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Frank v. Bunker Hill Co. Respondent's Brief Dckt. 34696

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

PAUL E. FRANK,

Claimant-Appellant,

vs.

THE BUNKER HILL COMPANY, Self-
insured Employer,

Defendant-Respondent.

Supreme Court Docket No. 34696

BRIEF OF RESPONDENT

Appeal from the Industrial Commission of the State of Idaho

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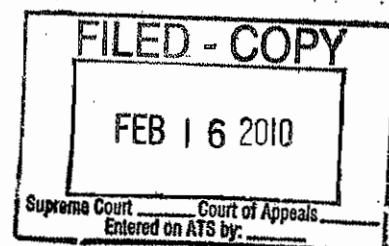


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Statutes & Rules

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I

Statement Of The Case

The Respondent in this appeal is Bunker Limited Partnership (“Bunker Limited”). Bunker Limited does not disagree with the Statement Of The Case as set forth in Appellant Paul Frank’s brief. The Court may find it helpful, however, to review the facts as set forth in Frank v. The Bunker Hill Company, 117 Idaho 790, 792 P.2d 815 (1988), and Frank v. The Bunker Hill Company, 142 Idaho 126, 124 P.3d 1002 (2005). In addition, the decision of the Idaho Industrial Commission dated January 14, 2010, involving the same parties as here is attached as Appendix 1.

II

Argument

A. Frank Does Not Cite Authority To Support His Argument For Medical Insurance Costs; His Issue On Appeal Is Therefore Waived

Paul Frank argues that the Idaho Industrial Commission erred by failing to award his cost of medical insurance to provide for the medical care of his injuries. (Frank’s Brief, pages 9-11.) He asserts that over the past years he has purchased medical insurance, and he will purchase insurance in future years. He says that the employer ought to be ordered to pay for the past and future cost of insurance. This assertion potentially implicates Bunker Limited in light of the Commission’s ruling of January 14, 2010 (Appendix 1), even though Bunker Limited is not the employer. Therefore Bunker Limited speaks to the point.

Rule 35(a)(6) of the Idaho Appellate Rules provides that argument is to be supported

by legal authority. Frank submits none. He does not provide any Idaho authority; there isn't any. Moreover, he does not cite any authority from foreign jurisdictions.

Failure to support an argument with legal authority constitutes a waiver by the appellant of the issue asserted on appeal. There must be at least one hundred Idaho decisions cited in the Rule 35 annotations that so hold. An example is State v. Zicho, 129 Idaho 259, 923 P.2d 966 (1996). In that case the court said at page 263: "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." A more recent case to the same effect is Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120 (2005).

One cannot help but at least think about the equity of Frank's cost-of-medical insurance point. One difficulty is that experience teaches that health insurance policies usually exclude from coverage conditions attributed to occupational injury or disease. Frank has not put his insurance contract in the record; therefore we do not know its terms in this regard. So, even if the Court was inclined to in some way, as Frank urges, make new law, there is nothing in the record to suggest that Frank's condition, if any, attributed to the accident, is covered by his personal health insurance, the cost of which he seeks be paid by the employer.

B. Frank Is Not Entitled To Attorney's Fees For The Commission Proceeding

Frank contends that the Commission erred by not awarding him attorney's fees in the proceeding before the Commission. (Frank's brief, pages 11-13. Frank is not contending for attorney's fees on this appeal.) Frank cites section 72-804 Idaho Code-Punitive Costs In

Certain Cases-as authority for his claim for fees.

The Commission decided in its order of September 12, 2007, that “ Claimant has not been awarded attorney fees previously in this matter and the Commission finds that Claimant does not present a sufficient argument to award them now.” (Order, page 4.) The Commission is correct. Here, before the Supreme Court, Frank argues failure to inform the Commission of conclusion of the bankruptcy proceedings is the same as a contest to a claim without reasonable cause. No authority is cited for this proposition.

Also, Frank’s basis for claim of fees is not logical. He had the ability to prosecute his case by watching, himself, the status of bankruptcy proceedings, and bringing the status to the attention of the Commission. Of equal importance is the simple fact that Frank did not show before the Commission, nor here before the Supreme Court, how late resumption of Commission proceedings has harmed him in any way.

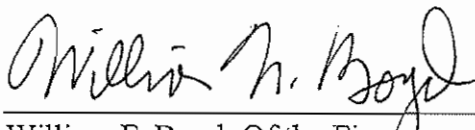
III

Conclusion

Bunker Limited requests that the Supreme Court affirm the order of the Industrial Commission dated September 12, 2007.

Dated this 12th day of February, 2010.

RAMSDEN & LYONS, LLP

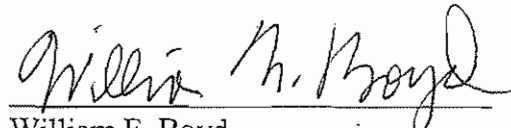
By 
William F. Boyd, Of the Firm
Attorneys for Bunker Limited Partnership

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John J. Rose, Jr., P.C.
708 West Cameron Avenue
Kellogg, ID 83837

US Mail
 Overnight Mail
 Hand Delivered
 Facsimile (208) 743-9442



William F. Boyd

APPENDIX I

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PAUL E. FRANK,)	
)	
Claimant,)	IC 80-341382
)	
v.)	ORDER ON
)	REMAND RE: DETERMINATION
THE BUNKER HILL COMPANY,)	OF PROPER PARTIES
)	
Employer/Self-Insured,)	
)	
and)	
)	FILED
BUNKER LIMITED PARTNERSHIP,)	JAN 14 2010
)	
Self-Insured,)	INDUSTRIAL COMMISSION
)	
Defendants.)	

The case is before the Commission on remand from the Supreme Court for a determination of the proper parties. This case has a long and confusing history, which is only partially clarified by what is contained in the Industrial Commission files. The Commission will set forth as much detail as possible in an attempt to clarify the situation and determine the proper parties.

BACKGROUND

Claimant was employed by The Bunker Hill Company when he was injured in a mining accident on November 12, 1980. In 1983, Claimant filed a complaint against The Bunker Hill Company with the Industrial Commission. Claimant was originally found totally and permanently disabled, but following a petition for change of condition in 1986, the Commission

**ORDER ON REMAND RE:
DETERMINATION OF PROPER PARTIES - 1**

found that Claimant was entitled to 55% permanent partial disability. In 1988 and 1990, the Supreme Court affirmed the Commission's decision to award Claimant 55% permanent partial disability.

The Bunker Hill Company was a mining company which operated in and around Kellogg, Idaho. In 1968 The Bunker Hill Company became a wholly owned subsidiary of Gulf Resource & Chemical Corporation (Gulf). Bunker Limited Partnership acquired certain assets and obligations of The Bunker Hill Company in 1982. The Asset Purchase Agreement (the Agreement) by which Bunker Limited Partnership purchased portions of The Bunker Hill Company will be discussed in more detail below. By the time of the sale, what remained of The Bunker Hill Company had changed its name to Pintlar Corporation and remained a wholly owned subsidiary of Gulf.¹

The Bunker Hill Company was self insured for purposes of workers' compensation, as was Bunker Limited Partnership when they formed in 1982. In 1992, Bunker Limited Partnership filed for bankruptcy. An Order Confirming Bunker Limited Partnership's Plan of Reorganization was issued on July 13, 1992 by the U.S. Bankruptcy Court of the Eastern District of Washington.

The Asset Purchase Agreement

The Asset Purchase Agreement was entered into on November 1, 1982 by Gulf Resources & Chemical Corporation, The Bunker Hill Company, and Bunker Limited Partnership. Gulf owned all of the outstanding capital stock of The Bunker Hill Company. In

¹ The background pertaining to Bunker Limited Partnership was found in the Disclosure Statement attached to the Plan of Reorganization and Order Confirming the bankruptcy of Bunker Limited Partnership filed with the Affidavit of William F. Boyd on November 16, 2009.

**ORDER ON REMAND RE:
DETERMINATION OF PROPER PARTIES - 2**

the transaction Bunker Limited Partnership purchased specified assets and assumed specified liabilities of The Bunker Hill Company.

Bunker Limited Partnership agreed to assume, pay and discharge the liabilities and obligations created by workman's compensation awards and claims, whether now or hereafter filed, subject to the terms of Section 5.10 of the Asset Purchase Agreement. Section 5.10 is titled right of Bunker Limited Partnership to reimbursement of certain excess contingent liabilities. It states that in the event that Bunker Limited Partnership is ultimately required to pay in excess of \$6,000,000 for (i) medical benefits to The Bunker Hill Company's retired employees and (ii) workers' compensation payments to employees of The Bunker Hill Company, then The Bunker Hill Company and Gulf will reimburse Bunker Limited Partnership for up to \$5,000,000 of such excess provided that The Bunker Hill Company and Gulf are given ample opportunity to participate fully at their expense in the defense of the matters describes in clauses (i) and (ii) above.

Bunker Limited Partnership's Bankruptcy Plan of Reorganization

In 1992, Bunker Limited Partnership filed for Chapter 11 Bankruptcy. An Order Confirming Bunker Limited Partnership's Plan of Reorganization was issued on July 13, 1992. Included in Plan of Reorganization is Exhibit C titled "The Bunker Hill Company Workers' Compensation Claims." The exhibit states certain responsibilities were assumed by Bunker Limited Partnership for workers' compensation claims incurred by The Bunker Hill Company. The exhibit then lists nine specific individuals in this group, one of whom is Paul Frank. The exhibit states that the only ongoing liability is medical care.

The Plan of Reorganization has a subsection dedicated to workers' compensation claims.

The section states that two annuities will be purchased for two specific individuals respectively. The Plan then states that "[t]he ongoing medical payments for the former employees of The Bunker Hill Company shall be satisfied by establishing a reversionary trust with a \$40,000 corpus. The trust will be administered by Washington Trust in Spokane, Washington at an estimated yearly cost of \$500 to \$600. The annual yield from the corpus shall be available to fund ongoing medical claims." Exhibit 4 Plan of Reorganization p. 21, attached to the Affidavit of William F. Boyd filed on November 16, 2009.

CONTENTIONS OF THE PARTIES

Claimant avers that the Asset Purchase Agreement creates a contractual responsibility which holds Bunker Limited Partnership responsible for Claimant's benefits. Additionally, Claimant argues that Bunker Limited Partnership had no authority to cancel The Bunker Hill Company's self-insured bond. Claimant alleges that Bunker Limited Partnership, Gulf, and Pintlar have been misleading Claimant, the Industrial Commission, and the Idaho Supreme Court. In conclusion, Claimant requests that the Commission hold the individuals who formed Bunker Limited Partnership responsible for the medical care related to Claimant's industrial injuries.

Bunker Limited Partnership states that while it has never been the employer of Paul Frank, it assumed some of The Bunker Hill Company's workers' compensation liability, to a limited extent, and is willing to honor its responsibility in that regard. Claimant has never moved to name Bunker Limited Partnership as a defendant in this case. Bunker Limited Partnership argues that Idaho Code § 72-701 bars any claim against it, and if Claimant is pursuing a contract claim the Industrial Commission is not the proper venue. Finally, Bunker Limited Partnership

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DETERMINATION OF PROPER PARTIES - 4**

states that it filed bankruptcy and a \$40,000 reversionary trust was established to fund medical claims made by workers' compensation claimants.

DISCUSSION

The case is before the Commission on remand from the Supreme Court for a determination of the proper parties. Three years after Claimant's industrial accident his employer, The Bunker Hill Company entered into an agreement with Bunker Limited Partnership. This transaction was complete before Claimant's original hearing before the Industrial Commission, yet the caption was never modified to acknowledge any change in responsible parties. Claimant was awarded disability and in 1990, the Supreme Court affirmed the Commission's disability award.

On August 3, 1992, Claimant's counsel submitted an affidavit stating that Bunker Limited Partnership had filed bankruptcy reorganization proceedings. On December 17, 1993, a letter was sent to the Commission advising that on August 18, 1993, an involuntary petition pursuant to Chapter 11 of the Bankruptcy Code was filed against Gulf and Pintlar. Pursuant to the Bankruptcy Code, the filing of a petition acts as an automatic stay of all actions and proceedings.

The case lay dormant for many years while Claimant utilized his wife's health care insurance to cover a portion of his medical care costs. When activity in the case resumed, Claimant's counsel stated he did not have an address for The Bunker Hill Company and the Bunker Limited Partnership stated that its responsibility was limited by the bankruptcy Plan of Reorganization.

At the time of Claimant's injury he was employed by The Bunker Hill Company. The

Bunker Hill Company has always been the named Defendant. No action has ever been taken to add any other defendants. Particularly, Pintlar Corporation, Gulf, and Bunker Limited Partnership have never been officially joined to this action. For a time Gulf USA Corporation and Pintlar Corporation were named as defendants. On remand from the Supreme Court, the Commission dismissed Gulf USA Corporation and Pintlar Corporation as improper parties on December 21, 2006.

Though Bunker Limited Partnership correctly argues that it was never a named defendant in this action, we find that the Asset Purchase Agreement attests to its assumption of The Bunker Hill Company's workers' compensation liability. Bunker Limited Partnership admits, in the affidavit of J.W. Kendrick, that it took an active role in the defense of Paul Frank's workers' compensation claim. Additionally, the bankruptcy Plan of Reorganization specifically names Paul Frank and other employees of The Bunker Hill Company for which Bunker Limited Partnership assumed workers' compensation responsibility.

That being said, Bunker Limited Partnership has filed and completed its bankruptcy proceedings. Claimant's remaining avenue of relief is to present a claim for medical benefits from the \$40,000 reversionary trust administered by Washington Trust in Spokane, Washington. The annual yield from the corpus of the trust is available to fund ongoing medical claims, until no longer required.

The Commission finds that Bunker Limited Partnership assumed responsibility for Paul Frank's right to workers' compensation benefits when it entered into the Asset Purchase Agreement with The Bunker Hill Company and thus, is a party to this case. Bunker Limited Partnership defended the claim and made no assertion that it was not the proper party. This issue

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DETERMINATION OF PROPER PARTIES - 6**

could have been assisted by Claimant making a request to add Bunker Limited Partnership as a defendant, but no request has been made. Yet with the facts presented to the Commission, and on a specific directive from the Idaho Supreme Court to determine the proper parties, the Commission concludes that it is appropriate to name Bunker Limited Partnership as a Defendant in this matter.

Bunker Limited Partnership's argument that Idaho Code §72-701 bars a claim against them is unpersuasive. Bunker Limited Partnership voluntarily assumed responsibility for Claimant's workers' compensation claim when it entered into the Asset Purchase Agreement. Bunker Limited Partnership had access to all the information relevant to Claimant's claim against The Bunker Hill Company.

Claimant alleges that the original partners of Bunker Limited Partnership should be responsible for Claimant's current medical care. While the Commission understands the difficult situation that Claimant is currently in, the Commission has no authority to extend liability to the original partners of Bunker Limited Partnership as requested by Claimant nor does Claimant present a legal basis for such liability.

CONCLUSION

The Commission has been directed by the Idaho Supreme Court to determine the proper parties in this matter. Based upon the foregoing reasons, the Commission determines that Claimant's employer at the time of his injury was The Bunker Hill Company, as stated in the caption, but that Paul Frank's workers' compensation claim was acquired by Bunker Limited Partnership who subsequently went bankrupt. By such assumption, Bunker Limited Partnership was made a Defendant to the above entitled claim by Paul Frank. Accordingly, Bunker Limited

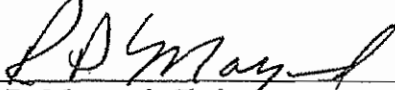
**ORDER ON REMAND RE:
DETERMINATION OF PROPER PARTIES - 7**

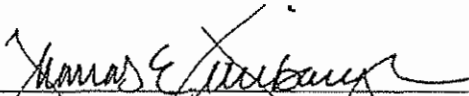
Partnership will be added to the caption in this matter. The practical effect of amending the caption is limited by the fact that Bunker Limited Partnership filed bankruptcy in 1992.

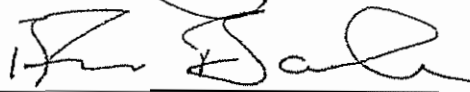
IT IS SO ORDERED.

DATED this 14th day of January, 2010.

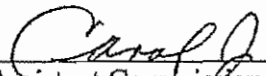
INDUSTRIAL COMMISSION



R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



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DETERMINATION OF PROPER PARTIES - 8

CERTIFICATE OF SERVICE

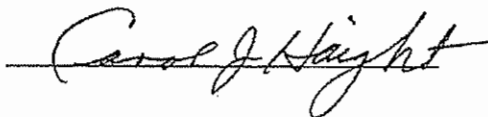
I hereby certify that on 14th day of January, 2010, a true and correct copy of the foregoing ORDER ON REMAND RE: DETERMINATION OF PROPER PARTIES was served by regular United States Mail upon each of the following:

JOHN J ROSE JR
708 W CAMERON AVENUE
KELLOGG ID 83837

BUNKER LIMITED PARTNERSHIP
PO BOX 53
CATALDO ID 83810

IDAHO SUPREME COURT
STATE HOUSE MAIL
PO BOX 83720
BOISE ID 83720-0101

sb/cjh



**ORDER ON REMAND RE:
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