

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, Liberty Mutual  
Insurance Company, Constitution State Service  
Company, Transportation Insurance Company,  
Pacific Employers' Insurance Company : Brief of  
Appellant

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Alan Hennebold; office of general counsel; attorneys for defendants.

Glenda W. Giles; pro se.

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IN THE UTAH COURT OF APPEALS

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GLEND A W. GILES,	)	
	)	
	)	
Petitioner/Appellant,	)	COURT OF APPEALS
	)	
vs.	)	
	)	
UTAH LABOR COMMISSION, OAKRIDGE	)	
COUNTRY CLUB and/or WORKERS	)	Appellate Court No 20030577-CA
COMPENSATION FUND; WASATCH	)	
CREST MUTUAL INSURANCE COMPANY;	)	
EMPLOYERS' REINSURANCE FUND; IRS;	)	
ADECCO, f/k/a TAD TECHNICAL	)	
SERVICES CORPORATION, and/or	)	Category 7
LIBERTY MUTUAL INSURANCE	)	
COMPANY; CONSTITUTION STATE	)	
SERVICE CO ; TRANSPORTATION	)	
INSURANCE COMPANY; and, PACIFIC	)	
EMPLOYERS' INSURANCE COMPANY,	)	
	)	
Respondents/Appellees.	)	
	)	

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SUPPLEMENT TO APPELLANT'S BRIEF

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Petition for Review of Final Order of the Utah Labor Commission

Presiding Administrative Law Judge Richard M. La Jeunesse

---

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IN THE UTAH COURT OF APPEALS

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

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SUPPLEMENT TO THE BRIEF OF THE APPELLANT

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REASONS FOR SUPPLEMENTATION  
AND PORTIONS OF BRIEF SUPPLEMENTED

In reviewing her Brief after copying, binding, and mailing, Giles noted there were a number of minor flaws in her Brief. The first flaw noted was that in the copying and binding process Page 25 failed to copy. This was a mechanical error which Giles could not control. Accordingly, Giles is herewith providing Page 25. Giles also noted that in the process of finalizing her Brief from multiple drafts, her Summary of the Argument was inadvertently not transferred into the Brief's final form. Since the Summary of the Argument was supposed to be on Page 26, Giles is including a page designated "25a" containing the omitted Summary of the Argument. Further, Giles' noted her Conclusion failed to contain the relief she had requested in other portions of the Brief, and is including a page designated "49a", which contains a brief summary of the relief sought.

Giles also wishes to apologize to this Court and the Respondent parties for an inadvertent duplication of argument occurring on Pages 34 to 35 and 45 to 47. Accordingly,

Giles is authorizing this Court and the Respondent parties to mark out, starting on the first full paragraph of Page 34 that begins, “It is particularly abhorrent”, to and including the close of the first partial paragraph on Page 35 ending, “that did occur on that date. (R. Vol. 1 at 47)”. All of this information is contained virtually verbatim on Pages 45 to 47. Giles apologizes for any inconvenience this may cause this Court or Respondent parties. This is not an addition to the Argument, but rather is a deletion from the Argument.

Giles is also taking this opportunity to provide this Court with updated Tables of Contents and Authorities. The Table of Authorities did not include the Statutes or Rules or the pages they were cited on. Giles is providing that information herewith starting on Page iii of the updated Tables of Contents and Authorities. Addendum A should have included the full text of Statutes and Rules used in the Brief. Giles noted that only the Constitutional provisions were included therein, and is supplying the full text of the Statutes and Rules herewith in Addendum A. Giles is also including an Addendum D which contains a copy of the Commission’s Order Denying Motion for Review, the only Order which has bearing on this Appeal.

Furthermore, Giles noted the following typographical errors in the review of her Brief.

#### **Typographical Errors**

On Page 2, the last word of the first line in Item 3 is “present”, but should be “presenting”.

On Page 13, in the first line there is not a space between the words “toxic” and “substances”.

On Page 37, in the first full sentence of Point III is the number “18”, and it should be “17”.

On Page 43, in the third line of the quote of (H) is the word “required”, and it should be “require”.



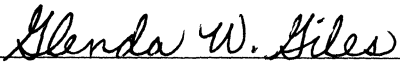
On Page 44, in the fifth line from the bottom is the word “claim”, and it should be “claims”.

On Page 45, in the second line down is the word “which”, and it should be deleted.

On Page 46, in the ninth line down is the word “as”, and it should be “at”.

These supplementations and corrections do not substantially alter her Brief, but merely brings the Brief into conformity with the Rules and correct errors. Giles is not providing any further or additional argument, and therefore this supplementation is appropriate.

Respectfully submitted, and dated this 26<sup>th</sup> day of May 2004.

  
\_\_\_\_\_  
Glenda W. Giles, Appellant Pro Se

**NOTE:** This document was prepared with assistance from my son, Robert E. Giles.

## CERTIFICATE OF SERVICE

I, Glenda W. Giles, hereby certify that a true and correct copy of the attached Supplement to Appellant's Brief and attachments were mailed postage prepaid on 26 May 2004 to the following at the addresses shown:

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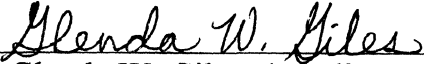
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\_\_\_\_\_  
Glenda W. Giles, Appellant Pro Se

61-70; Exhibit ‘D’ is Page 71 and is listed in R. Vol. 3 at 743, corresponding exactly with Pages 72-77; Exhibit ‘E’ is Page 78 and is listed in R. Vol. 3 at 769, corresponding exactly with Pages 79-95. It is obvious that the page labeled “Exhibit ‘A’” has been removed.

Giles has additional proof that she did indeed file Pages 1-95 as Exhibits with her Motion for Review. On Page 4 of TAD Technical’s Response to Motion for Review, under the heading ‘The Commission should affirm the ALJ’s Ruling’, is the following statement:

“... Petitioner raises a plethora of issues against several defendants in her 54+ page single-spaced Motion for Review and over 95+ page exhibit.” (Emphasis added.)

The record is supposed to be impartial; the Commission is charged with accurately maintaining the record, but in this case some documents have been ‘lost’, and others have been filed carelessly. Multiple documents that support Giles’ arguments have seemingly evaporated into thin air. But, inexplicitly, none of the documents which benefit Respondent parties are missing from the record. And, Giles is supposed to accept that there is no bias or prejudice at the Commission, and that she has been treated fairly. Giles also wonders whether the Commission employees are untrained; indifferent; negligent; or, are intentionally defiling the records for the benefit of employers and/or insurance carriers.

22. Giles also submitted new evidence, affidavits, and argument in her Request for Reconsideration that was dismissed by the Commission in the following statement:

“In this case, the Commission finds no basis to conclude that Mrs. Giles’ newly-presented evidence or arguments could not have been submitted to Judge La Jeunesse and also incorporated into Mrs. Giles’ motion for review. **The Commission therefore declines to accept or consider such evidence or argument now.**” (R. Vol. 4 at 1233). (Emphasis added.)

## **SUMMARY OF THE ARGUMENT**

In issuing its Orders in this case, the Commission has disregarded the critical issue of jurisdiction, especially over the prior injury by accident claim. The Commission has made new Findings concerning the prior claim without first re-establishing jurisdiction over the prior claim. Further, the Commission's Findings regarding the prior claim are contrary to statute; contrary to the defenses of some of the parties in the present claim; and, contrary to a binding contract. Further, the Commission has shown bias and prejudice towards Giles, and favoritism to employers and their insurance carriers by failing to apply proper standards; by promulgating Rules which are of themselves biased and prejudiced; and, by failing to follow proper procedures. Also, the Commission has a financial conflict of interest in any case involving WCF.

**SUPPLEMENT TO CONCLUSION  
RELIEF SOUGHT**

Giles hereby requests this Court to reverse the Commission's Orders in this case, based on lack of jurisdiction, failure to follow prescribed procedures, and applying the wrong standards to Requests for Dismissals and standards of proof on Commission Reviews and Reconsiderations. Giles further requests this Court to grant her Motion for Summary Judgment against Oakridge and WCF for failing to present a valid defense to her occupational disease claim. Giles also requests this Court to appoint, or Order the Commission to appoint, an ALJ with absolutely no ties to the Commission to preside over her occupational disease claim. Regarding the remaining Respondents, Giles hereby requests this Court to enter defaults, if appropriate, requested by Giles before the Commission. Giles further requests this Court to grant Giles' other Motions for Summary Judgment filed with the Commission, if appropriate. If necessary, Giles requests this Court to remand this matter to the aforementioned independent ALJ for Giles to conduct discovery; for referral to an independent Medical Panel, if appropriate; and, for said ALJ to determine apportionment, if appropriate.

# **ADDENDUM ‘A’**

**34A-1-301. Commission jurisdiction and power.**

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

Renumbered and Amended by Chapter 375, 1997 General Session

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*Last revised: Thursday, April 29, 2004*

**34A-1-303. Review of administrative decision.**

(1) A decision entered by an administrative law judge under this title is the final order of the commission unless a further appeal is initiated:

- (a) under this title; and
- (b) in accordance with the rules of the commission governing the review.

(2) (a) Unless otherwise provided, a person who is entitled to appeal a decision of an administrative law judge under this title may appeal the decision by filing a motion for review with the Division of Adjudication.

(b) (i) Unless a party in interest to the appeal requests in accordance with Subsection (3) that the appeal be heard by the Appeals Board, the commissioner shall hear the review in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(ii) A decision of the commissioner is a final order of the commission unless set aside by the court of appeals.

(c) (i) If in accordance with Subsection (3) a party in interest to the appeal requests that the appeal be heard by the Appeals Board, the Appeals Board shall hear the review in accordance with:

- (A) Section **34A-1-205**; and
- (B) Title 63, Chapter 46b, Administrative Procedures Act.

(ii) A decision of the Appeals Board is a final order of the commission unless set aside by the court of appeals.

(3) A party in interest may request that an appeal be heard by the Appeals Board by filing the request with the Division of Adjudication:

- (a) as part of the motion for review; or
- (b) if requested by a party in interest who did not file a motion for review, within 20 days of the date the motion for review is filed with the Division of Adjudication.

(4) (a) On appeal, the commissioner or the Appeals Board may:

- (i) affirm the decision of an administrative law judge;
- (ii) modify the decision of an administrative law judge;
- (iii) return the case to an administrative law judge for further action as directed; or
- (iv) reverse the findings, conclusions, and decision of an administrative law judge.

(b) The commissioner or Appeals Board may not conduct a trial de novo of the case.

(c) The commissioner or Appeals Board may base its decision on:

- (i) the evidence previously submitted in the case; or
- (ii) on written argument or written supplemental evidence requested by the commissioner or Appeals Board.

(d) The commissioner or Appeals Board may permit the parties to:

- (i) file briefs or other papers; or
- (ii) conduct oral argument.

(e) The commissioner or Appeals Board shall promptly notify the parties to any proceedings before the commissioner or Appeals Board of its decision, including its findings and conclusions.

(5) (a) Each decision of a member of the Appeals Board shall represent the member's independent judgment.

(b) A member of the Appeals Board may not participate in any case in which the member is an interested party.

(c) If a member of the Appeals Board may not participate in a case because the member is an interested party, the two members of the Appeals Board that may hear the case shall assign an individual to participate as a member of the board in that case if the individual:

- (i) is not an interested party in the case;
- (ii) was not previously assigned to:
- (A) preside over any proceeding related to the case; or



- (B) take any administrative action related to the case; and
- (iii) is representative of the following group that was represented by the member that may not hear the case under Subsection (5)(b):
  - (A) employers;
  - (B) employees; or
  - (C) the public.
- (d) The two members of the Appeals Board may appoint an individual to participate as a member of the Appeals Board in a case if:
  - (i) there is a vacancy on the board at the time the Appeals Board hears the review of the case;
  - (ii) the individual appointed meets the conditions described in Subsections (5)(c)(i) and (ii); and
  - (iii) the individual appointed is representative of the following group that was represented by the member for which there is a vacancy:
    - (A) employers;
    - (B) employees; or
    - (C) the public.
- (6) If an order is appealed to the court of appeals after the party appealing the order has exhausted all administrative appeals, the court of appeals has jurisdiction to:
  - (a) review, reverse, remand, or annul any order of the commissioner or Appeals Board; or
  - (b) suspend or delay the operation or execution of the order of the commissioner or Appeals Board being appealed.

Amended by Chapter 28, 2003 General Session

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*Last revised: Thursday, April 29, 2004*

**34A-3-111. Compensation not additional to that provided for accidents.**

The compensation provided under this chapter is not in addition to compensation that may be payable under Chapter 2, 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.

Renumbered and Amended by Chapter 375, 1997 General Session  
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*Last revised: Thursday, April 29, 2004*

**34A-2-420. Continuing jurisdiction of commission – No authority to change statutes of limitation – Authority to destroy records – Interest on award – Authority to approve final settlement claims.**

- (1) (a) The powers and jurisdiction of the commission over each case shall be continuing.
- (b) After notice and hearing, the Division of Adjudication, commissioner, or Appeals Board in accordance with Part 8, Adjudication, may from time to time modify or change a former finding or order of the commission.
- (c) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 3, Utah Occupational Disease Act.
- (d) The commission may not in any respect change the statutes of limitation referred to in Subsection (1)(c).
- (2) Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section **34A-2-417**, may be destroyed at the discretion of the commission.
- (3) Awards made by a final order of the commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.
- (4) Notwithstanding Subsection (1) and Section **34A-2-108**, an administrative law judge shall review and may approve the agreement of the parties to enter into a full and final:
  - (a) compromise settlement of disputed medical, disability, or death benefit entitlements under this chapter or Chapter 3, Utah Occupational Disease Act; or
  - (b) commutation and settlement of reasonable future medical, disability, or death benefit entitlements under this chapter or Chapter 3 by means of a lump sum payment, structured settlement, or other appropriate payout.

Renumbered and Amended by Chapter 375, 1997 General Session  
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*Last revised: Thursday, April 29, 2004*

health, safety and welfare of his employees. Where injury is caused by the willful failure of an employer to comply with the law or any lawful order of the industrial commission, compensation as provided for in this title shall be increased fifteen percent, except in case of injury resulting in death. (No change since 1953)

**35-1-13. Misconduct of employees.**

No employee shall remove, displace, damage, destroy or carry away any safety device or safeguard provided for use in any employment or place of employment, or interfere in any way with the use thereof by any other person; nor shall any employee interfere with the use of any method or process adopted for the protection of any employee in his employment or place of employment, or fail or neglect to follow and obey orders and to do every other thing reasonably necessary to protect the life, health, safety and welfare of employees. (No change since 1953)

**35-1-14. Penalty for failure to use safety device.**

Where injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's willful failure to obey any order or reasonable rule adopted by the employer for the safety of the employee, or from the intoxication of the employee, compensation provided for herein shall be reduced fifteen percent, except in case of injury resulting in death. (No change since 1953)

**35-1-15. Right of visitation.**

Any commissioner or any employee of the commission may enter any place of employment for the purpose of collecting facts and statistics or examining the provisions made for the health, safety and welfare of the employees therein, and may bring to the attention of every employer any law, or any order of the commission, and any failure on the part of such employer to comply therewith. No employer shall refuse to admit any commissioner or any employee of the commission to his place of employment. (No change since 1953)

**35-1-16. Powers and duties of commission -- Fees.**

(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 and to:

(a) supervise every employment and place of employment and to administer and enforce all laws for the protection of the life, health, safety, and welfare of employees;

(b) ascertain and fix reasonable standards, and prescribe, modify, and enforce reasonable orders, for the adoption of safety devices, safeguards, and other means or methods of protection, to be as nearly uniform as possible, as necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety, and welfare of employees in employment and places of employment;

(c) ascertain, fix, and order reasonable standards for the construction, repair, and maintenance of places of employment as shall make them safe;

(d) investigate, ascertain, and determine reasonable classifications of persons, employments, and places of employment as necessary to carry out the purposes of this title;

(e) promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees;

(f) establish and conduct free employment agencies, and license, supervise, and regulate private employment offices, and bring together employers seeking employees and working people seeking employment, and make known the opportunities for employment in this state;

(g) collect, collate, and publish statistical and other information relating to employees, employers, employments, and places of employment and such other statistics as it considers proper; and

(h) ascertain and adopt reasonable standards and rules, prescribe and enforce reasonable orders, and take such other actions as may be

appropriate for the protection of life, health, safety, and welfare of all persons with respect to all prospects, tunnels, pits, banks, open cut workings, quarries, strip mine operations, ore mills, and surface operations or any other mining operation, whether or not the relationship of employer and employee exists, but the commission may not assume jurisdiction or authority over adopted standards and regulations or perform any mining inspection or enforcement of mining rules and regulations so long as Utah's mining operations are governed by federal regulations.

(2) Unless otherwise provided by statute, the commission may adopt a schedule of fees assessed for services provided by the commission. The fee shall be reasonable and fair, and shall reflect the cost of services provided. Each fee established in this manner shall be submitted to and approved by the Legislature as part of the commission's annual appropriations request. The commission may not charge or collect any fee proposed in this manner without approval by the Legislature. Prior to submitting any proposed fee to the Legislature, the commission shall conduct a public hearing on the proposed fee.

**35-1-17. Appointment of state council -- Composition -- Terms of members -- Advice and recommendations -- Compensation.**

(1) The Industrial Commission shall appoint a state council composed of:

- (a) five employer representatives
- (b) five employee representatives; and
- (c) three members, one representing the Workers' Compensation Fund of Utah, one representing a private insurance carrier, and one representing health care providers, all of whom are nonvoting.

(2) The Utah insurance commissioner shall serve on the state council as an ex officio nonvoting member.

(3) Employers and employees shall consider nominating members of groups who historically may have been excluded from the council, such as women, minorities, and the disabled.

(4) Each council member shall be appointed for a two-year term beginning July 1 and ending June 30. The first term shall begin July 1, 1992. The commission shall terminate the terms of any council member who ceases to be representative as designated by his original appointment. The council shall confer at least quarterly for the purpose of advising the commission and the Legislature on the Utah workers' compensation and occupational disease laws, the administration of them, and related rules.

(5) The council shall offer advice on issues requested by the commission and the Legislature and also make recommendations to the commission regarding workers compensation, rehabilitation, and reemployment of employees who are disabled because of an industrial injury or occupational disease. Members of the council shall serve without pay, but they shall be entitled to all necessary expenses incurred in attending any meetings called by the council or commission. (as last amended by Chapter 199, Laws of Utah 1993)

**35-1-18. Chairman of council -- Voting powers -- Calling meetings.**

The chairman of the Industrial Commission of Utah shall be ex officio chairman without vote of the state council herein provided for, and shall be charged with the responsibility of calling the necessary meetings. (No change since 1953)

**35-1-19. Investigation of places of employment -- Violations of rules or orders -- Temporary injunction.**

(1) Upon complaint by any person that any employment or place of employment, regardless of the number of persons employed, is not safe or is injurious to the welfare of any employee, the commission shall proceed, with or without notice, to make such investigation as may be necessary to determine the matter complained of. After such investigation, the commission shall enter such order relative thereto as may be necessary to render such employment or place of employment safe and not injurious to the welfare of the employees therein. For any Utah mine subject to the Federal Mine Safety and Health Act, the sole duty of the commission shall be to notify the appropriate federal agency of the

commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes.

(5) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include an offender performing labor under Section 64-13-16 or 64-13-19, except as required by federal statute or regulation. (As last amended by Chapter 130, Laws of Utah 1993)

#### **35-1-44. Definition of terms.**

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

(1) "Average weekly earnings" means the average weekly earnings arrived at by the rules provided in section 35-1-75. (Last amended 1991)

(2) "Award" means the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(3) "Compensation" means the payments and benefits provided for in this title.

(4) "Disability" means becoming medically impaired as to function. Disability can be total or partial, temporary or permanent, industrial or nonindustrial.

(5) "General order" means an order applying generally throughout the state to all persons, employments, or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

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

(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" includes any injury caused by the willful act of a third person directed against an employee because of his employment.

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

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

(10) "Welfare" means comfort, decency and moral well-being. (As last amended by Chapter 136, Laws of Utah 1991)

#### **35-1-45. Compensation for industrial accidents to be paid.**

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance

which to compute the weekly compensation rate and shall be determined as follows:

(a) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be that yearly wage divided by 52.

(b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be that monthly wage divided by 4 1/3.

(c) If at the time of the injury the wages are fixed by the week, that amount shall be the average weekly wage.

(d) If at the time of the injury the wages are fixed by the day, the weekly wage shall be determined by multiplying the daily wage by the number of days and fraction of days in the week during which the employee under a contract of hire was working at the time of the accident, or would have worked if the accident had not intervened. In no case shall the daily wage be multiplied by less than three for the purpose of determining the weekly wage.

(e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than 20 for the purpose of determining the weekly wage.

(f) If at the time of the injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are rendered by paid employees.

(g)(i) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by 13 the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or fourth period of 13 consecutive calendar weeks in the 52 weeks immediately preceding the injury.

(ii) If the employee has been employed by that employer less than 13 calendar weeks immediately preceding the injury, his average weekly wage shall be computed as under Subsection (1) (g) (i), presuming the wages, not including overtime or premium pay, to be the amount he would have earned had he been so employed for the full 13 calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

(2) If none of the methods in Subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

(3) When the average weekly wage of the injured employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar.

#### **35-1-76. Likelihood of increase to be considered.**

If it is established that the injured employee was of such age and experience when injured that under natural conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wage.  
(No change since 1953)

#### **35-1-77. Medical panel -- Medical director or medical consultants -- Discretionary authority of commission to refer case -- Findings and reports -- Objections to report -- Hearing -- Expenses. (Last amended 1991)**

(1)(a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of and in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission.

(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.

(d) As an alternative method of obtaining an impartial medical evaluation

of the medical aspects of a controverted case, the commission may employ a medical director or medical consultants on a full-time or part-time basis for the purpose of evaluating the medical evidence and advising the commission with respect to its ultimate fact-finding responsibility. If all parties agree to the use of a medical director or medical consultants, they shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2)(a) The medical panel, medical director, or medical consultants shall make such study, take such X-rays, and perform such tests, including post-mortem examinations if authorized by the commission, as it may determine to be necessary or desirable.

(b) The medical panel, medical director, or medical consultants shall make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. In occupational disease cases, the panel shall certify to the commission the extent, if any, of the disability of the claimant from performing work for remuneration or profit, and whether the sole cause of the disability or death, in the opinion of the panel, results from the occupational disease and whether any other causes have aggravated, prolonged, accelerated, or in any way contributed to the disability or death, and if so, the extent in percentage to which the other causes have so contributed.

(c) The commission shall promptly distribute full copies of the report to the applicant, the employer, and its insurance carrier by certified mail with return receipt requested. Within 15 days after the report is deposited in the United States post office, the applicant, the employer, or its insurance carrier may file with the commission written objections to the report. If no written objections are filed within that period, the report is considered admitted in evidence.

(d) The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding.

(e) If objections to the report are filed, the commission may set the case for hearing to determine the facts and issues involved. At the hearing, any party so desiring may request the commission to have the chairman of the medical panel, the medical director, or the medical consultants present at the hearing for examination and cross-examination. For good cause shown, the commission may order other members of the panel, with or without the chairman or the medical director or medical consultants, to be present at the hearing for examination and cross-examination.

(f) The written report of the panel, medical director, or medical consultants may be received as an exhibit at the hearing, but may not be considered as evidence in the case except as far as it is sustained by the testimony admitted.

(g) The expenses of the study and report of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the Employers' Reinsurance Fund. (as last amended by Chapter 136, Laws of Utah 1991)

**35-1-78. Continuing jurisdiction of commission to modify award -- Authority to destroy records -- Interest on award -- No authority to change statutes of limitation.**

(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. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-98, may be destroyed at the discretion of the commission.

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

(3)(a) This section may not be interpreted as modifying in any respect the



statutes of limitations contained in other sections of this chapter or Chapter 2, Title 35, Utah Occupational Disease Act.

(b) The commission has no power to change the statutes of limitation referred to in Subsection (3)(a) in any respect.

**35-1-79. Lump-sum payments.**

The commission, under special circumstances and when the same is deemed advisable, may commute periodical benefits to one or more lump-sum payments. (No change since 1953)

**35-1-80. Compensation exempt from execution.**

Compensation before payment shall be exempt from all claims of creditors, and from attachment or execution, and shall be paid only to employees or their dependents. (No change since 1953)

**35-1-81. Awards -- Medical, nursing, hospital and burial expenses -- Artificial means and appliances.**

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

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

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

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

(5) The commission may, in unusual cases, order the payment of additional sums for burial expenses or to provide for artificial means or appliances as the commission considers just and proper.

**35-1-82.52. Appointment of law judges -- Power and authority.**

(1) The commission shall appoint one or more administrative law judges.

(2) The commission or any administrative law judge may call, preside at, and conduct hearings and adjudicative proceedings.

(3)(a) The commission and any administrative law judge may issue subpoenas.

(b) Failure to respond to a properly issued subpoena may result in a contempt citation and offenders may be punished as provided in Section 78-32-15. (as last amended by Chapter 161, Laws of Utah 1987)

**35-1-82.53. Review of administrative order -- Finality of commission's order.**

(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge may seek review of that order with the commission by complying with the commission's rules governing that review.

(2) The order of the commission on review is final, unless set aside by the Court of Appeals. (as last amended by Chapter 72, Laws of Utah 1988)

**35-1-82.56. Notice to parties of order or award.**

All parties in interest shall be given due notice of the entry of any administrative law judge's order or any order or award of the commission. The mailing of the copy of said order or award to the last known address shown in the files of the commission of any party in interest and to the attorneys or agents of record in the case, if any, shall be deemed to be notice of such order. (as last amended by Chapter 101, Laws of Utah 1975)

**35-1-85.1. Depositions of witnesses authorized.**

The commission or any party to a proceeding under this act may cause depositions of witnesses to be taken as in civil actions. (as enacted by Chapter 67, Laws of Utah 1965)

**35-1-86. Court of Appeals may review commission's actions.**

The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order. (as last amended by Chapter 72, Laws of Utah 1988)

**35-1-87. Attorney's fees.**

In all cases coming before the Industrial Commission in which attorneys have been employed, the commission is vested with full power to regulate and fix the fees of such attorneys. (No change since 1953)

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

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

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

- (a) Depositions and sworn testimony presented in open hearings.
- (b) Reports of attending or examining physicians, or of pathologists.
- (c) Reports of investigators appointed by the commission.
- (d) Reports of employers, including copies of time sheets, book accounts or other records.
- (e) Hospital records in the case of an injured or diseased employee. (as last amended by Chapter 67, Laws of Utah 1965)

**35-1-89. Injuries to minors.**

A minor shall be deemed sui juris for the purposes of this title, and no other person shall have any cause of action or right to compensation for an injury to such minor workman, but in the event of the award of a lump sum of compensation to a minor employee, such sum shall be paid only to his legally appointed guardian. (No change since 1953)

**35-1-90. Void agreements between employers and employees.**

No agreement by an employee to waive his rights to compensation under this title shall be valid. No agreement by an employee to pay any portion of the premium paid by his employer shall be valid. Any employer who deducts any portion of such premium from the wages of salary of any employee entitled to the benefits of this title is guilty of a misdemeanor, and shall be fined not more than \$100 for each such offense. (No change since 1953)

**35-1-91. Physical examinations.**

Any employee claiming the right to receive compensation under this title may be required by the commission, or its medical examiner, to submit himself for medical examination at any time, and from time to time, at a place reasonably convenient for such employee, and such as may be provided by the rules of the commission. If such employee refuses to submit to any such examination, or obstructs the same, his right to have his claim for compensation considered, if his claim is pending before the commission, or to receive any payments for compensation theretofore granted, shall be suspended during the period of such refusal or obstruction. (No change since 1953)

**35-2-103. Reporting of occupational diseases.** (Renumbered from Section 35-2-6 and amended 1991)

(1) Any employee sustaining an occupational disease, as defined in this chapter, arising out of and in the course of employment shall provide notification to his employer promptly of the occupational disease. If the employee is unable to provide notification, the employee's next-of-kin or attorney may provide notification of the occupational disease to his employer.

(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.

(3) An employer's or physician's injury report filed with the commission, employer, or insurance carrier, or the payment of any medical or disability benefits by the employer or the employer's insurance carrier, constitutes notification of an occupational disease.

(4)(a) Each employer shall file a report with the commission within seven days after the occurrence of an occupational disease, after the employer's first knowledge of the occurrence, or after the employee's notification of the same, on forms or by methods prescribed by the commission, of any occupational disease resulting in medical treatment, loss of consciousness, loss of work, restriction of work, or transfer to another job.

(b) Each employer shall file a subsequent report with the commission of any previously reported occupational disease that later resulted in death. The subsequent report shall be filed with the commission within seven days following the death or the employer's first knowledge or notification of the death. No report is required for minor injuries that require first-aid treatment only, unless a treating physician files, or is required to file, the Physician's Initial Report of Work Injury or Occupational Disease with the commission. Also, no report is required for occupational diseases that manifest after the employee is no longer employed by the employer with which the exposure occurred, or where the employer is not aware of an exposure occasioned by the employment that results in an occupational disease as defined by Section 35-2-107.

(5) Each employer shall provide the employee with a copy of the report submitted to the commission. The employer shall also provide the employee with a statement, as prepared by the commission, of his rights and responsibilities related to the occupational disease.

(6) Each employer shall maintain a record in a manner prescribed by the commission of all occupational diseases resulting in medical treatment, loss of consciousness, loss of work, restriction of work, or transfer to another job.

(7) Any employer who refuses or neglects to make reports, to maintain records, or to file reports with the commission as required by this section is guilty of a class C misdemeanor and subject to citation under Section 35-9-9 and a civil assessment as provided under Section 35-9-21, unless the commission finds that the employer has shown good cause for submitting a report later than required by this section.

(8) All physicians, surgeons, and other health providers, excluding hospitals, attending occupationally diseased employees shall comply with all the rules, including the schedule of fees, for their services as adopted by the commission, and shall make reports to the commission at any and all times as required as to the condition and treatment of an occupationally diseased employee or as to any other matter concerning industrial cases they are treating.

(9) A copy of the physician's initial report shall be furnished to the commission, the employee, and the employer or its insurance carrier.

(10) Any physician, surgeon, or other health provider, excluding any hospital, who refuses or neglects to make any report or comply with this section is guilty of a class C misdemeanor for each offense, unless the commission finds that there is good cause for submitting a late report.

(11) Applications for a hearing to resolve disputes regarding occupational disease claims shall be filed with the commission. After the filing, a copy shall be forwarded by mail to the employer or to the employer's insurance carrier, to the applicant, and to the attorneys for the parties.

(Renumbered by Law, Chapter 136, 1991)

### **63-46b-1. Scope and applicability of chapter.**

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern:

(a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and

(b) judicial review of the action.

(2) This chapter does not govern:

(a) the procedure for making agency rules, or judicial review of the procedure or rules;

(b) the issuance of a notice of a deficiency in the payment of a tax, the decision to waive a penalty or interest on taxes, the imposition of and penalty or interest on taxes, or the issuance of a tax assessment, except that this chapter governs an agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of the action;

(c) state agency action relating to extradition, to the granting of a pardon or parole, a commutation or termination of a sentence, or to the rescission, termination, or revocation of parole or probation, to the discipline of, resolution of a grievance of, supervision of, confinement of, or the treatment of an inmate or resident of a correctional facility, the Utah State Hospital, the Utah State Developmental Center, or a person in the custody or jurisdiction of the Division of Substance Abuse and Mental Health, or a person on probation or parole, or judicial review of the action;

(d) state agency action to evaluate, discipline, employ, transfer, reassign, or promote a student or teacher in a school or educational institution, or judicial review of the action;

(e) an application for employment and internal personnel action within an agency concerning its own employees, or judicial review of the action;

(f) the issuance of a citation or assessment under Title 34A, Chapter 6, Utah Occupational Safety and Health Act, and Title 58, Chapter 3a, Architect Licensing Act, Chapter 11a, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act, Chapter 17b, Pharmacy Practice Act, Chapter 22, Professional Engineers and Professional Land Surveyor Licensing Act, Chapter 53, Landscape Architects Licensing Act, Chapter 55, Utah Construction Trades Licensing Act, Chapter 63, Security Personnel Licensing Act, and Chapter 76, Professional Geologist Licensing Act, except that this chapter governs an agency action commenced by the employer, licensee, or other person authorized by law to contest the validity or correctness of the citation or assessment;

(g) state agency action relating to management of state funds, the management and disposal of school and institutional trust land assets, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in those contracts, or judicial review of the action;

(h) state agency action under Title 7, Chapter 1, Article 3, Powers and Duties of Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, and Title 63, Chapter 30, Utah Governmental Immunity Act, or judicial review of the action;

(i) the initial determination of a person's eligibility for unemployment benefits, the initial determination of a person's eligibility for benefits under Title 34A, Chapter 2, Workers'

Compensation Act, and Title 34A, Chapter 3, Utah Occupational Disease Act, or the initial determination of a person's unemployment tax liability;

(j) state agency action relating to the distribution or award of a monetary grant to or between governmental units, or for research, development, or the arts, or judicial review of the action;

(k) the issuance of a notice of violation or order under Title 26, Chapter 8a, Utah Emergency Medical Services System Act, Title 19, Chapter 2, Air Conservation Act, Title 19, Chapter 3, Radiation Control Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19, Chapter 5, Water Quality Act, Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act, Title 19, Chapter 6, Part 4, Underground Storage

Tank Act, or Title 19, Chapter 6, Part 7, Used Oil Management Act, except that this chapter governs an agency action commenced by a person authorized by law to contest the validity or correctness of the notice or order,

(l) state agency action, to the extent required by federal statute or regulation, to be conducted according to federal procedures,

(m) the initial determination of a person's eligibility for government or public assistance benefits,

(n) state agency action relating to wildlife licenses, permits, tags, and certificates of registration,

(o) a license for use of state recreational facilities,

(p) state agency action under Title 63, Chapter 2, Government Records Access and Management Act, except as provided in Section **63-2-603**,

(q) state agency action relating to the collection of water commissioner fees and delinquency penalties, or judicial review of the action,

(r) state agency action relating to the installation, maintenance, and repair of headgates, caps, valves, or other water controlling works and weirs, flumes, meters, or other water measuring devices, or judicial review of the action,

(s) (i) a hearing conducted by the Division of Securities under Section **61-1-11.1**, and

(ii) an action taken by the Division of Securities pursuant to a hearing conducted under Section **61-1-11.1**, including a determination regarding the fairness of an issuance or exchange of securities described in Subsection **61-1-11.1(1)**, and

(t) state agency action relating to water well driller licenses, water well drilling permits, water well driller registration, or water well drilling construction standards, or judicial review of the action

(3) This chapter does not affect a legal remedy otherwise available to

(a) compel an agency to take action, or

(b) challenge an agency's rule

(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

(a) requesting or ordering a conference with parties and interested persons to

(i) encourage settlement,

(ii) clarify the issues,

(iii) simplify the evidence,

(iv) facilitate discovery, or

(v) expedite the proceeding, or

(b) granting a timely motion to dismiss or for summary judgment if the requirements of

Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter

(5) (a) A declaratory proceeding authorized by Section **63-46b-21** is not governed by this chapter, except as explicitly provided in that section

(b) Judicial review of a declaratory proceeding authorized by Section **63-46b-21** is governed by this chapter

(6) This chapter does not preclude an agency from enacting a rule affecting or governing an adjudicative proceeding or from following the rule, if the rule is enacted according to the procedures outlined in Title 63, Chapter 46a, Utah Administrative Rulemaking Act, and if the rule conforms to the requirements of this chapter

(7) (a) If the attorney general issues a written determination that a provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of the provision to that agency shall be suspended to the extent necessary to prevent the denial

(b) The attorney general shall report the suspension to the Legislature at its next session

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening a time period prescribed in this chapter, except the time period established for judicial review.

Amended by Chapter 235, 2004 General Session

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*Last revised: Thursday, April 29, 2004*

**63-46b-7. Procedures for formal adjudicative proceedings – Discovery and subpoenas.**

(1) 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.

(2) Subpoenas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party, or may be issued by the presiding officer on his own motion.

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute.

Enacted by Chapter 161, 1987 General Session

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*Last revised: Thursday, April 29, 2004*

### **63-46b-10. Procedures for formal adjudicative proceedings – Orders.**

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any posthearing documents permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the 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 or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

(2) The presiding officer may use the presiding officer's experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding.

Amended by Chapter 138, 2001 General Session

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*Last revised: Thursday, April 29, 2004*



**63-46b-16. Judicial review – Formal adjudicative proceedings.**

(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.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Amended by Chapter 72, 1988 General Session

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*Last revised: Thursday, April 29, 2004*

### **78-2a-3. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees, or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63-46a-12.1**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity,

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 302, 2001 General Session

Amended by Chapter 255, 2001 General Session

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*Last revised: Thursday, April 29, 2004*

## **Rule 12. Defenses and objections.**

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading 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.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings 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.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

## Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.



# Rule R602-2. Adjudication of Workers' Compensation and Occupational Disease Claims.

Early  
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As in effect on March 1, 2002

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### [R602-2-1. Pleadings and Discovery.](#)

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

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

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

D. The employer or insurance carrier shall have 30 days following the date of the mailing of the application to file a written answer with the 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. All answers shall include a summary and categorization of benefits paid to date on the claim. A copy shall be sent to the applicant or, if there is one, to the applicant's attorney by the defendant.

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

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

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

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

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

J. All medical records shall be filed by the employer or its insurance carrier as a single joint exhibit at least one week before the scheduled hearing. Claimant must cooperate and submit all pertinent medical records contained in his/her file to the employer or its insurance carrier for the joint exhibit submission two weeks in advance of a scheduled hearing. Exhibits are to be placed in an indexed binder arranged by care provider in chronological order. Exhibits shall include all relevant treatment records which tend to prove or disprove a fact in issue. Pages shall be numbered consecutively. Hospital nurses' notes, duplicate materials, and other non-relevant materials may not be included.

K. The Administrative Law Judge shall be notified one week in advance of any proceeding when it is anticipated that more than four witnesses will be called, or where it is anticipated that the hearing of the evidence will require more than two hours.

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

M. Any party to an adjudicative proceeding may obtain review of an Order issued by an Administrative Law Judge by filing a written request for review with the Adjudication Division in accordance with the provisions of Section 63-46b-12 and Section 34A-1-303. Unless a request for review is properly filed, the Administrative Law Judge's Order is the final order of the Commission. If a request for review is filed, other parties to the adjudicative proceeding may

file a response within 20 calendar days of the date the request for review was filed. Thereafter, the Administrative Law Judge shall:

1. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary,
2. Amend or modify the prior Order by a Supplemental order, or
3. Refer the entire case for review under Section 34A-2-801.

If the Administrative Law Judge enters a Supplemental Order, as provided in this subsection, it shall be final unless a request for review of the same is filed.

N. In formal adjudicative proceedings, the Division shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas, except as the Utah Rules of Civil Procedure are modified by the express provisions of Section 34A-2-802, or as may be otherwise modified by the presiding officer.

O. A request for reconsideration of an Order on Motion for Review may be allowed and shall be governed by the provisions of Section 63-46b-13. Any petition for judicial review of final agency action shall be governed by the provisions of Section 63-46b-14.

#### **R602-2-2. Guidelines for Utilization of Medical Panel.**

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1. Conflicting medical opinions related to causation of the injury or disease;
2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
4. Conflicting medical opinions related to a claim of permanent total disability, and/or
5. Medical expenses in controversy amounting to more than \$10,000.

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

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



1. The treating physician has failed or refused to give an impairment rating, and/or

2. A substantial injustice may occur without such further evaluation.

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at a hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid from the Uninsured Employers' Fund, as directed by Section 34A-2-601.

#### R602-2-3. Compensation for Medical Testimony.

Compensation for medical panel examination, medical testimony, and preparation by medical panel members at hearings shall be \$87.50 per half hour and shall be \$100 per half hour for the medical panel chair.

#### R602-2-4. Attorney Fees.

Pursuant to Section 34A-1-309, the Commission adopts the following rule to regulate and fix reasonable fees for attorneys representing applicants before the Commission in all cases wherein such fees are awarded after January 1, 2002.

A. The concept of a contingency fee is recognized. A retainer in advance of a Commission approved fee is not allowed. Benefits are only deemed generated within the meaning of this rule when they are paid as a result of legal services rendered after an Appointment of Counsel form is signed by the applicant. A copy of this form must be filed with the Commission by the claimant's attorney.

B. By creating this rule, the commission does not intend that an applicant's attorney be paid a fee where the assistance the attorney renders involves only an incidental expenditure of time. For example, no attorney's fee shall be paid when compensation agreements are merely reviewed, simple documents are prepared, or an apparent dispute is quickly resolved as a result of oral or written communication.

C. "Benefits" within the meaning of this rule shall be limited to weekly death or disability compensation and accrued interest thereon paid to or on behalf of an applicant pursuant to the terms of Title 34A, Utah Code Annotated.

D. An attorney's fee deducted from the benefits generated shall be awarded for all legal services rendered through final Commission action with the following constraints:

1. 20% of weekly benefits generated for the first \$20,500, plus 15% of the weekly benefits generated in excess of \$20,500 but not exceeding \$41,000, plus 10% of the weekly benefits generated in excess of \$41,000.

2. In no case shall an attorney collect fees calculated on more than the first 312 weeks of any and all combinations of workers' compensation benefits.

3. Notwithstanding the above, in no case shall the maximum fee exceed \$10,352.

E. After either successfully prosecuting or defending an appeal following final Commission action, an increased attorney's fee shall be awarded amounting to:

1. 25% of the benefits in dispute before the Utah Court of Appeals, plus the amount awarded in part D of this rule, not to exceed \$15,130.

2. 30% of the benefits in dispute before the Supreme Court, plus the amount awarded in part D of this rule, plus the amount awarded in part E.1 of this rule, not to exceed \$19,900.

F. An attorney's fee shall be deducted from and paid out of the benefits generated and shall be paid directly to the applicant's attorney upon order of the Commission.

G. If a controversy over an attorney's fee develops, the Commission shall have the discretion, pursuant to Section 34A-1-309, and this rule, to award fees or otherwise resolve the dispute by Order delineating the Commission's findings along with the evidence and reasons supporting the decision.

#### **R602-2-5. Settlement Agreements.**

##### **A. Statutory authority:**

Section 34A-2-420 requires the Commission to review all agreements for the settlement or commutation of claims for workers' compensation or occupational disease benefits and grants the Commission discretion to approve such agreements. The Commission's authority under Section 34A-2-420 applies to all claims arising under the Utah Workers' Compensation Act or Occupational Disease Act, regardless of the date of accident or occupational disease. This rule sets forth the requirements for Commission approval of such agreements.

##### **B. General Considerations:**

Settlement agreements may be appropriate in claims of disputed validity or when the parties' interests are served by payment of benefits in a manner different than otherwise prescribed by the workers' compensation laws. However, settlement agreements must also fulfill the underlying purposes of the workers' compensation laws. Once approved by the Commission, settlement agreements are permanently binding on the parties. The Commission will not approve any proposed settlement that is manifestly unjust.

##### **C. Procedure:**

1. Parties interested in a present or potential workers' compensation claim, whether or not an application for hearing has been filed, may submit their settlement agreement to the Commission for review and approval. The Commission may delegate its authority to review and approve such agreements.

2. Each settlement agreement shall be in writing, executed by each party and such party's attorney, if any, and shall include a proposed order for Commission approval of the agreement.

3. Each settlement agreement shall set forth the nature of the claim being settled and what claims are in dispute, if any.

4. Each settlement agreement shall contain a statement that each party understands that the agreement is permanent, binding and constitutes full and final settlement of any right the claimant may otherwise have to future benefits, including medical benefits. The Commission may establish an approved form for complying with the foregoing disclosure requirement.

5. Attorneys' fees shall be allowed as provided by Rule R602-2-4. Each settlement agreement shall describe the amount to be paid to claimant's counsel as attorney's fees and costs, the manner in which such amounts are computed and the method of payment thereof.

6. The settlement agreement may provide for payment of benefits through insurance contract or by other third parties if the Commission determines a) such payment provisions are secure and b) such payment provisions do not relieve the parties of their underlying liability for payments required by the agreement.

7. Upon receipt of a proposed settlement agreement meeting the requirements of this rule, the Commission shall review such proposed agreement:

a. As needed, the Commission may contact the parties and others to obtain further information about the proposed settlement;

b. If the Commission determines that a proposed settlement agreement conforms with this rule, the Commission shall approve such agreement and notify the parties in writing.

c. If the Commission determines that a proposed settlement agreement does not comply with this rule, the Commission shall notify the parties in writing of its reasons for rejecting the proposed agreement.

d. The Commission shall retain a record of its action on all settlement agreements submitted to it for approval.

#### KEY

workers' compensation, administrative procedure, hearings, settlement

#### Date of Enactment or Last Substantive Amendment

January 15, 2002

#### Notice of Continuation

November 24, 1997

#### Authorizing, Implemented, or Interpreted Law

34A-1-301 et seq.; 63-46b-1 et seq.;

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## **Rule 4-501. Motions.**

### **Intent**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions

To establish a procedure for expedited dispositions

### **Applicability**

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

### **Statement of the Rule**

#### **(1) Filing and service of motions and memoranda**

(A) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities, appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The Notice to Submit for Decision shall state the date on which the motion was served, the date the memorandum in opposition, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

## (2) Motions for summary judgment

(A) Memorandum in support of a motion The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies

(B) Memorandum in opposition to a motion The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement

## (3) Hearings

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided

(D) When a request for hearing is denied, the court shall notify the requesting party When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing Courtesy copies shall not be filed with the clerk of the court

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date No dispositive motions shall be heard after that date without leave of the court

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the

request and decide the motion without oral argument

(4) Expedited dispositions Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily

(5) Telephone conference The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel

# **ADDENDUM ‘D’**



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**UTAH LABOR COMMISSION**

**GLEENDA W. GILES,**

**Applicant,**

**v.**

**OAKRIDGE COUNTRY CLUB;  
WORKERS COMPENSATION FUND;  
WASATCH CREST MUTUAL;  
EMPLOYERS REINSURANCE FUND;  
TAD RESOURCES, nka ADECCO;  
CONSTITUTION STATE SERVICE  
CO.; ACE USA/PACIFIC EMPLOYERS;  
INC. CO.; LIBERTY MUTUAL INS. CO.;  
and INTERNAL REVENUE SERVICE.**

**Defendants.**

**ORDER DENYING  
MOTION FOR REVIEW**

**Case No. 00-1228**

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Administrative Law Judge La Jeunesse summarily dismissed Glenda W. Giles' claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.). Mrs. Giles now asks the Utah Labor Commission to review Judge La Jeunesse's decision.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

**BACKGROUND AND ISSUES PRESENTED**

On approximately May 30, 1992, Mrs. Giles filed an Application for Hearing seeking workers' compensation benefits from Oakridge Country Club and its insurance carrier, Workers Compensation Fund. Mrs. Giles' Application alleged injuries from exposure to chlorine gas at Oakridge on September 7, 1991. The Employers' Reinsurance Fund was later added as a defendant to Mrs. Giles' claim. On March 8, 1995, the parties resolved this claim by settlement agreement.

On December 27, 2000, Mrs. Giles filed a second Application against Oakridge and Workers' Compensation Fund, this time for "porphyria" allegedly caused by exposure to toxic fumes at Oakridge between May and December 1991. Thereafter, the Employers' Reinsurance Fund, Wasatch Crest Mutual Insurance, TAD Resources, Constitution State Service Co., ACE USA/Pacific Employers Ins. Co., Liberty Mutual Ins. Co., and the Internal Revenue Service were added as defendants to Mrs. Giles' second claim.

## **ORDER DENYING MOTION FOR REVIEW**

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Wasatch Crest and ACE-USA/Pacific Employers Insurance Co. each moved for dismissal of Mrs. Giles' claim on the grounds neither company was an insurance carrier for Mrs. Giles' employers during any time relevant to Mrs. Giles' claim.

TAD and its insurance carrier, Liberty Mutual, moved for summary judgment on the grounds, among others, that there was no evidence establishing Mrs. Giles' work at TAD as a cause of her porphyria.

The Employers Reinsurance Fund, Oakridge and the Workers Compensation Fund moved for dismissal on the grounds Mrs. Giles' current occupational disease claim was subject to the parties' settlement of her original workers' compensation claim.

The Internal Revenue Service did not appear or otherwise participate in this matter.

On June 6, 2002, Judge La Jeunesse granted the defendants' various motions for dismissal and summary judgment. Judge La Jeunesse also dismissed Mrs. Giles' claim against the I.R.S. for lack of jurisdiction over that federal agency. Mrs. Giles now seeks Commission review of Judge La Jeunesse's decision.

The Commission has carefully reviewed Mrs. Giles' motion for review. Much of it deals with points that are legally irrelevant or factually unsupported. Ultimately, the Commission believes the following issues are determinative of Mrs. Giles' current claim for occupational disease benefits:

1. Is there any basis to conclude that Wasatch Crest, ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., or other nominal defendants may be liable for Mrs. Giles' current claim?
2. Is there a genuine issue of material facts regarding TAD and Liberty Mutual's possible liability for Mrs. Giles' current claim?
3. Does the settlement agreement which resolved Mrs. Giles' first claim against Oakridge, Workers Compensation Fund and ERF bar Mrs. Giles' current claim against those entities?

### **FINDINGS OF FACT**

The Commission finds there is no genuine dispute regarding the following facts which are material to resolution of Mrs. Giles' current claim.

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' claim was eventually denied by the Commission. Mrs. Giles sought review by the

## **ORDER DENYING MOTION FOR REVIEW**

**GLENDA W. GILES**

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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 in which the over production of porphyrin compounds results from deficient enzyme activity in the biosynthetic pathway of heme . . . .

. . . .

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’ 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.

Mrs. Giles has presented no evidence that would establish the liability of Wasatch Crest, ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., or Transportation Insurance Company with respect to her current occupational disease claim.

Mrs. Giles has failed to submit any evidence of exposure to substances at TAD that caused or contributed to her porphyria.

### **DISCUSSION AND CONCLUSIONS OF LAW**

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

## **ORDER DENYING MOTION FOR REVIEW**

**GLEND A W. GILES**

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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.”

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 the nonmoving party . Estate Landscape & Snow Removal Specialists v. Mountain States Telephone & Telegraph Co., 844 P.2d 322, 324 n. 1 (Utah 1992). In Hill v. Grand Central, Inc., 477 P.2d 150 (Utah 1970), the 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.

The Commission bears the foregoing principles in mind as it considers the propriety of summary dismissal of Mrs. Giles’ claim.

Liability of Wasatch Crest , ACE-USA/Pacific Employers Insurance Co., Constitution State Service Co., Transportation Insurance Company and IRS. Neither Wasatch Crest nor ACE-USA/Pacific were named by Mrs. Giles as defendants in this matter. Through some process that is not clear from the record, it appears that the Adjudication Division itself added these parties as defendants in the caption of this case. Likewise, from time to time, other insurance carriers such as “Constitution State” and “Transportation Insurance Company” have been listed as defendants in one or more pleading, motion or decision in this case. However, the Commission is unaware of any factual basis by which these companies would have any legal liability to pay Mrs. Giles’ current claim. The Commission therefore concludes that Mrs. Giles has no cognizable claim against these parties.

As to the I.R.S., Judge La Jeunesse correctly noted that the Utah Labor Commission has no jurisdiction over workers’ compensation or occupational disease claims against an instrumentality of the federal government. Mrs. Giles’ claim against the I.R.S. must also be dismissed.

Liability of TAD. The Commission now turns to Mrs. Giles’ claim against TAD and its workers’ compensation insurance carrier, Liberty Mutual. TAD and Liberty Mutual were added as defendants to Mrs. Giles’ claim on the grounds that the Occupational Disease Act’s apportionment provisions might reach TAD, as Mrs. Giles’ former employers. But for TAD and Liberty Mutual to incur any liability for Mrs. Giles’ alleged occupational disease, Mrs. Giles must first establish that her work at TAD exposed her to chemicals that caused or contributed to her porphyria.

Mrs. Giles acknowledges she is unable to produce any evidence establishing what, if any, chemicals she was exposed to at TAD, nor can she establish the extent of any such chemical

## ORDER DENYING MOTION FOR REVIEW

GLEND A W. GILES

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exposure. Her claims regarding the possibility of exposure to chemicals at TAD are entirely speculative. Under such circumstances, the Commission agrees with Judge La Jeunesse that the evidence, even when considered in the light most favorable to Mrs. Giles, fails to establish a genuine dispute of material fact regarding TAD's liability in this matter, and that TAD is therefore entitled to summary dismissal of Mrs. Giles' claim against TAD.

Mrs. Giles' second claim against Oakridge. As already noted, Mrs. Giles' first claim for benefits was filed under Utah's Workers' Compensation Act. Section 34A-2-401(1) of the Act defines the coverage of the Act as follows: "An employee . . . injured . . . by accident arising out of and in the course of . . . employment, wherever such injury occurred . . . shall be paid . . . compensation for loss sustained on account of the injury . . ." Thus, it is the existence of a work-related **injury** that is the basis for payment of benefits under the Worker' Compensation Act.

When Mrs. Giles filed her first claim for benefits against Oakridge in 1992, she initially described her injury in terms of symptoms: "seizures, memory loss, sinus, heart and lung injury." 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 found in §34A-2-311 of the Occupational Disease Act:

The compensation provided under this chapter (the Occupational Disease Act) is not in addition to compensation that may be payable under Chapter (the 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.

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.

**ORDER DENYING MOTION FOR REVIEW**

**GLEND A W. GILES**

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**ORDER**

The Commission affirms the decision of Judge La Jeunesse in this matter and denies Mrs. Giles' motion for review. It is so ordered.

Dated this 1<sup>st</sup> day of May, 2003.

A handwritten signature in black ink, appearing to read "R. Lee Ellertson", is written over a horizontal line.

R. Lee Ellertson  
Utah Labor Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**ORDER DENYING MOTION FOR REVIEW  
GLENDA W. GILES  
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**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Glenda W. Giles, Case No. 20001228, was mailed first class postage prepaid this 2<sup>nd</sup> day of May, 2002, to the following:

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