second College Edition (1984) defines ‘modify’ as: “To change or alter; esp., to change slightly or partially in character, form, etc.”. Webster’s defines ‘change’ as: “The act or process of substitution, alteration, or variation.”

Therefore, the Commission cannot take any action which modifies, changes, alters, or varies, even slightly, its former Findings or Orders without exerting its continuing jurisdiction . Accordingly, any finding by the Commission which modifies or changes its

former Findings or Orders in the prior case can only be made “after notice and hearing”.

The Commission has never provided notice of its intent to exert continuing jurisdiction over the prior case, nor has the Commission held a requisite hearing since it issued its final Order in the prior case. The act of approving the Settlement Agreement did not modify or change the Commission’s former findings.

The Commission may not exert its continuing jurisdiction arbitrarily. In Spencer v. Industrial Com’n of State of Utah, 735 P.2d 158, 161 (Utah 1987) at [1], the Utah Supreme Court held:

“The power of the Industrial Commission to modify awards when “in its opinion” modification is justified is not an arbitrary power, *Mecham v. Industrial Commission*, 692 P.2d 783 (Utah 1984); *Buxton v. Industrial Commission*, 587 P.2d 121 (Utah 1978), but a power wedded to the duty to examine credible evidence. Under well-established principles of stare decisis, the basis of modification is provided by evidence of some significant change or new development in the claimant’s injury or proof of the previous award’s inadequacy. *Buxton, supra*, at 123.”

Further, this Court held in Burgess v. Siaperas Sand & Gravel, 965 P.2d 583 (Utah App. 1998), that there are four prerequisites to the Commission exerting its continuing jurisdiction as presented below in pertinent part:

“. . . The powers and jurisdiction of the commission over each case shall be continuing. The commission, ***after notice and hearing***, may from time to time **modify or change its former findings and orders. . . .**

“. . . (T)he Commission may not arbitrarily exercise continuing jurisdiction to modify an award. See Spencer v. Industrial Comm’n, 733 P.2d 158, 161 (Utah 1987). The basis for reopening a claim is provided by ‘evidence of some significant change or new development in the claimant’s injury or proof of the previous award’s inadequacy.’ *Id.* . . .

“When an injured worker asks the Commission to exercise its continuing jurisdiction, see e.g., Mecham v. Industrial Comm’n, 692 P.2d 783, 786 (Utah 1984); Buxton v. Industrial Comm’n, 587 P.2d 121, 123 (Utah 1978), and has met the foregoing conditions, the Commission has the duty to reopen and adjudicate the injured worker’s case ‘after notice and hearing,’ Utah Code Ann. 35-1-78(1) (1994)

(now 34A-2-420(1)).” (Emphasis added).

There is no evidence that any party has requested that the prior case be re-opened, and the Commission has not referred to any. And, there has been no required hearing. Therefore, the Commission is bound by the Findings in the Orders issued in the prior case.

Moreover, in its Orders in the present case, the Commission has specifically denied any change or new development in Giles’ prior case, and has also denied the previous award was inadequate. In fact, in its Orders in the present case, the Commission has now found that Giles’ occupational disease of porphyria was the prior injury, and determined Giles is entitled to nothing more for her injury, or her occupational disease, than is provided in the Settlement Agreement. (R. Vol. 4 at 1032, 1034, 1232-1233). But, the Commission made these findings without the required notice and hearing.

None of the italicized facts which follow were found or contained in any of the Commission’s former Orders in the prior case, and the Commission had no jurisdiction to make them in this case. Starting on Page 2 of its 1 May 2003 Order on Review, the Commission determined in the present case under the heading “Findings of Fact”:

“On May 30, 1992, Mrs. Giles filed an Application For Hearing with the Utah Industrial Commission claiming workers’ compensation benefits for ‘seizures, memory loss, sinus, heart and lung injury’ caused by work-related exposure to chlorine gas at Oakridge on September 7, 1991. Oakridge denied liability for the alleged injuries.

“Mrs. Giles (sic) claim was eventually denied by the Commission. Mrs. Giles sought review by the Utah Court of Appeals. *In the meantime, Mrs. Giles continued to seek medical diagnosis of her alleged injury. On January 5, 1995, Dr. Baker diagnosed the injury as ‘chemically acquired or chemically induced porphyria’ from exposure to toxic fumes at Oakridge. According to Dr. Baker:*

The porphyrias are a group of diseases of heme synthesis . . . Without attempting to separately describe each different porphyria, general symptoms of the acute attack may include abdominal pain . . . nausea, vomiting, . . .

diarrhea. Neurological symptoms . . . may include peripheral neuropathy, weakness, . . . sensory disorder, possible respiratory problems, hallucinations, confusion, depression, sometimes even seizures.

“Although Oakridge continued to dispute Mrs. Giles’ claim, the parties agreed to a compromise settlement. Their written agreement identified Mrs. Giles’ claim as ‘physical and mental injuries allegedly, including organic brain damage, sustained via the exposure.’ The agreement provided for lump-sum and monthly payments to Mrs. Giles in lieu of any other benefits Mrs. Giles might be entitled to receive for her alleged injuries. The Commission approved the parties’ agreement, the defendants paid the required compensation, and Mrs. Giles (sic) claim was dismissed.

“On December 10, 2000, Mrs. Giles filed a second Application For Hearing with the Labor Commission, this time seeking benefits under the Utah Occupational Disease Act. This second claim was based on the same condition, porphyria, that had served as the basis for her first claim under the Workers’ Compensation Act. In support of this second claim, Mrs. Giles submitted the same diagnosis from Dr. Baker that had been obtained in early 1995 to support her first claim. (Emphasis added.)

Accordingly, these are new findings which modify and/or change the Commission’s former findings concerning the prior case.

Furthermore, the above findings in the present case presuppose that Giles’ porphyria was legally and medically caused by Giles’ exposure to the smell of super-chlorinated water on 7 September 1991. The above findings also presuppose that Giles’ porphyria was presented to and considered by the Commission in the prior case. Yet, there is no mention of Giles’ porphyria in any of the Order’s of the Commission in the prior case. And, all of the prior Orders state that Giles suffered no injuries from her exposure to the smell of super-chlorinated water, thereby precluding the finding that her porphyria was legally and medically caused by the 7 September 1991 incident.

This Court should remember that the Commission has specifically excluded from the Record in the present case the file containing the record of the prior case. There is no record in the present case that the Commission or any of the Respondent parties were aware of

Giles' porphyria. However, there is evidence in the Record in the present case that neither the Commission nor the Respondent parties knew of Giles' occupational disease. The ERF's Reply to Giles' Motion for Review contains the following statements, in pertinent part:

“Further, from the perspective of the (ERF), Ms. Giles acknowledges that at the time she entered into the settlement agreement back on March 8, 1995, she knew she had been diagnosed with an occupational disease. (Citation omitted.) Ms. Giles entered into the March 8, 1995 settlement agreement having a material fact . . . which she did not disclose to the parties.” (R. Vol. 3 at 847).

The Commission has pointed to no evidence in its Findings of Fact that would indicate the Commission had any knowledge of Giles' porphyria. And, Giles submits, based on the Commission's Findings in the prior case, that she had no obligation to inform the parties or the Commission of her porphyria when it could not have been caused by an accident the Commission had determined never happened, and which the Commission had determined caused Giles no injury. Moreover, the prior case was before this Court, where nothing more could be added to the record.

Without the above new findings, the Commission could not draw the following conclusions that are contained in its 1 May 2003 Order Denying Motion for Review, and presented below in pertinent part:

“As her claim progressed and additional medical evaluations were conducted, these descriptive symptoms were brought within a single over-arching diagnosis of porphyria. Thus, at the time Mrs. Giles settled her initial workers' compensation claim, that claim was for the injury of porphyria.

“Now Mrs. Giles has recast her initial claim for workers' compensation benefits for the **injury** of porphyria into a claim for occupational disease benefits for the **illness** of porphyria. In attempting to obtain benefits under both the Workers' Compensation Act and the Occupational Disease Act for the single diagnosis of porphyria, Mrs. Giles runs afoul of the following limitation in §34A-2-311 (sic) of the Occupational Disease Act (sic) . . .

“The 1995 settlement agreement between Mrs. Giles and Oakridge and ERF

granted certain workers' compensation benefits to Mrs. Giles for her porphyria. Pursuant to §34A-2-311 of the Occupational Disease Act, additional compensation for that same condition may not be paid. In light of the foregoing, the Commission concludes, as did Judge La Jeunesse, that Mrs. Giles' claim against Oakridge and ERF under the Occupational Disease Act must be dismissed." (Emphasis in original.) (R. Vol. 4 at 1034).

These conclusions are based on facts not in evidence in the present case, and facts which the Commission had no jurisdiction or authority to determine.

It is particularly abhorrent for the Commission to make these determinations when Giles' Form 026, filed to request a Hearing on her occupational disease claim, alleged "(t)hat she has the occupational disease of chemically induced porphyrinopathy as a result of exposure to numerous toxic fumes and materials" (detailed in 3 single-spaced pages attached thereto) "in the course of her employment with Oakridge C. C." during "the period of May 1991 to December 1991". Giles' injury by accident claim was only for a single exposure to one alleged toxic fume or material on only one day. The Commission did not in the prior injury by accident claim, nor in the present occupational disease claim, consider any of the other toxic fumes and materials Giles was exposed to at Oakridge on other days which she detailed in the 3 single-spaced pages attached to her Form 026.

It is even more abhorrent when the defense first asserted by Oakridge and WCF in response to the allegations in Paragraph 1 of Giles' Form 026 precludes the finding that Giles' occupational disease of porphyria was caused by the 7 September 1991 incident. That defense stated in relevant part:

"Respondents (Oakridge and WCF) deny the Petitioner sustained any injuries as a result of a chemical exposure on or about September 7, 1991, which employed at Oakridge Country Club." (R. Vol. 1 at 147). (Emphasis added.)

Not only does this denial preclude the finding by the Commission that Giles' porphyria was caused by the incident of 7 September 1991, but this denial fails to address **any other exposures on any other days**, which exposures formed the basis of Giles' occupational disease claim. Under the definition of "(p)ersonal injury by accident arising out of and in the course of employment" cited above, Giles' occupational disease could not result from the injury. First, as previously found by the Commission and never legally modified or changed, there was no accident on 7 September 1991, and Giles suffered no injury from "the normal event of leaking chlorinated water" that did occur on that date. (R. Vol. 1 at 47).

Accordingly, this Court should reverse the Commission's Findings, Conclusions, and Order regarding the parties Oakridge, WCF, and the ERF based on the Commission's lack of subject matter jurisdiction. Giles hereby requests that this Court grant her Motion for Summary Judgment against WCF based on WCF's failure to present a valid defense. Giles filed a Notice to Submit for Decision after the SA/Release was filed on Reconsideration, and the Commission totally disregarded, and did not address either that filing or Giles' Motion for Summary Judgment.

(b) The Issuance of the 16 July 2003 Order Denying Reconsideration

In its 27 May 2003 Order Extending Time for Reconsideration, the Commission ordered: "The Labor Commission will issue its decision *no later* than June 30, 2003." (R. Vol. 4 at 1124). By its own Order, the Commission ruled that its jurisdiction on Reconsideration would terminate on 30 June 2003. But, without issuing an Order extending time further, and with no explanation for the delay, the Commission issued its Order Denying Reconsideration on 16 July 2003. (R. Vol. 4 at 1231-1235). Since the Commission had no

jurisdiction or authority to issue an Order later than 30 June 2003, its act of issuing the Order Denying Reconsideration is null and void.

The Commission asserted in a letter addressed to Giles dated 21 July 2003 that it had jurisdiction and authority to issue the 16 July 2003 Order under this Court's decision in McCoy v. Disaster Kleenup, 2003 UT App. 49. (R. Vol. 4 at 1238). In McCoy, the Commission issued an Order extending time for Reconsideration wherein the Commission set a deadline for the issuance of its final Order on Reconsideration, and the Commission complied with that deadline. The facts in the present case are distinctly different. In the present case, the Commission set a deadline and failed to issue an Order by that deadline. There is nothing in McCoy which indicates the Commission had jurisdiction to issue an Order after its own established deadline. Accordingly, the Commission had no jurisdiction to issue the Order Denying Reconsideration in the present case, and said Order is null and void.

POINT II

By Statutory Definition Giles' Occupational Disease Claim Could Not Be Included in the Injury by Accident Claim Without the Commission First Determining that the Occupational Disease Resulted from an Injury Sustained on 7 September 1991

U.C.A. § 35-1-44(8)(a) and (b) (1991) stated in relevant part:

“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.” (Emphasis added.)

Since the Commission determined in the prior case that Giles sustained no injury by accident on 7 September 1991, Giles' occupational disease could not have resulted from the

incident of 7 September 1991. Giles raised this statute on multiple occasions and in multiple documents before the Commission, and the Commission never addressed the statutory prohibition of including Giles' occupational disease in the injury case. (R. Vol. 2 at 479-480, 483, Vol. 3 at 614, 706, 779-780, 798-799, Vol. 4 at 933, 1010, 1104).

POINT III

Oakridge, WCF, ERF, and Wasatch Crest Are Prohibited by Contract from Asserting that Giles Settled Her Occupational Disease Claim When She Executed the 7 September 1991 Settlement Agreement

Giles hereby incorporates by reference the facts stated in Item 18 above in the Statement of Facts. To summarize, Oakridge entered into a Settlement Agreement and Release (SA/Release) to resolve Giles' federal overtime suit then pending in U. S. District Court. In order to induce Giles to execute the SA/Release, Oakridge stipulated to certain facts that are inconsistent with the defenses asserted by Oakridge, WCF, Wasatch Crest, and ERF. These stipulations were agreed to over two years after the 8 March 1995 Settlement Agreement was executed. By its express terms, the SA/Release superseded all prior arrangements of any kind with respect to the subject matter covered therein. By its express terms, the SA/Release negated the Settlement Agreement of 8 March 1995 because Giles' prior case and the present case were part of the subject matter of the SA/Release. The SA/Release further stated:

"The parties acknowledge and agree that Giles has not released or discharged her pending workers' compensation claim (the present occupational disease claim), or any claim arising out of her worker's compensation claims, and nothing contained in (the SA/Release) shall be construed to constitute a release or waiver of such claims."

The SA/Release was prepared by counsel for Oakridge, and approved by him. Oakridge had

notice and knowledge of the SA/Release no later than 18 August 1997.

Oakridge had an obligation to its workers' compensation insurance carriers to inform them of the terms of the SA/Release. Because Oakridge knew of the SA/Release, the fact that it was not filed in the present case until Reconsideration is irrelevant because neither Oakridge nor its workers' compensation insurance providers can claim surprise. Giles did not divulge any part of the SA/Release until Reconsideration in an attempt to abide by at least the spirit of its restrictive confidentiality clauses. Giles gave Oakridge every opportunity to voluntarily conform its defenses in the present case with the provisions of the SA/Release. Oakridge not only breached the contract, but continued to defy the terms with full knowledge of said terms.

The Commission has refused to even consider the SA/Release based on its "consistent" practice of not considering newly presented evidence or issues raised for the first time as part of a Request for Reconsideration. This "practice", according to the Commission, is "essential to the fair and orderly conclusion of administrative adjudicative proceedings. (R. Vol. 4 at 1233). But, these statements of the Commission are not supported by the record in the present case. The Commission, on Reconsideration of the issue of an independent ALJ, accepted and considered new evidence and argument. There was no indication in the Commission's prior Order on Reconsideration in the present case that this was anything other than a normal practice of the Commission. The Commission did not state that it was considering evidence and argument on Reconsideration as an exception to its regular practices. The Commission cannot, absent prior notice to Giles, now change its practice already established in this case. What the Commission's practice may be in other

cases is irrelevant because the Commission has already previously accepted new evidence and argument on a prior Reconsideration in the present case. (R. Vol 2 at 373).

The Commission's statement feigning concern about fair and orderly proceedings is revolting. Where was the Commission's concern about fair and orderly proceedings while the timely acceptance/denial of Giles' present claim was deliberately disregarded by the Commission for six years, despite Giles' written notice? Pretending that Giles' claim was never filed with the Commission by removing it from the Commission's file does not excuse the Commission's neglect and failure to enforce its own Rules regarding the acceptance/denial of a claim. Written notice was not provided merely by Giles, but also by Oakridge, whose Form 122 (Employer's First Report of Illness) is inexplicably absent from the Commission's file. Losing one document, while not acceptable, could be forgiven, but the Commission has made a habit, at least in this present case, of losing documents, particularly those which would reflect poorly on the Commission.

POINT IV

The Commission has Repeatedly Shown Favor to Employers and Their Insurance Carriers Indicating a Bias and Prejudice Toward Applicants And The Commission Also has Financial and Other Conflicts of Interest These Favoristic Positions are Exhibited by the Following

As addressed in the Statement of Facts, TAD Technical was the only Respondent to file a Motion for Summary Judgment, but that Motion was for the single issue of the last injurious exposure doctrine in the 1990 statute, and that Motion was not granted by the Commission. The other two points raised in TAD Technical's filing, captioned Motion for Summary Judgment, actually requested dismissals. (R. Vol. 2 at 349-350). None of the

other parties filed Motions for Summary Judgment. All of the other parties requested dismissals for various reasons. The Commission has not made a distinction between requests for dismissals and motions for summary judgment. However, the Commission summarized in its Order Denying Motion for Review, under the heading ‘Discussion and Conclusions of Law’, the provisions of §63-46b-1(4)(b). The Commission stated the following:

“In this case, the Commission must determine whether the various defendants are entitled to **summary dismissal** of Mrs. Giles’ claim against them. Section 63-46b-1(4)(b) of the Utah Administrative Procedures Act permits **summary judgment** if the requirements of Rule 56 of the Utah Rules of Civil Procedure are satisfied. Rule 56 allows **summary judgment** only if the record shows ‘there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.’” (Emphasis added.)

However, the Commission failed to acknowledge that § 63-46b-1(4)(b) governs not only summary judgments, but also motions to dismiss. This statute states in relevant part:

“(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from: . . . (b) granting a timely **motion to dismiss** or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party . . .” (Emphasis added.)

The Commission did not consider the requirements of Rule 12(b), nor did it apply the standard for dismissals. Rule 12(b) of the URCP actually governs how defenses are presented, and only lists 7 defenses which can be made by motion. Only four of these defenses could have been asserted by the Respondents in this matter by motion. Those defenses are numbered and identified as follows: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, and (6) failure to state a claim upon which relief can be granted. Rule 12(b) further provides:

“If, on a motion asserting the defense numbered (6) to dismiss for failure to state

a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

While this Rule provides for certain dismissals to be disposed of as for summary judgments, there are conditions to such provisions. The Commission has not stated in its Orders that such conditions have been met. Furthermore, none of the Requests for Dismissal specifically state that they are “to dismiss for failure to state a claim upon which relief can be granted.” Accordingly, the Commission cannot treat every request for dismissal like a motion for summary judgment, but must explain its reasoning for treating each dismissal like a motion for summary judgment. § 63-46b-1(4)(b) limits the Commission to granting a timely motion to dismiss “if the requirements of Rule 12(b) are met by the moving party”. The Commission has not addressed the timeliness of any of the requests for dismissal, or established that all of the requirements of 12(b) have been met by the moving parties.

Furthermore, treating a request for dismissal like a motion for summary judgment does not mean using the standard of a motion for summary judgment for a dismissal. If there was no distinction between requests for dismissals and motions for summary judgment, there would be no need for § 63-46b-1(4)(b) to address the application of URCP Rule 12(b) and Rule 56. The standard on a motion for summary judgment is considerably more lenient than the standard for a dismissal. The standard for a dismissal is found in Mounteer v. Utah Power & Light Co., 773 P.2d 405, 406 (Utah App. 1989):

“In reviewing a dismissal for failure to state a claim, this court must construe the complaint in the light most favorable to the plaintiff, and indulge all reasonable inferences in plaintiff’s favor. *Arrow Indus. v. Zions First Nat’l Bank*, 767 P.2d 935,

936 (Utah 1988). Such a dismissal is appropriate only where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claims asserted. *Freegard v. First W. Nat'l Bank*, 738 P.2d 614, 616 (Utah 1987).”

Accordingly, the Commission has applied the wrong standard, and has therefore inappropriately granted dismissals to those Respondent parties requesting them. Whether the Commission has applied the correct standard to its conclusions is a question of law which this Court reviews under a correction of error standard.

Furthermore, summary judgments and dismissals should not be granted without allowing full discovery and a full opportunity to present evidence. In Drysdale v. Ford Motor Co., 947 P.2d 678 (Utah 1997), the Supreme Court held in pertinent part:

“Litigants must be able to present their cases *fully* to the court before judgment can be rendered against them unless it is *obvious* from the evidence before the Court that the party opposing judgment can establish no right to recovery.’ *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984) (emphasis added); *see also Krantz v. Holt*, 819 P.2d 352, 356 (Utah 1991). Prior to the completion of discovery, however, it is often difficult to ascertain whether the nonmoving party will be able to sustain its claims. In such a case, summary judgment should generally be denied. *See Pepper v. Zions First Nat'l Bank, N.A.*, 801 P.2d 144, 154 (Utah 1990) (summary judgment premature since nonmoving party *might be able*, through additional discovery, to prove different theories of recovery); (citation omitted).”

§ 63-46b-7(1) provides in pertinent part:

“In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information **necessary to support their claims or defenses**. **If the agency does not enact rules** under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.” (Emphasis added.)

The Commission has promulgated Rule 602-2-1(H) and (I) governing discovery, which state in pertinent part:

“(H) Upon filing of the Answer, **the defendant** may commence discovery with appropriate sets of interrogatories. . . . **The defendant** shall also be entitled to appropriately signed medical releases **The defendant** may also required the applicant to submit to a medical examination Failure of **an applicant** to comply with such requests may result in the dismissal of a claim . . . (Emphasis added.)

“(I) Commission subpoena forms **shall be used in all discovery proceedings . . .**” (Emphasis added.)

Rule 602-2-1(H) **does not comply** with the authorizing statute, § 63-46b-7(1). This Rule does not “prescribe means of discovery adequate to permit the **parties** to obtain all relevant information necessary to support their **claims**”. The Commission’s Rule makes no provision whatsoever for an applicant to conduct discovery. This Rule only provides sanctions to be meted out against an applicant who doesn’t comply with defendant’s requests.

Under § 63-46b-7(1), an applicant is not permitted to conduct discovery according to the URCP because “the agency” did “enact rules under” that section. URCP is only available if the agency does not enact rules for discovery. Accordingly, Giles was not permitted under the existing law to conduct discovery. Giles is aware that since she raised this argument with the Commission this Rule has been changed to allow discovery by applicants. However, this change only magnifies the failings of the prior Rule. It does not excuse it.

This Rule only further magnifies the Commission’s biased slant in favor of employers and their insurance carriers, and bolsters Giles’ previously presented issues concerning bias, prejudice, and conflicts of interest at the Commission. Giles has submitted evidence to the Commission of financial conflicts of interest between the Commission and WCF, namely that the Commission is a policyholder and as such is an owner of the assets of WCF; is entitled to receive dividends from WCF which can be adjusted as WCF so desires; and, is in a unique position to be able to influence the size of the pool from which dividends are

paid. (R. Vol. 1 at 199-319). Dividends are returned to policyholders based on the amount left over in the Injury Fund after expenses and claims have been paid. By denying claims, the Commission increases the size of the pool and is entitled to a bigger dividend, which can be increased even more at WCF's discretion. Since the State of Utah has put WCF 'out on its own', there is no oversight by the State government regarding dividends. Both WCF and the Commission have had opportunities to address this evidence, and WCF was provided an opportunity to present rebuttal argument and rebuttal evidence. Neither the Commission nor WCF has presented anything to contradict Giles' evidence or argument.

Another indication of the Commission's bias, prejudice, and conflicts of interests toward Giles is its failure in this case to appoint a medical panel as required by statute in all occupational disease claims. § 35-1-77(1)(b) (1991), the law in effect when Giles filed her notice of claim stated:

“When a claim for compensation based upon disability or death due to an occupational disease is filed with the Commission, the Commission shall, except upon stipulation of all parties, appoint an impartial medical panel.”

Here, again, since Giles raised the issue, the Commission has influenced the Legislature to change the statute from a mandatory requirement to a discretionary decision. But, when Giles filed her notice of claim, and when she filed her Application for Hearing, the statute required the appointment of a medical panel in all occupational disease claim. The Commission had no discretion over this issue because the statute stated “shall” instead of “may”.

Another example of the Commission's bias, prejudice, and conflicts of interests is reflected in the Commission's application of Code of Judicial Administration Rule 4-501,

which URCP 56 says applies to Motions for Summary Judgment. CJA Rule 4-501(1)(D), which states in relevant part:

“If neither party files a notice (to submit for decision), the motion will not be submitted for decision.”

Only one Respondent party filed a notice to submit, and that party was Wasatch Crest. That notice to submit was for Wasatch Crest, and only Wasatch Crest. (R. Vol. 3 at 704). It was not even on behalf of Oakridge. None of the other motions to dismiss or for summary judgment should have been considered by the Commission without a notice to submit from each party. The Commission’s failure to require a notice to submit is a violation of this Rule.

On Reconsideration of Giles’ request for an independent ALJ, in one of the cruelest ironies of this case, the Commission applied the wrong standard of review when the Commission was considering its own bias, prejudice, and conflicts of interest. In the Commission’s Order Denying Reconsideration is the following statement:

“There is nothing in Ms. Giles’ most recent submissions that convinces the Commission that its prior decision was in error.” (Emphasis added.)

It is common knowledge that the appropriate standard before the Commission is “by a preponderance of the evidence”. See Featherstone v. Industrial Com’n of Utah, 877 P.2d 1251, 1253 in Footnote 2 (Utah App. 1994). The Commission applied a clearly convincing standard. Since Giles presented evidence of bias, prejudice, and conflicts of interest which remains uncontradicted, Giles met the burden of proving by a preponderance of the evidence the existence of bias, prejudice, and conflicts of interest before the Commission, and her entitlement to an independent ALJ.

It is particularly abhorrent for the Commission to determine that the prior Settlement

Agreement resolved the occupational disease claim when Giles' Form 026, filed to request a Hearing on her occupational disease claim, alleged "(t)hat she has the occupational disease of chemically induced porphyriopathy as a result of exposures to numerous toxic fumes and materials" (detailed in 3 single-spaced pages attached thereto) "in the course of her employment with Oakridge C. C." during "the period of May 1991 to December 1991". Giles' injury by accident claim was only for a single exposure to one alleged toxic fume or material on only one day. The Commission did not in the prior injury by accident claim, nor in the present occupational disease claim, consider any of the other toxic fumes and materials Giles was exposed to as Oakridge on other days which she detailed in the 3 single-spaced typewritten pages attached to her Form 026. It is even more abhorrent when the defense first asserted by Oakridge and WCF in response to the allegations in Paragraph 1 of Giles' Form 026 precludes the finding that Giles' occupational disease of porphyria was caused by the 7 September 1991 incident. That defense stated in relevant part:

"Respondents (Oakridge and WCF) deny the Petitioner sustained any injuries as a result of a chemical exposure on or about September 7, 1991, while employed at Oakridge Country Club." (R. Vol. 1 at 147). (Emphasis added.)

Not only does this denial preclude the finding by the Commission that Giles' porphyria was caused by the incident of 7 September 1991, but this denial fails to address any other exposures on any other days, which exposures formed the basis of Giles' occupational disease claim. Under the definition of "(p)ersonal injury by accident arising out of and in the course of employment" cited above, Giles' occupational disease could not result from the injury. First, as previously found by the Commission and never legally modified or changed, there was no accident on 7 September 1991, and Giles suffered no injury from "the normal

event of leaking chlorinated water” that did occur on that date. (R. Vol. at 47).

Although Giles could make numerous arguments in multiple pages regarding the issue of her occupational disease claim being the same claim as her prior injury by accident claim, the issue has, in actuality, already been ruled on by this Court in prior Orders issued in this case. This Court ruled in its Order issued in this case on 26 September 2003:

“Petitioner seeks supplementation with the entire record of prior Commission case number 92-693.” (Emphasis added.)

Then, this Court ruled in its Order issued in this case on 22 March 2004,

“The appellate record is the record **only of the case appealed**. . . . Petitioner seeks again to supplement the record with **materials from other proceedings, not part of the record** before the Administrative Law Judge in the **administrative proceeding at issue**.” (Emphasis added.)

It is clear from these statements that this Court has previously ruled in this case that Commission Case Number 92-693 is not the same case as Commission Case Number 20001228. Therefore, the Commission’s Orders stating that the present occupational disease case is the same as the prior injury by accident case have been supplanted by the Orders of this Court.

No party has filed an Objection to these Orders. Since these determinations were made during the Review process before this Court, these Orders have become law of the case.

The Commission has also failed to enforce the deadlines for filing Answers by Respondents, particularly the ERF. The Commission has also allowed Respondent parties to present new defenses after they have filed their Answers in violation of the following. Commission Rule R602-2-1(D) (2001) states in relevant part:

“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 Commission, admitting or denying liability for the claim. The answer shall state all affirmative defenses with sufficient accuracy and detail that an applicant may be fully informed of the nature of the defense asserted. . . . A copy shall be sent to the applicant or, if there is one, to the applicant’s attorney by the defendant.” (Emphasis added.)

There is no such requirement for Applicants. None of the Answers filed by any of the above Respondent parties addressed the defenses of res judicata or estoppel. (R. Vol. 1 at 125, 147-155, 197, 387-397, 418-420, Vol. 3 at 663-672). However, in violation of the above rule, the above Respondent parties all presented these defenses in subsequent filings. (R. Vol. 2 at 323, Vol. 3 at 791, 818-822, 824, 847, 848). None of these defenses were argued or developed until after Giles filed her plenary Motion for Review on 5 July 2002, which was more than a year after the Answers were filed by the above Respondent parties.

For this reason alone, the Commission should not have determined that Giles’ occupational disease claim was the same as her prior injury by accident claim. Whether it’s the PALJ stating “(b)oth . . . claims consisted of claims . . . derived from her diagnosis of porphyria” (R. Vol. 3 at 731); or, the Commission stating “that this second claim was based on the same condition, porphyria, that had served as the basis for her first claim under the Workers’ Compensation Act”; or, the Commission stating “the Commission . . . remains convinced that both claims relate to the same medical condition, now diagnosed as ‘porphyria.’”, or whatever, the principles involved in making those determinations are those of res judicata and estoppel. Since none of the parties timely raised these defenses, the Commission should not have considered them.

Giles hereby requests this Court to reverse all grants of dismissals by the Commission

in this case because the Commission applied the wrong standard, and did not articulate its reasoning process for treating requests for dismissal as motions for summary judgment. And, also for this Court to remand this case to the Commission to allow Giles to conduct discovery. Giles further requests this Court to appoint or Order the Commission to appoint an ALJ with absolutely no ties to the Commission to preside over Giles' claim as the Commission has previously stated it would.

CONCLUSION

It is not possible for this Court to comprehend in a Brief of even this length all of the hardships, frustrations, disappointments, disillusionment that Giles has endured since becoming totally and permanently disabled in December 1991. Giles believed that there was a system in place to assure her of compensation for her occupational disability. Giles could not conceive when injured almost thirteen (13) years ago that she would encounter fraud, misrepresentation, perjury, deceit, corruption, and spitefulness to the extent documented in this case. Giles hope and prayer is that this Court will recognize the injustices perpetrated upon her. Giles recognizes that this Brief may not be all that the Court of Appeals expects, but it is the best she can do with her physical limitations and the brain damage she must contend with. Giles would hope that this Court would thoroughly review the entire voluminous record in this case so this Court can obtain a realistic picture of what has transpired in this case, and the prior case. Giles is firmly convinced that the Administrative Law Judges at the Commission should be placed under the jurisdiction of the judiciary instead of the Commission that hires, fires, and pays the ALJs.

Respectfully submitted and dated this 21st day of May, 2004.

A handwritten signature in cursive script, reading "Glenda W. Giles".

Glenda W. Giles, Appellant Pro Se

NOTE: This Brief was prepared with an enormous amount of assistance from my son, Robert E. Giles.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Appellant's Brief was mailed, postage prepaid, on 21 May 2004 to the following individuals at the following addresses.

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Salt Lake City, UT 84114-0230

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Glenda W. Giles

ADDENDUM ‘A’

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

No History for Constitution

Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

No History for Constitution

ADDENDUM ‘B’

Industrial Commission of Utah - Industrial Accidents Division
P.O. Box 146610
Salt Lake City UT 84114-6610
(801) 530-6800 1-800-530-5090 TDD(801)530-7685

EMPLOYEE NOTIFICATION OF DENIAL OF CLAIM

Employee: GLEND A GILES Date of Alleged Injury: 5-91

Address: PO BOX 354 Phone Number: 406 253 8521

City, State: EUREKA, MT 59917 Social Security #: 455 64 6702

Employer: UNKNOWN

Insurance Carrier: CNA INS Date carrier was notified: 6-6-01

Claim #: 19572165D6 Date of denial: 6-12-01

Adjuster: MARILYN MICHOTTE Phone Number: 1800 262 5303 EXT 4148

Please check appropriate reason for denial.

- ☐ Failure by an employee claiming benefits to sign release for medical information.
- ☐ Injury/Occupational Disease did not occur within the scope of employment.
- ☐ Medical information does not support the claim.
- ☐ Claim not filed within the statute of limitations.
- ☐ Claimant is not an employee.
- ☐ Claimant has failed to cooperate in the investigation of the claim.
- ☐ Pre-existing condition (Please be very specific). _____

☒ Other - A specific reason must be given. CNA does not have coverage for any of the listed employers provided by the claimant.

(Please give a brief explanation of any item checked above): _____

NOTICE TO THE CLAIMANT: If you are in disagreement with the carrier and cannot resolve your differences by talking to the carrier and/or your treating physician, you should then call the Industrial Commission, Industrial Accidents Division for further instructions.

R568-1-14. Acceptance/Denial of a Claim.

A. Upon receiving a claim for benefits from an injured employee, the carrier/self-insured employer shall promptly investigate the claim and begin payment of compensation within 21 days of a valid claim or the carrier shall send the claimant written notice, within 21 days, that further investigation is needed and the reasons for further investigation. Each carrier or self-insured employer shall complete its investigation within 45 days of receipt of the claim and shall commence the payment of benefits or notify the claimant in writing that the claim is denied.

B. The payment of compensation shall be considered overdue if not paid within 212 days of a valid claim or within the 45 days of investigation unless denied.

C. Failure to make payment without good cause shall result in referral of insurance companies to the Insurance Department for appropriate disciplinary action and may be cause for revocation of the Certificate of Self-Insurance from self-insured employers.

D. If a carrier or self-insurer begins payment of benefits on an investigation basis so as to process the claim in a timely fashion, the later denial of benefits based on newly discovered information shall be allowed.

cc: Industrial Commission, Employee

Street Address: 160 East 300 South, 3rd Floor

STATE OF UTAH - LABOR COMMISSION
 Division of Industrial Accidents
 P.O. Box 146610
 Salt Lake City, Utah 84114-6610
 (801) 530-6800 1-800-530-5090 TDD(801)530-7685

EMPLOYEE NOTIFICATION OF DENIAL OR PARTIAL DENIAL OF CLAIM

Employee: Glenda Gilead #10001228 Date of Alleged Injury: _____
 Address: P.O. Box 354 Phone Number: _____
 City: Eureka MT 59917 Social Security: 455-64-6907
 Employer: Tad Resources
 Insurance Carrier: ACE-USA / Pacific Employers Date Carrier was Notified: 5-16-01
 Policy: 780C 975374-0 Date of Denial: 5-22-01 Adjuster: Margie Simmons
 Employer's Address: P.O. Box 1260 W.J. UT 84088 Adjuster's Phone Number: 282-4859

check appropriate reason for denial (if a partial denial is issued, please refer to the section below).

- Failure by an employee claiming benefits to sign releases for medical information.
- Injury/Occupational Disease did not occur within the scope of employment.
- Medical information does not support the claim.
- Claim not filed within the statute of limitations.
- Claimant is not an employee.
- Claimant has failed to cooperate in the investigation of the claim.

Pre-existing condition (Please be very specific). _____

Other - A specific reason must be given. We did not have coverage for Tad Resource in 1985-90 when employee worked for Tad. We had coverage for Tad Resources 1994-97.

check appropriate reason for partial denial.

- Tested positive to a drug/alcohol chemical test -Medicals only paid.
- Disputed validity -Medicals only paid.
- Disputed validity -Compensation only paid.

give a brief explanation of any item checked above): _____

NOTE TO THE CLAIMANT: If you are in disagreement with the carrier and cannot resolve your differences by talking with the carrier and/or your treating physician, you should then call the Labor Commission, Division of Industrial Accidents, for further assistance.

7. Acceptance/Denial of a Claim. (Refer to the Utah Labor Commission Workers' Compensation Rules for complete text)

Upon receiving a claim for workers' compensation benefits, the insurance carrier or self-insured employer shall promptly investigate the claim and begin payment of compensation within 21 days from the date of notification of a valid claim or the insurance carrier or self-insured employer shall send the claimant and the division written notice on a division form or letter containing similar information, within 21 days of notification, that further investigation is needed stating the reason(s) for further investigation. Each insurance carrier or self-insured employer shall complete its investigation within 45 days of receipt of the claim and shall commence the payment of benefits or notify the claimant and division stating that the claim is denied and the reason(s) why the claim is being denied.

The payment of compensation shall be considered overdue if not paid within 21 days of a valid claim or within the 45 days of investigation completed.

Failure to make payment or to deny a claim within the 45 day time period without good cause shall result in a referral of the insurance carrier to the Insurance Department for appropriate disciplinary action and may be cause for revocation of the self-insurance certification for self-insured employer.

For Commission, Employee

Street Address: 160 East 300 South, 3rd Floor, Salt Lake City, UT

ADDENDUM ‘C’

P. O. Box 354
Eureka, MT 59917

8 July 2001

Mr. Michael E. Dyer
Blackburn & Stoll, LC
77 West 200 South, Suite 400
Salt Lake City, UT 84101

Re: Glenda W. Giles vs. Oakridge Country Club and/or Workers
Compensation Fund; Wasatch Crest Mutual Insurance; Employers
Reinsurance Fund; IRS; Adecco, f/k/a TAD Technical Services
Corporation and/or Liberty Mutual Insurance Company;
Transportation Insurance Company; Pacific Employers' Insurance
Company
Case No. 20001228
Petitioner's Answers to Interrogatories Filed By Respondents', Adecco
f/k/a TAD Technical Services Corporation and/or Liberty Mutual
Insurance Company,

Dear Mr. Dyer:

This letter contains my written Answers, to the best of my knowledge and under oath, to the Interrogatories relative to the above entitled action submitted by Respondents, Adecco f/k/a TAD Technical Services Corporation (hereinafter referred to as TAD) and/or Liberty Mutual Insurance Company (hereinafter referred to as Liberty Mutual). It is intended that these Answers shall be deemed continuing, and may be supplemented with additional information.

ANSWERS TO INTERROGATORIES

1. Names and addresses of Petitioner's employers for the past fifteen years:
 - a. TAD Technical Services Corporation, 150 Weldon Parkway - Suite 102, St. Louis, Missouri.
 - b. I.R.S. Ogden Service Center, 1160 West 12th Street, Ogden, Utah.
 - c. Oakridge Country Club, 1492 West Shepard Lane, Farmington, Utah.

2. With regard to Petitioner's employers:

A. TAD Technical Services Corporation (hereinafter referred to as TAD).

- a. September 1985 to October 1990.
- b. Administrative secretary/clerk.
- c. The office Petitioner worked in was permanently closed.
- d. Petitioner strained her right shoulder while attempting to remove several files from a filing cabinet drawer located in her office. Petitioner was unaware the heavy-duty dividers were secured with a steel rod inserted through metal grommets in the bottom of the dividers. Petitioner does not know the date or time of that injury.

Petitioner was exposed to numerous fumes on a daily basis while working. Details were provided in Petitioner's Response to these Respondent's Motion for Summary Judgment. On at least one occasion, the chemical alarms went off in the afternoon in the hangar where Petitioner's office was located. Petitioner and other employees were evacuated from the hangar, and Petitioner was told to go home. Petitioner does not know the date or exact time of that specific exposure. (Also see Item 21.)

B. IRS Ogden Service Center (hereinafter referred to as IRS).

- a. January 1991 to May 1991.
- b. Tax examiner clerk.
- c. Petitioner was a seasonal employee, and her season ended.
- d. When Petitioner went to work one evening, she saw small flags that had been placed around the grassy area adjacent to the sidewalk she used to reach her entry door. Petitioner did not stop to read the printing on the flags, and does not know what those flags designated. Petitioner assumed they were notices that the grassy area had been sprayed with fertilizer or weed killer, but she does not know for certain. Neither does Petitioner know the date she saw them; how long the flags remained; or what chemicals were used.

C. Oakridge County Club (hereinafter referred to as Oakridge).

- a. June 1991 to December 1991.
- b. Office manager.
- c. Petitioner was unable to perform her job because of her health problems.
- d. Petitioner was involved in an incident where a chlorine leak occurred at Oakridge on 7 September 1991 at approximately

11:30 a.m.. Petitioner believed it to be a leak of chlorine gas, but, Oakridge; Workers Compensation Fund of Utah; Utah OSHA; Federal OSHA; and the Industrial Commission of Utah all disagreed with her belief, and stated that she was only exposed to the fumes from so-called 'super-chlorinated' water. A three member Medical Panel, the ALJ, and the Industrial Commission all determined that none of Petitioner's health problems could have been caused by this incident.

Information on Petitioner's additional exposures at Oakridge are enumerated in the three page attachment to Petitioner's Form 026.

3. A thorough list of treating medical providers was attached to Petitioner's Form 026. However, Social Security; Workers Compensation Fund of Utah; and the Industrial Commission each had Petitioner examined by independent doctors, but Respondents will need to obtain that information from those agencies. In addition to the above mentioned list of treating medical providers, Petitioner has remembered she was also treated for an abscessed tooth by Dr. Dennis DeDecker, Oral Surgeon; 2179 North Robins Dr.; Layton, UT 84041. Furthermore, Petitioner was examined by the following medical providers:

- a. Dr. Terry Allen Brown; Holy Cross Salt Lake Industrial Clinic; 441 South Redwood Road; Salt Lake City, Utah 84104.
- b. Dr. David Alessi; Cedars-Sinai Medical Office Towers; 8631 West Third Street, Suite 625 East; Los Angeles, California 90048.
- c. Dr. August L. Reader, III; 8631 West Third Street, Suite 800-E; Los Angeles, California 90048.
- d. Dr. Jerry Kaye; Conejo Nephrology & Medical Group, Inc.; 227 West Janss Road, Suite 110; Thousand Oaks, California 91360.
- e. Dr. Ronald Lawrence; 28240 W. Agoura Road, Suite 202; Agoura, California 91301.
- f. Dr. F. Yanowitz; LDS Hospital; 326 8th Ave.; Salt Lake City, Utah.
- g. Terry D. Pendley; Davis Mental Health and Alcohol & Drug Services; 470 East Medical Drive; Bountiful, Utah 84010.
- h. Dr. Nathaniel M. Nord; 370 East South Temple, Suite 300; Salt Lake City, Utah 84111.
- i. University of California - Irvine; Brain Imaging Center; Irvine Hall, Room 170; Irvine, California 92717.
- j. Harbor/UCLA Diagnostic Imaging Center; 21840 South Normandie Avenue; Torrance, California 90502.
- k. Dr. David Kelsall; Denver Ear Associates; 799 East Hampden Ave., Suite 510; Englewood, Colorado 80110-2769.

- I. The Medical Panel appointed by the Industrial Commission's Presiding Law Judge, Timothy C. Allen.
 - m. The examining physicians Petitioner was referred to by the Utah Division of Disability Determination Services for Social Security.
4. The only persons identified in Item 3 above that gave Petitioner an impairment rating were the following:
 - a. Dr. Gordon Baker – “permanently disabled”; January 5, 1995.
 - b. Dr. David R. Warden – “significantly disabled”; December 22, 1992.
 - c. Dr. Gummow – “unable to work”; July 14, 1992.
 - d. Social Security’s Disability Determination doctors – “disabled” under ‘Social Security Administration rules – March 8, 1993.
5. A list of hospitals was attached to Petitioner’s Form 026, and provided to the Labor Commission. In addition to those previously listed, Petitioner was also treated in the Emergency Room of Kalispell Regional Medical Center; 310 Sunnyview Lane; Kalispell, Montana 59901.
6. This numbered item is not an interrogatory, and does not require a response. However, Petitioner attached thirty-four (34) signed and notarized ‘Authorizations to Release Medical Records’ to her Form 026, and wonders why these Respondents were either not provided those Authorizations, or have a requirement for additional ones. But, in order to comply with Respondents’ request, Petitioner has signed and had notarized the two ‘Authorization to Release Medical Records’ forms provided by Respondents. These are being returned to Respondents with a copy of this document.
7. Respondents have failed to specify which ‘incident’ is in question. Without further information, Petitioner cannot respond to this Interrogatory.
8. For the same reason listed in Item 7 above, Petitioner cannot answer this Interrogatory without further information.
9. Yes.
10. Please refer to Item 2.B.d. above. Liberty Mutual Insurance Company’s files on TAD should contain all the pertinent information relative to that injury. No permanent partial impairment resulted from that injury.

the Industrial Commission's Presiding Law Judge, Timothy C. Allen; and the Industrial Commission's three Commissioners, namely Chairman Stephen M. Hadley; Thomas R. Carlson; and Colleen S. Colton, all ruled that Petitioner was only exposed to 'highly chlorinated' or 'super-chlorinated' water. PLJ Allen and the Commissioners also ruled Petitioner suffered a 'severe anxiety attack' and/or an 'extreme emotional reaction' as a result of her exposure. In addition, PLJ Allen and the Commissioners ruled Petitioner's health problems were unrelated to her employment; and, she was not entitled to benefits under Utah's Workers' Compensation Act. They further ruled Petitioner did not sustain any compensable injury; therefore, no permanent partial impairment has been attributed to Petitioner's exposure on 7 September 1991. However, PLJ Allen; the Industrial Commission; the Employers' Reinsurance Fund; Workers Compensation Fund; and Oakridge all stipulated that Petitioner was permanently and totally disabled as of December 1, 1991. None of these entities attributed Petitioner's permanent and total disability to any condition whatsoever. Petitioner asserts that the cause of her permanent and total disability is indeed chemically induced porphyriopathy. Most all of Petitioner's symptoms and physical complaints can be explained by this diagnosis.

11. Petitioner intends to call the following witnesses at her hearing. She believes the descriptions of expected testimony to be accurate. This list of potential witnesses may be enlarged or diminished as circumstances dictate, and does not preclude Petitioner from calling rebuttal witnesses, or adding witnesses based on all Respondents' witness lists.

- a. Kelly Call – Petitioner's deterioration since he first met her in July 1995; and his information on her toxic chemical exposure.
- b. Lynn Blood – Petitioner's physical condition and abilities both before and after she became disabled.
- c. Joseph Scholler – Petitioner's exposure to toxic fumes and materials in the hangar at Hill Air Force Base while in TAD's employ.
- d. Ione Yeagley – The presence of toxic fumes and materials in the hangar at Hill Air Force Base.
- e. Carol Lytle – Petitioner's physical condition and abilities both before and after she became disabled.
- f. Robert Giles will testify to Petitioner's physical condition and abilities both before and after she became disabled. He will also testify that on several occasions he visited Petitioner in her office at Hill Air Force Base, and will testify to the presence of toxic fumes and materials within the hangar and Petitioner's work area.
- g. Glenda Giles will testify to her physical condition and abilities both before and after she became disabled. She will also testify to the presence of toxic fumes and materials in her working environment while in Oakridge's employ and TAD's employ. She will also testify to unsafe working conditions at Oakridge based on official reports.

12. The following individuals witnessed Petitioner's occupational exposures:

- a. Joseph Scholler; 219 South Talbot Dr.; Layton, Utah 84041 – Telephone (801) 546-1163.
- b. Ione Yeagley; 2875 North 400 West, # 71; Layton, Utah 84041 – Telephone (801) 773-2843.

It is not possible for Petitioner to list each and every person who witnessed her daily exposures to toxic fumes and materials. Petitioner does not know the names and addresses of the numerous military and civil service individuals who worked in the hangar, and may have witnessed her presence on the hangar floor or when she was evacuated due to a chemical alarm sounding that necessitated evacuation of the hangar.

13. Petitioner reported her occupational exposures to Joseph Scholler. He was aware of the daily exposures. Petitioner's reports were given orally; and, she does not know the exact date of any specific exposure. Additionally, Petitioner informed Robert Giles that she was evacuated due to the sounding of a chemical release alarm. Petitioner also discussed with Robert Giles the fumes and odors she was required to endure while working for TAD. Robert Giles also experienced these fumes first-hand on visits to Petitioner's office in the hangar, and while walking through the hangar.

14. Yes.

15. Petitioner attended the Bryman School in Salt Lake City, Utah, from June 1983 until December 1983, and completed the course work required for training as a Medical Assistant.

16. Yes.

- a. On or about May 12, 1992.
- b. March 8, 1993.
- c. Commencing in May 1992, the amount was \$529.00, subject to cost-of-living adjustments.
- d. Petitioner has no knowledge of what may be determined by the Social Security Administration regarding 'average current earnings'.

17. Petitioner's present claim is for an occupational disease caused by multiple exposures over time to toxic fumes and substances during the course of her employment. Petitioner is not claiming any medical expense for which she has not been paid that relates to an industrial accident.

18. See Item 17 above.

19. Petitioner cannot foresee her potential future medical treatment requirements. However, Petitioner is aware that acute porphyria attacks can require hospitalization; injectable pain medication; and, intravenous treatment.

20. Due to circumstances beyond her control, Petitioner has not compiled a complete list of out-of-pocket medical expenses she has incurred as a result of her occupational disease. Petitioner will provide a list of her medical expenses to these Respondents as soon as it is reasonably practical. However, Petitioner can provide general information pertaining to some of her unreimbursed out-of-pocket medical expenses. This is not a complete list, and should not preclude Petitioner from supplementing this list with additional unreimbursed out-of-pocket medical expenses prior to an Administrative Hearing on this matter.

- a. U.V. protectant tinted film applied to two vehicles' glass areas in order to protect Petitioner from sunlight and U.V. rays.
- b. Blinds in home to protect Petitioner from sunlight and U.V. rays.
- c. Petitioner's medically necessitated move to Montana from Utah.
- d. Petitioner's medically necessitated U.V. tint, and self-darkening lenses in her prescription eye glasses.
- e. Expenses of airline tickets; rental car; lodging; and meals incurred as a result of Petitioner's trip to Dr. Baker's office in Seattle, Washington.

21. These exposures occurred eleven to sixteen years ago, and it is impossible for Petitioner, at this late date, to compile a list of each exposure; on what date or dates they occurred; the length of time of exposure; the quantity of fume exposed to; the source or sources of each fume; and, the precise location of each exposure to such fume. Petitioner was exposed to toxic fumes on a daily basis, but has no way of knowing the identity of all the toxic materials she was exposed to. Petitioner's office was located upstairs in the middle of a hangar which covered approximately eleven (11) acres. In order to gain access to her office, Petitioner had to walk through the hangar past numerous work stations where military equipment was being maintained and repaired. Petitioner did not work with any of the toxic substances, and doubts that she could have obtained this information even while working for TAD because many of the substances and materials were of a classified nature. Even if Petitioner could have obtained this information, in all probability she would not be able to divulge the information because of its classified nature. Petitioner was required to have a Security Clearance in order to be contracted by TAD to McDonnell Aircraft Company. However, Petitioner did notice strange odors which she believed to be solvents, cleaning materials, exhaust fumes; welding and soldering fumes; jet fuel; diesel fuel; adhesives; paint fumes; carpet; and carpet glues. Although Petitioner's office had an evaporative cooler, the air intake for this cooler was located within the hangar. Any fumes which traveled on the air currents in the hangar were drawn into, and passed through, the

evaporative cooler. The evaporative cooler was generally operated even during the winter because the heat provided for the ground floor naturally rose, and increased the heat in the office to intolerable levels. Additionally, Petitioner also commonly ate food that was served in a small cafeteria located within the hangar. The food was in open containers, and exposed to any fumes in the air. Petitioner also had to walk through various areas in the hangar to perform her official duties. She also had to walk through work stations to access the ladies' restroom. During the time Petitioner was employed by TAD, the office she worked in acquired a new computer system and a leased copy machine, both of which were located in her work area. Her work area also included a FAX machine; an telephone answering machine; a micro-fiche machine viewer; and numerous file cabinets containing printed documents. One of Petitioner's duties was to maintain and file all of the pages of updates in the numerous technical manuals, which were newly printed changes. Additionally, Petitioner was evacuated from her office and the hangar on at least one occasion when the chemical alarms sounded. Petitioner was not notified what chemical caused the alarm, nor was she told what effects the exposure might cause. Petitioner and her co-workers discussed the poor air quality within the office. These co-workers included her supervisor, Joseph Scholler, and Ione Yeagley. On different occasions, Petitioner was told to close the office and go home because the fumes within the office area were unbearable.

22. See Item 21 above.

23. Dr. Gordon Baker states in his letter dated May 3, 1995 that Petitioner has had multiple exposures; and, that he can find nothing in her history to indicate a non-industrial source for her illness. In his January 5, 1995 letter, Dr. Baker lists the causes of acquired porphyria, including chemicals. Dr. Gunnar Heuser states in his letter dated June 21, 1994 that the majority of Petitioner's diagnoses are secondary to toxic exposure; and, that she has been found to have many objective abnormalities, all of which could only be due to toxic exposure. (See attached letters.)

24. No.

25. Petitioner will not be introducing any documents "at trial". Workers' compensation cases are subject to administrative law, and there will be no trial. Due to circumstances beyond her control, Petitioner has not compiled a complete list of documents she will introduce at her Administrative Hearing. Petitioner will provide a list of documents to these Respondents as soon as it is reasonably practical.

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

1. Respondents will have to obtain documents from the Social Security Administration. Petitioner does not have, nor can she produce, all of these documents because she has never possessed all of these documents. Petitioner has already

provided a copy of the award letter she received from Social Security.

2. Petitioner has already produced copies of Dr. Baker's letters, together with copies of laboratory test results from the Mayo Clinic. With these Answers to Interrogatories, Petitioner is now providing copies of Dr. Gunnar Heuser's reports. The Labor Commission and WCF have not only these reports, but copies of all of Petitioner's medical records through 1994. Copies of those medical records can be obtained from the Labor Commission and/or WCF. Petitioner has supplied with these Answers signed and notarized 'Authorization to Release Medical Records' forms, and should not be required to provide the medical records and reports in addition to these releases.

Sincerely,

Glenda Giles

Glenda Giles

Attachment

NOTE: This document was prepared with assistance from my son.

cc: Robert Martin, National Ombudsman
U. S. Environmental Protection Agency
Washington, D.C.

SUBSCRIBED AND SWORN to before me this 9th day of July, 2001.

My commission expires:

12-3-02



Vicki A. Tidwell
Notary Public

Residing at: *Eureka, Mt*

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Answers to Interrogatories filed by Respondents, Adecco f/k/a TAD Technical Services Corporation and/or Liberty Mutual Insurance Company, was mailed, postage prepaid, on 9 July 2001 to the following individuals at the following addresses:

Workers Compensation Fund of Utah
P. O. Box 57929
Salt Lake City, UT 84157

Wasatch Crest Mutual Insurance Co.
P. O. Box 27008
Salt Lake City, UT 84127

IRS Ogden Service Center
Room 1106
1160 West 12th Street
Ogden, UT 84409

United States Attorney's Office
185 South State Street, # 400
Salt Lake City, UT 84111

Transportation Insurance Company
% CNA Insurance Company
10333 E Dry Creek Road, # 300
Englewood, CO 80112

Pacific Employers Insurance Company
% ACE USA
P. O. Box 911
Portland, OR 97207

David M. Libby
Liberty Mutual
P. O. Box 45443
Salt Lake City, UT 84145

Michael E. Dyer
Blackburn & Stoll
77 West 200 South, Suite 400
Salt Lake City, UT 84101

Signed:



(Glenda Giles)

cc: Adjudication Division
Labor Commission of Utah
P.O. Box 146615
Salt Lake City, UT 84114-6615

GUNNAR HEUSER, M.D., Ph.D., F.A.C.P.

DIPL. MED. (McGILL)

NeuroMed and NeuroTox Associates

A Medical Group

NEUROTOXICOLOGY

IMMUNOTOXICOLOGY

June 21, 1994

To Whom It May Concern:

Re: Glenda Giles

DOA: 9-07-91

I saw Ms. Giles in initial consultation on 4-27-94 and thereafter two more times in April 1994. She was again seen on 6-18-94 in follow-up consultation.

At issue is the question whether or not her multisystem complaints and abnormalities on objective testing are related to chlorine exposure in September 1991.

HISTORY OF PRESENT ILLNESS

Both the medical and psychological history on this patient is reviewed in great detail in the 2-8-93 report of a medical panel. This history included events prior to the date of injury and also events thereafter. The report was addressed to Timothy Allen, presiding Administrative Law Judge. While this report was rendered in great detail, the members of the panel were naturally not aware of any tests and consultations that have been done since their report of February 1993.

Her history and records from officials (incl. professionals) who were either at the scene of the accident or saw her immediately thereafter, indicate that she was indeed exposed to chlorine gas.

I also understand that she was exposed more than the teenagers who she thought had gone into the basement where Ms. Giles was looking for them.

During exposure to chlorine gas she developed a multitude of symptoms some of which were present immediately, some of which developed with a certain delay.

It should be noted that her arterial pO2 was low at 56 when she was

Page 2

Re: Glenda Giles

seen in the Emergency Room shortly after exposure.

She gradually developed multisystem complaints many of which have persisted. Most of these complaints were present at the time the panel reviewed her records and can be found in their summary.

HISTORY OF PAST ILLNESSES

This is outlined in great detail in the report by the panel dated 2-8-93.

REPORTS BY CONSULTANTS

Dr. Warden reports on 12-22-92 that he had known this patient since November 1983 and had watched her through many illnesses. He states on page 2 of his report that there is a causal relationship between exposure to chlorine gas and her present symptomatology. As of the date of his report he considered her as significantly disabled because of her exposure to chlorine gas. His letter of 6-13-94 further expands on his impression and also mentions abnormal pulmonary function found by Dr. Sadler (chest specialist) on 12-23-91.

Dr. Gummow saw Ms. Giles in neuropsychological evaluation in January and February 1992. She reports on 2-11-92 her diagnoses of organic mental disorder, multiple personality disorder (in remission), and panic disorder (rule out mild temporal lobe seizure disorder). In her letter of 1-8-92 she describes Ms. Giles as totally disabled.

Dr. Vine saw her in neurological consultation in April 1993 and wrote a number of follow-up notes thereafter. On 12-8-93 he writes that she may be having complex partial seizures. On 4-29-93 his impression was that she had suffered a potential hypoxic insult to the central nervous system as a result of exposure to noxious gas as well as a direct toxic effect of chlorine gas on the central nervous system.

Dr. Nelson saw her in neurological consultation on 7-14-93 and felt that there was possible chlorine gas exposure with low level oxygen producing a low level organic mental syndrome. He ordered a number of tests which will be discussed below.

Page 3

Re: Glenda Giles

A follow-up report dated 12-2-93 states that "the reasonable assumption would be that chlorine exposure caused her some anoxic episode which created these findings" (abnormal laboratory test results).

Neuro-ophthalmological evaluation by Dr. Reader showed dysmetria (=cerebellar sign) and mild optic neuropathy (visual field defect, delayed visual evoked responses, optic nerve pallor) all of which are compatible with toxic injury.

Dr. Alessi saw her in ENT consultation on 4-25-94 and diagnosed chronic rhinosinusitis and laryngitis, the latter being related at least in part to reflux. It is important to note that he found her nasal mucosa to be dry.

Dr. Wilcox had been her dentist even before chlorine exposure. He writes on 12-4-92 that there is obvious deterioration of the surfaces of a number of front teeth. This represented a marked change from that seen before exposure. His follow-up note of 6-14-94 confirms and extends his original impression.

Dr. Rahbar saw her in gastrointestinal consultation on 4-25-94 and writes in his report of 5-10-94 that in his opinion there is no direct correlation between the gastrointestinal findings and her history of chlorine exposure. An indirect effect however might have been psychological stresses.

Dr. Kaye saw her in renal consultation and found hematuria (etiology to be determined). He recommended a cystoscopy which has been done and was described as normal. So was an IVP.

LABORATORY TEST RESULTS

A PET brain scan was done on 8-24-93 and was abnormal. It should be noted that these abnormalities were bilateral but mostly left sided. This scan was done at the University of California, Irvine.

A SPECT brain scan was done on 5-2-94 and also abnormal. There was a bilateral but mostly left sided defect in perfusion. Neurotoxic substance exposure was mentioned in the differential diagnosis. This test was done at UCLA.

An EEG was abnormal in a bilateral distribution, again more abnormal on the left.

An MRI brain scan was done on 4-29-93 and reported as negative.

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Re: Glenda Giles

A current perception threshold study was abnormal on 4-26-94 and therefore suggestive of a sensory neuropathy.

Resting spirometry was normal and a methacholine challenge test was negative in March 1992.

Pulmonary function tests were again normal on 11-25-92.

Pulmonary function tests were also normal on 4-27-94 in my office. However, her FEF25-75% was 78% of predicted and increased by 23% after administration of a bronchodilator. This would suggest the presence of some small airway dysfunction.

Oximetry was within normal limits on 4-28-94.

Immune testing on 4-28-94 showed antibodies to both myelin and gangliosides.

Autoimmunity was also documented in an autoimmune panel (ANALyzer) which showed mild elevation in ANA titers and also elevation of the C3.

DIAGNOSTIC IMPRESSIONS AND DISCUSSION

In view of the above, the following diagnoses appear justified:

Toxic encephalopathy.

Optic neuropathy, secondary to toxic exposure.

Sensory neuropathy, secondary to toxic exposure.

Chronic rhinosinusitis, secondary to toxic exposure.

Dental deterioration, secondary to toxic exposure.

Small airway dysfunction, mild, secondary to toxic exposure.

Autoimmune disorder, secondary to toxic exposure.

Hematuria, possibly due to toxic exposure.

Abnormal liver function, possibly due to medication.

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Re: Glenda Giles

With regard to brain function, it should be noted that objective tests in totally different centers were all abnormal, more so on the left side. An asymmetrical distribution of damage is frequently found after toxic exposure. Therefore, there is overwhelming evidence of a toxic injury to the brain. This is supported by the neuropsychological evaluation discussed above.

Her multiple complaints can certainly be understood on the basis of her brain damage. It should be noted that impaired brain function can certainly also impair emotional stability. Furthermore, there are many reports in the literature of panic attacks during and immediately after exposure to chlorine gas. These panic attacks can continue for a while. In this patient's case they did occur and have since markedly diminished. Her neurological and neuropsychological complaints can therefore be explained on the basis of chlorine exposure and damage to brain function as a result.

Since peripheral nerve function was impaired in more than one location, one could not argue that it is due to a pressure effect. Also, there is no evidence of a metabolic origin for this peripheral neuropathy. Therefore, toxic exposure appears to be the only cause. Peripheral neuropathy can explain a number of her complaints with regard to tingling and other sensations.

In a nonsmoker, atrophy and/or dryness of the nasal mucosa is usually only caused by toxic irritant exposure. It is not due to allergies. Therefore, Dr. Alessi's findings are consistent with toxic exposure.

While reactive airway disease was ruled out by the negative methacholine test, an element of dysfunction never-the-less seems to be present as shown in the test done in my office. In a nonsmoker, this dysfunction is best explained as an asthmatic reaction. If asthma was not known to be present prior to exposure, her dysfunction would have to be due to toxic exposure.

The peer reviewed literature frequently refers to erosion of frontal teeth after chlorine exposure.

Autoimmunity is frequently seen after toxic exposure. In this case, we see antibodies directed against her nerves (myelin, ganglioside). This abnormality is consistent with the abnormalities found on testing of brain function and of peripheral nerve function. Elevated ANA titers and C3 complement are further evidence of an autoimmune process.

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Re: Glenda Giles

Her hematuria has remained unexplained. It certainly is not due to the usual causes (negative IVP, negative cystoscopy) and may therefore indeed be due to toxic exposure.

In summary, Ms. Giles has been thoroughly tested and has been found to have many objective abnormalities all of which could only be due to toxic exposure. I am not aware of any disease which would give her the problems she presents with.

The prognosis is guarded, particularly since no effective treatment is available for toxic encephalopathy and peripheral sensory neuropathy. These conditions may persist for years to come.

She will have to be re-evaluated at regular intervals particularly in view of the possibility that she will develop more evidence and also symptoms of autoimmune disease.

A handwritten signature in black ink, appearing to read 'G. Heuser', with a stylized, wavy line extending from the end.

Gunnar Heuser, M.D.
GH/1f

GUNNAR HEUSER, M.D., Ph.D., F.A.C.P.
DIPLO. MED (McGILL)
NeuroMed and NeuroTox Associates
A Medical Group

NEUROTOXICOLOGY

IMMUNOTOXICOLOGY

July 7, 1994

To Whom It May Concern:

Re: Glenda Giles

This is an addendum to my original summary of this case dated 6-21-94.

The question apparently has arisen why two young males who were also in the building at the time did not get sick while Mrs. Giles did.

I have the following comments:

I understand that Mrs. Giles spent a longer time in the building and that she was thus exposed for a longer time than the two young gentlemen.

An underexercised and distraught person will breathe harder and therefore be exposed to greater amounts of chemicals. This was apparently the case with Mrs. Giles.

Females are known to be more sensitive to chemicals than males, especially young healthy males.

Patients with allergies including asthma are often more sensitive to chemicals. This situation applies in this case.

Certain people are genetically more sensitive to chemicals than others. This may also apply in this case.

In summary, I believe that Mrs. Giles is far more likely to be injured by chemicals than young healthy males would be.



Gunnar Heuser, M.D.
GH/lf

STATE OF UTAH - LABOR COMMISSION
Division of Adjudication
160 East 300 South, 3rd Floor
P.O. Box 146615
Salt Lake City, UT 84114-6615
(801) 530-6800 1(800)530-5090 (Fax #(801) 530-6804)

AUTHORIZATION TO RELEASE MEDICAL RECORDS

I hereby authorize and request that you release all medical films and records, including drug, alcohol, and psychiatric in your possession for treatment you have provided to me at any time.

I authorize the Labor Commission to release this information to all parties, including medical and rehabilitation providers and government agencies, for the purposes of verifying, evaluating, and managing my industrial claim.

PHOTOCOPIES OF THIS AUTHORIZATION ARE AS VALID AS THE ORIGINAL.

Subscribed and sworn to before me this

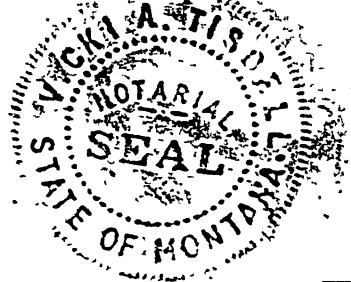
9th day of July, 2001

Vicki A. Liddell

NOTARY PUBLIC

Residing at: Eureka, Mt.

My commission expires:



Glenda W. Giles

Signature of Petitioner

Glenda W. Giles

Petitioner's Name (printed)

P.O. Box 354

Street Address

Eureka, MT 59917

City/State/Zip

(406) 253-8521

Telephone No.

17 June 1939

Date of Birth

N/A

Date of Industrial Injury

Oakridge Country Club

Employer on Date of Injury/Occupational Disease

THIS IS NOT A RELEASE OF CLAIM FOR DAMAGES

MAIL RECORDS TO

Blackburn & Stoll

STREET ADDRESS

77 West 200 South, Suite 400

CITY, STATE, ZIP

Salt Lake City, Utah 84101

PLEASE list on the back of this form the names and addresses of physicians who have treated you in the past 10 year(s). If you have any questions or concerns about this form, please call 530-6800.

FAX COVER SHEET

Date: 9 July 2001 **Fax #:** (801) 521-7965

To: Michael E. Dyer
BLACKBURN & STOLL

From: Glenda Giles, Petitioner

Subject: Petitioner's Answers to Interrogatories Filed by Respondents,
Adecco f/k/a TAD Technical Services Corporation and/or
Liberty Mutual, together with reports of Dr. Gunnar Heuser.

This is Page 1 of 17. If you do not receive all 17 Pages please call me at (406) 253-8521. The Original was mailed to you today postage prepaid by first class mail.

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