

2003

Glenda W. Giles v. Utah Labor Commission,  
Oakridge Country Club, Workers Compensation  
Fund, Wasatch Crest Mutual Insurance Company  
Employers' Reinsurance Fund, IRS, Adecco, TAD  
TEchnical Services Corporation, Libert Mutual  
Insurance Company, Constitution State Service  
Company, Transportation Insurance Company,  
Pacific Employers' Insurance Company : Reply  
Brief

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IN THE UTAH COURT OF APPEALS

GLEND A W. GILES,

Petitioner/Appellant,

vs.

UTAH LABOR COMMISSION, OAKRIDGE

COUNTRY CLUB and/or WORKERS

COMPENSATION FUND; WASATCH

CREST MUTUAL INSURANCE COMPANY;

EMPLOYERS' REINSURANCE FUND; IRS;

ADECCO, f/k/a TAD TECHNICAL

SERVICES CORPORATION, and/or

LIBERTY MUTUAL INSURANCE

COMPANY; CONSTITUTION STATE

SERVICE CO.; TRANSPORTATION

INSURANCE COMPANY; and, PACIFIC

EMPLOYERS' INSURANCE COMPANY,

Respondents/Appellees.

COURT OF APPEALS

Appellate Court No. 20030577-CA

Priority 7

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APPELLANT REQUESTS ORAL ARGUMENT AND ALSO REQUESTS  
THAT HER SON BE ALLOWED TO ARGUE, EITHER IN HER STEAD  
OR IN ADDITION TO HER, DUE TO HER MANY DISABILITIES.  
REPORTING IS REQUESTED BECAUSE THERE ARE NO DECISIVE  
APPELLATE RULINGS ON TWO ISSUES OF FIRST IMPRESSION.

UTAH APPELLATE COURTS

SEP 15 2004

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## ARGUMENT

Each of the Appellees who filed a Brief have asserted that summary judgment or dismissal was appropriate in this case. See: Workers Compensation Fund's (WCF) Brief at 1, 16, 18, 19, 27-28; TAD Technical Services Corporation's (TAD) Brief at 16, 22; ACE USA/Pacific Employers Ins. Co.'s (PACIFIC) Brief at 4, 9-11. As Giles argued in her Brief the Appellees' and the Commission's failure to follow proper procedure should have precluded the Commission from reaching any Motion for Summary Judgment or Motion to Dismiss. Giles' Brief at 26-35, 39-43, 44-49, 49a. The Appellees have neither disputed Giles' arguments, nor presented any justification for the Commission to grant dismissals or summary judgment without following proper procedure.

Giles raised four separate issues in her Brief, argued multiple points, and presented multiple facts, most of which were unassailed by the Appellees' in their Briefs. The Supreme Court has stated:

“The brief of the **appellee** must contain the contentions and reasons of the **appellee** with respect to the issues presented in the opposing (**appellant's**) brief.” Brown v. Glover, 16 P.3d 540, 545 (Utah 2000). (Emphasis added).

The arguments the Appellees failed to dispute are listed below under each issue, with citation to the points in Giles' Brief and the Record where those arguments were raised below.

- (1) The Issue of the Commission's disregard for the critical issue of jurisdiction.
  - (a) Giles' arguments that the Commission lacked jurisdiction to make new findings relative to the prior claim in the present claim. Giles' Brief at 1-2, 26-35, R. Vol. 4 at 1106.
  - (b) Giles' arguments that the Commission lacked jurisdiction to issue the Order Denying Reconsideration dated 16 July 2003. Giles' Brief at 2, 35-36, see also 8.
- (2) The issue that by statutory definition Giles' occupational disease claim could not be included in the injury by accident claim, and
  - (a) Giles' arguments relative thereto. Giles' Brief at 1-2, 3-4, 26-35, 36-37,

R. Vol. 2 at 479-480, 483, Vol. 3 at 614, 706, 779-780, 798-799, Vol. 4 at 933, 1010, 1104-1106.

- (3) The issue that Oakridge Country Club (Oakridge), WCF, Wasatch Crest Mutual Ins., and Employers' Reinsurance Fund (ERF) are contractually prohibited from asserting Giles settled her occupational disease claim when she executed the Settlement Agreement dated 8 March 1995, based on a subsequent Settlement Agreement and Release (SA/Release) executed by Giles and her employer, Oakridge.

(a) Giles' arguments that the defenses asserted by Oakridge and WCF represent a material breach of the SA/Release dated 18 August 1997. Giles' Brief at 2, 37-38; see also Pages 20-22.

(b) Giles' arguments that the Commission's practice in other cases is irrelevant, and is superceded by the Commission's previous practice in the present case. Giles' Brief at 2, 38-39, see also 25, R. Vol. 2 at 373.

(c) Giles' arguments concerning the loss of documents by the Commission. Giles' Brief at 38-39; see also 6, 7, 17, 20.

- (4) The issue of the Commission repeatedly showing favor to employers and their insurance carriers, indicating bias and prejudice toward applicants, and that the Commission has financial and other conflicts of interest.

(a) Giles' arguments that the Commission applied the wrong standard to Requests for Dismissals. Giles' Brief at 2, 39-42.

(b) Giles' arguments that Summary Judgment should not be rendered prior to the completion of discovery, which Giles was not permitted by Commission Rule to conduct. Giles' Brief at 42-43, R. Vol. 4 at 1039-1040, 1096-1097, 1152, 1155-1156, 1157-1159, 1162.

(c) Giles' arguments that the Commission's applicable Rule regarding discovery was not only biased and prejudicial on its face, but did not provide for injured workers to conduct discovery, depriving Giles of her constitutional right to conduct discovery in this case. Giles' Brief at 42-43, R. Vol. 4 at 1039-1040, 1096-1097, 1152, 1155-1156, 1157-1159, 1162.

(d) Giles' arguments that the Commission and the PALJ failed to refer this occupational disease claim to a medical panel as required by applicable statutes in all occupational disease cases. Giles' Brief at 44, R. Vol. 3 at 763-771, 774-776, 784-786, 898-900, 918, Vol. 4 at 1042, 1098-1101, 1160-1161, 1163, 1206.

(e) Giles' arguments that the Commission applied the wrong standard on review of the issue of an independent ALJ. Giles' Brief at 45, and Page 9 of Giles' Petition for Rehearing filed with this Court on 20 December 2001, attached hereto as Exhibit 'A' in the Addendum.<sup>1</sup>



(f) Giles' arguments that the Commission's decision regarding WCF was contrary to WCF's own Answer, its own defenses in this case, and the Commission's findings in the prior injury case. Giles' Brief at 45-47, see also 13-16, 34.

(g) Giles' arguments that the Commission failed in the present disease case and the prior injury case to consider any exposures on any other days than 7 September 1991, the day of the incident in the prior injury case. Giles' Brief at 45-47, see also 13-16, 18, 34-35.

(h) Giles' arguments that this Court, and the Commission by its actions, had ruled that the present disease claim and the prior injury claim are not the same claim. Giles' Brief at 47, see also 32.

(i) Giles' arguments that the Commission failed to enforce its own Rules and filing deadlines against Appellees. Giles' Brief at 6, 47-48, R. cites are too numerous to list.

(k) Giles' arguments that the Commission allowed new defenses by employers and insurers after they had filed their Answers in violation of the Commission's Rule governing answers, and the Commission basing its Orders on those new defenses. Giles' Brief at 47-48.

Despite WCF's statements to the contrary, Giles addressed financial conflicts of interest between the Commission and WCF, and also between the Commission and ERF. R. Vol. 1 at 220-221, 226-230, Vol. 2 at 333-334, 507-508, 533-535, 576-577, 596-597, Vol. 3 at 610-612, 653, 753-754, 778, 788, Vol. 4 at 1042, 1098-1101, 1160-1161, 1163, 1206.

Additionally, Giles presented the following facts in her Brief which were not disputed by Appellees in their Briefs. These facts are followed by citations to Giles' Brief and the Record where Giles raised these facts below.

- (1) The fact that Giles filed her Notice of Claim for her occupational disease with the Commission on 19 May 1995. Giles' Brief at 4, 16-17, 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.
- (2) The fact that Giles mailed a copy of her claim of an occupational disease to her former employers, including TAD and WCF by U.S. Postal Service certified mail with return receipt requested, which were received by each no later than 31 May 1995 as shown by the return receipts. Giles' Brief at 4-5, 16-17, 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.
- (3) The fact that Oakridge filed an Employer's First Report of Illness (Form 122) on 13 September 1995. Giles' Brief at 5, 19-20, 39, R. Vol. 3 at 741, 804-805, Vol. 4 at 958.
  - (4) The fact that TAD failed to file an Employer's First Report of Illness (Form 122). Giles' Brief at 17, R. Vol. 3 at 740-741, 885-902.
  - (5) The fact that TAD failed to provide Giles with the statutorily required statement of her rights and responsibilities relative to her occupational disease claim. Giles' Brief at 17, 20, R. Vol. 3 at 740-741, 885-902;
  - (6) The fact that none of the Appellees timely (within 21 days) accepted and began payment of benefits, or timely (within 21 days) denied Giles' occupational disease claim as required by Commission Rule R568-1-14. Giles' Brief at 17, R. Vol. 1 at 126, 137, 166, 173-174, 207-210, Vol. 3 at 741-744, 750-751, 797-798, 885, Vol. 4 at 1000, 1047, 1111.
  - (7) The fact that most of the Appellees failed to file a Notice to Submit for Decision on their Motion for Summary Judgment or Motions to Dismiss, and the issue of whether that failure was a violation of an applicable Rule. Giles' Brief at 44-45, R. Vol. 4 at 1156-1157, 1162, 1225.
  - (8) The fact that Forms 089 filed by Giles' employers and their insurance carriers did not meet the Commission's requirements for an 'Answer', yet the Commission accepted them as 'Answers'. Giles' Brief at 6, R. Vol. 2 at 437-439, 440-442, 443-445, Vol. 3 at 673-678, 750-751, 760, 784, Vol. 4 at 994-1007, 1221.
  - (9) The fact that Giles' filed requests for Entries of Default and Motions for Orders Striking the Defenses and Answers of Giles' employers and their insurance carriers, but the Commission did not rule on them. Giles' Brief at 7, 49a, R. Vol. 1 at 165-182, 184-185, Vol. 2 at 398-406, 477-489, Vol. 3 at 673-676, 679-683.
  - (10) Giles' general assertions of fraud, misrepresentation, and perjury. Giles' Brief at 49, R. Vol. 1 at 166-167, 174, 207, 220-221, 226-229, Vol. 2 at 334-335, Vol. 3 at 758, 778-780, Vol. 4 at 941-943, 1010, 1011-1014, 1044-1045, 1049, 1051, 1081-1086, 1088-1091, 1101-1102, 1104-1107, 1111, 1201-1203.

Accordingly, these facts should be accepted as true by this Court. The mere fact that the Commission failed to refer this case to a medical panel, which fact was undisputed in Appellees' Briefs, should have precluded summary judgment. U.C.A. § 35-1-77 (1)(b) and (c) (1991), the applicable statute in the present case, required:

“(b) 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.

“(c) A medical panel shall consist of one or more physicians specializing in the

treatment of the disease or condition involved in the claim.”

As support for this position, Giles refers this Court to a similar case, Johnson v. Moore Business Forms, 694 P.2d 597 (Utah 1984). In that case, Johnson brought a claim under the occupational disease disability law. The ALJ dismissed the claim **after a hearing**, and the Industrial Commission affirmed. The Supreme Court reversed and remanded, holding that the ALJ was required to call a medical panel upon claimant’s assertion of an occupational disease to decide the extent and causation of any disability. The following quotes, in pertinent part, from Johnson apply to the present case:

“The issue in this review from the Industrial Commission is whether an administrative law judge can dispose of a claim . . . under the Utah Occupational Disease Disability Law without calling a medical panel.” Johnson, at 597.

“The Act **requires** that when such a **claim is filed** with the Commission, ‘the commission **shall appoint an impartial medical panel . . .**’” (Italics emphasis Court’s) Johnson, at 598. (Bold and underlined emphasis added).

“Despite the clear requirement of the statute that upon the *mere filing* of such a claim a medical panel ‘**shall be convened**, the administrative law judge took it upon himself to hold a hearing, consider the evidence, including the supportive medical opinion of Mrs. Johnson’s doctor, and make findings of fact and conclusions of law that Mrs. Johnson’s (alleged occupational disease) did not result from any of the causes enumerated in (the applicable statute). He then dismissed her claim.” Johnson, at 598. (Emphasis added).

“Because that finding was made without first convening a medical panel as required by section 35-2-56(2) (in the present case the aforementioned § 35-1-77(b) (1991)) of the Act, we reverse.” Johnson, at 598. (Parenthetical comment added).

“The administrative law judge seemed to be operating under the unspoken premise that not every claim filed that alleges the statutory elements requires convening a medical panel; only those cases that pass some threshold test of meritoriousness established by the administrative law judge may go forward. That interpretation of the statute is contrary to the plain language of section § 35-2-56(2) and, furthermore, is flatly contrary to this Court’s holdings in *Schmidt v. Industrial Commission*, Utah, 617 P.2d 693, 695-96 (1980), and *Lipman v. Industrial Commission*, Utah, 592 P.2d 616, 618 (1979). In those cases, we ruled that similar language in the Workers’ Compensation Act required the convening of a medical panel in all cases. Utah Code Ann., 1953, § 35-1-77 (1974 ed.).

“In the present case, Mrs. Johnson’s claim met the required statutory minimum

to trigger the convening of a medical panel. . . . (Mrs. Johnson) . . . produced a letter from her doctor . . . , opining that the requirements of her job played a causative role in her (physical) problems. Once she made this showing, a medical panel had to be called to report on whether the . . . require(ments of her) job . . . resulted in her (claimed occupational disease).

“The administrative law judge invaded the province of the medical panel when, without input from a panel, he found (no medical causation).” Johnson, at 599.

The Court then refers to a Footnote which states:

“In his findings, the administrative law judge also stressed the fact that nothing unusual or accidental in nature had occurred on the day Mrs. Johnson first reported pain. **That fact is irrelevant. It is only when the injury** complained of does not fit under the Utah Occupational Disease Disability Law and **is dealt with under the Workers’ Compensation Act that the claimant must show an identifiable accident as a prerequisite to recovery.** See *Pintar v. Industrial Commission*, 14 Utah 2d 276, 277, 382 P.2d 414 (1963).” Johnson, at Footnote 2, 599. (Emphasis added).

In contrast to the Johnson case, there has not even been a hearing in the present claim, and yet the PALJ has taken it upon himself to decide that Giles has not shown medical causation regarding her exposures at TAD. Giles has presented evidence of the materials and substances she was exposed to on a daily basis, though not of any specific identifiable accidents. However, under Johnson, Giles does not have to show on what dates the exposures occurred, the quantity of fumes, the source of each fume, or the identity of all the toxic materials and substances to which she was exposed. Such is only required in an injury by accident claim. Giles has provided the Commission with a letter from Dr. Baker stating that he could find no non-industrial source for Giles’ occupational disease, and none of the parties have presented any evidence to contradict his statement. R. Vol. 1 at 110-112, 248-250, Vol. 2 at 367-369. Giles was first exposed at TAD to many of the same materials and substances she was exposed to at Oakridge. And, Giles’ has also provided medical evidence in a letter from Dr. Gunnar Heuser which verifies a causal connection between her porphyria

and her employment at TAD. R. Vol. 4 at 1042-1043, 1060-1063. Since the Commission failed to refer this claim to a medical panel, as required by statute and the Supreme Court's ruling in Johnson, the submission of this report on Reconsideration cannot be considered improper, nor can Giles' submission of an affidavit verifying what Giles had sworn in her Answers to Interrogatories a witness would testify to concerning Giles' exposures at TAD.

Giles' position on mandatory referral to a medical panel is further supported by a case cited by TAD. In Allen v. Industrial Com'n, 729 P.2d 15, 27 (Utah 1985), the Supreme Court stated, quoting from Schmidt:

“With the issue being one primarily of causation, the importance of the . . . medical panel becomes manifest. It is through the expertise of the medical panel that the Commission should be able to make the determination of whether the injury (or disease) sustained by a claimant is causally connected or contributed to by the claimant's employment.’ *Schmidt*, 617 P.2d at 697”.

Moreover, in Willardson v. Industrial Com'n of Utah, 904 P.2d 671, 675 (Utah 1995), the Supreme Court stated that it was improper to allow an “ALJ, who has no medical training and possesses no medical degrees, to determine medical causation as a threshold question and dismiss (medical evidence) . . .”. The Supreme Court went on to say that:

“We have heretofore recognized, independent of any rule of the Commission, that ‘where the evidence of a causal connection between the work-related event and the injury (or disease) is uncertain or highly technical, failure to refer the case to a medical panel may be an abuse of discretion.’ *Champion Home Builders v. Industrial Comm'n*, 703 P.2d 306, 308 (Utah 1985); *accord Hone v. J.F. Shea Co.*, 728 P.2d 1008, 1012 (Utah 1996). We find an abuse of discretion here.” (Emphasis added).

This determination was made in a claim under the Workers' Compensation Act where the Commission had discretion to appoint a medical panel. Clearly, when the Commission has no discretion regarding the appointment of a medical panel, failure to appoint a medical

panel is more than an abuse of discretion. It is a violation of applicable laws and reflects the Commission's partiality, unfairness, bias, prejudice and conflicts of interest.

For this reason alone the Commission's Orders in this case should be reversed. In their Briefs, none of the Appellees addressed Giles' arguments concerning mandatory referral to a medical panel. Accordingly, Appellees' arguments in their Briefs that Summary Judgment was appropriately granted by the Commission are irrelevant and in error. Giles therefore requests this Court to reverse the Orders of the Commission for the following failings: failing to follow proper procedure; failing to abide by the Commission's own rules; and, failing to re-establish jurisdiction prior to making new findings concerning the prior claim. However, should this Court disagree with Giles on these issues, Giles responds to Appellees' Briefs as follows.

#### **Reply to Appellees' Course of the Proceedings and Statements of Fact**

This case was summarily dismissed by the Commission. Therefore, this Court presumes "to the extent necessary to resolve the issues on appeal, that the facts are as stated by (Giles)." Footnote 2 in Wrolstad v. Industrial Com'n of Utah, 786 P.2d 243, 244 (Utah App. 1990). See also: Avis v. Board of Review of Indus. Com'n, 837 P.2d 584, 585 (Utah App. 1992), and Velarde v. Board of Review, 831 P.2d 123, 124 n. 2 (Utah App. 1992). Accordingly, Appellees must first show that Giles' facts are not accurate before this Court should disregard Giles' facts, and accept the facts of the Appellees. Giles' Brief at 4-25.

Additionally, included in Appellees' Course of the Proceedings and Statement of the Case are "*findings*" by the Commission that Giles challenged in her Brief on jurisdictional grounds. Giles' Brief at 31-32, 33-34; TAD's Brief at 11, 12; WCF's Brief at 11, 12, 13.

None of the Appellees disputed Giles' jurisdictional challenges. Accordingly, this Court should disregard Appellees' purported facts based on the Commission's "*findings*".

Likewise, none of the Appellees disputed Giles' jurisdictional challenges to the Commission's Order Denying Request for Reconsideration. Giles' Brief at 26-27, 35-36. This Court should disregard any reference made by Appellees to said Order or its contents.

### **1) Reply to WCF's Issues and Determinative Law**

Issue A of Oakridge's and/or WCF's (hereinafter collectively WCF) Brief does not accurately reflect the Commission's actions. The Commission did not determine that Utah Code Annotated (U.C.A.) § 35-2-110 (1991 version, Supp. 1993) applied to this case. The PALJ applied § 35-2-110 (1991), but the Commission overruled the PALJ in its Order Denying Motion for Review and applied U.C.A. § 34A-3-111, which was enacted in 1997 and has not been amended since. R. Vol. 3 at 731, Vol 4 at 1034. Even though the Commission did not have jurisdiction, the Commission again applied § 34A-3-111 (1997) when it issued its Order Denying Request for Reconsideration. R. Vol. 4 at 1233.

WCF admits Giles' disease claim against WCF and the ERF was summarily dismissed. Yet, WCF asks this Court to decide whether "summary judgment" was appropriate without addressing Giles' issues and arguments concerning the different standards for summary judgment and dismissals. Giles' Brief at Pages 41-42. WCF has not given this Court any reason to apply the summary judgment standard in light of Giles' arguments. So, this Court should apply the standard for dismissals to the Commission's grant of summary dismissal to WCF. The standard for dismissals is found in Mounteer v. Utah Power & Light Co., 773 P.2d 405, 406 (Utah App. 1989), which states:

**“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. (Citation omitted). 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. (Citation omitted).” (Emphasis added).**

See also: Giles’ Brief at Pages 41-42.

Issue ‘B’ of WCF’s Brief was not properly preserved below and should be disregarded by this Court. WCF has not cited to any document filed by it before the Commission wherein it raised or addressed defenses to any of Giles’ many allegations of unfairness, partiality, bias, prejudice, or conflicts of interest before the Commission. WCF has no right to raise new defenses to Giles’ allegations before this Court. If this Court does consider Issue ‘B’, it should be reviewed under the aforementioned dismissal standard because Giles’ request for an independent ALJ was summarily denied without a hearing.

## **2) Reply to Argument of WCF**

WCF begins its argument by citing U.C.A. § 34A-1-301 (2001). WCF’s Brief at 15. While this statute provides the Commission with the full power, jurisdiction, and authority to determine the facts and apply the law, the Commission has no authority to determine facts on summary judgment. R. Vol. 4 at 1033.

Contrary to WCF’s assertions, the 1991 statute and the current statute do not “contain the same substantive provisions”. Footnote 4 of WCF’s Brief at 12. § 35-2-110 (1991) ends with the following statement: “. . . no compensation under this chapter shall be payable.” WCF’s Brief at 2, 15. Conversely, § 34A-3-111 (1997) ends with: “. . . compensation under this chapter may not be payable”. The Legislature made a deliberate and substantive change



to this statute in 1997, and also changed how the Commission was to apply it. The Legislature eliminated the mandatory bar to benefits, and enacted a statute to be applied with discretion. “Shall” is mandatory and “may” is discretionary. See: Anabasis, Inc. v. Labor Com’n, 30 P.3d 1236, 1243 (Utah App. 2001).

Despite being apprized of this change by Giles, the Commission applied § 34A-3-111 (1997) as an “absolute” bar to Giles’ recovery. R. Vol. 4 at 1105-1106. The Legislature clearly intended a change, which the Commission has disregarded. The Commission granted WCF summary dismissal under a summary judgment standard which requires WCF to prove it “is entitled to a judgment as a matter of law”. See Utah Rules of Civil Procedure (URCP) 56(c). Since the statute the Commission applied is discretionary, WCF cannot be entitled to judgment as a matter of law based on § 34A-3-111 (1997). Giles addressed the discretionary nature of this statute in her Request for Reconsideration, which was the first time it could have been raised by Giles. R. Vol. 4 at 1105-1106. Clearly, Giles could not address the application of the statute before the Commission applied it.

Furthermore, WCF’s Brief relies on a statute which the Commission determined did not apply. WCF has not argued that the Commission erred in applying the 1997 statute, but has merely addressed application of the 1991 statute.

Moreover, both § 35-2-110 (1991) and § 34A-3-111 contain two requirements before compensation under the Occupational Disease Act can be disallowed. § 34A-3-111 requires:

“The compensation provided under this chapter is not in addition to compensation that may be payable under Chapter 2 (Workers’ Compensation Act), and in all cases when injury results by reason of an accident arising out of and in the course of employment and compensation is payable for the injury under Chapter 2, compensation under this chapter may not be payable.” (Emphasis added).

The Commission and WCF have only considered one prerequisite – the compensation Giles is receiving via the Settlement Agreement. But before the compensation can be considered there must be a determination that there is an injury, and the *injury* must result by reason of an accident arising out of and in the course of employment. In her Brief, Giles addressed the fact that the findings of the Commission in the prior injury case have never been legally altered or changed. Giles’ Brief at 26-35. WCF does not dispute this fact on appeal, but wants this Court to ignore the prior findings in favor of the Commission’s new version of what occurred in the prior injury claim.

In Alvin G. Rhodes Pump Sales v. Industrial Com’n, 681 P.2d 1244 (Utah 1984), the Supreme Court held, citing Pacheco v. Industrial Commission, 668 P.2d 553 (1983):

“Unlike an award, *a settlement involves no factual determination by the Commission . . .*” (Emphasis added.)

Based on this ruling, the Commission’s prior findings must stand as is. Therefore, Giles’ occupational disease could not have resulted by an accident on 7 September 1991.

WCF cites Wilburn v. Interstate Electric, 748 P.2d 582, 587-588 (Utah Ct. App. 1988) for the proposition that a prior settlement could bar a subsequent claim, even though the subsequent claim was not specifically noted in the prior settlement. The present case is distinguishable from Wilburn for the following reasons. First, in Wilburn the claim was for additional benefits under the permanent total disability provisions of the Act for the same back injury previously settled by agreement. Second, the Commission determined the Settlement Agreement in Wilburn was ambiguous, and the Commission correctly held a hearing and accepted parol evidence to determine the intent of the parties. After the hearing

the ALJ determined “as a matter of fact, that the agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability”. Wilburn, at 586 in [3]. This Court had doubts as to whether the decision was “the fairest or the most appropriate”. However, because the Commission made this determination as a matter of fact, after a hearing, the Court was obliged to give “maximum deference” to the facts determined by the Commission. Id.

Further, this Court held the following in Wilburn:

“Section 35-1-90 provides, in relevant part:

‘No agreement by an employee to waive his rights to compensation under this title shall be valid.’ Utah Code Ann. § 35-1-90 (1974).

“Under this provision, settlements are appropriate only when the compensable nature of the worker’s injury is disputed and the worker’s right to recover is doubtful. *See Brigham Young Univ. v. Industrial Comm’n*, 74 Utah 349, 279 P. 889 (1929). Conversely, when the compensability of a workers’ compensation claim is not disputed, an employee cannot waive his claim by agreement. *Barber Asphalt Corp. v. Industrial Comm’n*, 103 Utah 371, 135 P.2d 266 (1943).” Wilburn at 586.

This disease claim was not in dispute when the Settlement Agreement was executed on 8 March 1995, as asserted by WCF. The Commission had no jurisdiction over Giles’ disease claim on 8 March 1995 because Giles did not file her notice of claim invoking the Commission’s jurisdiction until 19 May 1995. Moreover, Giles is not asking for further benefits under the same injury claim which was settled. The Commission has treated Giles’ disease claim as a separate claim from the beginning, and has refused to include the record from the injury claim in the present disease claim Record. The Settlement Agreement in the prior injury claim does not refer to any other exposures on any days other than 7 September 1991. Neither does the Settlement Agreement address any type of occupational disease. The Settlement Agreement specifically states that it is subject to further Order of the

Commission, thereby precluding it from being “full and final”.

WCF tried to dispose of Giles’ present disease claim based on the Settlement Agreement, but on advise from WCF’s legal counsel, WCF acquiesced and accepted Giles’ occupational disease claim as a separate claim. Giles’ Brief at 19, R. Vol. 1 at 182. WCF had Oakridge file a Form 122 Employer’s First Report of Illness wherein Oakridge admitted it did not know of Giles’ occupational disease until 31 May 1995, almost three months after the Settlement Agreement was executed. Giles’ Brief at 19, R. Vol. 1 at 182, Vol. 3 at 741, 804-805, Vol. 4 at 958. Oakridge also admitted Giles’ disease was incurred on Oakridge’s premises. Oakridge later entered into the SA/Release with Giles, wherein Oakridge “acknowledged and agreed” that Giles had two separate claims before the Commission, and that Giles had not released her disease claim as of 17 August 1997. Giles’ Brief at 21-22, R. Vol. 4 at 1081-1086.

WCF further argues that the Settlement Agreement and Release (SA/Release) has no effect on the present disease claim based on Giles’ late filing of the SA/Release, admissibility and jurisdictional issues, and basic principles of contract law. WCF failed to present any of these arguments to the Commission. When Giles filed her Request for Reconsideration, there were multiple responses from other parties, but WCF was conspicuously silent. Giles asserts that WCF’s silence precludes it from raising any new arguments or defenses to the SA/Release for the first time on appeal.

WCF states that “the Court of Appeals declines to review issues and evidence not properly presented at the . . . administrative, (sic) level.” WCF’s Brief at 14. But, Giles submitted her evidence with a timely and properly filed Request for Reconsideration, which

is part of the Administrative Procedures Act, U.C.A. § 63-46b. Therefore, Giles did properly present her evidence at the administrative level. There has been no evidentiary hearing in this case. Giles was never allowed to present her case fully to the Commission. Moreover, WCF conducted no discovery in this case where Giles would have been required to divulge any evidence she might be presenting at a Hearing.

Furthermore, Oakridge had full knowledge of the terms of the original Settlement Agreement and of the SA/Release. Workers' compensation is Giles' exclusive remedy against her employers for any injuries or diseases she may have incurred. See: U.C.A. § 35-1-60. Giles' disease claim is against her employers, including Oakridge. The employers' insurers were joined solely to allow the insurer to represent and defend the employer. In Taslich v. Industrial Commission, 262 P. 281 at 286 (Utah 1927), the Supreme Court stated:

**“When application for compensation is made against the employer alone, his duties and obligations alone are involved, except as his carrier, if a legal entity and authorized so to do, may be permitted to appear and protect and defend them. But in doing so the carrier is restricted to the defenses and to the rights, duties, and obligations of the employer, and is not permitted to assert or maintain rights or defenses apart from those of the employer.”** (Emphasis added).

Giles raised this quote at the same time she filed the SA/Release, and WCF has still not responded to it. R. Vol. 4 at 1043. The Taslich decision means none of Oakridge's insurers can assert defenses that Oakridge is not permitted to present. What's more, WCF has not shown that it was substantially prejudiced by Giles' late filing of the SA/Release.

WCF argues the SA/Release may have been inadmissible. But, WCF did not raise any objection before the Commission challenging the admissibility of the SA/Release. The contemporaneous objection rule requires that an objection be made below before the

objection may be presented on appeal. Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984). So, this Court should disregard WCF's arguments concerning admissibility.

WCF's jurisdictional arguments are similarly irrelevant. WCF represents that the SA/Release has no effect on Giles' workers' compensation claims because the Federal and District Courts have no jurisdiction over workers' compensation claims. This argument assumes the Federal Court had a hand in the preparation or execution of the SA/Release. Besides the fact that this argument assumes facts not in evidence in the present case, the foregoing assumption is not accurate. The SA/Release was bargained for, prepared and executed without any input or approval from the Court. Oakridge's attorney and Giles' attorney hammered out the terms, Giles signed it, and then Oakridge's President signed it. The Court merely dismissed Giles' claim based on an agreed settlement between the parties.

Moreover, there was no need for the Commission to approve any terms of the SA/Release for them to be binding on Giles' workers' compensation claims. The only agreements between an employer and employee that are specifically prohibited by statute are those which involve an employee waiving their right to compensation. See: § 35-1-90. The SA/Release did not require Giles to waive any compensation.

Giles agrees that basic principles of contract law apply to the SA/Release, just not as asserted by WCF. In the State of Utah:

“The covenant of good faith and fair dealing inheres in most, if not all, (contracts) . . .” (Citations omitted). “Application of this covenant means that each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract.” Little Caesar v. Bell Canyon Shopping Ctr., 13 P.3d 600, 603 (Utah App. 2000).

Oakridge breached not only the SA/Release but also the covenant of good faith and fair

dealing, not once but multiple times. First, Oakridge allowed WCF and Wasatch Crest, as its agents, to present defenses that were contrary to the terms of the SA/Release. Now, Oakridge has allowed WCF to breach the contract again by making arguments attempting to escape the terms of the SA/Release before this Court.

### **3) Reply to TAD's Issues and Determinative Law**

The only issue presented by TAD Technical Services Corp. and/or Liberty Mutual Ins. Co. (hereinafter collectively TAD) is one that is not appropriately determined on Summary Judgment. TAD admits the issue of medical causation is an "issue of fact". See: Standard of Review in TAD's Brief on Pages 1, 13-14, 15, and 17-23. See also: R. Vol. 4 at 1131, wherein TAD stated: "Medical causation involves a factual finding." Issues of fact are not to be determined on Summary Judgment. Indeed, as stated by the Commission:

"Summary Judgment is never used to determine what the facts are, but only to determine if there are any issues of material fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the parties properly bring the motion before the court." (R. Vol. 4 at 1033).

See also: Hill v. Grand Central, Inc., 477 P.2d 150 (Utah 1970).

Giles addressed the inappropriateness of determining medical causation on Summary Judgment before the Commission on multiple occasions. See generally: R. Vol. 2 at 375-380, 490-495, 499-501, Vol. 3. at 736-788 with Exhibits at Vol. 1 at 1-95, Vol. 3 at 884-918, Vol. 4 at 1037-1120, and 1149-1169. See specifically: R. Vol. 2 at 378-379, 380, 492-493, 494-495, Vol. 3 at 763, 770, 775-776, 784-786, 787, 886, 887, 888-889, 898-900, 903-906, Vol. 4 at 1037, 1099, and 1154-1155.

Further, Rule 24(a)(6) of the Utah Rules of Appellate Procedure (URAP) states:

“(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.” (Emphasis added.)

URAP Rule 24(a)(11) requires in pertinent part:

“(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

- (1) Any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief; (Emphasis added.)

Any determinative statute presented in a brief must be reproduced verbatim either in the brief or in an addendum.

On Page 2 of its Brief, TAD cited U.C.A. “§ 35-2-14 (1990) . . . in relevant part”.

TAD ends its quote with four periods representing that the quote is incomplete. Then, on Page 3 of its Brief, TAD cited U.C.A. § 35-2-27 (1990), and quoted it in pertinent part as follows:

“For the purpose of this act, only the diseases enumerated in this section shall be deemed to be occupational diseases:

. . .

(28) Such other diseases . . .”

Obviously, there are at least 27 other numbered paragraphs TAD has not included in its quote. TAD did not reproduce verbatim in its Brief the statutes it asserts are determinative of this Appeal and failed to supply an addendum. TAD’s failure is a violation of URAP Rule 24. This Court should disregard TAD’s arguments based on the above statutes.



Nevertheless, the correct law to be applied in this case is the law as it existed when the cause of action arose in January 1995, U.C.A. Title 35-2, Utah Occupational Disease Act (1953), as last amended by the Legislature in 1994. TAD notes that Utah's appellate courts have not issued a definitive ruling on which law is to be applied in the context of occupational disease cases. So, according to TAD, this is an "Issue of First Impression".

#### **4) Reply to TAD's Argument**

TAD did not raise below that Giles needed to submit evidence "*with her Application for Hearing*" of medical causation concerning TAD for her porphyria. If TAD had raised this below, Giles would have responded that the ALJ, Commission, and TAD have ignored the fact that Giles was not required to submit *any medical evidence* with her Application for Hearing. Commission Rule R602-2-1-A in effect when Giles filed her Form 026 specifically states "applications shall include supporting medical documentation of the claim *where there is a dispute over medical issues*". None of the Appellees disputed Giles' occupational disease *until after* her application was filed, even though Giles had notified her prior employers and WCF almost six years previously of her claim for an occupational disease.

Furthermore, while the ALJ and Commission repeatedly stated Giles bore the burden of proving her right to benefits by a preponderance of the evidence, Giles repeatedly disputed before the Commission that such burden applied to summary judgment or dismissal proceedings. R. Vol. 3 at 776, 784-786, 888-889, 903-906, Vol. 4 at 1041, 1154-1155. Even the Commission admitted in its Order Denying Motion for Review on Page 4:

"The parties seeking summary dismissal of Mrs. Giles' claim have the burden of establishing their right to judgment, even when all facts and reasonable inferences are viewed in the light most favorable to (Giles). (Citations omitted). . . . [T]he Utah

Supreme Court observed:

‘Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the parties properly bring the motion before the court.’” R. Vol. 4 at 1033.

Clearly the burden of proving the right to summary judgment was on TAD as the moving party. In order to prevail against a Motion for Summary Judgment, Giles is not required to prove her case. In Hobbs v. Labor Com’n, 991 P.2d 590, 593 at Footnote 3 (Utah App. 1999), this Court stated in the terms of this case:

“(Giles’) burden is not to persuade the court, but (Giles) must put forth evidence that ‘raises a genuine issue of fact . . .’ (Citation omitted).

TAD had the burden to prove there were no material issues of fact in dispute. This Court stated in Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 47 (Utah App. 1988); in the terms applicable to this case:

“In order for (Giles) to successfully oppose (TAD’s) motion for summary judgment and send the issue to a fact-finder, it is not necessary for (her) to actually prove (her). . .theory. . . It is only necessary for (Giles) to show ‘facts’ which controvert the ‘facts’ stated in (TAD’s) affidavit. . . (Giles) (must) (demonstrate) unresolved factual questions which make the grant of summary judgment to (TAD) improper.” (Terms applicable to this case inserted).

Giles fully explained how she had presented facts concerning her exposures at TAD and how those exposures could have contributed to her development of porphyria. R. Vol. 2 at 375-380. Giles presented further information in her “Answers to Interrogatories” concerning exposures at TAD; identified witnesses she intended to call who would testify to the presence of chemicals, fumes, and other substances used in proximity to her workplace; and, identified multiple doctors and other health care providers who had records pertinent to this

claim. See: Answers to Interrogatories at Addendum C of Giles' principal Brief, specifically Answers 2A, 3, 5, 6, 11, 12, 13, 17, Full Answer 21, 23, 25, and Answers to Request for Production of Documents 1, 2. Giles also submitted that many of the substances Dr. Baker attributed to causing Giles' porphyria at Oakridge were substances she was first exposed to at TAD. R. Vol. 2 at 398-403. In support of all of the foregoing; See: R. Vol. 2 at 490-496, R. Vol. 3 at 739, 761-776, 784-787, 887-890, 898-900, 903-907, R. Vol. 4 at 1037-1038, 1041-1043, 1055-1058, 1060-1063, 1094, 1096-1097, 1098-1101, 1154-1161, 1162-1163.

In an occupational disease case, an employee may have had multiple exposures to the hazards of the disease with multiple employers over the course of a career. Applying the law as it existed when the employee was exposed to the hazards of the disease with multiple employers would require the application of multiple laws, possibly even conflicting laws, to multiple employers. This is clear from the present case alone.

In the present case, the last injurious exposure law in 1990, when Giles was employed by TAD, conflicts with the law in 1991 when Giles was employed by Oakridge. Under TAD's proposed solution, the Commission must apply one law to Oakridge and another law to TAD. Under the 1991 law, the Commission must apportion liability because Giles did not work for Oakridge for a full twelve months. But, under the 1990 law, no apportionment is allowed. Such conflicts could result in neither law being applied correctly.

Giles asserts this issue is one that has been addressed by Utah's appellate courts, although maybe not specifically applied to occupational disease cases. In Stouffer Food Corp. v. Utah Labor Com'n, 4 P.3d 1287 (Utah 2000), the Utah Supreme Court in Footnote 2 held: "[i]n workers' compensation cases, we determine *the rights and liabilities of the*

*parties* as of the date when the accident at issue occurred”. (Quoting from Moore v. American Coal Co., 737 P.2d 989, 990 (Utah 1987)). Pursuant to this ruling, the law to be applied is the law which governs “the rights and liabilities of the parties”. In an occupational disease case, that law is the law in effect when the cause of action arises.

For example, when Giles’ occupational disease of porphyria was first diagnosed in January 1995, U.C.A. § 35-2-103(2) (1991) provided:

“(2) Any employee who fails to notify his employer or the commission within 180 days after the cause of action arises is barred from any claim of benefits arising from the occupational disease. The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease *and knew*, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment.” (Emphasis added.)

This statute remains substantially unchanged to the present day, despite being renumbered and subdivided into two subsections. See U.C.A. § 34A-3-108(2)(a) and (b). While Giles became permanently and totally disabled in December 1991, Giles could not know that her disability was “from the occupational disease” of porphyria, or “that the occupational disease was caused by employment”, until the occupational disease was first diagnosed in January 1995. It is axiomatic, and this Court has previously ruled, that “(a) person cannot file an occupational disease claim for a disease that (s)he does not know (s)he has.” See: Wrolstad v. Industrial Com’n of Utah, 786 P.2d 243, 245 (Utah App. 1990).

All other statutes of limitation provided elsewhere in the Occupational Disease Act stem from the date the cause of action arises. See U.C.A. § 35-2-108 (1991), now § 34A-3-109. Likewise, benefits are to be computed based on the employee’s average weekly wage at the time the cause of action arises. See U.C.A. § 35-2-106 (1991), now codified in § 34A-

3-107. The controlling date for all aspects of an occupational disease claim, including “the rights and liabilities of the parties” under the Act, is the date the cause of action arises, and the law to be applied is the law that existed at that time. Any other application ignores the plain language of the statutes in the Occupational Disease Act as a whole. Furthermore, applying the law as it existed when the cause of action arises is the only way to avoid applying multiple, and often conflicting, statutes to the same occupational disease claim.

The 1991 statute went into effect on 29 April 1991, prior to Giles being hired by Oakridge, where she was last injuriously exposed to the hazards of the disease in 1991. (See: Footnote 1 of Luckau v. Board of Review, 840 P.2d 811 (Utah App. 1992)). This statute requires apportionment in this case because Giles was not employed for at least 12 consecutive months by Oakridge. Application of this law does not result in a retroactive application of the law to TAD, because this was the law in effect when Giles actually suffered her last injurious exposure at Oakridge, her last employer. TAD admits Giles’ last injurious exposure occurred at Oakridge, where Giles was employed from June 1991 to December 1991. R. Vol. 2 at 341. This statute states which employer is liable if certain conditions are met. Those conditions were not met in this case, so apportionment is required.

TAD did not file its Interrogatories as a part of the Record, and has quoted Interrogatory 21 and Giles’ Answer to it out of context. Without the complete text of the Interrogatory, this Court can only guess at what information TAD requested Giles to furnish.

#### **5) Reply to PACIFIC’s Issue**

The sole issue presented by ACE-USA/Pacific Employers’ Ins. Co. (hereinafter PACIFIC) is misleading. Actually, the issue is whether an insurer when the cause of action

arises in an occupational disease claim can be held liable for benefits. Giles addressed this issue before the Commission at the following points in the Record: R. Vol. 2 at 375, 377, 379, 482-483, 490-492, 494, 516-518, 639, 674-675, 705, 747, 760, 783-784, 796-797, 999-1000, 1221-1223, 1049-1050. As argued before the Commission and not disputed by PACIFIC, the Commission has no jurisdiction over coverage disputes. R. Vol. 2 at 502, 518, 607, 639-640, Vol. 4 at 1049-1050, 1222-1223. The Commission's jurisdiction is limited to conflicts between employers and employees, not insurers. Insurers are bound by statutes outside the Commission's jurisdiction to comply with the Commission's Orders respecting the liability of employers they insure. Coverage disputes fall within the jurisdiction of district court. Should this Court decide to consider this issue, the proper standard is the standard for dismissals because Giles' claim against PACIFIC was summarily dismissed.

#### **6) Reply to PACIFIC's Argument**

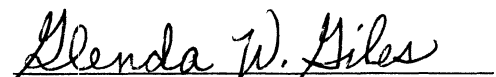
Giles asserts PACIFIC has no right to move for dismissal because PACIFIC did not file a timely Answer in this case. In its Brief, PACIFIC does not even pretend it did. Regardless, PACIFIC's argument is that coverage only attaches during the employment period. While this may hold true for injury claims, this is an occupational disease claim. As already addressed in this Reply Brief on Pages 19, 22, and 23, occupational disease claims are based on when the cause of action arises. PACIFIC has admitted it was the carrier for TAD at the time the cause of action arose in this case in January 1995. Contrary to PACIFIC's argument, the liability of a carrier when the cause of action arises is not clear from the statutes. Apparently, this is also an issue of first impression in Utah. The Commission's apportionment jurisdiction does not extend beyond employers. Therefore, the

Commission had no jurisdiction to determine PACIFIC's liability in this case. PACIFIC's liability is between PACIFIC, TAD, and TAD's other insurers. The Commission is not the appropriate forum to resolve disputes between employers and their various insurers. Giles therefore asserts it was improper for the Commission to dismiss PACIFIC. Pursuant to Taslich, PACIFIC was only joined to this suit so it could appear, protect and defend TAD, anyway.

### **CONCLUSION**

In conclusion, dismissal of Giles' occupational disease claim was inappropriate because the Commission and the Appellees failed to follow proper procedure. The Commission violated its own statutes, its own rules, and abused its discretion in dismissing Giles' claim. In addition, none of the Appellees have established they are entitled to a judgment as a matter of law. Giles hereby requests this Court to grant the relief previously requested by Giles in her principal Brief.

Respectfully submitted this 15<sup>th</sup> day of September 2004.



Glenda W. Giles, Appellant Pro Se

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

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the attached Reply Brief was mailed, first class with sufficient postage prepaid on 15 September 2004 to the following at the addresses shown:

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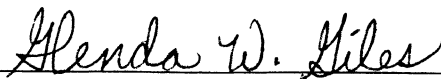
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Glenda W. Giles, Appellant Pro Se



# **ADDENDUM**

# **Exhibit ‘A’**

**IN THE UTAH COURT OF APPEALS**

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GLEENDA W. GILES,	)	
	)	COURT OF APPEALS
Applicant/Appellant,	)	
	)	
v.	)	Case No. 20010565-CA
	)	
OAKRIDGE COUNTRY CLUB and WORKERS	)	
COMPENSATION FUND OF UTAH,	)	Oral Argument
	)	Category Not Applicable
Defendants/Appellees.	)	

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**APPELLANT'S PETITION FOR REHEARING**

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Petition For Rehearing of Appellate Memorandum Decision

Appeal from Utah Labor Commission

Original Letter Order Issued By

Richard M. La Jeunesse, Presiding Administrative Law Judge

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**IN THE UTAH COURT OF APPEALS**

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GLENDA W. GILES,	)	
	)	
Petitioner/Appellant,	)	COURT OF APPEALS
	)	
v.	)	
	)	
OAKRIDGE COUNTRY CLUB and/or WORKERS	)	Case No. 20010565-CA
COMPENSATION FUND; WASATCH CREST	)	
MUTUAL INSURANCE; EMPLOYERS' REIN-	)	
SURANCE FUND; IRS; ADECCO, f/k/a TAD	)	
TECHNICAL SERVICES CORPORATION, and/or	)	Oral Argument
LIBERTY MUTUAL INSURANCE COMPANY;	)	Category Not Applicable
TRANSPORTATION INSURANCE COMPANY;	)	
PACIFIC EMPLOYERS' INSURANCE COMPANY,	)	
and UTAH LABOR COMMISSION,	)	
	)	
Respondents/Appellees.	)	

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**APPELLANT'S PETITION FOR REHEARING**

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**STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction to consider a Petition for Rehearing pursuant to Utah Rules of Appellate Procedure, Rule 35 and Utah Code Annotated 78-2a-3(1).

**STATEMENT OF ISSUES ON PETITION FOR REHEARING**

1. Did the Court of Appeals correctly apply the Utah Supreme Court opinion in Barker v. Public Serv. Comm'n, 970 P.2d 702 (Utah 1998) regarding final agency action? In reviewing whether the law has been misapplied or interpreted erroneously under 63-46b-16(4)(d), the standard of review is correction of error, Savage Indus., Inc. v. Utah



State Tax Comm'n, 814 P.2d 664 (Utah 1991).

2. In its Memorandum decision, this Court did not address Giles' argument that jurisdiction is properly accepted where there would not be an adequate remedy after an award has been issued. Because this issue can be applied whether or not final agency action has occurred, should this Court revisit this issue? See Burton v. Industrial Comm'n of Arizona, 801 P.2d 473 (Ariz. App. 1990). In reviewing a case where all issues have not been decided under 63-46b-16(4)(c), the standard of review is correction of error, Bennett v. Industrial Comm'n of Utah, 726 P.2d 427.

## **DETERMINATIVE STATUTES AND RULES**

Appellant submits the following statutes may be determinative of the central issues in this proceedings:

**Section 63-46b-16(1), U.C.A. (1997):**

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

**Section 63-46b-13(1)(a), U.C.A. (1997):**

(1)(a) Within twenty days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

## **STATEMENT OF THE CASE**

### **(a) Nature of the Case**

This case involves a total denial by the Utah Labor Commission of Petitioner Glenda Giles' request for the appointment of an administrative law judge who is not

employed by the Commission to hear her occupational disease case.

**(b) Course of Proceedings<sup>1</sup>**

1. Together with her Application for Hearing to the Commission, Giles attached a letter dated 20 December 2000 in which she formally requested her case be assigned to an ALJ with absolutely no ties to the Commission (see Addendum). In a letter dated 22 February 2001 addressed to Giles, Presiding Administrative Law Judge Richard M. La Jeunesse stated: “The Labor Commission is the only agency that has jurisdiction to hear workers’ compensation cases. Therefore, it is not possible to even entertain your request that a judge outside the Labor Commission hear your case.” (see Addendum).

2. In a letter dated 8 March 2001, Giles requested the Commission review PLJ La Jeunesse’s Order. On 30 April 2001, the Commission issued an Order denying Giles’ Motion for Review, and exercised jurisdiction pursuant to Utah Code Ann. § 63-46b-12 (see Addendum).

3. In a letter dated 17 May 2001, Giles requested reconsideration of the Commission’s Order Denying Motion for Review. On 21 May 2001, the Commission issued an Order Extending Time for Reconsideration, under Utah Code Ann. § 63-46b-1(9), and invoked jurisdiction pursuant to Utah Code Ann. § 63-46b-13. The Commission extended time to issue its decision a total of two days; and, also granted two select parties the

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<sup>1</sup> Giles’ does not have benefit of access to the record for appropriate citations and does not wish to overburden the Court with repetitive duplicate copies of Motions and letters. She is only including documents she considers essential in the Addendum.

preferential right to respond to the Request for Reconsideration (see Addendum). On 25 May 2001, Floyd W. Holm on behalf of Oakridge Country Club and Workers Compensation Fund filed a Response to the Request for Reconsideration (see Addendum).

4. In a letter dated 29 May 2001, Giles filed an Objection to the Order Extending Time for Reconsideration; and, a Motion to Strike any responses filed. In a letter dated 1 June 2001, Giles filed a Response to Holm's Response to the Request for Reconsideration. On 11 June 2001, the Commission issued an Order Denying Reconsideration (see Addendum).

5. In a letter dated 1 July 2001 addressed to PLJ La Jeunesse, Giles notified the Commission of her intent to pursue judicial review of the Order Denying Reconsideration, and requested a stay of that Order and any further action in Giles' case pending judicial review. To date, the Commission has failed to even acknowledge that request. (see Addendum). On 11 July 2001, Giles filed a Petition for Review with this Court; and on 6 December 2001, this Court issued a Memorandum Decision dismissing Giles' Petition for Review. That Memorandum Decision forms the basis for this Petition for Rehearing (see Addendum).

#### **(c) Disposition at Agency**

PLJ La Jeunesse denied Giles' request for an ALJ with absolutely no ties to the Labor Commission; and, the Commission denied her Motion for Review, and her Request for Reconsideration.

## **RELEVANT FACTS**

The facts relevant to this Petition for Rehearing are few.

1. The Labor Commission exercised jurisdiction to review PLJ La Jeunesse's Order under Utah Code Ann. § 63-46b-12.
2. The Labor Commission exercised jurisdiction under Utah Code Ann. § 63-46b-13 in its Order Extending Time for Reconsideration, in addition to authority under Utah Code Ann. § 63-46b-1(9).
3. The Labor Commission exercised jurisdiction under Utah Code Ann. § 63-46b-13 in its Order Denying Reconsideration.

## **SUMMARY OF THE ARGUMENT**

1. In its Memorandum Decision, the Court of Appeals misapplied the Utah Supreme Court's ruling in Barker. This misapplication was the result of the Supreme Court's paraphrased definitions, and not the fault of this Court. The complete definition requires a deference to the intent of the agency regarding final agency action, which this Court could not divine from the Supreme Court's paraphrased definition. Being unaware of that fact, this Court imposed its own conclusions over those of the Commission on the finality of the Commission's Orders, giving no deference to the Commission's intentions. This Court assumed it was to consider whether the agency action was preliminary, preparatory, procedural, or intermediate, and therefore found final agency action did not occur. Accordingly, this Court did not apply any other portions of Barker. This Court should apply all applicable rulings in Barker to the present case. Doing so would confirm final

agency action did occur.

2. The Court of Appeals did not address Giles' argument that jurisdiction is properly accepted where there would not be an adequate remedy after an award has been issued. This argument applies whether or not final agency action has occurred, and should therefore have been addressed in this Court's Memorandum Decision. Clearly, there would be no adequate remedy for Giles to receive a fair and impartial hearing before an ALJ free of bias, prejudice, and conflicts of interest after she has had a hearing before a Commission ALJ. A hearing before an ALJ with the preceding qualifications is a fundamental and constitutional right which the Commission has ruled Giles is entitled to receive, and it is also an integral component of due process.

## **ARGUMENT**

### **POINT I**

#### **PROPER APPLICATION OF BARKER V. UTAH PUBLIC SERVICE COM'N. WOULD REQUIRE A FINDING THAT THE ORDER DENYING RECONSIDERATION CONSTITUTED FINAL AGENCY ACTION.**

In Barker, on Page 705 under the heading "II. Jurisdiction", in Paragraph 3, the Utah Supreme Court made the following observation:

"The Utah Administrative Procedures Act does not specifically define 'final agency action.' However, it does say that an agency will contemplate reconsideration of an order only 'if the order would otherwise constitute final agency action'. Utah Code Ann. § 63-46b-13. We can thus assume the Commission considered the ... order to be a final agency action by virtue of its failure to indicate that the action was not final at the time of the rehearing request. The Commission merely denied the request for rehearing by nonaction instead of notifying petitioners that they would have to apply for rehearing at a later date."

In the present case, Giles not only petitioned the Commission for reconsideration, but the Commission exercised jurisdiction under § 63-46b-13 in its Order Extending Time for Reconsideration, and in its Order Denying Reconsideration. If the Supreme Court in Barker assumes an order to be final agency action by virtue of the Commission's failure to indicate the action was not final at the time of the rehearing request, then when the Commission exercises jurisdiction on reconsideration and issues two orders so declaring, there can be no doubt the Commission intended the Order Denying Motion for Review to otherwise constitute final agency action, and the Order Denying Reconsideration was final agency action on this issue.

Furthermore, the two select parties afforded a preferential opportunity to respond to Giles' Request for Reconsideration were told, in the Order Extending Time, the Commission was exercising jurisdiction under § 63-46b-13. Neither of these select parties objected to the reconsideration on the grounds the Order Denying Motion for Review would not otherwise constitute final agency action. Therefore, it is clear the Commission and the primary parties viewed the Order Denying Motion for Review as otherwise constituting final agency action, and considered the Order Denying Reconsideration final agency action until Giles filed her Petition for Review with this Court. In Barker, the Commission argued that its Order did not represent final agency action. In the present case, the Commission has made no such argument. If the Supreme Court can find in Barker that the Commission's Order was final agency action despite the Commission's argument it was not, then Giles' argument carries even more weight because in the

present case the Commission has made no such argument that its Orders did not constitute final agency action.

In the Addendum, Giles has attached two recent Labor Commission decisions which clearly exemplify the Commission's understanding of reviewable decisions. In a Decision dated 19 April 2001, in the case entitled J.L.C. v. Emery Mining Corp., Mr. C. asked the Commission to review an ALJ's Interim Order Denying Motion to Dismiss. The Commission dismissed the motion for review without prejudice, allowing the parties to file motions for review including all issues, including any issues raised in the current motion for review, if such issues were not resolved by the ALJ's final order.

In a Decision dated 27 August 2001, in the case entitled D.L.B., widow of G.E.B., v. W. R. White Co., the Commission noted no evidentiary hearing had been conducted in the matter. For that reason, the Commission viewed any agency review proceeding as premature, and remanded the matter to an ALJ for further proceedings. Clearly, the Commission distinguished Giles' case as being worthy of administrative review and reconsideration, and intended its Orders to constitute final agency action. Obviously the Commission understands when a matter is brought before it prematurely, but clearly it did not believe Giles' Motions were premature. As in Barker, no one questioned the finality of the Commission's Orders until this appeal was filed with the Court of Appeals.

The Utah Supreme Court next stated in Barker at [2]:

“Because of the nature of agency proceedings, final actions often take place seriatim, disposing completely of discrete issues in one order while leaving other issues for later orders. Such orders will be final as to any

issue fully decided by that order and appealable any time from the date of that order to the last day to appeal the last final agency action in the case.”

In the present case, the Commission has fully decided the discrete issue of whether to appoint an independent ALJ to preside over Giles’ occupational disease claim. The Commission has completed its decision-making process on this discrete issue.

The Utah Supreme Court in Barker at [3], then quoted this U.S. Supreme Court statement regarding the Administrative Orders Review Act, 28 U.S.C. § 2342 (1988):

“(T)he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.”

In the present case, the administrative decision-making process is complete on the issue being appealed to this Court. Judicial review of this issue will not disrupt the orderly process of adjudication because the adjudicative hearing on the occupational disease claim has yet to begin. Clearly, the Commission determined in its Order Denying Motion for Review that Giles has a right to a fair and impartial hearing before an ALJ free of bias, prejudice, and conflicts of interest; but, the Commission concluded Giles’ evidence of bias, prejudice, and conflicts of interest was not convincing.<sup>2</sup> The legal consequence that flows from the agency action is Giles must have her occupational disease claim

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<sup>2</sup> “The burden of proof in workmens’ compensation cases is by a preponderance of the evidence.” Lipman v. Industrial Comm’n, 592 P.2d 616 (Utah 1979). Clearly, the Commission engaged in an unlawful decision-making process by expecting Giles’ Motion for Reconsideration to ‘convince’ the Commission.



adjudicated by a Commission ALJ, which Giles asserts deprives her of the very right the Commission determined Giles is entitled to have.

After the preceding quote, the Utah Supreme Court in Barker cited two U.S. Supreme Court cases, Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 S.Ct. 203, 209, 27 L.Ed.2d 203 (1970) and Franklin v. Massachusetts, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773-74, 120 L.Ed.2d 636 (1992). In Franklin, the U.S. Supreme Court stated:

“An agency action is not final, for purposes of judicial review under 5 U.S.C.S. § 704, if such action is only tentative or the ruling of a subordinate official; in determining finality, the core question is whether (1) the agency has completed its decision-making process, and (2) the result of such process will directly affect the parties.”

In the present case, the action complained of is not tentative nor is it merely the ruling of a subordinate official. The Commission issued three Orders signed by the Labor Commissioner himself. The Commission was given every opportunity provided for under administrative review, and it completed its decision-making process on this issue. Its decision does directly affect the parties, and does therefore qualify as final agency action.

Only at this point in Barker did the Utah Supreme Court make this statement:

“Similarly, the Model State Administrative Procedure Act defines final agency action negatively as ‘the whole or a part’ of any action which is not ‘preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.’ 1981 Model State Admin. P. Act 5-102(b)(2).”

The Supreme Court did not, as this Court suggested, distinguish orders that were preliminary, preparatory, procedural, or intermediate, but credited the 1981 Model State

Administrative Procedure Act with these negative definitions. Unfortunately, these definitions were paraphrased by the Supreme Court, which changed the entire meaning of the definitions. This is unfortunate for two reasons. First, because the Supreme Court was attempting to define final agency action more explicitly, and apparently created additional confusion instead. Secondly, the whole purpose of the National Conference of Commissioners on Uniform State Laws, who prepared the 1981 Model State Administrative Procedure Act, is to attempt to bring uniformity to state administrative procedures throughout the nation. Unless the complete definitions are applied, there can be no uniformity. In reality, the 1981 Model State Administrative Procedure Act in § 5-102(b)(see Addendum) defines final and non-final agency action as follows:

“(b) For purposes of this section and Section 5-103:

(1) “Final agency action” means the whole or a part of any agency action other than non-final agency action;

(2) “Non-final agency action” means the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that ***the agency intends or is reasonably believed to intend*** to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.” (Emphasis added.)

This Court only applied the paraphrased negative definitions of final agency action in Barker to the present case. The above more explicit definitions clearly require an assessment of ***the agency’s intent*** when determining finality. All indications in the present case are that the Commission intended their Orders to be final agency action. Contrast this with the circumstances in Barker, and the present case provides an even stronger argument that final agency action did occur. The Commission, by considering

Giles' Motions for Review and for Reconsideration, intended its Orders on review and reconsideration to be final agency action on the issue of appointment of an independent ALJ. Furthermore, if the Commission viewed its orders as non-final agency action, it should have been the first to file a Motion to Dismiss Giles' appeal with this Court based on the lack of final agency action. To date, the Commission has made no such Motion, and this non-action is further evidence it intended the Order Denying Reconsideration to be final agency action. When the Commission's intentions are considered under the full definitions of the 1981 Model State Administrative Procedure Act, a finding that final agency action did occur is clearly required. In its Memorandum Decision, this Court clearly considered its own conclusions instead of the intent of the Commission when it decided the Commission's action was "preliminary, preparatory, and procedural", and therefore not final.

In Barker, the Utah Supreme Court stated: "Thus quite clearly, at the time of appeal, all parties understood the order ... to constitute an appealable final agency action. We see no reason to regard it differently." Since, in the present case, the Commission and the primary parties considered the Commission's Orders final until the appeal was filed with this Court, Giles can see no reason for this Court to regard it differently.

## **POINT II**

**FINAL AGENCY ACTION NEED NOT OCCUR FOR THIS COURT TO ACCEPT JURISDICTION IN THIS CASE IF POSTPONEMENT OF JUDICIAL REVIEW WOULD RESULT IN AN INADEQUATE REMEDY OR IRREPARABLE HARM DISPROPORTIONATE TO THE PUBLIC BENEFIT DERIVED FROM POSTPONEMENT.**

Giles argued in her Response to Holm's Motion to Dismiss Petition for Review that jurisdiction is properly accepted when there would not be an adequate remedy after an award has been issued. Giles cited Burton wherein the Arizona Court of Appeals held:

“Court of Appeals properly accepted jurisdiction over petitioner's appeal from administrative law judge's order prohibiting him from having tape recorder with him during medical examination, which was entered prior to Industrial Commission's award, since petitioner would not have an adequate remedy after an award had been issued.”

Additionally, the 1981 Model State Administrative Procedure Act states in § 5-103 under the heading “Non-final Agency Action Reviewable”:

“A person is entitled to judicial review of non-final agency action only if:  
(1) it appears likely that the person will qualify under Section 5-102 for judicial review of the related final agency action, and  
(2) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.”

Giles pointed out in her Response to Holm's Motion to Dismiss Petition for Review that a fair and impartial hearing before an ALJ free of bias, prejudice, and/or conflicts of interest is infinitely more important than allowing a tape recorder during a medical review. Giles further argues that raising this issue after a hearing has been conducted by a Commission ALJ would cause irreparable harm, and does not provide an adequate remedy. After a Commission ALJ has conducted a hearing, all other parties will object to Giles' request for the appointment of an independent ALJ on the grounds of *res judicata*. Clearly, the only hope Giles has of obtaining her right to a fair and impartial hearing before an ALJ free of bias, prejudice, and/or conflicts of interest, given the facts

revealed by her evidence filed with the Commission, is to have an independent ALJ appointed before a hearing is held on her occupational disease claim. See State Tax Com'n v. Iverson, 782 P.2d 519 at [2, 3], (Utah 1989). As previously stated by Giles and the Commission, her right to a fair and impartial hearing before an ALJ free of bias, prejudice and conflicts of interest is provided for constitutionally, statutorily, and by Commission practice. This basic fundamental right is also an integral part of due process, and cannot be dismissed lightly. See Anderson v. Industrial Comm'n of Utah, 696 P.2d 1219, 1220 (Utah 1985).

### CONCLUSION

The actions of the Commission do qualify as final agency action under Barker, and accordingly this Court should accept jurisdiction. Even in the unlikely event this Court determines final agency action has not occurred, this Court should still accept jurisdiction because Giles has no adequate remedy before the Commission, and the harm to Giles would be irreparable and disproportionate to the public benefit derived from postponement of judicial review.

I hereby certify that this Petition for Review is presented in good faith, and not for delay.

Respectfully submitted this 20<sup>th</sup> day of December, 2001.

---

Glenda W. Giles  
Petitioner Pro Se

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

CERTIFICATE OF MAILING

I, Glenda W. Giles, certify that on 20 December 2001, I caused to be mailed two true and correct copies of the attached APPELLANT'S PETITION FOR REHEARING, postage prepaid, to each of the following by mailing it to them by first class mail with sufficient postage prepaid to the following address:

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---

Glenda W. Giles  
Petitioner / Appellant

CERTIFICATE OF SERVICE

I, Glenda W. Giles, certify that on 20 December 2001, I caused to be mailed a true copy of the attached APPELLANT'S PETITION FOR REHEARING to each of the following by mailing it to them at the following addresses by first class mail with sufficient postage prepaid:

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Glenda W. Giles  
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