

1993

# Jennie M. Featherstone v. Industrial Commission of Utah, Tooele Valley Regional (employer) and/or Utah Local Government Trust and Employers' Reinsurance Fund : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David Church; Erie V. Boorman; Thomas C. Sturdy; Defendant.

David W. Parker; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *Featherstone v. Industrial Commission of Utah*, No. 930280 (Utah Court of Appeals, 1993).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5164](https://digitalcommons.law.byu.edu/byu_ca1/5164)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
K F U  
50  
.A11  
DOCKET NO

930280

JENNIE M. FEATHERSTONE,  
Claimant/Petitioner,

Appeal No. 930280-CA

priority # 7

Defendants/Respondents.

PETITION FOR REVIEW OF A  
DECISION OF THE INDUSTRIAL COMMISSION OF UTAH

**FILED**  
Utah Court of Appeals

**JAN 28 1994**

  
Mary T. Noonan  
Clerk of the Court

David L. Church #659  
Attorney for Employer  
560 E. 200 S. Ste 220  
Salt Lake City, Utah  
84102  
355-1888

---

IN THE UTAH COURT OF APPEALS

---

JENNIE M. FEATHERSTONE,	:	
	:	
Claimant/Petitioner,	:	
	:	
vs.	:	
	:	Appeal No. 930280-CA
INDUSTRIAL COMMISSION OF UTAH	:	
TOOELE VALLEY REGIONAL (employer)	:	priority # 7
and/or UTAH LOCAL GOVERNMENT	:	
TRUST and EMPLOYERS' REINSURANCE	:	
FUND,	:	
	:	
Defendants/Respondents.	:	

---

RESPONDENTS'S REPLY BRIEF

---

PETITION FOR REVIEW OF A  
DECISION OF THE INDUSTRIAL COMMISSION OF UTAH

---

David W. Parker  
Attorney for CLAIMANT/PETITIONER  
Bank One Tower, Suite 900  
50 West Third South  
Salt Lake City, Utah 84101

Erie V. Boorman  
Attorney for DEFENDANT/RESPONDENT  
Employers' Reinsurance Fund  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

Sharon J. Eblen  
Attorney for DEFENDANT/RESPONDENT  
Industrial Commission of Utah  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

David L. Church #659  
Attorney for Employer  
560 E. 200 S. Ste 220  
Salt Lake City, Utah  
84102  
355-1888

## TABLE OF CONTENTS

JURISDICTION . . . . .	1
STATEMENT OF ISSUES . . . . .	1
DETERMINATIVE STATUTES, ORDINANCES AND RULES . . . . .	2
STATEMENT OF THE CASE . . . . .	2
NATURE OF THE CASE . . . . .	2
COURSE OF THE PROCEEDINGS . . . . .	2
DISPOSITION AT AGENCY . . . . .	3
RELEVANT FACTS . . . . .	4
SUMMARY OF THE ARGUMENT . . . . .	5
ARGUMENT . . . . .	6
POINT I	
The Industrial Commission did apply the proper standard of review of the Administrative Law Judge's decision. . . . .	6
POINT II	
The decision of the Industrial Commission of Utah and its Administrative Law Judge should be sustained by the Court when the issue turns on credibility of evidence and witnesses. . . . .	7
POINT III	
Petitioner has not been denied due process rights by the actions of the Industrial . . . . .	9
CONCLUSION . . . . .	10

### ADDENDA:

"A" - ORDER DENYING MOTION FOR REVIEW

"B" - FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

"C" - ORDER ON REMAND

"D" - UTAH CODE ANN. 63-46b-8

"E" - UTAH CODE ANN. 63-46b-10

"F" - UTAH CODE ANN. 63-46b-12

"G" - UTAH CODE ANN. 63-46b-16

## TABLE OF AUTHORITIES

### Cases

<u>Ashcroft vs. Industrial Commission</u> , 885 P.2d 267 (Utah App. 1993).....	1,6
<u>Grace Drilling, v. Board of Review</u> , 776 P.2d 63 (Utah App. 1989).....	9
<u>Merriam vs. Board of Review</u> , 812 P.2d 447, (Utah App. 1991)....	7
<u>Morton Intl., Inc. v. Auditing Division</u> , 814 P.2d 581 (Utah, 1991) .....	1,2,10

### Statutes and Rules

Utah Code Annotated §35-1-86.....	1
Utah Code Ann. 63-46b-16(4)(g).....	7,8
Utah Code Ann. 63-46b-8.....	9
Utah Code Ann. 63-46b-10.....	9,10
Utah Code Ann. 63-46b-12.....	9

---

IN THE UTAH COURT OF APPEALS

---

JENNIE M. FEATHERSTONE,	:	
	:	
Claimant/Petitioner,	:	
	:	
vs.	:	
	:	Appeal No. 930280-CA
INDUSTRIAL COMMISSION OF UTAH	:	
TOOELE VALLEY REGIONAL (employer)	:	priority # 7
and/or UTAH LOCAL GOVERNMENT	:	
TRUST and EMPLOYERS' REINSURANCE	:	
FUND,	:	
	:	
Defendants/Respondents.	:	

---

**JURISDICTION**

The Court of Appeals has jurisdiction to review the order of the Industrial Commission pursuant to Utah Code Annotated §35-1-86.

**STATEMENT OF ISSUES**

The Petitioner has only presented three issues for review.

First, did the Industrial Commission apply the appropriate standard of review of the administrative law judges decisions. This is an issue of law and is reviewed under a correction of error standard. Morton Intl., Inc. v. Auditing Division, 814 P.2d 581 (Utah, 1991)

Second, was the decision of the Commission supported by the facts. This is a factual determination which is reviewed under a substantial evidence standard. Ashcroft vs. Industrial Commission, 885 P.2d 267 (Utah App. 1993)

Third, was Petitioner denied due process by either the administrative law judges delay in rendering a decision or the review afforded by the Industrial Commission. This is a question of law and reviewed under a correction of error standard. Morton Intl., Inc. v. Auditing Division, 814 P.2d 581 (Utah, 1991)

#### DETERMINATIVE STATUTES, ORDINANCES AND RULES

The following are determinative statutes which are set out in their entirety in the addendum to this brief.

Utah Code Ann. 63-46b-16(g)

Utah Code Ann. 63-46b-8

Utah Code Ann. 63-46b-10

Utah Code Ann. 63-46b-12

#### STATEMENT OF THE CASE

##### NATURE OF THE CASE

This is an Appeal from an Order of the Utah Industrial Commission.

##### COURSE OF THE PROCEEDINGS

On December 31, 1991 Petitioner filed an Application for Hearing with the Industrial Commission of Utah requesting medical expenses, permanent, partial and temporary partial disability compensation, interest, travel expenses and permanent and total disability. A hearing was held before an administrative law judge on June 12, 1992. The petitioner was present and represented by an attorney. The employer was present through its insurer and represented by an attorney and the Employers Reinsurance Fund was represented by its administrator and attorney. After the hearing

the Administrative Law Judge entered Findings of Fact and Conclusions of Law and an Order which were dated November 20, 1992. This Order denied petitioner's application and found that there was no compensable industrial accident. Petitioner, through her attorney, filed a timely Motion for Review of the Administrative Law Judge's order with the Utah Industrial Commission. On the 2nd day of April, 1993 The Utah Industrial Commission issued its Order Denying Motion for Review. Petitioner subsequently filed her Notice of Appeal with the Utah Court of Appeals.

The Utah Court of Appeals on Motion of Petitioner and stipulation of the parties remanded the matter back to the Industrial Commission on the 28th day of October, 1993 for the limited purpose of determining whether the Petitioner had shown by a preponderance of evidence that she was entitled to compensation. The Industrial Commission entered its Order on Remand finding that petitioner had not shown she had suffered an industrial accident by a preponderance of the evidence and once again sustained the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

#### DISPOSITION AT AGENCY

The Industrial Commission of Utah has upheld the Findings of Fact and Conclusions of Law of its Administrative Law Judge which found that no compensable industrial accident occurred to petitioner.



### RELEVANT FACTS

The following are the facts relevant to this case with appropriate citations to the record:

1. Petitioner was an employee of the Tooele Valley Regional Medical Center. (Transcript pg. 8)

2. Petitioner had a history of problems with her right shoulder and right arm extending back at least three years prior to July 15, 1991. (Transcript pgs. 24-26, 47-51)

3. Petitioner had been receiving medical treatment for her shoulder prior to July 15, 1991. (Transcript pgs. 24-26, 47-51)

4. Petitioner suffered an industrial injury to her lower back in April, 1991. (Transcript pg. 51)

5. Petitioner applied to her employer's insurance company for medical benefits for an operation to her shoulder under her claim from her industrial accident of April, 1991. (Transcript pg. 51 & 105)

6. The insurance company denied coverage to her for the shoulder since the claim was for an injury to her back. (Transcript pg. 106)

7. After denial of the benefits, petitioner reported that she had suffered a second industrial accident on July 15, 1991 which injured her shoulder. (Transcript pg. 105)

8. Petitioner had left work July 15, 1991 complaining of pain in her shoulder. (Transcript pg. 21)

9. Petitioner did not report to her supervisor when leaving

work on July 15th that she had suffered an industrial accident.  
(Transcript pgs. 123, 124-131)

10. Petitioner did not report the alleged industrial accident of July 15, 1991 until after the medical procedure on her shoulder had been denied under her April, 1991 industrial accident.  
(Transcript pgs. 115-120)

11. Petitioner was released by her doctors to return to work on November 4, 1991, but chose to retire on November 10, 1991.  
(Transcript pgs. 135-136, 139)

#### SUMMARY OF THE ARGUMENT

The Industrial Commission has applied the appropriate standard of review. Although there is some confusion in the Industrial Commission's first Order Denying Motion for Review, the Industrial Commission now has clearly applied the appropriate standard and has found that petitioner did not prove that she had a compensable injury by a preponderance of the evidence.

Petitioner was not denied due process of law by the delay in receiving a decision from the Administrative Law Judge since she suffered no prejudice as a result of the delay.

The decision of the Industrial Commission of Utah and the Findings of Fact and Conclusions of Law of the Administrative Law Judge should be upheld by this Court. The Administrative Law Judge found that the petitioner, Jennie Featherstone, had failed to show by a preponderance of credible evidence that an industrial accident occurred on July 15, 1991, and therefore, she was not entitled to Workers Compensation benefits. The Findings of Fact that lead to

this conclusion are all supported by evidence contained within the record. The evidence which the Administrative Law Judge discounted was based upon the credibility of the witnesses. Issues of credibility should be left to the trier of fact to determine.

### **ARGUMENT**

#### **POINT I**

The Industrial Commission did apply the proper standard of review of the Administrative Law Judge's decision.

Petitioner has argued in her Brief that the Industrial Commission misapplied the standard of review in looking at the Administrative Law Judge's decision. She relies on the case of Ashcroft vs. Industrial Commission, 885 P.2d 267 (Utah App. 1993). In Ashcroft the Court of Appeals held that there is a distinction between the standard preponderance of evidence and substantial evidence, and that this difference is significant. The Court explained that a reviewing body, such as this Court, applies the standard of substantial evidence to examine whether the record contains evidence supporting the findings made by the trier of fact. The reviewing court does not weigh the evidence. In contrast, a trier of fact, including the Commission, determines whether the Petitioner has met his or her burden, the standard being preponderance of the evidence. Ashcroft at page 269.

While some confusion existed as to whether or not the Industrial Commission misapplied these standards of review, this Matter was remanded back to the Industrial Commission to resolve this alleged error. The Order on Remand clearly applies the

appropriate standard. The Industrial Commission found:

For the reasons outlined above, we find that the Applicant has failed to prove by a preponderance of the evidence that she injured her right shoulder in a compensable industrial accident on July 15, 1991.

The Industrial Commission has now specifically applied the appropriate standard of review to the Administrative Law Judge's Findings of Fact and Conclusions of Law. Petitioner's argument now is clearly without merit.

#### POINT II

The decision of the Industrial Commission of Utah and its Administrative Law Judge should be sustained by the Court when the issue turns on credibility of evidence and witnesses.

Findings of Fact of the Utah Industrial Commission should be upheld by this Court unless the determination of fact is not supported by substantial evidence when viewed in light of the whole record before the Court. (See Utah Code Ann. 63-46b-16(4)(g)) In this matter the Utah Industrial Commission in adopting the Findings of the Administrative Law Judge has determined that Petitioner's shoulder was not injured in an industrial accident on July 15, 1991. Petitioner is now challenging these Findings in the Court of Appeals. In order to successfully challenge these Findings, it is necessary that the Petitioner marshal all of the evidence supporting the Findings and show that despite the facts in support of the Findings and in light of the conflicting or contradictory evidence the Findings are not supported by substantial evidence. Merriam vs. Board of Review, 812 P.2d 447, (Utah App. 1991). Since

Petitioner's Brief does not marshall all of the evidence in support of the Industrial Commission's finding that no industrial accident occurred and then make a showing from the record that the factual determination was unsupported this Court should accept the findings of the Industrial Commission.

Respondent admits that there is evidence in the record contradictory to the evidence that no industrial accident occurred, but the trier of fact determined that this evidence either did not support the contentions of Petitioner or lacked credibility. There is substantial evidence to support the findings of the Industrial Commission of Utah. These facts supported by citations to the record are contained in this brief's Statement of Facts and can be summarized as follows: Petitioner had a history of problems with her right shoulder which predated the alleged injury by approximately three years; Petitioner had expressed to her doctor symptoms similar to what she alleged to have been caused by the industrial accident prior to the industrial accident; Petitioner did not report the industrial accident at the time the accident was alleged to have occurred; Petitioner attempted to get the shoulder covered under a prior industrial accident claim; and Petitioner only reported the industrial accident after the insurance carrier for the employer had denied coverage for the requested treatment under the prior industrial accident claim. This evidence supports the conclusion of the Industrial Commission that no compensable industrial accident occurred and is substantial enough to meet the standard required by Utah Code Annotated §63-46b-16(4)(g).

The Industrial Commission's determination on credibility should be deferred to by this Court. As stated in Grace Drilling, v. Board of Review, 776 P.2d 63 (Utah App. 1989):

It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.(citations omitted) Grace id. at 68.

Since Petitioner has not marshalled all the facts which support the Boards's conclusion and which contradict her conclusions and has not shown the factual determination that no compensable industrial accident occurred to Petitioner was an arbitrary and unreasonable conclusion by the Industrial Commission, this Court should defer to the Industrial Commission's finding of no industrial accident.

#### POINT III

Petitioner has not been denied due process rights by the actions of the Industrial Commission.

In her Statement of the Issues Petitioner avers that she is presenting for review, issues concerning whether Petitioner's due process rights have been denied by virtue of the Commission taking too long in making its Findings of Fact and whether the Petitioner's due process rights have been denied by virtue of the Commission's Findings of Fact being arbitrary, capricious and wholly without cause. These issues are wholly without merit.

What is procedurally required by Industrial Commission has been established by the State Legislature in the Utah Administrative Procedures Act. (Utah Code Annotated §§63-46b-8, 63-46b-10, 63-46b-12.) The Industrial Commission has complied with

procedural standards in processing Petitioner's application. Petitioner apparently is challenging the Administrative Law Judge's findings of fact and is questioning the Industrial Commissions order on review. Both of these meet the standards required by the statutes referred to above, and while Utah Code Annotated §§ 63-46b-10 requires that a decision be rendered in a reasonable time no specific time table is mandated. Petitioner has not cited any cases which would specially define what is reasonable for a Administrative Law Judge under circumstances similar to this matter and this Respondent has not found any cases on point. Petitioner has not alleged any substantive harm or prejudice to her because of the delay in making the decision. Since no prejudice to Petitioner's case has been shown by the delay between the hearing and the rendering of the decision, Petitioner's assertion of violation of due process rights should be ignored as a harmless error at most. An error is harmless if it is:

Sufficiently inconsequential...that there is no reasonable likelihood that the error affected the outcome of the proceeding. Morton Intl., Inc. v. Auditing Division, 814 P.2d 581 (Utah, 1991) at pg. 84.

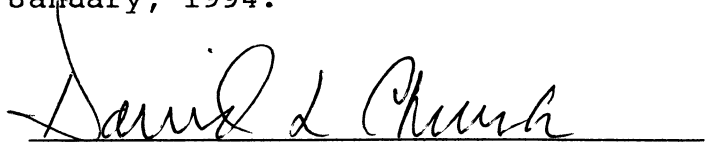
Even if the delay in the decision was longer than reasonable, there is no showing that it affected the outcome of this claim.

#### CONCLUSION

The decision of the Industrial Commission should be upheld. The appropriate standard of review of the Administrative Law Judge's Findings of Facts and Conclusions of Law was employed by the Industrial Commission. The dispute between Petitioner and the

Industrial Commission's decision hinges on an interpretation of evidence, and the credibility of witnesses. The Findings of Fact of the Industrial Commission are supported by substantial evidence in the record. The Court should therefore defer to this determination of fact and uphold the decision denying benefits to the Petitioner.

DATED this 28<sup>th</sup> day of January, 1994.

A handwritten signature in cursive script, reading "David L. Church", is written over a horizontal line.

DAVID L. CHURCH  
Attorney for Defendant/Respondent  
Utah Local Government Trust



**ADDENDUM A**

**ORDER DENYING MOTION FOR REVIEW**

THE INDUSTRIAL COMMISSION OF UTAH

Jennie M. Featherstone,	*	
	*	
Applicant,	*	
vs.	*	ORDER DENYING
	*	MOTION FOR REVIEW
Tooele Valley Regional and/or	*	
Utah Local Government Trust and	*	Case No. 92000079
Employers' Reinsurance Fund,	*	
	*	
Respondents.	*	
*****		

The Industrial Commission of Utah issues this order pursuant to Utah Code Annotated, Section 35-1-78 and Section 63-46b-12.

The applicant timely filed this motion for review of the administrative law judge's ("ALJ") order dated November 20, 1992. Said order denied the applicant's claim for workers' compensation benefits pursuant to an alleged July 15, 1991 industrial accident.

The applicant asserts that the ALJ improperly based his decision on credibility when the testimony of the applicant and her witnesses was not contradicted by other witnesses or other evidence in the record. She further asserts that the ALJ's findings of fact are clearly erroneous and are not supported by the evidence in the record.

Under the Utah Administrative Procedures Act ("UAPA"), an ALJ's findings of fact will be sustained if the findings are supported by "substantial evidence when viewed in light of the whole record before the court." U.C.A. 63-46b-16(4)(g) (1992). Substantial evidence is "more than a mere 'scintilla' of evidence ... though 'something less than the weight of the evidence.'" Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Ut. App. 1989) quoting Consolo v. FMC, 383 U.S. 607, 620 (1966). In its discussion of review of agency factfinding, the court noted that it would "not substitute its judgment as between two reasonable conflicting views," even if the court may have reached a different conclusion had the matter come before them on de novo review. Grace Drilling at 68.

We will apply the substantial evidence test to the ALJ's findings of fact, recognizing that the ALJ was present at the hearing and was better able to observe the testimony and demeanor of the witnesses and to evaluate their credibility than the commission on its review of the record. We have reviewed the tape of the hearing in order to better assess the conformity of the ALJ's findings with the taped testimony.

Review of the medical records exhibit shows that the applicant had a history of shoulder pain prior to July 15, 1991, the date of the alleged industrial accident. Medical Records Exhibit, pp.

Jennie Featherstone  
Order  
Page two

00027, 00033, 00045, 00053, 00056, 00058, 00101, 00118, 00119, 00122. Dr. Mark Greene, however, opined that the applicant's rotator cuff injury which has been attributed to the alleged July 15, 1991 industrial accident, was different from the applicant's 1987 shoulder pain and bursitis. Medical Records Exhibit, p. 00001.

The progress notes of Dr. David E. Curtis, the applicant's treating physician, make reference to the applicant's "recurrent" right shoulder pain. Medical Records Exhibit, p. 00027. Dr. Curtis offered no opinion regarding the causal connection between the applicant's rotator cuff tear and her employment, although he did note that the applicant believed that her injury was associated with "more heavy work at her dishwashing job, especially taking care of the trays which come from the jail." Medical Records Exhibit, p. 00033. It is important to note that the applicant's medical records indicate that she suffered the pain, popping and grinding in her shoulder that she attributes to the industrial accident before the alleged accident occurred. Medical Records Exhibit, p. 00027.

At the hearing, the applicant testified that on July 15, 1991, she picked up 12 serving trays to place them in the dishwasher and felt extreme pain "like her arm was being pulled out of the socket." She told Food Services Manager Greg Coburn that her arm hurt and she needed to go see her doctor. Later that day, the applicant saw her treating physician, Dr. Curtis. Dr. Curtis diagnosed a rotator cuff tear, but did not tell the applicant that the injury predated the July 15, 1991 incident. With regard to seeing Dr. Green for a second opinion, the applicant testified that he told her that the 1991 rotator cuff injury was different from her preceding shoulder problems. Dr. Green gave the applicant no recommended course of treatment that she could recall, but she testified that she "told him what she needed to have done and he did it." Hearing Tape # 1 at 1275.

In addition, the applicant testified that she talked to Greg and her supervisor, Opal West, on July 15, 1991 after the alleged industrial accident. On cross examination, the applicant stated that she believed she had been treated for arthritis in her shoulder with cortisone shots prior to the accident. She testified that prior to July 15, 1991, she suffered from severe shoulder pain, popping and grinding. However, she didn't remember telling Dr. Curtis about the pain, grinding and popping during her June 20, 1991 visit to the doctor. See Medical Records Exhibit at 00027. The applicant further testified that when she suffered an industrial injury to her low back in April 1991, she filled out an accident report and reported to the emergency room per hospital policy. On July 15, 1991, however, she claimed that her shoulder

Jennie Featherstone  
Order  
Page three

"hurt too much" and she didn't think about filling out an accident report or going to the emergency room. Instead, she left work early at about 9:00 a.m. to see her treating physician, Dr. Curtis. The applicant stated that she initially thought her shoulder pain was caused by arthritis, but later after she discovered there were torn ligaments, she decided the injury must have resulted from lifting the trays at work.

Penny Manchester, one of the applicant's co-workers, testified that the applicant asked her to work for her on July 15, 1991. The applicant appeared to be in a great deal of pain and was crying when she asked Ms. Manchester to work for her. Ms. Manchester also testified that Opal West was working on July 15, 1991.

Charles Featherstone, the applicant's husband of three years, testified that before the alleged accident of July 15, 1991, the applicant kept the house clean and always had supper ready when he came home. After the accident, the house wasn't clean and supper was "soup and sandwiches." Mr. Featherstone stated that his wife seemed to be in more pain after July 15, 1991 than she was before that date. He did not go with his wife to her June and July 1991 appointments with Dr. Curtis, so he did not know what the doctor told her.

Marilyn Beesley, an insurance adjuster for the Utah Local Government Trust, testified that she was the adjuster for the applicant's April 16, 1991 lower back industrial claim. She received a request for approval of shoulder surgery to be charged to the April 16, 1991 claim. Payment for the surgery was denied by letter dated August 6, 1991 because there was nothing in her file on the April 16, 1991 accident to support payment for the shoulder surgery. The applicant called Ms. Beesley on August 7, 1991 to request that she reconsider the denial of benefits. During this conversation, the applicant did not mention a second accident in July 1991. Ms. Beesley talked to the respondent in early August to find out how the shoulder injury related to the accident in April 1991. The employer representative, Beth Bowles, indicated that she did not know why the applicant had surgery. An employer's first report of injury for the alleged July 15, 1991 accident was received by the carrier on August 30, 1991.

Greg Coburn, the Director of Materials Management and Food Services for the respondent testified that the applicant did not tell him on July 15, 1991 that she had an industrial accident but told him that her shoulder and arm hurt and she needed to leave. The applicant had not mentioned her shoulder pain to him prior to July 15, 1991. Mr. Coburn testified that Opal West was not working on July 15, 1991. He stated that Opal regularly had Mondays off, and that July 15, 1991 was a Monday. He also checked the work schedule which showed that Opal was off that day and that Diane

Jennie Featherstone  
Order  
Page four

Moore was the supervisor on July 15, 1991. Mr. Coburn saw the applicant on August 29, 1991 when she came in to file an employer's first report of injury. On cross examination, Mr. Coburn stated that he did not fill out an incident report on July 15, 1991 because the applicant did not tell him the injury was industrially related.

Diane Moore, the applicant's supervisor on July 15, 1991 testified that she wasn't at work when the alleged accident occurred, but came to work at about 9:00 a.m. that day. The applicant came to her and told her that her shoulder and arm ached and she needed to go to the doctor. Prior to the date of the accident Ms. Moore and the applicant had discussed the applicant's shoulder pain which was attributed to arthritis. Ms. Moore further testified that she didn't fill out an incident report because the applicant did not say that she had suffered an industrial accident. On August 29, 1991, Gary Coburn called Ms. Moore and told her to help the applicant fill out an incident report for the alleged July 15, 1991 industrial accident.

We find that there is substantial evidence in the record to support the ALJ's findings on the credibility of witnesses and the compensability of the alleged industrial accident of July 15, 1991. The evidence in the record shows that the applicant complained of shoulder and arm pain on July 15, 1991 and left work to seek medical attention. Testimony of Jennie Featherstone, Penny Manchester, Greg Coburn, Diane Moore. The symptoms that the applicant attributes to the industrial accident were present before the alleged accident of July 15, 1991. Medical Records Exhibit, p. 00027. The accident was not immediately reported as industrially caused and was not reported to the employer as an industrial accident until the claim for benefits based upon the applicant's April 16, 1991 industrial accident was denied. Testimony of Jennie Featherstone, Greg Coburn, Diane Moore. There were no witnesses to the alleged accident and the accident was not reported to any of the applicant's co-workers. Testimony of Jennie Featherstone, Greg Coburn, Diane Moore, Penny Manchester. The applicant's treating physician attributed her complaints to a recurrent condition for which she had previously sought treatment on June 20, 1991. Medical Records Exhibit, p. 00027. Therefore, the evidence in the record does not support a finding that the applicant was injured in a compensable industrial accident on July 15, 1991.

ORDER:

IT IS ORDERED that the Order of the administrative law judge dated November 30, 1992 is hereby affirmed.


IT IS FURTHER ORDERED that any appeal shall be to the Utah

Jennie Featherstone  
Order  
Page five

Court of Appeals within 30 days of the date of this order, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, 63-46b-16, and Bonded Bicycle Couriers v. Dept. of Employment Security et al., 201 Utah Adv. Rep. 79. (CA, 12/04/92). The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.



Stephen M. Hadley  
Chairman



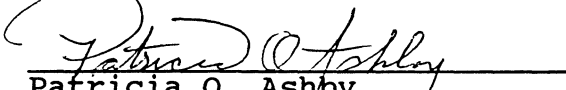
Thomas R. Carlson  
Commissioner



Colleen S. Colton  
Commissioner

Certified this 2nd day of April 1993.

ATTEST:

  
Patricia O. Ashby  
Commission Secretary

CERTIFICATE OF MAILING

I, Benjamin A. Sims, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Order Denying Motion for Review in Featherstone v. Tooele Valley Regional, Case Number 92000079, on 2 April 1993 to the following:

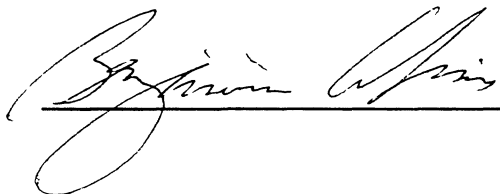
✓ David Church, Atty.  
51 East 400 South #200  
Salt Lake City, UT 84111

David Parker, Atty.  
180 S. 300 W. #260  
Salt Lake City, UT 84101

Jennie Featherstone  
428 East 300 North  
Tooele, UT 84074

Erie V. Boorman, Atty.  
Employers' Reinsurance Fund  
(intraoffice mail)

Judge George  
(intra office mail)



A handwritten signature in cursive script, reading "Benjamin A. Sims", is written over a horizontal line.

**ADDENDUM B**

**FINDING OF FACT  
CONCLUSIONS OF LAW**



INDUSTRIAL COMMISSION OF UTAH

Case No. 92-079

JENNIE M. FEATHERSTONE,

Applicant,

vs.

TOOELE VALLEY REGIONAL and/or  
UTAH LOCAL GOVERNMENT TRUST  
and/ EMPLOYERS REINSURANCE  
FUND,

Defendants.

\* \* \* \* \*

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah,  
160 East 300 South, Salt Lake City, Utah on June  
12, 1992 at 1:00 o'clock p.m. Said hearing  
pursuant to Order and Notice of the Commission.

BEFORE: The Honorable Donald L. George, Administrative Law  
Judge.

APPEARANCES: The applicant, Jennie Featherstone, was present and  
represented by David Parker, Attorney at Law.

The defendant employer, Tooele Valley Regional, and  
its insurer, Utah Local Government Trust were  
represented by David L. Church, Attorney at Law.

The Employers' Reinsurance Fund was represented by  
its Administrator, Erie V. Boorman, Attorney at  
Law.

An Application for Hearing requesting medical expenses,  
permanent partial and temporary partial disability compensation,  
interest, travel expenses and reserving the issue of permanent and  
total disability was filed with the Industrial Commission of Utah  
on December 31, 1991, wherein the applicant, Jennie M.  
Featherstone, alleges that she sustained an injury by accident  
arising out of or in the course of her employment with the  
defendant employer, Tooele Valley Regional, on July 15, 1991. That  
Application was assigned case number 92-079, a copy was sent to the  
defendant employer, an Answer thereto timely filed, and accordingly  
the matter was scheduled for hearing before the Industrial  
Commission of Utah on June 12, 1992.

JENNIE M. FEATHERSTONE  
ORDER  
PAGE TWO

Beyond the benefits applied for, the defendants' position was that no industrial accident had occurred, and in the alternative, if an industrial accident were found, legal causation would have to be overcome as well. Credibility was deemed to be a major issue.

The applicant testified that on the day of the alleged industrial accident, July 15, 1991, she was working at her job as a dishwasher for Tooele Valley Regional. She stated that she moved 12 trays (which are weighed at 1 pound 13 ounces each) and felt a stabbing pain in her arm and shoulder.

Later when her supervisor, Greg came in, she was reportedly crying, he asked what was wrong and she said she had to go to the doctor.

Previous to this in April, 1991, the applicant had another industrial accident where she picked up a tray of milk in a walk-in freezer, hurt her low back, and reported that.

Dr. Curtis treated her for this July accident by telling her to take a few days off. When she returned to work around the end of October or the end of November, she asked for and was put on as a "cold cook" but represented that she was not able to handle it for more than 4 days because lifting above her head was necessary and she couldn't do it. She stated that she could not return to dishwashing because it was too hard on her arm.

On July 30, 1991, she reports surgery for a rotator cuff repair, but still complained of pain after that procedure.

The applicant specifically stated that on the date of the industrial accident, in addition to talking to supervisor, Greg, she had also talked to her direct supervisor, Opal, about the incident, but no report was filled out.

On cross-examination, the applicant acknowledged shoulder problems prior to 1987. She also at first did not recall an appointment with Dr. Curtis for this condition on June 20, 1991, then acknowledged that she did. As to her July 15, 1991, visit with Dr. Curtis, the medical records do not show any notations indicating an industrial accident. The applicant acknowledged filing out an industrial accident claim for the April, 1991, incident, and stated that on July 15, 1991, no report was made out because she was in too much pain.

The applicant admitted that her leg pain was what prevented her from doing the "cold cook" job, not her shoulder. The applicant disagreed with Dr. Curtis' notes after the surgery which

JENNIE M. FEATHERSTONE  
ORDER  
PAGE THREE

indicated that she had full range of motion and good strength. When she went to Dr. Greene for a second opinion, she stated that he did not relate to her pain.

The applicant admitted knowing the reporting procedure, because it had been explained to her and because she had done so on the prior industrial accident.

In support of her application, the applicant called as a second witness, Penny Manchester, who did not witness the industrial accident, but said the applicant approached her on that day, told the witness that her arm was hurting and asked Manchester to work for her, to which she agreed. Manchester's testimony shed no light, and appeared to be straining to support the applicant's position.

The applicant presented her husband as her third and final witness, who acknowledged that his wife had arthritis, and recited a litany of worsened symptoms after the alleged industrial accident. He was however, clearly biased, argumentative, exhibited selective favorable recall, was angry with Dr. Curtis for allegedly not turning in the industrial accident reporting paper work until a month and a half after, thereby damaging the applicant's cause; he also disagreed with Dr. Curtis of full range of motion.

The defendants presented as their first witness, insurance adjuster, Marilyn Beesley, who had talked with the applicant on August 7, 1991, when the applicant called Beesley about her denial letter to Dr. Curtis on August 6th. In that conversation, the applicant was requesting Beesley to reconsider her denial, and stated that her shoulder was giving her the problem all along [since the prior industrial accident]. There was no mention of July 15th or this alleged second industrial accident. On cross-examination, Beesley stated that she investigated further, and no report had been made to the employer by the applicant concerning the July 15th incident.

The defendant's second witness was Greg Coburn, the director of material management and food services who stated that he did observe the applicant in tears and that she stated that she could not work and left. No industrial accident was reported to him at that time, and he was surprised when it was later turned in as an industrial accident.

Coburn testified that contrary to the applicant's statement that she had reported this injury to Opal West on July 15th, which was a Monday, Opal West did not work on Mondays, and when he checked specifically as to the July 15th time sheet, West was off.

JENNIE M. FEATHERSTONE  
ORDER  
PAGE FOUR

Defendant's third witness was Diane Moore, who was the applicant's direct supervisor on the date of the alleged injury. She testified that the applicant did approach her around 9:30 or 10:00 a.m., and stated that she had to leave to go to the doctor because her shoulder and arm ached. The applicant did not say anything about an industrial accident at that time, and had previously complained of shoulder pain, and taken time off.

On cross-examination, it was brought up that the applicant had complained to Moore several times of her arm hurting because of arthritis, but on August 29th, the applicant reported it as an industrial accident.

Testimony ended.

Having reviewed the file, the exhibits, and further having had an opportunity to observe the candor and demeanor of the witnesses, the Administrative is now prepared to make the following:

#### FINDINGS OF FACT:

1. The applicant had problems with her right arm and shoulder long before the alleged industrial accident of July 15, 1991, complained of it to the doctors, and received treatments which included shots up to five years previous. The medical records on page 101, dated May 22, 1991, indicate increasing shoulder pain. That is followed on June 20, 1991, by the notation that the applicant ". . . has complained of this over the past 3 years."

2. The applicant knew the industrial accident reporting system well, having done so previously on February 11, 1985, when she cut her finger; December 21, 1984, when she burned her forearm; November 7, 1990, when she cut her finger on a pot, and the last mentioned incident of April 16, 1991, where she allegedly hurt her back. Yet, when she claims to have an unwitnessed industrial accident on July 15, 1991, by her own testimony, she did not report to Greg. She did, however, claim that she reported it to Opal, who was not even present on that day (to the detriment of the applicant's credibility), further the applicant did not mention an industrial accident in her visit to Dr. Curtis that same day, nor did she follow through in reporting the matter at all until August 29th or after, when she had been denied medical expenses.

3. The applicant was released to return to work on November 4, 1991, but chose to retire on 11/10/91, and admitted that her leg

pain was what prevented her from doing the "cold cook" work, not her shoulder. Further, on November 14, 1991, the applicant applied for unemployment benefits, stating only that she had back and leg pain, with no mention of her shoulder.

4. The applicant admitted that she told supervisor Greg Coburn that it was arthritis, and an x-ray report of July 18, 1991, does show degenerative joint disease.

5. Considering all the foregoing, the Administrative Law Judge finds that the applicant is not a credible witness.

6. As to the applicant's second witness, Penny Manchester, factually she added nothing, but was obviously attempting to support the applicant's cause, but not convincingly.

7. The applicant's husband was an antagonistic,, biased witness on the applicant's behalf, argumentative, attacking Dr. Curtis on various grounds, and having bursts of sudden favorable recall. His testimony is neither credible nor reliable.

8. The ALJ finds the defense witnesses to be more credible than those of the applicant. Their testimony and the medical records are clear that the applicant had previously existing problems with her arm and shoulder, and when she left on the day of the alleged industrial incident, she gave no indication whatsoever that this was an industrial accident, and thereafter did not report it as such for another 6 weeks.

9. There is no connection between the applicant's shoulder problem and the alleged industrial accident of July 15, 1991, nor with the applicant's prior industrial injury of April, 1991, nor her low back problems.

10. The applicant was not involved in a compensable industrial accident on July 15, 1991.

#### CONCLUSIONS OF LAW:

The applicant, Jennie M. Featherstone, has failed to show by a preponderance of credible evidence that an industrial accident occurred on July 15, 1991, and accordingly she is not entitled to workers compensation benefits.

Good cause appearing herein, the Administrative Law Judge hereby issues the following:

JENNIE M. FEATHERSTONE  
ORDER  
PAGE SIX

ORDER:

IT IS THEREFORE ORDERED that the claim of the applicant, Jennie M. Featherstone, for medical expenses, temporary total disability, temporary partial disability, permanent partial disability, interest, travel and permanent total disability benefits as a result of a July 15, 1991, incident, should be and the same is hereby denied and dismissed with prejudice.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

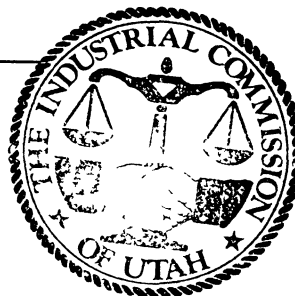
*Donald L. George*

Donald L. George  
Administrative Law Judge

Certified this 20th day of November, 1992.

ATTEST:

*Patricia O. Ashby*  
Patricia O. Ashby  
Commission Secretary



CERTIFICATE OF MAILING

I hereby certify that on the 20<sup>th</sup> day of November, 1992, the attached ORDER in the case of Jennie M. Featherstone was mailed, postage pre-paid to the following persons at the following addresses:

Jennie M. Featherstone  
428 E 300 N  
Tooele UT 84074

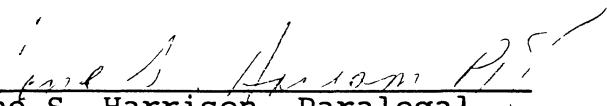
David W. Parker, Atty  
180 S 300 W #260  
Salt Lake City UT 84101

Utah Local Governments Insurance  
5460 E 200 S #200  
Salt Lake City UT 84102-2020

David L. Church, Atty  
51 E 400 S #200  
Salt Lake City UT 84111

Erie V. Boorman, Atty  
ERF

INDUSTRIAL COMMISSION OF UTAH

  
\_\_\_\_\_  
June S. Harrison, Paralegal  
Adjudication Division

/jsh  
Ord\Feathers

**ADDENDUM C**  
**ORDER ON REMAND**



THE INDUSTRIAL COMMISSION OF UTAH  
P.O. Box 146600  
Salt Lake City, Utah 84114-6600

Jennie M. Featherstone,	*	
	*	
Applicant,	*	
vs.	*	ORDER ON
	*	REMAND
Tooele Valley Regional and/or	*	
Utah Local Government Trust and	*	Case No. 92000079
Employers' Reinsurance Fund,	*	
	*	
Respondents.	*	
*****		

This matter was remanded to the Industrial Commission ("commission") by the Court of Appeals on October 28, 1993 for the limited purpose of determining whether petitioner has shown by a preponderance of the evidence that she is entitled to compensation.

The applicant filed a claim for workers' compensation benefits based upon an alleged July 15, 1991 industrial accident. An administrative law judge of the commission ("ALJ") denied benefits based in part on credibility determinations he made at the hearing. We affirmed the ALJ's order based upon our determination that there was substantial evidence in the record to support the ALJ's findings of fact, conclusions of law and order. The Court of Appeals has held that we must apply the preponderance of the evidence standard in our review of administrative law judge ("ALJ") decisions.<sup>1</sup>

We will now review the evidence in the record to determine whether the applicant has shown by a preponderance of the evidence that she suffered a compensable industrial accident on July 15, 1993.

DISCUSSION:

Review of the medical records exhibit shows that the applicant had a history of shoulder pain prior to July 15, 1991, the date of the alleged industrial accident. Medical Records Exhibit, pp. 00027, 00033, 00045, 00053, 00056, 00058, 00101, 00118, 00119, 00122. Dr. Mark Greene, however, opined that the applicant's rotator cuff injury which has been attributed to the alleged July 15, 1991 industrial accident, was different from the applicant's 1987 shoulder pain and bursitis. Medical Records Exhibit, p. 00001.

The progress notes of Dr. David E. Curtis, the applicant's

---

<sup>1</sup> Ashcroft v. Industrial Commission, 215 Utah Adv. Rep. 50 (Ut. App. 1993).

treating physician, make reference to the applicant's "recurrent" right shoulder pain. Medical Records Exhibit, p. 00027. Dr. Curtis offered no opinion regarding the causal connection between the applicant's rotator cuff tear and her employment, although he did note that the applicant believed that her injury was associated with "more heavy work at her dishwashing job, especially taking care of the trays which come from the jail." Medical Records Exhibit, p. 00033. It is important to note that the applicant's medical records indicate that she suffered the pain, popping and grinding in her shoulder that she attributes to the industrial accident before the alleged accident occurred. Medical Records Exhibit, p. 00027.

At the hearing, the applicant testified that on July 15, 1991, she picked up 12 serving trays to place them in the dishwasher and felt extreme pain "like her arm was being pulled out of the socket." She told Food Services Manager Greg Coburn that her arm hurt and she needed to go see her doctor. Later that day, the applicant saw her treating physician, Dr. Curtis. Dr. Curtis diagnosed a rotator cuff tear, but did not tell the applicant that the injury predated the July 15, 1991 incident. With regard to seeing Dr. Green for a second opinion, the applicant testified that he told her that the 1991 rotator cuff injury was different from her preceding shoulder problems. Dr. Green gave the applicant no recommended course of treatment that she could recall, but she testified that she "told him what she needed to have done and he did it." Hearing Tape # 1 at 1275.

In addition, the applicant testified that she talked to Greg and her supervisor, Opal West, on July 15, 1991 after the alleged industrial accident. On cross examination, the applicant stated that she believed she had been treated for arthritis in her shoulder with cortisone shots prior to the accident. She testified that prior to July 15, 1991, she suffered from severe shoulder pain, popping and grinding. However, she didn't remember telling Dr. Curtis about the pain, grinding and popping during her June 20, 1991 visit to the doctor. See Medical Records Exhibit at 00027. The applicant further testified that when she suffered an industrial injury to her low back in April 1991, she filled out an accident report and reported to the emergency room per hospital policy. On July 15, 1991, however, she claimed that her shoulder "hurt too much" and she didn't think about filling out an accident report or going to the emergency room. Instead, she left work early at about 9:00 a.m. to see her treating physician, Dr. Curtis. The applicant stated that she initially thought her shoulder pain was caused by arthritis, but later after she discovered there were torn ligaments, she decided the injury must have resulted from lifting the trays at work.

Penny Manchester, one of the applicant's co-workers, testified that the applicant asked her to work for her on July 15, 1991. The applicant appeared to be in a great deal of pain and was crying when she asked Ms. Manchester to work for her. Ms. Manchester also testified that Opal West was working on July 15, 1991.

Charles Featherstone, the applicant's husband of three years, testified that before the alleged accident of July 15, 1991, the applicant kept the house clean and always had supper ready when he came home. After the accident, the house wasn't clean and supper was "soup and sandwiches." Mr. Featherstone stated that his wife seemed to be in more pain after July 15, 1991 than she was before that date. He did not go with his wife to her June and July 1991 appointments with Dr. Curtis, so he did not know what the doctor told her.

Marilyn Beesley, an insurance adjuster for the Utah Local Government Trust, testified that she was the adjuster for the applicant's April 16, 1991 lower back industrial claim. She received a request for approval of shoulder surgery to be charged to the April 16, 1991 claim. Payment for the surgery was denied by letter dated August 6, 1991 because there was nothing in her file on the April 16, 1991 accident to support payment for the shoulder surgery. The applicant called Ms. Beesley on August 7, 1991 to request that she reconsider the denial of benefits. During this conversation, the applicant did not mention a second accident in July 1991. Ms. Beesley talked to the respondent in early August to find out how the shoulder injury related to the accident in April 1991. The employer representative, Beth Bowles, indicated that she did not know why the applicant had surgery. An employer's first report of injury for the alleged July 15, 1991 accident was received by the carrier on August 30, 1991.

Greg Coburn, the Director of Materials Management and Food Services for the respondent testified that the applicant did not tell him on July 15, 1991 that she had an industrial accident but told him that her shoulder and arm hurt and she needed to leave. The applicant had not mentioned her shoulder pain to him prior to July 15, 1991. Mr. Coburn testified that Opal West was not working on July 15, 1991. He stated that Opal regularly had Mondays off, and that July 15, 1991 was a Monday. He also checked the work schedule which showed that Opal was off that day and that Diane Moore was the supervisor on July 15, 1991. Mr. Coburn saw the applicant on August 29, 1991 when she came in to file an employer's first report of injury. On cross examination, Mr. Coburn stated that he did not fill out an incident report on July 15, 1991 because the applicant did not tell him the injury was industrially related.

Diane Moore, the applicant's supervisor on July 15, 1991 testified that she wasn't at work when the alleged accident occurred, but came to work at about 9:00 a.m. that day. The applicant came to her and told her that her shoulder and arm ached and she needed to go to the doctor. Prior to the date of the accident Ms. Moore and the applicant had discussed the applicant's shoulder pain which was attributed to arthritis. Ms. Moore further testified that she didn't fill out an incident report because the applicant did not say that she had suffered an industrial accident. On August 29, 1991, Gary Coburn called Ms. Moore and told her to help the applicant fill out an incident report for the alleged July 15, 1991 industrial accident.

The ALJ determined that the applicant was not credible based upon his observation of the witnesses and the inconsistencies between the applicant's testimony and the evidence contained in the medical records. The ALJ further found that Penny Manchester added no factual support to the applicant's case and that the applicant's husband was an antagonistic, biased and argumentative witness who was neither credible nor reliable.

In *Vali Convelescent and Care Institutions v. Div. of Health Care Financing*, 797 P.2d 438 (Utah App. 1990), the Court of Appeals cited with approval an Idaho case dealing with credibility determinations by a hearing officer of an administrative agency. The Idaho court noted

where credibility is crucial and where first-hand exposure to the witnesses may strongly affect the outcome, we think the Personnel Commission should not override the hearing officer's impressions unless it makes a cogent explanation of its reasons for doing so. Such an explanation is essential to meaningful judicial review . . .

*Dept. of Health & Welfare v. Sandoval*, 742 P.2d 992, 996 (Ct. App. 1987) cited in *Vali* at 449.

We will only overturn an ALJ's findings of fact if there is a compelling reason to do so, especially when the factual issues turn on questions of witness credibility. In this case, we find no compelling reason to overrule the ALJ's findings of fact. We therefore conclude that the ALJ's findings of fact and conclusions of law are well supported by a preponderance of the evidence in the record and hereby adopt them as our own.

CONCLUSIONS OF LAW:

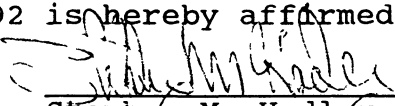
JENNIE FEATHERSTONE  
ORDER ON REMAND  
PAGE FIVE

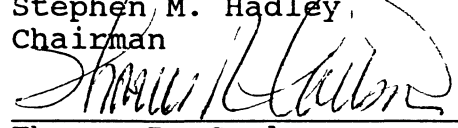
For the reasons outlined above, we find that the applicant has failed to prove by a preponderance of the evidence that she injured her right shoulder in a compensable industrial accident on July 15, 1991.


ORDER:

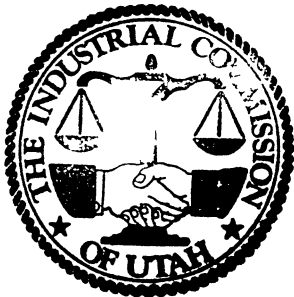
IT IS THEREFORE ORDERED that the Order of the administrative law judge dated November 30, 1992 is hereby affirmed.

DATED THIS 30<sup>th</sup> DAY OF NOVEMBER,  
1993.

  
\_\_\_\_\_  
Stephen M. Hadley,  
Chairman

  
\_\_\_\_\_  
Thomas R. Carlson  
Commissioner

  
\_\_\_\_\_  
Colleen S. Colton  
Commissioner



CERTIFICATE OF MAILING

I, Adell Butler-Mitchell, certify that I did mail by prepaid first class postage, except as noted below, a copy of the ORDER ON REMAND in the case of JENNIE M. FEATHERSTONE, Case Number 92000079, on 22th day of November, 1994 to the following:

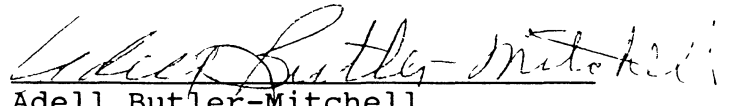
JENNIE M. FEATHERSTONE  
428 EAST 300 NORTH  
TOOELE, UTAH 84074

DAVID W. PARKER  
50 WEST 300 SOUTH SUITE 900  
SALT LAKE CITY, UTAH 84101

DAVID CHURCH  
51 EAST 400 SOUTH, SUITE 200  
SALT LAKE CITY, UTAH 84114-6600

ERIE V. BOORMAN, ADMINISTRATOR  
EMPLOYERS' REINSURANCE FUND

MARY NOONAN  
CLERK OF THE COURT  
UTAH COURT OF APPEALS  
(INTEROFFICE MAIL)

  
Adell Butler-Mitchell  
Paralegal  
General Counsel's Office  
Industrial Commission of Utah

**ADDENDUM D**

**UTAH CODE ANN. §63-46b-8**

**63-46b-8. Procedures for formal adjudicative proceedings  
— Hearing procedure.**

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious;

(ii) shall exclude evidence privileged in the courts of Utah;

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document;

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge.

(c) The presiding officer may not exclude evidence solely because it is hearsay.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing.

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense.

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties.

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing.

**History:** C. 1953, 63-46b-8, enacted by L. 1987, ch. 161, § 264; 1988, ch. 72, § 19.

**Cross-References.** — Judicial notice, Utah R. Evid. 201.  
Privileges, Utah R. Evid. 501 et seq.



**ADDENDUM E**

**UTAH CODE ANN. §63-46b-10**

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

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

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

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

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

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

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

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

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

(3) No finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

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

(a) notify the parties of further hearings;

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

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

History: C. 1953, 63-46b-10, enacted by L.  
1987, ch. 161, § 266; 1988, ch. 72, § 20.

**ADDENDUM F**

**UTAH CODE ANN. §63-46b-12**

## **63-46b-12. Agency review — Procedure.**

- (1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.
  - (b) The request shall:
    - (i) be signed by the party seeking review;
    - (ii) state the grounds for review and the relief requested;
    - (iii) state the date upon which it was mailed; and
    - (iv) be sent by mail to the presiding officer and to each party.
- (2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.
- (3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.
- (4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.
- (5) Notice of hearings on review shall be mailed to all parties.
- (6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.
  - (b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.
  - (c) The order on review shall contain:
    - (i) a designation of the statute or rule permitting or requiring review;
    - (ii) a statement of the issues reviewed;
    - (iii) findings of fact as to each of the issues reviewed;
    - (iv) conclusions of law as to each of the issues reviewed;
    - (v) the reasons for the disposition;
    - (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
    - (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
    - (viii) the time limits applicable to any appeal or review.

**ADDENDUM G**

**UTAH CODE ANN. §63-46b-16**

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

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

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

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

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

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

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

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

(ii) according to any other provision of law.

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

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

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

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

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

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

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

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

(h) the agency action is:

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

(ii) contrary to a rule of the agency;

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

(iv) otherwise arbitrary or capricious.

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of the Respondent, postage prepaid, this 28<sup>th</sup> day of January, 1994 to the following:

Attorney for  
CLAIMANT/PETITIONER  
David W. Parker  
Bank One Tower, Suite 900  
50 West Third South  
Salt Lake City, Utah 84101

Attorney for  
DEFENDANT/RESPONDENT  
Erie V. Boorman  
Industrial Commission of Utah  
Administrator of the  
Employers' Reinsurance Fund  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

Attorney for  
DEFENDANT/RESPONDENT  
Sharon J. Eblen  
Industrial Commission of Utah  
Adjudication Division  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

David L. Church