

2003

Millard R. Crafts v. Utah Labor Commission and Yellow Freight Systems, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS DOCKET NO. 200

MILLARD R. CRAFTS, :
 : Court of Appeals
Petitioner/ Appellant : Case No.: 20030712-CA
v. :
 : Priority 7
UTAH LABOR COMMISSION and
YELLOW FREIGHT SYSTEMS, :
INC. (self-insured), :
 : Labor Commission No.: 99292
Respondents/Appellees. :

BRIEF OF APPELLEES YELLOW FREIGHT SYSTEMS, INC.

Appeal from the Utah Labor Commission

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**RESPONDENTS RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review filed by Appellant Millard Crafts is from a final order of the Labor Commission of Utah dated July 30, 2003. This Court has jurisdiction over this appeal 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 Commission correctly determined that Mr. Crafts did not meet his burden of showing that he sustained a “significant impairment” as a result of the 1997 work accident, so as to meet the threshold requirement for permanent total disability under Utah Code Ann. § 34A-2-413. This issue was preserved at R. 303 et. seq.

Standards of Review

Under the Utah Administrative Procedure’s Act, an agency’s factual findings will be affirmed if they are “supported by substantial evidence when viewed in light of the whole records before the court.” See Utah Code Ann. § 63-46b-16(4)(g).

The question of whether an employee is totally and permanently disabled is one of fact to be decided by the Commission, based upon all of the evidence in the case. See Kerans v. Industrial Comm’n, 713 P.2d 49 (Utah 1985). The Commissions’ underlying determination that the

claimant is not significantly impaired from the 1997 event is similarly a question of fact reviewed under the substantial evidence standard. See Utah Code Ann. § 63-46b-16(4).

The effect of a Compensation Agreement involves a question of agency specific law, reviewed for an abuse of discretion. Whether res judicata, or other legal doctrines apply, is a conclusion of law. See Smith v. Smith, 793 P.2d 407, 407 (Utah Ct. App. 1990).

DETERMINATIVE LAW

To obtain recovery for any worker's compensation benefits under the Utah Worker's Compensation Act (the "Act"), an employee must establish that he sustained an "accident arising out of and in the course of the employee's employment". See Utah Code Ann. § 34A-2-401. This statute has been interpreted to require that a claimant establish: (1) he sustained an accident; (2) medical causation; and, (3) legal causation. These are the threshold requirements of compensability.

A claimant seeking entitlement to permanent total disability benefits has the additional burden of establishing the statutory requirements of section 34A-2-413 of the Utah Code. The 1997 version of this section reads as follows:

(1) (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

- (i) the employee is not gainfully employed;
- (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
- (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and
- (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413 (1997) (Emphasis added).¹

¹ The 1997 version of this statute remains the same as the present version of this statute.

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case involves the Utah Labor Commission's denial of workers' compensation permanent total disability benefits to Mr. Millard Crafts for a back injury sustained between April 16 and June 24, 1997 (the "Industrial Accident") while working for Yellow Freight Systems, Inc.

Following this accident, the parties entered into a Compensation Agreement on or about July 20, 1998, which provided voluntary benefits to Mr. Crafts for permanent partial disability compensation benefits for a 3% whole person permanent impairment.

On March 26, 1999, Mr. Crafts filed an Application for Hearing seeking permanent total disability benefits as a result of the Industrial Accident of 1997. (R. at 1-2). The Employer (Yellow Freight is self-insured) filed an Answer on April 30, 1999 and Amended Answer on September 7, 1999 denying this claim. (R. at 40, 46). Specifically, the Employer denied Mr. Crafts' claim based upon the lack of a permanent impairment from the 1997 industrial accident and asserted the prior voluntary payment of permanent partial disability benefits had been an error.

A Notice of Hearing was sent and scheduled for November 2, 1999. (R. at 46). That hearing was later continued to January 31, 2001 and conducted on that date by Administrative Law Judge Donald George.

On February 5, 2001, Mr. Crafts filed a Motion for an Interim Order. (R. at 185-95). Yellow Freight filed a Reply Memorandum on February 16, 2001. (R. at 221-37).

On March 2, 2001, the Compensation Agreement was signed by the ALJ. (R. at 241).

On December 31, 2001 the ALJ entered his Findings of Fact, Conclusions of Law and Order denying Craft's claim for permanent total disability benefits. (R. at 252). Crafts filed a Motion for Review on January 23, 2003. (R. at 259-67). A response to that motion was filed by Yellow Freight. (R. at 274-93).

On July 30, 2003 the Commission entered its Order Denying Motion for Review. (R. at 303-06).

On August 29, 2003 Crafts filed a Petition for Review with the Court of Appeals. (R. at 307). A Docketing Statement was later filed on September 8, 2003.

Statement of Facts

The factual history of this case is accurately set forth in the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order as well as the Commission's Order Denying Motion for Review. A summary of these facts follows:

The applicant, Millard R. Crafts, has been a long-haul truck driver for approximately thirty years. He was hired by Yellow Freight and began working in its Nevada operation in 1988.

Prior to his employ at Yellow Freight, Mr. Crafts underwent two lumber surgeries. A lumbar fusion at L5-S1 in 1972 and an L4 fusion in 1975 by Dr. Pemberton. (R. 309 at MRE, 190).

In November of 1991 Crafts injured his neck and low back in an industrial accident at Yellow Freight when he fell eight feet off a loading dock at its Las Vegas, Nevada Terminal. He suffered injuries to his cervical and lumbar spine after this event and continued to treat for the next 6 ½ years.

Mr. Crafts was off work for approximately two years and was ultimately rated on July 18, 1994 by Dr. Kudrewicz who gave Mr. Crafts a 13% whole person impairment rating of which, 7% was attributable to the November 1991 injury (5% was attributable to his cervical spine; 2%

was for the lumbar spine), and the remaining 6% to his pre-existing back conditions. (R. 309, at MRE, 148-53). The Nevada State Industrial Insurance System (SIIS), Yellow Freight's carrier at that time, took full responsibility for the 1991 claim and paid benefits for the impairment ratings. (R. 309 at MRE, 152-53).

From 1994 to 1997 Mr. Crafts worked at Yellow Freight in its Denver, Colorado office. The company allowed drivers to use a swinging bunk system at that office. This system was suspended with springs to allow the off-duty driver to sleep while the on-duty driver continued with the route.

Mr. Crafts then began working in the Salt Lake City operation of Yellow Freight on April 13, 1997. Yellow Freight was self-insured for the Utah jurisdiction. The Salt Lake City operation did not permit the use of the swinging bunk system, but permitted a four inch sponge rubber pad to be placed directly on the steel flooring of the sleeper. Crafts began to experience increased back pain and other problems which he attributed to the inadequate rubber mattress protection. His problems culminated on about June 23, 1997 when Crafts was resting in the sleeper of his truck while a co-driver was driving. The truck hit a pot hole and jostled Crafts.

Mr. Crafts sought additional medical treatment and on February 7, 1998, Dr. Anderson issued a medical report. The report provided a 10% whole person impairment rating. Of this rating, 3% was “apportioned to his injury with Yellow Freight.” (R. at 309, MRE, 223-24). A careful reading of the report shows that the 3% rating relates to the 1991 industrial accident with Yellow Freight, which is referenced in the report. It does not relate to the 1997 Industrial Accident with Yellow Freight, which is never mentioned in the report. In fact, no permanent impairment rating has ever been assigned to the 1997 Industrial Accident.

On about July 20, 1998, Mr. Crafts and Felicia Hildreth, an adjustor for Yellow Freight, submitted a Compensation Agreement (Form 019) to the Commission. The Compensation Agreement set forth the method of computation of Mr. Crafts’ temporary total disability compensation and also stated that Mr. Crafts was entitled to permanent partial disability compensation for a 3% whole person impairment, totaling \$2,484.92. (R. At 241). The agreement was not approved by the Labor Commission at that time due to lack of required documents. The record and the parties agree that the Compensation Agreement mistakenly attributed a 3% permanent impairment to the 1997

Industrial Accident. In fact, the 3% rating was attributable to Mr. Craft's 1991 work injury with Yellow Freight, covered by SIIS, and, therefore, should not have been paid as Mr. Crafts had already received an impairment rating and benefits.

On March 26, 1999, Mr. Crafts filed an Application for Hearing seeking permanent total disability compensation for the work accident occurring between April 16, 1997 and June 24, 1997 while working for Yellow Freight. In the Application, Crafts claimed that his disability was caused by "gradual increasing spine problems due to 'jarring' occasioned by sleeping in a non 'swinging' bunk in the sleeper cab of an 18-wheeler truck culminating in a severe bump/jarring in back when truck hit a road bump over Donner Pass, California." (R. at 1-35).

Yellow Freight denied liability for the permanent total disability claim, asserting that Mr. Crafts suffered, at most, a temporary aggravation of his pre-existing spine condition from a 1991 accident and suffered no new injury or permanent impairment to his spine as a result of the 1997 Industrial Accident. Yellow Freight specifically alleged that the voluntary payment of the 3% permanent partial disability benefits had been an error.

On September 7, 2000, Mark Albright D.C., drafted a report assessing Mr. Crafts' impairment rating. (R. at 309, MRE, 172). He assigns Mr. Crafts an 11% impairment whole person impairment rating, however, contrary to the statement of Mr. Crafts, he does not apportion any of this rating to the 1997 Industrial Accident. Moreover, after the hearing, Mr. Crafts notified and Labor Commission that he waived any claim to an impairment rating other than the 3% rating per Dr. Anderson's report.

A hearing was eventually held on January 31, 2001 before Administrative Law Judge Donald George.

After the hearing, on March 2, 2001, Petitioner resubmitted the Compensation Agreement which had been signed by the parties and asked for Labor Commission approval. The Agreement was signed by the ALJ. (R. at 241). The was done over the objection of the employer.

On December 31, 2001, the ALJ entered his Findings of Fact, Conclusions of Law and Order. The ALJ found that Mr. Crafts did not present any medical evidence of a permanent impairment rating for the 1997 industrial accident. Ultimately, the ALJ found that the claimant simply incurred a *temporary* aggravation of his pre-existing 1991 injury. Therefore, the ALJ denied Craft's claim for permanent total disability

benefits for failure to meet the “significant impairment” requirement under Utah’s permanent total disability statute – Utah Code Ann. § 34A-2-413. (R. at 252).

Crafts filed a Motion for Review on January 23, 2003. (R. at 259-67). A response to that motion was filed by Yellow Freight. (R. at 274-93).

On July 30, 2003, the Utah Labor Commission entered its Order Denying Motion for Review. (R. at 303-06). The Commission affirmed the ALJ’s Order finding that Mr. Crafts failed to establish that he sustained a significant impairment from his 1997 Industrial Accident. The Commission rejected the claimant’s argument that the erroneous Compensation Agreement affirmatively establishes a 3% impairment rating attributable to the 1997 event, arguably meeting the significant impairment prong of the statute.

Mr. Crafts has since filed a Petition for Review of the Commission’s Order.

SUMMARY OF THE ARGUMENT

An essential element of a finding of permanent total disability requires that the claimant have a “significant impairment” as a result of the industrial accident. The meaning of the term “significant impairment” has yet to be defined by statute or appellate case law.² Mr. Crafts provides no medical evidence establishing that his truck driving during the period of April 16, 1997 to July 23, 1997 caused any permanent impairment. His attempt to meet this statutory requirement by reference to a Compensation Agreement which mistakenly provided for a 3% whole person impairment rating lacks legal merit. Well established Utah law provides that voluntary payments of indemnity benefits do not preclude an employer from later challenging the compensability of a claim. This doctrine is based upon the public policy of providing payments to injured workers in an expedited manner. Following the position urged by Mr. Crafts would encourage employers to contest all aspects of employment related injuries.

Finally, Mr. Crafts recitation to various legal doctrines such as res judicata and collateral estoppel have no bearing on this case as there has

² This court should be aware that a recent case is on appeal regarding the meaning of this term. See Thurston Cable v. Labor Comm’n, Case No. 20030532-CA. That case is currently in the briefing process, although a brief has been filed by the Appellant.

not been a prior action. Moreover, the principles of estoppel, cited in passing, have not been shown by Mr. Crafts. Accordingly, we ask that this Court affirm the Commission's Order denying worker's compensation benefits.

ARGUMENT

Point 1. LIBERAL CONSTRUCTION RULES DO NOT APPLY WHEN UTAH LAW DOES NOT SUPPORT SUCH AN AWARD.

Mr. Crafts argues that because Utah law encourages liberal construction of the Workers' Compensation Act (the "Act"), he is entitled to permanent total disability benefits. Yellow Freight agrees that Utah's courts and the Labor Commission should construe the Act in favor of coverage and compensation. See Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990). However, this command does not dispense with the requirement that an injured party prove his case by a preponderance of the evidence. See Lipman v. Ind. Comm'n, 592 P.2d 616 (Utah 1979). Indeed, this court held in Jackson v. Industrial Comm'n, Memorandum Decision, 920804-CA (Utah Ct. App. 1993), that "regardless of the remedial nature of the worker's compensation statutes, a liberal construction cannot relieve the applicant from the threshold requirement to demonstrate causation." Id.; see Utah Code Ann. § 34A-2-401

(allowing workers' compensation benefits only if requirements of statutory provision are met).

As discussed below, because Mr. Crafts fails to meet his statutory burden of showing that he "sustained a significant impairment or combination of impairments as a result of the industrial accident," under 34A-2-413, he is not entitled to permanent total disability benefits.

Point 2. CRAFTS HAS FAILED TO MEET HIS BURDEN TO PROVE THAT HE SUSTAINED A "SIGNIFICANT IMPAIRMENT" AS A RESULT OF THE 1997 INDUSTRIAL ACCIDENT.

A. The Voluntary Payment of Permanent Partial Disability Benefits, With Or Without a Compensation Agreement, Does Not Relieve a Claimant from Satisfying his Burden to Show a Significant Impairment from the Industrial Accident for a Claim of Permanent Total Disability.

To obtain recovery for any worker's compensation benefits under the Utah Worker's Compensation Act (the "Act"), an employee must establish that he sustained an "accident arising out of and in the course of the employee's employment". See Utah Code Ann. § 34A-2-401. This statute requires that a claimant establish: (1) an accident; (2) medical causation; and, (3) legal causation. These are known the threshold requirements of compensability. See Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

In addition to the threshold requirements, a claimant seeking entitlement to permanent total disability benefit must also establish, by a preponderance of evidence, the statutory requirements of section 34A-2-413 of the Utah Code. The 1997 version of this section reads as follows:

(1) (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age,

education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413 (1997) (Emphasis added).

The ALJ and Commission correctly determined that Mr. Crafts presented no medical evidence of any significant impairment as a result of the 1997 event to satisfy his statutory burden.³ Ultimately, the ALJ and Commission found that the 1997 Industrial Accident resulted in only a temporary aggravation of his pre-existing cervical condition, having no permanent impairment rating. (R. at 256).⁴

³ As noted, Mr. Crafts has attached a copy of Dr. Albright's report of an 11% rating. However, this rating was never attributed to the 1997 Industrial Accident. Moreover, Mr. Crafts has waived his claim of impairment based upon this report. (R. 263, 245). Also since this is a factual finding Mr. Crafts must show that there is no substantial evidence to support the Commission's finding that the claimant has no impairment rating for the Industrial Accident of 1997. He has not done so. In any event, even if Mr. Crafts is presenting such a challenge, he has failed to marshal the evidence. Whitaker v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct. App. 1998).

⁴ Although an "impairment" may be temporary or permanent, see Utah Code Ann. 34A-2-102(8), the meaning of the term "significant" certainly requires a ratable impairment. The AMA Guides read as follows:

Impairment percentages or ratings developed by medical specialists are consensus-derived estimates **that reflect the severity of the medical condition** and the degree to which the impairment decreases an individual's ability to perform common activities of daily living, excluding work. Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the Guides

In an intriguing twist of logic, Mr. Crafts attempts to meet his burden of proving the “significant impairment” prong of section 34A-2-413 by relying upon an erroneously executed Compensation Agreement which provides for a 3% permanent impairment rating for the 1997 Industrial Accident.⁵ He relies upon various legal theories of relief why the Compensation Agreement is valid and that the Commission should

estimate the impact of the impairment on the individual’s overall ability to perform activities of daily living, excluding work

...
...

The AMA Guides clearly indicate that a person with a 0% impairment rating does not have a significant impairment since there is no significant anatomic or functional loss. The AMA Guides read:

A 0% whole person (WP) impairment is assigned to an individual with an impairment if the impairment has no significant organ or body system functional consequences and does not limit the performance of the common activities of daily living indicated in Table 1-2. A 90% to 100% WP indicates a very severe organ or body system impairment requiring the individual to be fully dependent on others for self-care, approaching death.

American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, Fifth Edition, 4-5 (Emphasis Added).

⁵ Mr. Crafts maintains that the presence of an executed and approved Compensation Agreement, and the voluntary payment of permanent partial disability benefits for a 3% rating by the employer, conclusively binds the employer on the elements of legal and medical causation found under section 34A-2-401 as interpreted by case law and also precludes the employer from denying that this impairment rating is attributable to the industrial accident of 1997 for purposes of establishing a “significant impairment”.

impose liability for purposes of permanent total disability. This argument not only lacks support by any citation, but is in fact contrary to well-established Utah law.

There is no dispute that the employer and claimant *mistakenly* entered into a Compensation Agreement for a 3% whole person permanent impairment rating. As found by the ALJ, the basis of this erroneously paid rating was a February 7, 1998 report from Dr. Mark Anderson which provides that the claimant has a 10% whole person impairment rating. Of this rating, Dr. Anderson stated that 3% was “apportioned to his injury with Yellow Freight.” (R. at 309, MRE, 224). However, as the Commission and ALJ found, a careful reading of the report shows that the 3% rating relates to the **1991** industrial accident with Yellow Freight rather than the 1997 Industrial Accident. The ALJ found,

Although this report was made after the 6/23/97 incident, and therefore it might at first glance seem to be related, a close reading shows there is no mention by Dr. Anderson of the 6/23/97 incident, but rather only the 1991 fall from the dock. It therefore follows that the 3% must be attributed in its entirety to the 1991 injury.

(R. at 256.)

Mr. Crafts attempts to take advantage of the adjustor's error by claiming that the executed and approved Compensation Agreement affirmatively establishes a 3% whole person impairment rating for purposes of evaluating the "significant impairment" prong of the relevant permanent total disability statute. He recites various equitable and legal doctrines as a basis for his argument.⁶

First, Mr. Crafts relies on basic contract principles in arguing that the Compensation Agreement is a binding contract between the parties. He maintains that the Compensation Agreement is a legally binding agreement with legal obligations. He states that once the agreement was approved by the ALJ, the provisions were "legally enforceable."

The Court of Appeals has stated the following with regard to Compensation Agreements:

The Commission has developed a "Compensation Agreement" form. "This form is used by the parties to a workers' compensation claim to enter into an agreement as to a permanent partial impairment award, and must be submitted to the Commission for approval." Workers' Compensation Rules and Regulations §§ R490-1-2(P) (effective March 4, 1986, as amended). The "Compensation Agreement," the Commission's Form 019, is used in situations where there is no dispute about the occurrence or compensability of an accident to document that a claimant "accepts the compensation and medical payments paid to date and agrees with the permanent partial disability rating shown above."

⁶ His argument should be rejected under Utah App. P. 24.

Wilburn v. Interstate Electric, 748 P.2d 582, n.5 (Utah Ct. App. 1988)

(emphasis added).

Moreover, Rule 612-1-3(P) of the Utah Administrative Code provides:

"Compensation Agreement - Form 219" [aka. 019] - This form is used by the parties to a workers' compensation claim to enter into an agreement as to a permanent partial impairment award, and must be submitted to the Division of Industrial Accidents for approval.

Utah Admin. Code R.612-1-3(P).

Rule 612-1-9 of the Utah Administrative Code provides:

A. An applicant, insurance company, and/or employer may enter into a compensation agreement for the purpose of resolving a worker's compensation claim. Compensation agreements must be approved by the Commission. The compensation agreement must be that contained on Form 019 of the Commission forms and shall include the following information:

1. Signatures of the parties involved;
2. Form 122 - Employer's First Report of Injury;
3. Doctor's report of impairment rating;
4. Form 141 - Payment of Benefits Statement.

B. Failure to provide any of the above documentation and forms may result in the return of the compensation agreement to the carrier or self-insured employer without approval.

Utah Admin. Code R.612-1-9.⁷

Mr. Crafts places great weight on the “validity” of the Compensation Agreement. However, the contractual validity of this document is irrelevant. The preparation of the Compensation Agreement and the payment of permanent partial disability benefits were all *voluntary* actions on the part of Yellow Freight. This was not an award of benefits after the adjudication of a claim. The in-house adjuster at Yellow Freight (unfamiliar with and lacking the claim file and full information on the 1991 industrial accident) clearly made an error in Mr. Crafts’ favor by paying him additional benefits for an impairment which was due to a 1991 injury rather than the 1997 Industrial Accident. This mistaken payment cannot be used by the claimant to relieve him of his burden of proof and bar the Labor Commission from looking to the actual medical evidence in this case as the ultimate fact finder.

This principle is supported by Utah case precedent. In fact, Utah’s courts have consistently held that the mere fact that an employer voluntarily pays benefits does not conclusively determine that the employer is thereafter, as a matter of law, barred from contesting

⁷ The Compensation Agreement was initially rejected since the appropriate forms were not attached.

liability. See Olsen v. Industrial Comm'n, 776 P.2d 937 (Utah Ct. App. 1989). In Olsen, the Court stated:

It would be unjust to both the employee and the insurance carrier if the law were that when the insurance carrier once undertakes to provide medical or other care for an injured [employee] it has lost all right to afterwards defend against what it believes to be an unjust or illegal claim. The insurance carrier cannot and ought not wait until full investigation has been made before providing necessary care and treatment for injured [employees].

Id. See also 4 Larson, *Workmen's Compensation Law* § 82.61 at 15-1215 to 15-1224 (1989) (voluntary payment does not constitute an "award" for which proceedings may be reopened nor does it waive the employer's right to later dispute the claim). The Utah Court of Appeals recently affirmed this position in Olsen v. Ellertson, 2003 UT App 302 (Memorandum Decision).

The Court in Harding v. Industrial Comm'n, 28 P.2d 182 (Utah 1934), similarly reiterated this principle:

Ordinarily, in the absence of prejudice to the employee or of facts giving rise to estoppel, an insurance carrier may, notwithstanding voluntary payment of compensation, the furnishing of hospital or medical care, the entry of appearance, or statement made that the policy covered the employee, urge the defense that the employee did not meet with an accident,... or that there was no causal connection between the injury and disability. It would be unjust to both the employee and the insurer if the law were that when a carrier once undertakes to provide medical or other care for

an employee, it has lost all right to defend what it believes to be an unjust or illegal claim.

Harding v. Industrial Comm'n, 28 P.2d 182 (Utah 1934); see Taggart v. Industrial Comm'n, 12 P.2d 356 (Utah 1932) (when insurer paid compensation to employee, insurer could still deny that employee had accident); Crow v. Industrial Comm'n, 140 P.2d 321 (Utah 1943) (insurance carrier which voluntarily paid medical and hospital expenses of injured employee and paid weekly sum to employee for six years was not “estopped” from claiming that the employee was not totally and permanently disabled since employee did not change position or relinquish any right in reliance on payment); Larson v. Wycoff, 624 P.2d 1151 (Utah 1981) (stating payment of some of the claims does not itself estop carrier from discontinuing coverage under policy).

Utah’s courts have explained that there are significant public policies underlying this rule of law and stated that to hold otherwise would discourage carriers from making any voluntary payments. See Olsen, supra (stating “adopting the position urged by petitioner would encourage employers to contest all employment related injuries to avoid later being estopped from raising their claims”); Id. (citing 4 Larson, Workers’ Compensation Law § 82.61 at 15-1215 to 15-1224 (1989) (voluntary payment does not constitute an award for which proceedings

may be reopened nor does it waive the employer's right to later dispute the claim)). As Justice Wolfe observed:

If the insurance carrier could not pay for an indefinite time in order to see if there would be an improvement both as to extent and as to duration but must seek at once to have determined the extent if not duration of his disability, much hardship and injustice might ensue to the applicant or to the carrier. The Commission would have to hazard a guess and once it committed it would be subject to the objection that it could not alter its award unless the conditions changed. In cases where there is a disability partial or total in extent for an indefinite time it is better if the matter be left for future determination as long as the party is receiving compensation for the support of his family.

Crow, supra (Wolfe, J. concurring).

In this case, Yellow Freight voluntarily made payments to Mr. Crafts. The Compensation Agreement was created (mistakenly) based on an adjustor's effort to take care of a claim and follow Labor Commission guidelines. It was **not** intended or understood by the parties to represent a contract. The claim was filed as an aggravation of his pre-existing condition from an event in June 1997. Mr. Crafts was paid for time off work and provided with necessary medical treatment. Ultimately, a rating was provided, with the clearly stated explanation of its relationship to the original 1991 injury. The Yellow Freight adjustor made a mistake by paying the permanent impairment benefits as related to the 1997 event. The medical evidence did not support the payment of

these benefits as related to the 1997 event, and Mr. Crafts had already received permanent partial disability benefits for the 7% rating from 1991 event.

However, even if the Court assumes, *arguendo*, that the Compensation Agreement is a contract, the doctrine of mutual mistake has long been recognized as a basis of contractual reformation and correction. See Briggs v. Liddell, 699 P.2d 770, 772 (Utah 1985). In Briggs, the court stated that “if the [contractual] instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate”. Such is the case here.

At the time the Compensation Agreement was entered into, the parties were under the belief that the claimant was entitled to a 3% impairment rating payment. However, since it was later discovered that this permanent impairment rating was entered into upon a mistaken belief of both parties, reformation principles would certainly absolve the parties of this mistake, or at least allow for revision of that agreement. Accordingly, on this basis as well, the impairment rating is not binding for purposes of establishing “significant impairment.”

Second, Mr. Crafts likens the Compensation Agreement to a Full and Final Settlement Agreement. He recites non-jurisdictional law which

states that “if the settlement is approved, it takes on the quality of the award and the parties can no more back out of it than any other kind of award.”

Mr. Craft’s recitation to this authority is taken out of context. The authority cited from Professor Larson’s treatise relates not to a compensation agreement, but to attempts by a party to back out of approved full and final settlement agreements which are intended to have binding contractual effect. See Utah Admin. Code R. 602-2-5(B) (once approved by the Commission, settlement agreements are permanently binding on the parties.).

Yellow Freight is not attempting to “back out” of paying the 3% rating. It is well-settled that once indemnity or medical benefits are paid, erroneous or not, a carrier cannot recoup those amounts from the injured worker. Yellow Freight simply submits that its agreement to pay benefits, pursuant to the Compensation Agreement, is not an admission of compensability or impairment for purposes of determining permanent total disability. To hold a Compensation Agreement to such a high standard is contrary to well-established Utah law and against public policy.⁸

⁸ The Commission has previously indicated that a Compensation Agreement has no such binding affect on either party. In a letter dated May

Third, Mr. Crafts urges the doctrines of res judicata and, seemingly, collateral estoppel. He argues that the Compensation Agreement “is res judicata to all issues covered therein.” However, neither of these doctrines apply here since both require that there be a previous action. See Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶¶19, 20, 37, 16 P.3d 1214; see also Aragon v. Clover Club Foods, 857 P.2d 250 (Utah Ct. App. 1993).

Fourth, without any citation to authority, and in passing reference, Mr. Crafts urges the doctrine of equitable estoppel. He states that the parties are estopped from “relitigating” the issue of Mr. Crafts’

9, 2001 to Attorney Thomas Sturdy in the matter of John McKelvie, the Commission’s General Counsel stated the following:

You have filed with the Labor Commission a motion for review of a compensation agreement in the above-referenced matter. The Commission **does not consider such an agreement to be an adjudicative order** that can be appealed to the Commission. Instead, the agreement represents the **parties’ appraisal** of the status of the workers’ compensation claim **as of the date on which the agreement is signed. If the employer/insurance carrier comes to believe that the agreement is incorrect, it can simply decline to pay the disputed benefits.** The injured worker can then present the dispute the Commission for resolution by filing an application for hearing with the Commission’s Adjudication Division. Likewise, the injured worker can file an application for hearing if he or she believes the compensation agreement is inadequate.

R. at 293. (Emphasis added).

permanent impairment rating since the parties reduced their agreement by way of a Compensation Agreement. As noted by the Commission, this case involves only the present litigation. Thus, the parties are not “relitigating” anything.

Although not cited by Mr. Crafts, the elements essential to invoke the doctrine of equitable estoppel are:

- (1) an admission, statement or act inconsistent with the claim afterwards asserted,
- (2) action by the other party on the faith of such admission, statement or act, and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979).

There is no dispute that based upon Dr. Anderson’s report, Yellow Freight (and the claimant) initially took a position that it should pay the 3% impairment rating. Yellow Freight has since changed its position based upon its discovery that it misread Dr. Anderson’s report. However, despite this error, Mr. Crafts has not taken any action in reliance of this assertion and has not sustained any injury as a result of this action.⁹

⁹ In any event, he has not adequately asserted this argument in his brief to warrant a response or the Court’s review.

B. The Claimant's Position is Contrary to Public Policy.

The position urged by Crafts is contrary to wise public policy. An employer would undoubtedly be disadvantaged by holding it to an impairment rating listed in a Compensation Agreement voluntarily entered into due to section 34A-2-413's requirement that a claimant show that he sustained "significant impairment" as a direct result of the industrial accident. Certainly, this statutory term requires supporting medical evidence.

To adopt Mr. Crafts' position would certainly discourage insurance carriers from completing a Compensation Agreement form for fear that they could not later contest compensability. This concern is especially justified in permanent total disability cases where one of the required elements is that the claimant show a "significant impairment".

In most cases a dispute concerning the compensability of the claim may never arise after the payment of permanent partial disability benefits. However, to bind an employer by the amounts stated in a Compensation Agreement will certainly cause an employer to give greater pause and scrutiny to entering into Compensation Agreements. It will encourage employers (as was the concern expressed in Olsen and other cases) to delay and/or deny the payment of these types of benefits.

Employers may be encouraged to fully adjudicate, or at a minimum, send all claims for permanent partial disability out for legal review before they are paid.¹⁰ Resolution of the claim by simply accepting the rating and/or compromising the rating among the parties, as is common practice, would be undermined. The public policy that Utah has adopted encourages employers to voluntarily make payments based upon the assurance that if a dispute arises, a claim will be adjudicated based upon the facts, rather than a prior adjusting error. This policy applies equally in the case of the payment of permanent partial disability benefits, with or without a Compensation Agreement.

Point 3. CRAFTS HAS NOT MET HIS BURDEN OF DEMONSTRATING THE LEGAL REQUIREMENTS NECESSARY FOR A TENTATIVE FINDING OF PERMANENT TOTAL DISABILITY BENEFITS.

Mr. Crafts, essentially reiterating his argument in Point II of his brief, further argues that he is entitled to a tentative finding of permanent total disability simply because the carrier made indemnity payments. As noted above, whether a claimant is entitled to permanent total disability is an determination to be based upon the medical

¹⁰Given the efforts the Labor Commission has made to minimize litigation regarding permanent partial disability benefits (i.e., the Utah Impairment Guidelines), this would be an unfortunate and costly consequence.

evidence, not the erroneous payment of indemnity. See Oman v. Industrial Comm'n, 735 P.2d 665 (Utah Ct. App. 1987). The requirements for a tentative finding of permanent total disability are set forth in Section 34A-2-413, see supra.

In addition, a claimant is only entitled to a tentative finding of permanent total if he proves that he has suffered a "compensable industrial injury." Zimmerman v. Industrial Commission, 785 P.2d 1127, 1132 (Utah Ct. App. 1989) (unless the Commission concludes that an employee has suffered a compensable industrial injury, it will not consider "whether [the employee] qualifies for tentative permanent total disability."). This requires that the claimant show medical causation. See Smith v. Mity Lite, 939 P.2d 684 (Utah Ct. App. 1997) (holding that claimant established medical causation--the uncontroverted facts and relevant portions of the medical panel's report as adopted by the Commission undeniably establish that an industrial accident caused a portion of Smith's physical impairment; that he cannot perform his former job; and that he is currently disabled. As such, the Commission erred in not making a tentative finding of permanent total disability and referring Smith to the division of vocational rehabilitation.).

Mr. Crafts has failed to produce evidence which would satisfy the five elements articulated above. Particularly, he has failed to produce the necessary medical evidence to support an award of permanent total disability. The actual medical evidence in this case shows that as a result of the 1997 accident, Mr. Crafts suffered, at most, a *temporary* aggravation of his pre-existing condition. There is *no* evidence of any *permanent* impairment to the cervical spine from the 1997 accident. Rather, the medical evidence shows that Mr. Crafts has been rated only for a cervical spine impairment from the 1991 accident. (See R., 309, MRE at 223, 224.) His current restrictions and limitations have been directly attributed back to the 1991 accident.

The only additional impairment that Mr. Crafts has produced in support of his permanent total disability claim is the rating from Mark Albright, D.C., who opines that Mr. Crafts is entitled to an 11% whole person permanent impairment for his cervical and thoracic spine findings. Notably, *none* of the medical providers, including Dr. Albright, Dr. Thoen, Dr. Rich, etc. that evaluated Mr. Craft's thoracic spine films have found a direct causal relationship between the industrial accident of June 1997 and/or Mr. Crafts's findings, symptoms, complaints or disability. Rather, Dr. Thoen, Dr. Rich, and Dr. Anderson relate their

opinion that these findings are *asymptomatic*. (R. at 309, MRE at 194, 212, 238, 240, .) Dr. Rich notes that the findings appear old. These are all the treating physicians. Their opinion is further supported by the full review of the records and films performed by Dr. Luers, whose expertise is radiology, and Dr. Chung, who concluded that there is no evidence of any new injury or impairment from the 1997 Industrial Accident. (R. at 309, MRE at 376, 379, 380-384.) Thus, even though there may be objective evidence of a problem in the thoracic spine upon which Dr. Albright provides a rating, no provider has linked these findings with the accident and, more importantly, with any disability that Mr. Crafts currently suffers.

Notably, there is no prejudice to Mr. Crafts in allowing Yellow Freight to contest liability. Given the nature of Dr. Anderson's letter, Mr. Crafts and his counsel should have known of the mistaken payment and that he was not eligible for a 3% impairment rating pursuant to Dr. Anderson's letter. See Larson, supra. (indicating no prejudice since claimant should have known of overpayment). Mr. Crafts has failed to allege facts that demonstrate that he changed his position or relinquished any rights as a result of receiving the 3% impairment benefits from Yellow Freight.

Mr. Crafts' claim should be reviewed and adjudicated as any other claim. He must be held to the same burden of proof as any other claimant before the Commission. He must produce evidence that his June 1997 accident resulted in a "significant impairment" which was caused him to become permanently and totally disabled. He has failed to do this. The medical evidence before the Commission demonstrates that Mr. Crafts suffered a temporary aggravation of his pre-existing condition from his 1991 injury. He has never been assigned a permanent impairment for his cervical spine due to the 1997 accident. While he has been assigned a new impairment to his thoracic spine, the medical records fail to establish that (1) this impairment is due to the June 1997 industrial accident; and (2) this impairment causes Mr. Crafts **any** disability as it has been found to be asymptomatic and/or unrelated to Mr. Crafts's various symptoms and complaints. The restrictions and limitations placed upon him by the physicians has been related to his **cervical** spine. No work limitations or restrictions have been placed on him because of his thoracic spine film findings.


CONCLUSION

The Commission correctly determined that Crafts is not entitled to a tentative finding of permanent total disability. The adjustor's

erroneous payment of benefits based upon a Compensation Agreement does not conclusively establish a permanent impairment rating for the 1997 event. Given Crafts has failed to establish the requisite statutory requirement of “significant impairment”, Yellow Freight respectfully requests the Court to affirm the Commission’s Order Denying Motion for Review.

Respectfully submitted this 1st day of June, 2004.

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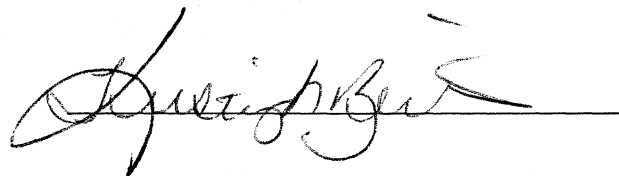
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 18th day of June, 2004, to:

Utah Court of Appeals (8 copies, one w/ orig. signature)
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A handwritten signature in cursive script, appearing to read "Virginus Dabney", written over a horizontal line.