

2003

Glenda Giles v. Utah Labor Commission, Oakridge Country Club and/or Workers' Compensation Fund; Wasatch Crest Mutual Ins. Co.; Employers' Reinsurance Fund; Adecco, f/k/a/ Tad Technical Services Corp., and/or Liberty Mutual Ins. Co.; Constitution State Service Co.; Ace Usa/Pacific Employer's Ins. Co.; Transportation Ins. Co.; and Internal Revenue Service, : Brief of Appellee

Utah Court of Appeals

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Theodore E. Kanell; Joseph C. Alamilla; Plant, Christensen & Kanell; Alan Hennebold; General Counsel; attorneys for defendants.

Glenda W. Giles; pro se.

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IN THE UTAH COURT OF APPEALS

GLEND A GILES,

Petitioner/Appellant

vs.

UTAH LABOR COMMISSION, OAKRIDGE
COUNTRY CLUB and/or WORKERS'
COMPENSATION FUND; WASATCH
CREST MUTUAL INS. CO.; EMPLOYERS'
REINSURANCE FUND; ADECCO, f/k/a TAD
TECHNICAL SERVICES CORP., and/or
LIBERTY MUTUAL INS. CO.;
CONSTITUTION STATE SERVICE CO.;
ACE USA/PACIFIC EMPLOYER'S INS. CO.;
TRANSPORTATION INS. CO.; and
INTERNAL REVENUE SERVICE,

Respondents/Appellees.

Court of Appeals

Case No.: 20030577-CA

Priority 7

Labor Commission No.: 2001228

Appeal from the Utah Labor Commission

BRIEF OF APPELLEE ACE USA/PACIFIC EMPLOYER'S INS. CO.

Glenda W. Giles
P.O. Box 354
Eureka, MT 59917
Appellant, Pro Se

Theodore E. Kanell
Joseph C. Alamilla
PLANT, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Attorneys for Appellees Ace USA/Pacific
Employer's Ins. Co.

Alan L. Hennebold
General Counsel
Labor Commission of Utah
160 East 300 South
P.O. Box 146615
Salt Lake City, Utah 84114-6615

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UTAH APPELLATE COURTS
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P.O. Box 354
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Theodore E. Kanell
Joseph C. Alamilla
PLANT, CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Attorneys for Appellees Ace USA/Pacific
Employer's Ins. Co.

Alan L. Hennebold
General Counsel
Labor Commission of Utah
160 East 300 South
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Workers Compensation Fund of Utah
Attn: Floyd Holm
P.O. Box 57929
Salt Lake City, Utah 84157
Attorneys for Oakridge and the WCF

Mark R. Sumsion
Richards Brandt Miller Nelson
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Oakridge Country
Club and Wasatch Crest Mutual Ins.
Co.

Michael E. Dyer
Kristy L. Bertelsen
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Attorneys for TAD Technical Services
Corp and/or Liberty Mutual

Employers' Reinsurance Fund
Attn: Lorrie Lima
P.O. Box 146600
Salt Lake City, Utah 84114

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JURISDICTION

The Appellant petitioned the Utah Court of Appeals from a final order of the Utah Labor Commission dated July 16, 2003. This appeal also includes the Labor Commission's Order Denying Motion for Review, dated May 1, 2003. This Court has jurisdiction of this matter pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Whether the Labor Commission's dismissal of Ms. Giles claims against Ace USA/Pacific Employer's Ins. Co. (hereinafter "PACIFIC") was proper based on the Labor Commission's factual finding that Ms. Giles was not employed during PACIFIC's period of coverage. This issue was preserved on appeal. (R. 720-35; R. 880-883; R. 1030-36, R. 1139-1142).

Standard of Review: "When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the findings are not supported by substantial evidence." Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

DETERMINATIVE LAW

Utah Code Annotated § 34A-1-301 provides that "[t]he 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."

STATEMENT OF THE CASE

Nature of the Case: Ms. Giles filed an application for hearing alleging that she was entitled to benefits from various defendants. Specifically, she filed her claim against TAD Technical Services Corporation and Liberty Mutual Insurance (hereinafter "TAD"), its worker's compensation carrier. Other insurance carriers unilaterally were added by the Labor

Commission because they were thought to be the insurers at the time of Ms. Giles' second application for hearing, even though Ms. Giles had not worked for since 1991.

Course of Proceedings: On May 30, 1992, Ms. Giles filed an Application for Hearing against Oakridge Country Club and/or the Worker's Compensation Fund. (R. 1-95). As a result of Ms. Giles claims against Oakridge, Ms. Giles and Oakridge entered into a full and final settlement agreement. On December 27, 2000, Ms. Giles filed a second Application for Hearing alleging that additional benefits should be paid as a result of chemically induced porphyria. (R. 96-117). Ms. Giles alleges that during her employment with Oakridge Country Club, she was exposed to numerous toxic fumes and materials from May, 1991 to December, 1991. (R. 98).

On December 27, 2000, Ms. Giles' filed a motion with the Labor Commission demanding that an impartial administrative law judge be appointed to the case. (R. 96). Ms. Giles made the request for an impartial administrative law judge because she felt her case would not receive fair treatment based on how she had been treated when she had filed her previous application.

On February 22, 2001, Ms. Giles motion for a non-labor commission administrative law judge was denied. Because the Labor Commission was the only agency with the ability and authority to adjudicate worker's compensation claims, Judge LaJeunesse denied Ms. Giles' request for an impartial administrative law judge.

On May 14, 2001, the Labor Commission unilaterally amended the Application for Hearing to include numerous other insurers, which included PACIFIC. (R. 195). Ms. Giles stated in her Application for Hearing that her alleged exposure to the chemicals occurred from May, 1991 through December, 1991. (R. 98). Ms. Giles further stated that she has been unable to work from December 19, 2001 through the present. (R. 98).

On June 8, 2001, TAD filed an Answer and Motion for Summary Judgment in which TAD challenged Ms. Giles' recent claim for additional benefits. (R. 340-70). Ms. Giles filed a response to TAD's Motion for Summary Judgment arguing that she should be allowed to apportion her compensation between TAD and Oakridge Country Club. (R. 375-85). On July 18, 2001, TAD filed a reply memorandum in support of its motion for summary judgment. (R. 421-34).

On July 23, 2001, TAD filed a Motion for Summary Dismissal, seeking to dismiss Ms. Giles' attempt to appeal because there had been no final order from which to appeal. (R. 450-76). On December 6, 2001, the Utah Court of Appeals granted TAD's motion and dismissed Ms. Giles' appeal because the Court lacked jurisdiction on an appeal made before a final order had been entered below. (R. 686-87). Ms. Giles subsequently appealed the denial of her appeal to the Utah Supreme Court, which refused to hear the claim. (R. 702).

On August 9, 2001, PACIFIC requested Ms. Giles' claims against it be dismissed because she did not work for TAD from 1994 to 1997, the period in which PACIFIC provided insurance coverage. (R. 623). On September 10, 2001, Ms. Giles filed a response to PACIFIC's motion to dismiss. (R. 673).

On June 6, 2002, the Labor Commission ruled on TAD's Motion for Summary Judgment and PACIFIC's Motion to Dismiss. (R. 720-35). The Labor Commission ruled that PACIFIC had not provided coverage from 1985 through 1991, the term of Ms. Giles's employment and claims. Accordingly, the Labor Commission determined that PACIFIC was not a proper party to these proceedings. Ultimately, the Labor Commission determined that PACIFIC's insurance policy did not cover the time period of May, 1991 through December, 1991, the period of time Ms. Giles alleges she was exposed to toxic chemicals.

On July 8, 2002, Ms. Giles filed a Motion for Review. On May 1, 2003, the Labor Commission entered its Order Denying Motion for Review. (R. 1030-36). On May 21, 2003, Ms. Giles filed a Request for Reconsideration, (R. 1037-1120), which the Labor Commission denied after briefing by the parties involved. (R. 1231-35).

On July 16, 2003, Ms. Giles filed a Petition for Review, (R. 1236-37), and filed her Amended Petition for Review on July 23, 2003. (R. 1239-40). Ms. Giles subsequently filed her Docketing Statement. On May 21, 2004, Ms. Giles filed an incomplete Appellant's Brief lacking material and pages. She subsequently filed her Supplement to Appellant's Brief on May 26, 2004 and filed her Amended Brief on June 1, 2004.

STATEMENT OF FACTS

Ms. Giles worked as a secretary for TAD from September, 1985 to October, 1990. (R. 354). After Ms. Giles left her employment at TAD, she worked for Oakridge Country Club (hereinafter "Oakridge") from May, 1991 to December, 1991. (R. 98). PACIFIC did not provide TAD insurance coverage from September, 1985 to December, 1991. (R. 623). From May, 1991 to December, 1991, Ms. Giles alleges she suffered from an occupational disease as a result of chemical exposure at Oakridge. (R. 98).

On or about June 9, 1992, Ms. Giles filed an Application for Hearing alleging she was injured on September 7, 1991, as a result of chlorine gas exposure while working for Oakridge. (R. 1-95). On January 4, 1993, the parties presented their case at a hearing in which the administrative law judge ruled that Ms. Giles did not meet her burden of proof and denied her claim. (R.36-49).

On January 5, 1995, Ms. Giles was diagnosed with chemically acquired or chemically induced porphyria from exposure to toxic fumes while she was employed at Oakridge. (R. 367-

69). Oakridge continued to dispute liability, but a settlement agreement was reached and Ms. Giles was then entitled to medical benefits and compensation as a result of the compensation agreement. (R. 360-70).

On December 27, 2000, Ms. Giles filed another Application for Hearing seeking additional benefits from Oakridge and the Workers' Compensation Fund (hereinafter "WCF"). (R. 96-99). Ms. Giles requested the addition of TAD and its insurer, Liberty Mutual Insurance, as parties to this claim. (R. 133-35). On February 23, 2001, the Labor Commission sent Oakridge, WCF, and Wasatch Crest Mutual Insurance a Request for Answer. (R. 123-124). On May 14, 2001, the Labor Commission sent an Amended Request for Answer to TAD, PACIFIC, and Liberty Mutual Insurance. (R. 195-196).

On August 9, 2001, PACIFIC sent Judge LaJeunesse a request for dismissal of Ms. Giles' claims because PACIFIC's term of coverage was from 1994 to 1997. (R. 623). Ms. Giles admitted that she had not worked from December, 1991 to the present. (R. 98). Ms. Giles did not work for TAD from 1994 to 1997 and, therefore, PACIFIC requested that Judge LaJeunesse dismiss Ms. Giles' claims against PACIFIC. (R. 623).

On June 6, 2002, Judge LaJeunesse issued his Ruling on the Motions for Summary Judgment and Motions to Dismiss. (R. 720-35). In the Labor Commission's Findings of Fact, the fact that PACIFIC did not provide coverage from 1985 through 1991 was uncontested. (R. 724). Judge LaJeunesse, therefore, dismissed Ms. Giles' claims against PACIFIC because PACIFIC did not provide coverage in 1991 and Ms. Giles did not work for TAD during the term of PACIFIC's insurance coverage from 1994 to 1997. (R. 732-33). This holding was upheld by the Labor Commission in its Order Denying Motion for Review. (R. 1032-33).

SUMMARY OF THE ARGUMENT

Because it is uncontested that PACIFIC did not provide insurance coverage from 1985 through 1991, the Labor Commission properly dismissed PACIFIC as a party to this claim. Ms. Giles claims that she is entitled to benefits as a result of her toxic exposure during her employment with Oakridge from May, 1991 through December, 1991. PACIFIC's insurance coverage of TAD was from 1994-1997. These facts are undisputed. Consequently, the Labor Commission correctly ruled that PACIFIC was not a proper party to Ms. Giles' Application for Hearing because PACIFIC did not provide coverage from 1985 to 1991.

ARGUMENT

BECAUSE MS. GILES DID NOT WORK FOR TAD DURING PACIFIC'S COVERAGE PERIOD, THE LABOR COMMISSION CORRECTLY DISMISSED MS. GILES CLAIMS AGAINST PACIFIC

Ms. Giles posits that the Labor Commission incorrectly granted PACIFIC's motion to dismiss. PACIFIC asserts that the grant of its motion to dismiss was proper given the undisputed facts in this case. It is undisputed that PACIFIC's insurance policy with TAD was from 1994-1997. (R. 732; R. 1032). It is also undisputed that Ms. Giles' period of potential exposure to chemicals at Oakridge was from May, 1991 to December, 1991. (R. 724; R. 1030). Based upon these undisputed facts, the Labor Commission correctly dismissed Ms. Giles' claims against PACIFIC because PACIFIC's insurance coverage did not encompass Ms. Giles' years of employment from 1985 to 1991. (R. 732). Likewise, PACIFIC did not provide worker's compensation coverage for Oakridge from May, 1991 to December, 1991. (R. 623).

Under Utah Code Ann. § 63-46b-1(4)(b), the Labor Commission may grant a motion to dismiss "if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party" Administrative Law Judge LaJeunesse granted

PACIFIC's motion to dismiss based on the uncontroverted facts, above, and the lack of an assertion that PACIFIC issued an insurance policy for any of Ms. Giles' employers from 1985 to 1991. (R. 733). Judge LaJeunesse dismissed PACIFIC as a party to Ms. Giles' claims because there was no insurance coverage and, therefore, the Labor Commission "lacked the authority to keep [PACIFIC] as respondents in the present case." (R. 733).

The Labor Commission based its ruling on a Utah Supreme Court case which determined the commission was "without the authority to apply the terms of an insurance policy to an individual or corporation not named in the policy as the insured." State Ins. Fund v. Industrial Comm'n, 115 Utah 383, 386, 205 P.2d 245, 246 (1949). In State Ins. Fund, the employee's injury occurred after the termination of the policy and before a new policy was issued. *Id.* Accordingly, because the employee was not covered under the insurance policy at the time of the accident, the commission could not apply the terms of the policy in place after the accident had occurred. *Id.*

In the present case, the Labor 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." Utah Code Annotated § 34A-1-301. The Labor Commission found PACIFIC's insurance policy coverage was from 1994 through 1997. The Labor Commission found that PACIFIC did not insure TAD from 1985 through 1991, the time period in which Ms. Giles alleges she was exposed to toxic chemicals and in which her alleged claims arose. The Labor Commission found these facts to be uncontested. Accordingly, the Labor Commission dismissed PACIFIC as a party to Ms. Giles' claims because Ms. Giles did not work for TAD between the years of 1994 through 1997.

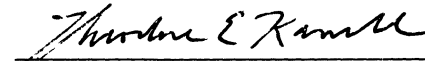
Because the Labor Commission held that PACIFIC's insurance policy did not include the time period from 1985 to 1991, and held that Ms. Giles did not work for TAD during the PACIFIC policy period from 1994 to 1997, the Labor Commission correctly held that PACIFIC was not a proper party to Ms. Giles' claims for benefits. The Labor Commission's findings of fact are based on undisputed evidence and, therefore, there is substantial evidence supporting the Labor Commission's determination that no PACIFIC insurance policy was in place from 1985 through 1991.

CONCLUSION

The Order Denying Motion for Review was properly entered in this case. Based upon the Labor Commission's uncontested factual findings concerning PACIFIC insurance coverage, the Labor Commission correctly determined that PACIFIC did not provide worker's compensation coverage from 1985 through 1991 and, therefore, Ms. Giles' claims against PACIFIC were properly dismissed.

Respectfully submitted this 30 day of June, 2004.

PLANT, CHRISTENSEN & KANELL



THEODORE E. KANELL

JOSEPH C. ALAMILLA

Attorneys for Appellee's Ace USA/Pacific
Employer's Insurance Company

CERTIFICATE OF SERVICE

I certify that on the 30 day of June, 2004, true and correct copies of the foregoing document were mailed first class, postage prepaid, to the following:

Utah Court of Appeals
Scott M. Matheson Courthouse
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230
(8 copies, one with original signature)

Glenda W. Giles
P.O. Box 354
Eureka, MT 59917
Appellant, Pro Se

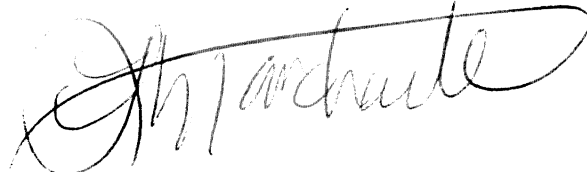
Michael E. Dyer
Kristy L. Bertelsen
BLACKBURN & STOLL
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Attorneys for TAD Technical Services
Corp and/or Liberty Mutual

Workers Compensation Fund of Utah
Attn: Floyd Holm
P.O. Box 57929
Salt Lake City, Utah 84157
Attorneys for Oakridge and the WCF

Alan L. Hennebold
General Counsel
Labor Commission of Utah
160 East 300 South
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Mark R. Sumsion
Richards Brandt Miller Nelson
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Oakridge Country
Club and Wasatch Crest Mutual Ins.
Co.

Employers' Reinsurance Fund
Attn: Lorrie Lima
P.O. Box 146600
Salt Lake City, Utah 84114



ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, an addendum is included herewith.



PO Box 1260
West Jordan, UT 84083

801.282.4850 tel
801.282.4860 fax

margie.simmons@ACE-INA.com
www.ace-ina.com

Margie Simmons
Claims Representative

August 09, 2001

Utah Labor Commission
Attn: Judge LaJeunesse
P.O. Box 146615
Salt Lake City, UT 84114-6615

Re: Claimant: **Glenda Giles**
Case Number: 20001228
Employer: Tad Resources International Inc.

Dear Judge LaJeunesse:

Please accept this letter as a request to dismiss ACE-USA/Pacific Employers Insurance Co from these proceeding. We did not provide coverage for Tad Resources during the period that Ms. Giles was employed by Tad (1985-1990). Our coverage period was 1994-97.

If our motion to dismiss is to be denied, we request a detailed explanation of the denial so that we can respond accordingly.

Thank you for your prompt attention to our request for dismissal.

Sincerely,

Margie Simmons
Claims Representative

Cc: **Glenda Giles**
Trudy Stauffer, Wasatch Crest
Janet Moffit, WCF
Sherrie Hayashi, ERF
IRS
United States Attorney's Office
Mike Dyer, Esq.
Transporation Ins.Co.
Mark R. Sumsion

UTAH LABOR COMMISSION
P.O. BOX 146615
Salt Lake City, Utah 84114-6615

Case No. 20001228

GLEND A W. GILES,

Petitioner,

vs.

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

Respondents,

RULING ON MOTIONS FOR
SUMMARY JUDGMENT AND
MOTIONS TO DISMISS

Judge: Richard M. La Jeunesse

I. STATEMENT OF THE CASE

The petitioner, Glenda Giles, filed an "Occupational Disease Claim" with the Utah Labor Commission on December 27, 2000, and claimed entitlement to permanent total disability compensation. Ms. Giles' claim for workers' compensation benefits arose out of her alleged contraction of "chemically induced porphyria" as a result of exposure to "numerous toxic fumes and materials" during the course of her employment with Oakridge Country Club (Oakridge), TAD Resources nka Adecco (Adecco), and the Internal Revenue Service (IRS).

The respondents denied that Ms. Giles' employment with respondents exposed her to substances which medically caused porphyria. The respondents argued that Ms. Giles' alleged porphyria resulted from causes other than her employment conditions.

Employers' Reinsurance Fund (ERF), Oakridge, Workers' Compensation Fund of Utah (WCF), Wasatch Crest Mutual Ins. Co. (Wasatch Crest), all contended that Ms. Giles' released them from further workers' compensation liability as to her employment with Oakridge when on March 8, 1995 she entered into a "Settlement Agreement."

Adecco claimed that Ms. Giles' failed to meet certain statutes of limitations with respect to the filing of her claim. ACE USA/Pacific Employers' Mutual Ins. Co. (ACE) and Constitution State Service Co. (Constitution) both denied that they provided insurance coverage for Adecco during the periods of Ms. Giles' employment. Finally, a question existed in my mind as to whether the Labor Commission exercised any Jurisdiction over the IRS, a federal agency.

II. ISSUES.

1. Did Glenda Giles' employment with any or all of the respondents expose her to "toxic fumes and materials" that caused her to suffer porphyria?
2. Is Glenda Giles' Occupational Disease Claim against any or all of the respondents precluded by the March 8, 1995 Settlement Agreement?
3. Did Glenda Giles' fail to file her workers' compensation claims against Adecco within the applicable statutes of limitations?¹
4. Should the respondents, Wasatch Crest, ACE, and Constitution, be dismissed from the present action because they never provided insurance coverage for any of the respondent employers during the times relevant to this case?
5. Does the Labor Commission have jurisdiction to adjudicate the workers' compensation liability of the Internal Revenue Service?

III. PROCEEDINGS.

On December 27, 2000 Ms. Giles filed the present Occupational Disease claim based on her alleged exposure to "toxic fumes and materials" during the course of her employment with Oakridge from May 1991, through December 1991. On March 5, 2001 Wasatch Crest filed a Request for Dismissal from the present claim based on the assertion that Wasatch Crest never insured Oakridge during the period May 1991, through December 1991. Wasatch Crest filed a number of subsequent motions to dismiss along the same lines.

¹ I never reached this issue, because I found resolution of the other issues dispositive.

On March 23, 2001 WCF filed an answer to Ms. Giles' Occupational Disease Claim. WCF denied the existence of any evidence that demonstrated a causal connection between Ms. Giles' porphyria and her employment with Oakridge. WCF also claimed that the Settlement Agreement of March 8, 1995 released Oakridge and WCF.

On April 4, 2001 Constitution filed a response that Constitution provided no coverage for Adecco during the relevant time periods at issue in this case. On May 24, 2001 ACE also filed a response that ACE provided no coverage for Adecco during the relevant time periods at issue in this case.

Adecco and Liberty Mutual filed an answer to Ms. Giles' Occupational Disease Claim. Adecco denied the existence of any evidence that demonstrated a causal connection between Ms. Giles' porphyria and her employment with Adecco. On the same day Liberty Mutual and Adecco filed a Motion for Summary Judgment. Adecco argued that Ms. Giles' claims failed for untimeliness under applicable statutes of limitations.

On July 11, 2001 ERF filed a Motion to Dismiss ERF from the present action. ERF raised the same legal defenses advanced by WCF.

Ms. Giles filed her own assorted dispositive motions on April 4, 2001. Additionally, Ms. Giles filed at various times motions to default each of the respondents for untimely answers.²

In the meantime, Ms. Giles requested the appointment of an Administrative Law Judge outside the Labor Commission. Ms. Giles pursued her request all the way to the Utah Supreme Court, which ultimately denied her Petition for Writ of Certiorari on April 8, 2002. The Utah Court of Appeals remitted the case back to the Labor Commission on May 9, 2002.

IV. FINDINGS OF FACT

A. The Respondents, Oakridge Country Club, Workers Compensation Fund of Utah, and Employers' Reinsurance Fund.

On March 8, 1995 Judge Timothy C. Allen of the Industrial Commission of Utah nka Labor Commission issued an Order that adopted a Settlement Agreement entered into by Glenda Giles, Oakridge, WCF and ERF. Ms. Giles and her attorney Phillip Shell both executed the Settlement Agreement.

² IRS was the only respondent that failed to file an answer in this case.

The Settlement Agreement between Ms. Giles, WCF and ERF stated in relevant part:

2. The applicant (Glenda Giles) has filed a claim for workers' compensation insurance benefits in connection with allegations that she was exposed to chlorine gas in the course of her employment with the Oakridge Country Club on September 7, 1991. She submits that she is permanently and totally disabled from further employment as a direct result of the physical and mental injuries allegedly, including organic brain damage, sustained via the exposure.
3. [t]he employer denies any causal relationship between this incident and the applicant's health difficulties.
4. In light of this dispute, and in light of the varying odds for success for the claims of the parties, it is the desire of the parties to reach a compromise settlement of a claim of disputed validity. The parties are willing, as set forth below to stipulate that the claimant is permanently and totally disabled, but that any benefits paid shall be as set forth and limited by the terms of this agreement.
5. For the purpose of this compromise of this disputed claim, the defendants agree to pay the applicant compensation for permanent total disability at the rate of \$135.00 per week.
7. The applicant's commencement date for permanent total disability is agreed to be December 1, 1991. In light of her age and physical limitations, she is not considered to be a candidate for successful vocational rehabilitation. She qualified for Social Security Disability beginning December 1, 1991.
8. Based on the forgoing, the employer/carrier shall pay the applicant the lump sum amount of \$21,060.00 in compensation in full settlement of their portion of her workers' compensation claim of September 7, 1991. This represents \$135.00 per week for 156 weeks beginning December 1, 1991. The defendants shall not be responsible for any medical or health care benefits, except that the Defendants shall reimburse the applicant in the sum of \$12,000.00 for past medical bills and expenses incurred in connection with her alleged September 7, 1991 injury. Of this amount, \$6,000.00....The total lump sum payment of \$33,060.00, less attorneys fees set forth below, shall be paid upon approval of this agreement by the Industrial Commission.

-
9. The Employers' Reinsurance Fund agrees to place the applicant on its permanent total disability rolls beginning December 1, 1994 at the rate of \$135.00 per week. Applicant shall remain on the Fund's payroll for so long as she shall live, or until further order of the Industrial Commission of Utah, subject to any offsets afforded by the terms of §35-1-67(5) U.C.A. Upon the applicant reaching the age of 65 years (June 17, 2004), her weekly compensation rate shall convert to the then prevailing minimum amount based on 36% of the state average weekly wage, as adjusted yearly.

Ms. Giles based her original claim for permanent total disability benefits against the respondents on a diagnosis of porphyria by Dr. Gordon Baker M.D. dated January 5, 1995. [see: letter of Dr. Gordon Baker M.D. attached to Ms. Giles' Application for Hearing]. Ms. Giles also based her present claim for permanent total disability benefits against the respondents on the same diagnosis of porphyria by Dr. Baker only couched as an occupational disease, rather than an industrial accident claim. [id.].

B. The Respondents Wasatch Crest Mutual Ins. Co., Constitution State Service Co., and AC USA/Pacific Employers Ins. Co.

The respondents Wasatch Crest, Constitution, and ACE all denied that they as insurance companies provided workers' compensation insurance coverage for any of Ms. Giles' employers during the relevant time periods at issue. None of the other parties contradicted the assertions of the respondents Wasatch Crest, Constitution, and ACE. None of the parties alleged the existence of insurance policies provided by Wasatch Crest, Constitution, or ACE that covered any of Ms. Giles' employers during the relevant time periods at issue.

C. The Respondents TAD Resources nka Adecco and Liberty Mutual Ins, Co.

Ms. Giles' "Occupational Disease Claim" filed on December 27, 2000 originally named only Oakridge and WCF as respondents. Ms. Giles' initially claimed that her porphyria resulted from exposure to "numerous toxic fumes and materials in the course of her employment with Oakridge C.C....the period May 1991 to December 1991." [see: "Occupational Disease Claim" filed December 27, 2000 page 1].

On March 14, 2001 Ms. Giles filed a letter that obliquely requested the joinder of Adecco and its insurance carrier Liberty to her Occupational Disease Claim as respondents. On March 30, 2001 Ms. Giles provided to the Labor Commission the address of Adecco.

On May 14, 2001 the Labor Commission sent an "Amended Request for Answer" to Adecco and Liberty. On June 8, 2001 Adecco and Liberty filed an "Answer" and "Motion for Summary Judgment." Adecco claimed inter alia that Ms. Giles presented no evidence that linked her employment at Adecco with her porphyria.

Dr. Baker's letters dated January 5, 1995, and May 3, 1995, constituted the only medical evidence provided by Ms. Giles in support of her Occupational Disease Claim and her multiple responses to the various motions filed in this case. Dr. Baker's January 5, 1995 letter stated in pertinent part that:

Glenda Giles is a 55-year-old woman who was in good health until she was working at a country club in Utah. At that time, extensive remodeling was going on. Chlorine was used for a junior Olympic swimming pool in the basement. She was exposed to chlorine gas, which has been previously documented.

She has extensive documentation of her initial exposure and there is no need to repeat this.

This (tests) would indicate that she has an intoxication or chemically acquired or chemically induced porphyria.

Porphyria is considered to be a rare hereditary disease; however, porphyria may be acquired by exposure to a group of porphyric drugs and chemicals. The acquired porphyria may be considered to be the result of an environmental insult or poison on either 1. A genetically predisposed individual, or 2. a previously normal individual with no familial history or predisposition to this disease.

The causes of acquired porphyria are:

1. Drugs. Over 20 drugs are known to induce or cause porphyria including barbituates, chloriphenical, Danazol, Ergot alkaloids, glutethamide, Griseofulvin, imipramine, Meprobamate, Metho-Dopa, Fenton, Sulfonamides, Albutamide, birth control pills with estrogens, and many others.

2. Chemicals. Many, at least 50 environmental porphyrogenic substances include lead, paints, metal fumes, arsenic, vinyl chloride, alcohols, glycols and their derivatives, polychlorinated biphenals (PCB), Dioxin, Chlorobenzina, possibly all chlorinated hydrocarbons or any chemical the (sic) mimics estrogen. One large outbreak was caused by grain contaminated with the fungicide hexachlorabenzine.

3. Infectious Hepatitis C is a major cause of porphyria.

4. Malnutrition can bring on a hereditary form.

In summary, then, Glenda Giles has developed porphyria as a result of exposure to toxic materials at work at a country club. In addition to be (sic) exposed to chlorine, she was exposed to extensive materials in remodeling including carpeting. She did notice illness in this area and she was consistently better away from this area.

Tests at the Mayo Clinic do indicate that she does have porphyria. It is highly unlikely that she had this previously as she does have a triple enzyme defect, and the hereditary forms of porphyria usually will have one enzyme defect. [emphasis added].

On May 3, 1995 Dr. Baker added:

She has had multiple exposures. She was not only exposed to chlorine gas in a one-time exposure, which could be significant, she also was chronically exposed to chemical fumes used in extensive remodeling. So she would have been exposed to the different building materials and also office machinery. She was exposed to copiers, fax machines, and carbonless copy paper, which may release many toxic substances. She was also exposed to new electronic equipment including computers. There could have been other materials used at the country club. Golf courses are well-known for having large amounts of pesticides being constantly sprayed.

In sum, Dr. Baker listed a host of potential environmental factors as possible contributing causes of Ms. Giles' porphyria. However, Dr. Baker specifically opined that Ms. Giles' "developed porphyria as a result of exposure to toxic materials at" Oakridge. Dr. Baker emphasized the unlikelihood that Ms. Giles developed porphyria prior to her employment at Oakridge.

Ms. Giles acknowledged that Dr. Baker directed his opinion concerning the medical causation of her porphyria exclusively toward her exposure to chemicals at Oakridge. [see: Petitioner's Response to "Answer" Filed by Respondents Oakridge Country Club and Workers Compensation Fund page 4 filed April 4, 2001]. Ms. Giles observed:

The doctor who diagnosed Petitioner's occupational disease has stated that her exposure to the many chemicals involved in the re-modeling and new construction of the club house; the many chemicals used in and around the club house, and on the golf course grounds; together with the office supplies and equipment were sufficient to produce the chemically induced porphyrinopathy. [id.].

Ms. Giles confirmed that:

Petitioner's case is primarily directed at Oakridge Country Club, and Workers Compensation (sic) Fund. All other parties have been joined in this case because Petitioner did not work for Oakridge for twelve consecutive months, and therefore apportionment is required by law. There can be no doubt that Petitioner became permanently and totally disabled while in Oakridge Country Club's employ. However, there are substantial questions concerning the causal contribution of her prior employers. The extent of these Respondents' liability is a question of fact for the Labor Commission to determine through these proceedings. [see: "Petitioner's Response to Motion for Summary Judgment filed by Respondents"; Adecco f/k/a Tad Technical Services Corporation and/or Liberty Mutual Insurance Company" at pages 4-5, filed June 18, 2001].

Ms. Giles alleged that she worked for Adecco from September 1985, to October 1990. [see: Occupational Disease Claim Sec. J.]. In her response to Adecco's "Motion for Summary Judgment," Ms. Giles admitted that: "The extent of these Respondents' causal contribution to Petitioner's chemically induced porphyriopathy has yet to be determined." [see: Petitioner's Response to these Respondents' Motion for Summary Judgment p. 1 numbered paragraph 2 filed June 18, 2001]. Ms. Giles further stated:

Petitioner submits that when she filed her notice of occupational disease with the Industrial Commission of Utah on May 19, 1985, she stated therein: 'I also worked for McDonnell Aircraft (a subsidiary of McDonnell Douglas) In the office located in the hangers at Hill Air Force Base. I worked there for five years (1985 to October 1990). There were numerous fumes there.' In addition, Petitioner testified on 4 January 1993 at the hearing on her occupational injury claim: 'I told the Workers Comp people that I worked at Hill Field for five years in the hangers; and that once a year during the winter when they closed the hangers up to keep it warm, I would develop bronchitis.' (Citation omitted). Petitioner does not know all of the chemicals and fumes she was exposed to while in TAD's employ; but she does know that she was exposed to these hazards on a daily basis while working for TAD.

Petitioner admits she knew on 5 January 1995 that her occupational disease was work related; but she did not know then, and still does not know, to what extent the exposure she endured while working for TAD may have aggravated, predisposed, or contributed to her diagnosed occupational disease. [id. at pp. 2-3][emphasis added].

On June 25, 2001 Ms. Giles filed "Petitioner's Response to 'Answer' filed by Respondents Adecco f/k/a TAD Technical Services Corporation and Liberty Mutual" wherein she reiterated:

As stated in her Response to these Respondent's Motion for Summary Judgment, Petitioner informed TAD in May 1995 that she was exposed to numerous fumes while in their employ. Petitioner does not know to what extent her exposures while employed by TAD affected, contributed, predisposed, and/or caused her occupational disease. [Petitioner's Response to 'Answer' filed by Respondents Adecco f/k/a TAD Technical Services Corporation and Liberty Mutual p. 4 Response to Sixth Defense filed June 25, 2001][emphasis added].

In her "Response to Memorandum in Support of Respondents", Adecco f/k/a TAD Technical Services Corporation and/or Liberty Mutual Insurance Company, Motion for Summary Judgment" filed on July 28, 2001, Ms. Giles' offered a slightly more specific description of the substances she believed her employment at Adecco exposed her to:

'Petitioner did notice strange odors which she believed to be solvents, cleaning materials, exhaust fumes, welding and soldering fumes, jet fuel, adhesives, paint fumes, carpet, and carpet glues.' (Ms. Giles quoting her own answer to respondents' interrogatory No. 21). Petitioner also mentioned a new computer system, a leased copy machine, a FAX machine, and working with newly printed documents....'Petitioner was evacuated from her office and the hanger on at least one occasion when the chemical alarms sounded.' Although Petitioner was not notified what chemical caused the alarm, or what effects the exposure might have, this is evidence of injurious exposure while employed by TAD at Hill Airforce Base. ["Response to Memorandum in Support of Respondents", Adecco f/k/a TAD Technical Services Corporation and/or Liberty Mutual Insurance Company, Motion for Summary Judgment" at pages 3-4 filed on July 28, 2001].

Nevertheless, earlier in her answer to interrogatory No. 21 Ms. Giles stated:

These exposures occurred eleven to sixteen years ago, and it is impossible for Petitioner, at this late date, to compile a list of each exposure; on what date or dates they occurred; the length of time of exposure; the quantity of fume exposed to; the source or sources of each fume. Petitioner was exposed to toxic fumes on a daily basis, but has no way of knowing the identity of all the toxic materials she was exposed to. [see: "Reply Memorandum in Support of Respondents, Adecco f/k/a TAD Technical Service Corporation and/or Liberty Mutual Insurance Company's Motion for Summary Judgment" Exhibit "A" filed July 18, 2001].

The medical evidence produced by Ms. Giles to date in this case, and taken in the light most favorable to Ms. Giles, established that she developed porphyria as a result of exposure to toxic materials while at work for Oakridge and not from any prior industrial exposure. Accordingly, Ms. Giles' own medical evidence excluded Adecco from any liability for Ms. Giles' porphyria.

Further, Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time and place of any such exposure. At best Ms. Giles could only express her belief as to the type of substances her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that she did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case was against Oakridge, but she joined Adecco as a hedge against apportionment under the Occupational Disease statute. With her case against Adecco mired in mere speculation, Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since any proof of a causal connection between Ms. Giles employment with Adecco and her porphyria is admittedly beyond her means, Ms. Giles' claim against Adecco must be dismissed.

V. CONCLUSIONS OF LAW

A. Standard for Motions for Summary Judgment.

Utah Code §63-46b-1(4) provides in pertinent part that:

This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

(b) granting a timely motion ... for summary judgement if the requirements of ... Rule 56 ... of the Utah Rules of Civil Procedure are met by the moving party

Utah Rule of Civil Procedure 56 states in relevant part that:

(c) [T]he judgement sought shall be rendered forthwith 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 judgement as a matter of law.

B. The Respondents, Oakridge Country Club, Workers Compensation Fund of Utah and Employers' Reinsurance Fund.

Utah Code Ann. §35-1-16 (1994) in effect at the time of the March 8, 1995 Settlement agreement provided in relevant part:

- (1) The commission has the duty and 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:

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

The Utah Court of Appeals upheld a decision by an Industrial Commission administrative law judge that a "Compromise and Settlement Agreement" executed by a claimant/employee, employer/respondent, and Second Injury Fund (now ERF), barred the claimant/employee's subsequent claim for permanent total disability compensation. Wilburn v. Interstate Electric, 748 P. 2d 582 (Utah App. 1988). In Wilburn the claimant/employee (Wilburn) received a 36% whole person impairment apportioned 10% to the industrial low back injury at issue, 15% to a preexisting low back problem, and 15% to a nonindustrial cervical spine pathology. [id. at 584]. The respondents in Wilburn paid Mr. Wilburn some temporary total, and permanent partial, disability benefits. [id.]. Mr. Wilburn then notified the respondents that he intended to file for permanent total disability benefits. [id.]. The parties then entered into the "Compromise and Settlement Agreement" whereby the respondents paid Mr. Wilburn some additional permanent partial disability benefits. [id.].

After the "Compromise and Settlement Agreement" Mr. Wilburn filed a claim against respondents with the then Industrial Commission for permanent total disability compensation. [id.]. The administrative law judge ultimately ruled that:

The Compromise and Settlement Agreement was therefore binding and barred plaintiff's claim for permanent and total disability compensation. [id.].

As noted above, the Utah Court of Appeals affirmed the decision of the administrative law judge. [id. at 588].

The undisputed facts of the present claim verified that Ms. Giles entered into a “Settlement Agreement” with the respondents Oakridge, WCF, and ERF on March 8, 1995. The “Settlement Agreement” established that Ms. Giles became permanently and totally disabled as a result of porphyria she allegedly contracted from her employment with Oakridge. [see: paragraphs 2 and 7 of the “Settlement Agreement”]. The respondents agreed to pay Ms. Giles a compromised, weekly benefit rate of \$135.00 for her permanent total disability allegedly incurred while employed for Oakridge. [see: paragraphs 8 and 9 of the “Settlement Agreement”]. The “Settlement Agreement” specifically stated that the sum paid represented a compromise of a disputed claim. [see: paragraphs 4 and 5 of the “Settlement Agreement”].

Ms. Giles couched her present claim as an occupational disease rather than an industrial accident. Nevertheless, Ms. Giles’ present Occupational Disease Claim essentially constituted the same claim for permanent total disability benefits that she compromised in her “Settlement Agreement” approved on March 8, 1995. Both Ms. Giles’ claims consisted of claims for permanent total disability compensation derived from her diagnosis of porphyria allegedly caused by her employment at Oakridge. Accordingly, the March 8, 1995 “Settlement Agreement” barred Ms. Giles’ present Occupational Disease Claim. Wilburn v. Interstate Electric, 748 P. 2d 582.

The mere fact that Ms. Giles’ recast her claim for permanent total disability compensation as an occupational disease rather than an industrial accident failed to create a separate and distinct remedy from her first claim. Utah Code Ann. §35-2-110 (1991) in effect at the time of the March 8, 1995 Settlement agreement stated:

The compensation provided under this chapter (occupational disease chapter) is not in addition to compensation which may be payable under Title 35, Chapter 1 (industrial accidents chapter), and in all cases where injury results by reason of an accident arising out of an in the course of employment and compensation is payable for the injury under Title 35, Chapter 1, no compensation under this chapter shall be payable.

In short, Ms. Giles is not allowed double recovery for permanent total disability compensation from the same injury by the same employer under both the industrial accidents, and occupational disease, chapters of the Workers Compensation Act.³

³ The Utah Supreme Court held that:

[a]n employee is not entitled to compensation for wage loss for which the employer has already compensated him or her. Realistically, and in view of our workers’ compensation plan, any other holding ignores the plain language of the

Ms. Giles argued that Utah Code §35-1-90 prevented her from compromising her rights to further benefits via the March 8, 1995 “Settlement Agreement.” [see: Petitioner’s Response to Answer Filed by Respondents Oakridge Country Club and Workers Compensation Fund” filed April 4, 2001 at page 8]. Utah Code Ann. §35-1-90 (1917) in effect at the time of the March 8, 1995 “Settlement Agreement” stated in part:

No agreement by an employee to waive his rights to compensation under this title shall be valid.

The Court in Wilburn specifically addressed this argument:

Under this provision, settlements are appropriate only when the compensable nature of the worker’s injury is disputed and the worker’s right to recover is doubtful. (citation omitted). Wilburn v. Interstate Electric, 748 P. 2d at 586.

The “Settlement Agreement” of March 8, 1995 specifically stated that: “it is the desire of the parties to reach a compromise settlement of a claim of disputed validity.” [see: paragraph 4 of the “Settlement Agreement”]. In such a case, the Court in Wilburn held “§ 35-1-90 is no bar to enforceability of the agreement.” [id. at 587].

C. The Respondents Wasatch Crest Mutual Ins. Co., Constitution State Service Co., and AC USA/Pacific Employers Ins. Co.

The respondents Wasatch Crest, Constitution, and ACE all denied that they as insurance carriers provided workers’ compensation insurance coverage for any of Ms. Giles’ employers during the relevant time periods at issue. None of the other parties contradicted the assertions of the respondents Wasatch Crest, Constitution, and ACE. None of the parties alleged the existence of insurance policies provided by Wasatch Crest, Constitution, or ACE that covered any of Ms. Giles’ employers during the relevant time periods at issue.

The Utah Supreme Court specifically held that:

[t]he Industrial Commission is without authority to apply the terms of an insurance policy to an individual or a corporation not named in the policy as the insured. State Ins. Fund v. Industrial Commission of Utah, 115 Utah 383, ___, 205 P. 2d 245, ___ (1949)

workers’ compensation statutes and would result in claimants’ receiving duplicate payments for loss of earning capacity. Johnson v. Harsco/Heckett, 737 P. 2d 986, 988 (Utah 1987).

Absent any assertion that Wasatch Crest, Constitution, or ACE issued workers' compensation insurance policies for any of Ms. Giles' employers during the relevant time periods at issue, the Labor Commission lacks authority to keep them as respondents in the present case.

D. The Respondents TAD Resources nka Adecco and Liberty Mutual Ins, Co.

Utah Code Ann. § 35-2-107 (1991) provided that:

For purposes of this chapter, a compensable occupational disease is defined as any disease or illness which arises out of and in the course of employment and is medically caused or aggravated by that employment.

Ms. Giles as the petitioner in the present matter carried the burden to prove by a preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco. [see gen: Ashcroft v. The Industrial Comm'n of Utah, 855 P. 2d 267, 269 (Ut App. 1993) (petitioner's burden of proof by preponderance of the evidence)]. Ms. Giles also bore the burden to prove by a preponderance of the evidence that her employment at Adecco medically caused her porphyria.

The medical evidence produced by Ms. Giles to date in this case, and taken in the light most favorable to Ms. Giles, established that she developed porphyria as a result of exposure to toxic materials while at work for Oakridge and not from any prior industrial exposure. Accordingly, Ms. Giles' own medical evidence excluded Adecco from any liability for Ms. Giles' porphyria. [see gen: Stevenson v. The Industrial Comm'n of Utah, 641 P. 2d 117 (Utah 1982).

Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time and place of any such exposure. At best Ms. Giles could only express her belief as to the type of substances her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case was against Oakridge, but she joined Adecco as a hedge against apportionment under the Occupational Disease statute. Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since Ms. Giles lacked the means to prove by a preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco her claim must be dismissed.


E. The Respondent Internal Revenue Service.

Ms. Giles requested joinder of her former employer the Internal Revenue Service. However, a federal employee's remedy for a workers' compensation claim lies exclusively under the Federal Employees' Compensation Act 5 U.S.C. § 8101-8152 (FECA). see: Miller v. V.A. Medical Center, 2001 U.S. App. Lexis 7659 (10th Cir. 2001) and Hope v. Berrett, 756 P. 2d 102, 103 (Ut. App 1988). Further, the Utah Court of Appeals noted in Hope a "[f]ederal employee...is not actually an 'employee' as defined by Utah Code Ann. § 35-1-43 (1987)." id. at fn 1. Consequently, the Utah Labor Commission lacks jurisdiction to consider Ms. Giles' occupational disease claim against the IRS under the Utah Workers Compensation Act. Ms. Giles must pursue her claim against the IRS pursuant to FECA before the United States Secretary of Labor.

VI. ORDER

IT IS THEREFORE ORDERED that Glenda Giles' Occupational Disease Claim against Oakridge Country Club, Workers Compensation Fund of Utah, Wasatch Crest Mutual Ins., Employers' Reinsurance Fund, TAD Resources nka Adecco, Constitution State Service Co., ACE USA/Pacific Employers' Ins. Co., Liberty Mutual Ins. Co., and Internal Revenue Service, is hereby dismissed with prejudice.

Dated this 6th day of June 2002,


Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

CERTIFICATE OF MAILING

I, Alicia Zavala-Lopez, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Ruling on Motions for Summary Judgment and Motions to Dismiss in the case of Giles v. Oakridge Country Club et al, Case No. 20001228 on the 16 day of June 2002, to the following:

GLENDIA GILES
PO BOX 354
EUREKA MT 59917

JANET MOFFIT ESQ
392 E 6400 S
SALT LAKE CITY UT 84117

TAMMY WASHINGTON
CLAIM REPRESENTATIVE
CONSTITUTION STATE SERVICE CO
PO BOX 173762
DENVER CO 80217-3762

UNITED STATES ATTORNEY'S OFFICE
185 S STATE STE 400
SALT LAKE CITY UT 84111

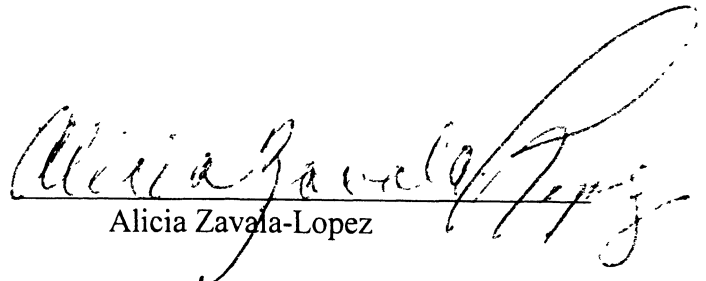
MARGIE SIMMONS
CLAIMS REPRESENTATIVE
ACE USA
PO BOX 1260
WEST JORDAN UT 84088

MICHAEL DYER ESQ
77 W 200 S STE 400
SALT LAKE CITY UT 84101

BRAD BETEBENNER ESQ
PO BOX 2465
SALT LAKE CITY UT 84110-2465

SHERYL HAYASHI ESQ
160 S 300 S THIRD FLOOR
SALT LAKE CITY UT 84111

OAKRIDGE COUNTRY CLUB
1492 W SHEPHERD
FARMINGTON, UTAH 84025


Alicia Zavala-Lopez

UTAH LABOR COMMISSION

GLENDA 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.

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**ORDER DENYING
MOTION FOR REVIEW**

Case No. 00-1228

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
GLEND A W. GILES
PAGE 2

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
GLEND A W. GILES
PAGE 3

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

PAGE 4

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.

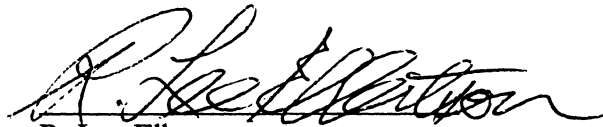
The 1995 settlement agreement between Mrs. Giles and Oakridge and ERF granted certain workers' compensation benefits to Mrs. Giles for her porphyria. Pursuant to §34A-2-311 of the Occupational Disease Act, additional compensation for that same condition may not be paid. In light of the foregoing, the Commission concludes, as did Judge La Jeunesse, that Mrs. Giles' claim against Oakridge and ERF under the Occupational Disease Act must be dismissed.

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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 1st 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 2nd day of May, 2002, to the following:

FLOYD W HOLM
WORKERS COMPENSATION FUND
P O BO X57929
SALT LAKE CITY UT 84157

IRS OGDEN SERVICE CENTER
ROOM 1106
1160 WEST 12TH STREET
OGDEN UT 84409

UNITED STATE ATTORNEY'S OFFICE
185 SOUTH STATE STREET #400
SALT LAKE CITY UT 84111

TRANSPORTATION INSURANCE CO
C/O CNA INSURANCE COMPANY
10333 E DRY CREEK RD #300
ENGLEWOOD CO 80112

MICHAEL E DYER
BLACKBURN & STOLL
77 WEST 200 SOUTH #400
SALT LAKE CITY UT 84101

BRAD C BETEBENNER
RICHARDS BRANDT MILLER & NELSON
P O BOX 2465
SALT LAKE CITY UT 84110-2465

THEODORE E KANELL
PLANT WALLACE CHRISTENSEN &
KANELL
136 E SOUTH TEMPLE #1700
SALT LAKE CITY UT 84111

TAMMY WASHINGTON
CLAIM REPRESENTATIVE
CONSTITUTION STATE SERVICE CO.
P O BOX 173762
DENVER CO 802177-3762

MARGI SIMMONS
CLAIMS REPRESENTATIVE
ACE USA
P O BOX 1260
WEST JORDAN UT 84088

GLENDA GILES
P O BOX 354
EUREKA MT 59917

SHERYL HAYASHI
EMPLOYERS REINSURANCE FUND
P O BOX 146600
SALT LAKE CITY UT 84114-6600



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
REQUEST FOR
RECONSIDERATION**

Case No. 00-1228

Glenda W. Giles asks the Utah Labor Commission to reconsider its prior decision denying Ms. Giles' claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND AND ISSUES PRESENTED

On March 8, 1995, Mrs. Giles, Oakridge Country Club, the Workers Compensation Fund and the Employers' Reinsurance Fund settled Mrs. Giles' claim for workers' compensation benefits for alleged injuries from exposure to chlorine gas at Oakridge on September 7, 1991.

On December 27, 2000, Mrs. Giles filed another claim against Oakridge and Workers' Compensation Fund, this time for occupational disease benefits for the disease of "porphyria" allegedly caused by exposure to toxic fumes at Oakridge between May and December 1991. Various other parties were later added as defendants to Mrs. Giles' second claim.

On June 6, 2002, Judge La Jeunesse summarily dismissed Mrs. Giles' occupational disease claim. Mrs. Giles then asked the Commission to review Judge LaJeunesse's decision. After careful

ORDER DENYING REQUEST FOR RECONSIDERATION

GLEND A W. GILES

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review of the matter, the Commission concluded that three issues were determinative of Mrs. Giles' current claim for occupational disease benefits:

- 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?
- Is there a genuine issue of material facts regarding TAD and Liberty Mutual's possible liability for Mrs. Giles' current claim?
- 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?

Answering the first two issues negatively and the third issue affirmatively, the Commission concurred with Judge LaJeunesse's dismissal of Mrs. Giles' occupational disease claim.

Ms. Giles now asks the Commission to reconsider its prior decision. Specifically, Mrs. Giles raises a wide variety of issues that can be loosely categorized as follows:

1. Effect of settlement of prior workers' compensation claim: Mrs. Giles argues that her initial workers' compensation injury was different than her current occupational disease, and that settlement of the injury claim should not prevent her from pursuing her occupational disease claim.

2. Propriety of summary judgment: Mrs. Giles argues that genuine issues of material fact exist regarding legal and medical causation and other circumstances of her occupational disease, thereby precluding summary judgment.

3. Procedural errors and other defects in the Commission's adjudicative process: Mrs. Giles alleges errors regarding proper notice, denial of right to conduct discovery, failure to appoint a medical panel, lack of good faith, and conflict of interest.

DISCUSSION

Beginning with Mrs. Giles' arguments that her initial workers' compensation claim was for an "injury" that is different from her current "disease," the Commission has again reviewed the evidence on that point and remains convinced that both claims relate to the same medical condition, now diagnosed as "porphyria." Under such circumstances, Mrs. Giles may not receive compensation for that condition under both the Workers' Compensation Act and the Occupational Disease Act. Specifically, §34A-3-111 of the Occupational Disease Act provides as follows:

ORDER DENYING REQUEST FOR RECONSIDERATION

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The compensation provided under this chapter (the Occupational Disease Act) is not in addition to compensation that may be payable under Chapter 2 (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 Commission therefore reaffirms its determination that the prior settlement by Mrs. Giles, Oakridge, Workers' Compensation Fund, and ERF of Mrs. Giles' injury claim, and the payment of workers' compensation benefits to Mrs. Giles pursuant to that claim, precludes an additional award of occupational disease benefits to Mrs. Giles for the same medical condition.

Ms. Giles's second category of arguments focus on the propriety of summary dismissal of her occupational disease claim. As noted above, Mrs. Giles is precluded as a matter of law from receiving occupational disease benefits for the same medical condition that is the basis for payment of her workers' compensation benefits. Furthermore, Mrs. Giles has failed to identify evidence that would support liability on the part of defendants Wasatch Crest, ACE-USA/Pacific, Constitution State, Transportation Insurance Company, the I.R.S., TAD or Liberty Mutual. The Commission remains convinced that no genuine dispute exists regarding the facts that are material to the resolution of this matter, and that the defendants are entitled to dismissal of Mrs. Giles' occupational disease claim as a matter of law.

Finally, Mrs. Giles raises a host of issues regarding notice, discovery, failure to appoint a medical panel, lack of good faith, and conflict of interest. Mrs. Giles' arguments on these issues reflect some confusion over the facts, as well as a misunderstandings of Commission practice and applicable procedural standards. Furthermore, Mrs. Giles' request for reconsideration submits evidence that was not presented to Judge LaJeunesse or, even later, as part of Mrs. Giles' initial motion for review to the Commission. Likewise, Mrs. Giles' request for reconsideration raises allegations and procedural challenges that were not raised in her initial motion for review.

Section 63-46b-12(1)(b) of the Utah Administrative Procedures Act requires that a motion for review ". . . shall: . . . (ii) state the grounds for review and the relief requested;" Furthermore, §34-46b-12(1)(a) establishes a 30-day jurisdictional time limit for filing motions for review. The foregoing provisions are essential to the fair and orderly conclusion of administrative adjudicative proceedings. The Commission has consistently declined to consider evidence or issues raised for the first time as part of a request for reconsideration, unless such matters could not reasonably have been raised earlier.

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 LaJeunesse and also incorporated into Mrs. Giles' motion for review. The Commission therefore declines to accept or consider such evidence or argument now.

**ORDER DENYING REQUEST FOR RECONSIDERATION
GLENDA W. GILES
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ORDER

The Commission reaffirms its prior decision in this matter and denies Mrs. Giles' request for reconsideration. It is so ordered.

Dated this 16th day of July, 2003.

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

R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

**ORDER DENYING REQUEST FOR RECONSIDERATION
GLENDA W. GILES
PAGE 5**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Request for Reconsideration in the matter of Glenda W. Giles, Case No. 00-1228, was mailed first class postage prepaid this 16th day of July, 2003, to the following:

FLOYD W HOLM
WORKERS COMPENSATION FUND
P O BOX 57929
SALT LAKE CITY UT 84157

IRS OGDEN SERVICE CENTER
ROOM 1106
1160 WEST 12TH STREET
OGDEN UT 84409

UNITED STATE ATTORNEY'S OFFICE
185 SOUTH STATE STREET #400
SALT LAKE CITY UT 84111

TRANSPORTATION INSURANCE CO
C/O CNA INSURANCE COMPANY
10333 E DRY CREEK RD #300
ENGLEWOOD CO 80112

MICHAEL E DYER
BLACKBURN & STOLL
77 WEST 200 SOUTH #400
SALT LAKE CITY UT 84101

BRAD C BETEBENNER
RICHARDS BRANDT MILLER & NELSON
P O BOX 2465
SALT LAKE CITY UT 84110-2465


THEODORE E KANELL
PLANT WALLACE CHRISTENSEN &
KANELL
136 E SOUTH TEMPLE #1700
SALT LAKE CITY UT 84111

TAMMY WASHINGTON
CLAIM REPRESENTATIVE
CONSTITUTION STATE SERVICE CO.
P O BOX 173762
DENVER CO 802177-3762

MARGI SIMMONS
CLAIMS REPRESENTATIVE
ACE USA
P O BOX 1260
WEST JORDAN UT 84088

GLENDA GILES
P O BOX 354
EUREKA MT 59917

SHERYL HAYASHI
EMPLOYERS REINSURANCE FUND
P O BOX 146600
SALT LAKE CITY UT 84114-6600


Sara Danielson