

1996

J. David Vigos v. Mountainland Builders Inc. and workers Compensation Fund of Utah : Brief of Petitioner

Utah Court of Appeals

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Eugene C. Miller, Jr.; Attorney for Petitioner; Richard Sumsion; Workers' Compensation Fund of Utah; Attorney for Respondent.

Alan Hennebold; The Industrial Commission of Utah; Attorney for Respondent.

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UTAH COURT OF APPEALS

EUGENE C. MILLER, JR.(5369)
Attorney for Applicant
40 East South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 328-3500

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DOCKET NO. 960283-CA

IN THE UTAH COURT OF APPEALS

J. DAVID VIGOS,

Applicant and Petitioner,

v.

MOUNTAINLAND BUILDERS
INC. and
WORKERS COMPENSATION FUND
OF UTAH,

Defendants and Respondents

COURT OF APPEALS

Priority 7

Case No.: ~~960283-CA~~

96-0283-CA

BRIEF OF PETITIONER

**PETITION FOR REVIEW FROM A DECISION
OF THE INDUSTRIAL COMMISSION
STATE OF UTAH**

EUGENE C. MILLER, JR., ESQ.
40 East South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 328-3500
ATTORNEY FOR PETITIONER

RICHARD SUMSION, ESQ.
Worker's Compensation Fund of Utah
P.O. Box 57929
Salt Lake City, UT 84157-0929
ATTORNEY FOR DEFENDANTS/RESPONDENTS

ALAN HENNEBOLD, ESQ.
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
ATTORNEY FOR INDUSTRIAL COMMISSION OF UTAH

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COURT OF APPEALS

EUGENE C. MILLER, JR.(5369)
Attorney for Applicant
40 East South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 328-3500

IN THE UTAH COURT OF APPEALS

J. DAVID VIGOS,)	
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Applicant and Petitioner,)	
v.)	Priority 7
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OF UTAH,)	
)	
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EUGENE C. MILLER, JR., ESQ.
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Salt Lake City, Utah 84111
Telephone: (801) 328-3500
ATTORNEY FOR PETITIONER

RICHARD SUMSION, ESQ.
Worker's Compensation Fund of Utah
P.O. Box 57929
Salt Lake City, UT 84157-0929
ATTORNEY FOR DEFENDANTS/RESPONDENTS

ALAN HENNEBOLD, ESQ.
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
ATTORNEY FOR INDUSTRIAL COMMISSION OF UTAH

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WORKERS COMPENSATION FUND)	
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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction over this case pursuant to Article VIII, section 5 of the Utah Constitution, and Utah Code Ann. §§ 78-2a-3 (2)(a) (1992) 35-1-82.53 (2) (1988), 35-1-86 (1988), and 63-46b-14 (1993). This is an appeal from a final order wherein the Utah State Industrial Commission denied applicant's motion for review and A Petition for Review was timely filed on April 23, 1996.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The Industrial Commission committed reversible error when it determined that "accident," as stated in the statute of limitations for a claim for permanent total disability (Utah Code Ann. § 35-1-99(3)), only means the day Mr. Vigos fell and does not include the date he could no longer work, which is when the cause of action

accrues. Because the Industrial Commission requires an injured employee to first obtain a determination of disability from the Social Security Administration, the statute cannot begin to run until that occurs.

If the Industrial Commission correctly defined "accident" in the statute of limitations, then the statute is an unconstitutional statute of repose because it prevents Mr. Vigos from filing a claim without regard to when the cause of action accrues. Mr. Vigos worked until January, 1994 and then applied for social security benefits. The Social Security Administration determined on June 23, 1995 that Mr. Vigos was disabled. Because this necessary element for permanent total disability benefits was obtained more than six years after Mr. Vigos fell, he is barred from filing his claim, which makes the statute one of repose.

The Industrial Commission has continuing jurisdiction once a claim has been filed. The Worker's Compensation Fund was given adequate notice of the facts because they had paid all of Mr. Vigos' medical bills and all of his temporary total disability benefits; therefore, the Industrial Commission has continuing jurisdiction and should have allowed Mr. Vigos to have had a hearing.

Because the Industrial Commission mandates that an applicant obtain a determination of disability from the Social Security Administration before it will allow an applicant to file a claim for permanent total disability benefits, the statute of limitations should be equitably tolled.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution, Article I, § 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article I, § 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Code Ann. §35-1-44(5):

"Personal injury by accident arising out of or in the course of employment" shall include any injury caused by the willful act of a third person directed against an employee because of his employment. It shall not include a disease, except as it shall result from the injury.

Utah Code Ann. §35-1-45:

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

Utah Code Ann §35-1-60:

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee

of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, defendants, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

Utah Code Ann. §35-1-67(1):

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), and (f) (1) and (2), as revised.

Utah Code Ann. §35-1-78(1):

The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and order. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-99, may be destroyed at the discretion of the commission.

Utah Code Ann. § 35-1-99(3) (1988):

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total

disability benefits is wholly barred, unless an application for hearing is filed with the Industrial Commission within six years after the date of the accident.

Utah Code Ann. § 63-46b-16(4)(a and d):

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;

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

STATEMENT OF THE CASE

On October 13, 1988 Mr. Vigos fell and sustained a serious head injury. (R. 1, 13) The Worker's Compensation Fund of Utah was the employer's insurance carrier and it paid all of Mr. Vigos' medical bills and all of his temporary total disability benefits. (R. 38, 39) After Mr. Vigos returned to work he wrote the Fund a letter and stated, "I want to thank you personally for hanging in there with me through my recovery. I'm ready to return to work - finally. Thank you so much." (R. 87 emphasis in original) Mr. Vigos continued to work until January, 1994, when he applied for social security benefits. (R. 24) Sometime in 1994 Mr. Vigos started to call the Fund to see if he could get additional medical benefits because he was having additional problems. (R. 111) The Fund did not respond to his calls until after six years from the date that he fell. (R. 111) This was the first and only time The

Fund or the employer ever advised Mr. Vigos that he could file an application for hearing if he did not like the treatment they provided. (R. 11) On June 23, 1995 the Social Security Administration determined that Mr. Vigos was disabled and had not performed any gainful employment as of January 1, 1993. (R. 23-5) On July 10, 1995, 17 days after he received the social security determination, Mr. Vigos filed his application for hearing with the Industrial Commission for permanent total disability benefits. (R. 13).

Pursuant to defendant's motion to dismiss, the ALJ dismissed the claim because it was filed more than six years after Mr. Vigos fell. (R. 61-2) Mr. Vigos disputed the ALJ's order and filed a Motion for Review within 30 days of the ALJ's Order and in accordance with Utah Code Ann. §§35-1-82.53 (1) (1988) 63-46b-12 (1)(a) (1992). (R. 64) On March 28, 1996 the Industrial Commission affirmed the ALJ's order. (R. 117-9) On April 25, 1996 Mr. Vigos filed this Petition for Review. (R. 121)

STATEMENT OF FACTS

Mr. Vigos was employed by defendant Mountainland Builders, Inc. (Mountainland) on October 13, 1988. (R. 1, 13) While working on a plank, Mr. Vigos fell and struck his head and sustained a head injury, and other injuries, while acting within the course and scope of his employment. (R. 1, 13, 38, and 39) Mountainland's insurance carrier, the Worker's Compensation Fund of Utah (the Fund), last paid medical expenses in July of 1989 and benefits from

October 14, 1988 to May 8, 1989 as a result of this accident. (R. 38, 39) Mr. Vigos was given neither an impairment rating for this injury nor any indication that he was permanently totally disabled by his treating physicians. (R. 65)¹

Over the years after the accident, Mr. Vigos attempted to work several different jobs; however, because of his head injury he was unable to hold a job. (R. 65) At some point, Mr. Vigos realized his head injury could be the source of his problems so he attempted to get additional medical treatment. (R. 65, 111) On November 3, 1994 the Fund informed Mr. Vigos that more than three years had lapsed since his last medical treatment and the Fund denied Mr. Vigos' request for additional medical treatment. (R. 11) This was done despite the Fund's knowledge that Mr. Vigos had a severe head injury. (R. 176, 222, 229) In fact, in the report of David G. Ericksen, Ph.D., he stated, "It is recommended that he [Mr. Vigos] not place himself in a position to be responsible for large scale development projects, for approximately 12 months following his injury. It would, at present, be unfair for Mr. Vigos to put himself in the position where his livelihood, and perhaps large sums of other peoples' [sic] money are riding on his judgment and problem-solving abilities. He would be well-advised to pursue a somewhat more slow-paced, structured line of work, and increase his load and responsibility as appropriate." (R. 226)

¹ Because the Commission dismissed petitioner's claim without a full hearing on the facts, "we presume, to the extent necessary to resolve the issues on appeal, that the facts are as stated by petitioner." Velarde v. Board of Review, 831 P.2d 123, 124 n.2 (Utah App. 1992).

Mr. Vigos applied for Social Security benefits on January 25, 1994. (R. 24) After a hearing in May of 1995, Mr. Vigos was awarded Social Security benefits on June 23, 1995. (R. 23-25) On July 10, 1995, Mr. Vigos applied for permanent total disability benefits. (R. 13) The Fund claimed that Mr. Vigos' application was filed after the statute of limitations had lapsed and moved for dismissal. (R. 39) On September 18, 1995 the ALJ dismissed Vigos' application with prejudice. (R. 61-2) Mr. Vigos filed a Motion for Review on October 16, 1995. (R. 64) On March 28, 1996 the Industrial Commission affirmed the ALJ's order. (R. 117-9) On April 25, 1996 Mr. Vigos filed this Petition for Review. (R. 121)

SUMMARY OF ARGUMENT

In a claim for permanent total disability benefits, a claimant cannot file for benefits with the Industrial Commission until he can prove that he had an accidental injury and that he can no longer work, which is determined by the Social Security Administration. Mr. Vigos did not receive a determination from the Social Security Administration until June 23, 1995. He applied for worker's compensation benefits within 17 days of that determination. Even though he could not meet the statutory requirements for permanent total disability until June 23, 1995, the Industrial Commission determined that the statute of limitations ran on October 14, 1994. The Industrial Commission committed reversible error when it determined that "accident," as stated in the statute

of limitations for a claim for permanent total disability (Utah Code Ann. § 35-1-99(3)), only means the day Mr. Vigos fell and does not include the date he could no longer work, which is when the cause of action accrues.

If the Industrial Commission correctly defined "accident" in the statute of limitations, then the statute is an unconstitutional statute of repose because it prevents Mr. Vigos from filing a claim without regard to when the cause of action accrues. Because Mr. Vigos had a delayed onset of injury that occurred more than six years from the date he fell, he could not file for benefits within six years. Even if the onset date of his disability is determined to be January 1, 1993, as the Social Security Administration did, the statute unconstitutionally limits the time he can file without regard to the date of when the cause of action accrues.

The Industrial Commission has continuing jurisdiction once a claim has been filed. The Utah Supreme Court has said that a claim for compensation only needs to give notice to the parties and the Commission of the material facts. The Fund was given adequate notice of the facts because they had paid all of Mr. Vigos' medical bills and all of his temporary total disability benefits. The only fact that the Fund did not have was whether Mr. Vigos could work or not. Once he obtained that from the Social Security Administration, the Industrial Commission should have had continuing jurisdiction. This is especially true since the Fund did not notify Mr. Vigos that he could file an application for hearing until after six years had passed since Mr. Vigos fell.

During the time Mr. Vigos received medical treatment and benefits he was not represented by counsel. He fully cooperated with the Fund. In fact, he wrote a letter in 1989 thanking the Fund for its help. Also, the Fund knew he had a head injury that affected his judgment and problem solving abilities. To now allow the Fund to take advantage of these circumstances is a manifest injustice.

Because the Industrial Commission mandates that an applicant obtain a determination from the Social Security Administration before it will allow an applicant to even file a claim for permanent total disability benefits, the statute of limitations should be equitably tolled. The employer knew all of the facts of the accident and was not prejudiced by the requirement to file for social security; therefore, the statute of limitations should have been equitably tolled.

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ARGUMENT

POINT I

DID THE INDUSTRIAL COMMISSION IMPROPERLY DENY PERMANENT TOTAL DISABILITY BENEFITS WHEN IT DETERMINED THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN ON THE DAY MR. VIGOS FELL AND NOT FROM THE DAY HE BECAME PERMANENTLY AND TOTALLY DISABLED, WHICH WAS SEVERAL YEARS LATER?

A. STANDARD OF REVIEW

The question before this Court is a question of law because the Industrial Commission dismissed Mr. Vigos' claim without a hearing and based its decision solely upon the language of Utah Code Ann. § 35-1-99(3) (1988)². In considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988). This court must "review an agency's interpretation and application of statutes for correctness, unless the statute in question grants the agency discretion." Morton Int'l, Inc. v. Auditing Div. of State Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991). The statute in question does not grant the Industrial Commission discretion.

² Since Mr. Vigos' accident, this statute has been repealed; however, the current statute of limitations, Utah Code Ann. §35-1-98(2), uses nearly the same language as Utah Code Ann. §35-1-99(3).

B. BECAUSE PERMANENT TOTAL DISABILITY REQUIRES THE
EMPLOYEE TO BE BOTH, INJURED AND UNABLE TO WORK,
THE STATUTE OF LIMITATIONS SHOULD NOT
BEGIN TO RUN UNTIL A CLAIMANT, SUCH AS MR. VIGOS,
FIRST LEARNS HE IS PERMANENTLY AND TOTALLY DISABLED

Utah Code Ann. § 35-1-99(3), states:

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the Industrial Commission within six years after the date of the accident.

Id. The question in this case is, when did the statute of limitation begin to run? The statute states "within six years after the date of the accident." However, it is critical to know how the courts and legislature define "accident." In Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986), the Supreme Court stated, "An accident is an unexpected or unintended occurrence that may be either the cause or the result of an injury." Id. at 22 (emphasis added). In Avis v. Board of Review of the Indus. Comm'n, 837 P.2d 584 (Utah App. 1992), this Court stated, "Section 35-1-99 is a statute of limitations because it runs from the date of injury, when the cause of action accrues, not from a point in time unrelated to when the cause of action arose." Id. at 587 (emphasis added). The Workers' Compensation Statute entitled, "Compensation for industrial accidents to be paid," Utah Code Ann. §35-1-45, reads:

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the

accident was not purposely self-inflicted, shall be paid compensation for the loss sustained on account of the injury or death, (Emphasis added).

Id. Furthermore, in the definition of terms, used at the time of Mr. Vigos' injury, Utah Code Ann. §35-1-44(5), the legislature defined an injury as, "'Personal injury by accident'" From these cases and statutory language we can see that there must be both, an accident and an injury, before an employee can claim workers' compensation benefits. An employee obviously could not file a claim unless he was injured, regardless of the type of accident.

Permanent total disability has an additional element before an injured employee can obtain benefits. The employee must suffer both an injury and the inability to work after medical stabilization. Utah Code Ann. §35-1-67(1), requires, "a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised." The Social Security Administration requires that the employee not be gainfully employed before he applies for social security benefits. Consequently, as long as an employee is still working, even odd lot jobs, despite his injury, he cannot apply for permanent total disability benefits because he is not statutorily disabled.³

³ In fact, as will be shown below in Point I.C, the Industrial Commission does not allow an employee to even file for permanent total disability until he has an award from the SSA.

The legislature did not intend to require an employee to file a claim for permanent total disability within six years of the "accident" if he did not meet the statutory requirements for disability. To require an employee to file before he had a claim runs contrary to the statutory construction and well established Utah law. In Nixon v. Salt Lake City Corp., 898 P.2d 265 (Utah 1995), the Utah Supreme Court stated:

"'The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.'" Although we generally rely on the plain language rule of statutory construction, we note that an equally important rule of statutory construction is that a statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute. . . . (Emphasis added and cites omitted).

Id. at 268. The statute of limitations for permanent total disability cannot begin to run until the claimant has an injury and can no longer work. Larson's Workmen's Compensation, §78.42(d); See also, Avis v. Board of Review of the Indus. Comm'n, 837 P.2d 584 (Utah App. 1992).

In Larson's treatise he states that a statute of limitations should not begin to run until a claimant is aware that he has a claim. Larson's Workmen's Compensation, §78.41 states:

The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. (Emphasis added).

Id. Larson's Workmen's Compensation, §78.42(a) also states:

A rigid claims period may operate unfairly not only because the nature, seriousness, and work-connection of

the injury could not reasonably be recognized by the claimant, or perhaps even by the claimant's doctor, but in many cases because the injury itself does not exist in compensable degree during the claims period. This latent or delayed injury problem presents in the sharpest relief the senselessness of uncompromising time periods. The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A worker is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the "accident," and if the court applies the statutory language with draconian literalism, the worker can never collect for the injury no matter how diligent he is: he cannot claim during the year, because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident. (Emphasis added).

Id. This is precisely the problem Mr. Vigos has in the present case. He suffered a head injury in 1988. He continued to work odd lot jobs for several years, and then, in January, 1994 Mr. Vigos applied for social security benefits. On June 23, 1995 the SSA found that Mr. Vigos was disabled, which was done in accordance with "Title 20 of the Code of Federal Regulations as revised," and is required by Utah Code Ann. §35-1-67(1) in a claim for permanent total disability. The SSA also determined that Mr. Vigos' "impairments which are considered to be 'severe' under the Social Security Act are bipolar disorder, history of closed head injury with residuals of head and neck pain," and that he had not performed any substantial gainful activity since January 1, 1993 and that he has been under a disability since January 1, 1993. (R. 24, emphasis added). Mr. Vigos filed his claim for permanent total disability with the Industrial Commission on July 10, 1995, a mere

17 days after the SSA determined that he was permanently and totally disabled. June 23, 1995 was the first day that Mr. Vigos met the statutory requirements of Utah Code Ann. §35-1-67(1).

The Commission's erroneous decision states, "Under the plain language of the foregoing statute [35-1-99(3)], Mr. Vigos' claim was barred when he failed to file it with the Industrial Commission within six years from the date of the accident." (R. 118) This application of "the statutory language with draconian literalism" does not give effect to the intent of the legislature and is reversible error. The statute cannot begin to run until the employee has a compensable injury.

The legislature determined that a claim for permanent total disability is not compensable until the employee is both: injured and unable to work, as defined by the SSA. In the present case, the SSA did not make that determination until June 23, 1995. The SSA decision states that Mr. Vigos was not disabled until January 1, 1993, which would be the earliest date the statute should have started to run⁴. Moreover, the Industrial Commission's ruling flies in the face of the Supreme Court's ruling that:

⁴ The Fund, in its argument to the Industrial Commission, claims that because Mr. Vigos filed for social security benefits within six years of the day he fell he could have also filed for permanent total disability with the Industrial Commission within six years. However, such an argument misses the issue, the real issue is when did the statute begin to run. If it runs when Mr. Vigos first learned when the cause of action accrues, then the earliest it could begin was January 1, 1993. In following the Fund's argument, if Mr. Vigos had applied for social security benefits on October 13, 1994 he could have still filed his workers' compensation claim within the six years, even though he would have only one day left to file. If he last worked on November 1, 1994 and applied for social security benefits on that day, his workers' compensation claim is barred without ever having been given the right to pursue it and then the statute is a statute of repose, as will be discussed in Point II. Therefore, it is only logical and just to determine that "accident" also means "injury" and "injury" in a permanent total disability claim includes the inability to work.

The Workmen's Compensation Act is to be construed liberally to further the statutory purposes of providing relief from injuries caused by industrial accidents. . . . The Industrial Commission is in the first instance responsible for effectuating the purposes of the Act by construing its provisions to secure its humane objectives. (Cite omitted).

Pinter Constr. Co. v. Frisby, 678 P.2d 305, 306 (Utah 1984).

Therefore, the Industrial Commission's decision in the present case is erroneous and must be reversed.

C. THE INDUSTRIAL COMMISSION'S PROCEDURE CONCERNING A CLAIM FOR PERMANENT TOTAL DISABILITY CONCLUSIVELY SHOWS THAT SUCH A CLAIM DOES NOT ACCRUE UNTIL THE INJURED EMPLOYEE OBTAINS A DISABILITY DETERMINATION FROM THE SOCIAL SECURITY ADMINISTRATION

When an injured employee files for permanent total disability benefits, the Industrial Commission will not allow the claim to be filed until the employee has obtained an award from the Social Security Administration. The legislature enacted Utah Code Ann. §35-1-67(1) (1988), which states:

In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), and (f) (1) and (2), as revised. (Emphasis added).

Id. The Industrial Commission, in accordance with the statutory directive, made rules that conform "to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d),

and (f) (1) and (2), as revised." (R. 80, January 31, 1994, memorandum from Judge Timothy C. Allen, Presiding ALJ, to Marge Mele, Clerk). Pursuant to the Industrial Commission rules, an applicant must include a "notice of award, and a disability determination and transmittal or decision from the Social Security Administration when filing a claim for permanent total disability." (R. 80) If this is not done, then the Industrial Commission will return the application to the applicant. (R. 82). Eventually, if the applicant has not submitted the required information, then the case will be dismissed without prejudice. (R. 84, Notice That Claim Will be Dismissed within 30 Days). In other words, if a claimant does not have a social security award, then the Industrial Commission will dismiss a claim without prejudice because the applicant does not meet the statutory elements necessary to prove an injury by accident.

In the Bradley case, cited above, (R. 80, 82, and 84), Mr. Bradley was injured on October 4, 1988. An application for hearing for permanent total disability benefits was filed on September 2, 1994, and, according to the Industrial Commission's interpretation of Utah Code Ann. §35-1-99(3), the statute of limitations would have run on October 5, 1994. The Industrial Commission then sent Mr. Bradley the "Notice that Claim Will be Dismissed Within 30 Days" on October 7, 1994, which was two days after the statute had run according to the Industrial Commission. Individuals should not be required to file an application for hearing in an attempt to defeat a statute of limitations defense only to have the

application dismissed without prejudice. This would be a pointless and wasteful exercise. Therefore, it is pointless for a claimant to file before the statute runs if he does not have a social security award because the Industrial Commission does not recognize a compensable injury until this final element is met.

Therefore, in the present case, the statute did not begin to run until June 23, 1995, when Mr. Vigos received his award from the Social Security Administration. If the Industrial Commission will not recognize a compensable injury until the SSA makes a determination of disability, then how can the Industrial Commission require an employee to file within six years if he cannot meet the elements within the six years? The Industrial Commission has either an impossible standard or the statute does not begin to run until the injured employee's action accrues, which is the day the SSA determines he is disabled.

The Utah Supreme Court stated in Projects Unlimited, Inc. v. Copper State Thrift, 798 P.2d 738, 752 (Utah 1990), "[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd." The only way that Utah Code Ann. §§ 35-1-99(3) and 35-1-67(1) can be "construed as to render all parts thereof relevant and meaningful" is that the cause of action did not accrue until June 23, 1995. This would also support the directive that, "The Workmen's Compensation Act is to be construed liberally . . . to secure its humane objectives." Pinter Constr. Co. v. Frisby, 678 P.2d 305,

306 (Utah 1984). Therefore, this Court should remand this case so Mr. Vigos can have his hearing.

POINT II

IS UTAH CODE ANN. §35-1-99(3) AN
UNCONSTITUTIONAL STATUTE OF REPOSE FOR
PERMANENT TOTAL DISABILITY BECAUSE THE
APPLICANT MAY NOT KNOW HE HAS A COMPENSABLE
INJURY UNTIL MORE THAN SIX YEARS HAVE PASSED
AFTER THE ACCIDENT?

A. STANDARD OF REVIEW

The Utah Administrative Procedures Act permits this court to grant relief if Mr. Vigos has been substantially prejudiced because the Commission "has erroneously interpreted or applied the law," Utah Code Ann. § 63-46b-16(4)(d) (1989), or because "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied." Utah Code Ann. § 63-46b-16(4)(a) (1989). Velarde v. Board of Review of Indus. Comm'n., 831 P.2d 123, 125 (Utah App. 1992).

In considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988). This court must "review an agency's interpretation and application of statutes for correctness, unless the statute in question grants the agency discretion." Morton Int'l, Inc. v. Auditing Div. of State Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991).

B. IF "DATE OF THE ACCIDENT" MEANS THE DATE
THE CLAIMANT FELL AND DOES NOT INCLUDE THE DATE
THE CAUSE OF ACTION ACCRUES, THEN UTAH CODE ANN.
§35-1-99(3) IS A STATUTE OF REPOSE

The Commission decided the date when Mr. Vigos fell was the "date of the accident" and determined that October 13, 1988 is when the statute began to run. If the Industrial Commission correctly defined the term "accident," then Utah Code Ann. §35-1-99(3) is a statute of repose and violates a claimant's constitutional rights⁵, because it violates the due process provision and the open courts provision of the Utah Constitution, Article I, §§ 7 and 11. Section 7 states, "No person shall be deprived of life, liberty or property, without due process of law." And, Section 11 states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Id. In Hales v. Industrial Comm'n., 854 P.2d 537 (Utah App. 1993), this Court stated:

⁵ Mr. Vigos' argument that Utah Code Ann. §35-1-99(3), is a statute of repose is limited to his claim for permanent total disability. However, any claim that falls under this statute or the current Utah Code Ann. §35-1-98(2), where the employee has a delayed onset of injury after the "accident," and if the Industrial Commission continues to interpret the statute with "draconian literalism" then both statutes are statutes of repose. In the other cases where this Court has reviewed the statute and the claim that it is a statute of repose, the employee knew he or she had an injury at the time of the "accident", and there was no delayed onset issue. Consequently, a factor in those cases was whether or not the claimant knew he or she had an injury. (see, Avis v. Board of Review of the Indus. Comm'n, 837 P.2d 584 (Utah App. 1992); Middlestadt v. Industrial Comm'n, 852 P.2d 1012 (Utah App. 1993)). However, in this case it is undisputed that the claimant did not know he was permanently totally disabled until several years after he fell. Hence, the issue here is when there is a delayed onset, when does the statute begin to run? If it runs from the date he fell, which is not the day his cause of action arose, then it is a statute of repose.

The difference between a statute of limitations and a statute of repose is that

[a] statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action.

Berry v. Beech Aircraft Corp., 717 P.2d 670, 672 (Utah 1985). "A statute of repose . . . prevents suit a statutorily specified number of years after a particular event occurs, without regard to when the cause of action accrues." Velarde v. Industrial Comm'n, 831 P.2d 123, 125 (Utah App. 1992). An action accrues, generally, "upon the happening of the last event necessary to complete the cause of action." Becton Dickinson & Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983).

Id. at 539. In Selvage v. J.J. Johnson & Associates, 910 P.2d 1252, 1258, (Utah App. 1996), this Court stated:

Utah courts have consistently followed the same test for determining whether a time limit is a statute of repose or one of limitation. Simply put, a statute of repose begins to run from a date or event independent and unrelated to the date of legal injury. By contrast, a statute of limitation does not begin to run until the cause of action has accrued. (Emphasis added).

Id.

It is undisputed that a claim for permanent total disability requires that the claimant be both, 1) injured and, 2) unable to work. Hence, an injured employee cannot prosecute his claim until the last event necessary to complete the cause of action for permanent total disability occurs. If the statute begins at a time earlier than the last event, then the statute is one of repose rather than limitation. This is especially true since the

Industrial Commission requires a favorable decision of disability from the SSA before it will acknowledge a legal injury. Because the cause of action does not accrue until the SSA determination, any date prior to that makes the statute a statute of repose.

In the case at hand, the SSA determined that Mr. Vigos was last gainfully employed on January 1, 1993. Moreover, he did not meet the statutory requirement of permanent total disability until June 23, 1995. The very earliest the statute should have begun to run was January 1, 1993, which would have given Mr. Vigos until January 1, 1999 to file. Just because Mr. Vigos filed his claim with the SSA within six years of the day he was injured still makes Utah Code Ann. §35-1-99(3) a statute of repose. In footnote 4 of Lee v. Gaufin, 867 P.2d 572 (Utah 1993), the Supreme Court stated:

The effect of the four-year repose period differs with respect to causes of action that accrue before and after the four-year period. The statute of repose shortens the statute of limitations as to causes of action that accrue before the repose period expires. For example, when knowledge of the injury is acquired more than two years but less than four years after the act of malpractice, the repose period shortens the time in which a known action must be filed to less than the two-year statute of limitations. Thus, the nearer the end of the four-year period one acquires knowledge of the injury, the shorter the time one has to file an action. Conceivably one could be required under the statute to file an action the same day one learned of it. That might well raise significant constitutional problems. (Cites omitted and emphasis added).

Id. at 576. A claim for permanent total disability is much more akin to death benefits than it is to a claim for temporary total disability, temporary partial disability, or permanent partial disability simply because an injured employee cannot file for

permanent total disability until his injury prevents him from working, which oftentimes does not occur for a significant period of time. See, Hales v. Industrial Comm'n., 854 P.2d 537, 539 (Utah App. 1993).

It would be patently unfair to hold Mr. Vigos to a two year statute of limitations while all other claimants for permanent total disability get six years. Therefore, Utah Code Ann. §35-1-99(3) is a statute of repose and not one of limitation.

C. UTAH CODE ANN. 35-1-99(3) IS A STATUTE OF REPOSE AND IS ARBITRARY, UNREASONABLE AND DOES NOT ACHIEVE THE STATUTORY OBJECTIVE, HENCE, IT IS UNCONSTITUTIONAL

In Velarde v. Board of Review of Indus. Comm'n., 831 P.2d 123 (Utah App. 1992), this Court stated:

Although such statutes [statutes of repose] have passed constitutional muster in other states, . . . Utah courts have interpreted the open courts provision of the Utah Constitution to proscribe statutes of repose unless the statutes have certain redeeming characteristics. (Cite omitted).

Id. at 126. Furthermore, in Currier v. Holden, 862 P.2d 1357 (Utah App. 1993), this court declared:

the reviewing court will only declare a statute unconstitutional if it is "arbitrary, unreasonable, and will not achieve the statutory objective." . . . If a reviewing court closely examines an enactment under section 11, it will invalidate that act if it imposes a disability "on individual rights which is too great to be justified by the benefits accomplished." . . . When reviewing a statute that abrogates a remedy or cause of action without providing an "effective and reasonable alternative remedy 'by due course of law,'" section 11 requires a 'balancing analysis." . . . The statute must be justified by its elimination of a clear economic or social evil through a reasonable and non-arbitrary means. (Cites omitted and emphasis added).

Id. at 1365. In Avis, this Court stated, "even though petitioner did not seek a disability rating or file a compensation claim until twenty-two years after his accident, he knew of the injury and could have filed for compensation within the statutory period. Avis v. Board of Review of the Indus. Comm'n, 837 P.2d 584, 588 (Utah App. 1992). Unlike Mr. Avis, Mr. Vigos could not file because the Industrial Commission requires that a determination of disability from the SSA must be filed with the application.

The exclusive remedy of an injured worker is in the Workers' Compensation system. The Utah legislature took all common law remedies from statutory employees (except for a very few exceptions that do not apply in this case) and allow them to only file a claim with the Industrial Commission. (See, Utah Code Ann §35-1-60). Mr. Vigos has no other alternative remedy for this claim and he lost this claim because he was out in the work force trying to survive while, unbeknownst to him, the Industrial Commission had started the clock on his six year statute of limitations, even before his claim had accrued. When he could no longer hold a job, he applied for social security benefits in January, 1994. By that time he had lost over four of the six years allotted to him by the Industrial Commission to file a claim. Assuming he discovered his loss on January 1, 1993, he still lost over three years of the six year statute of limitation.

The benefit of a statute of limitations is that an employer does not have to defend a stale claim. However, in the case at hand, the employer was in possession of all of Mr. Vigos' medical

records, they had investigated the accident, and they had paid all of his medical bills and temporary total disability benefits. The only element of Mr. Vigos' permanent total disability claim that the employer did not have was whether he was employable. That element was satisfied when Mr. Vigos prevailed with the SSA for his disability benefits, which he was required to obtain before he could even file for permanent total disability benefits. Mr. Vigos was denied his only opportunity for workers' compensation benefits by an unreasonable and arbitrary means. Therefore, the statute is an unconstitutional statute of repose because it violates the due process provision and the open courts provision of the Utah Constitution for injured employees with permanent total disability claims and this Court should remand the case to the Industrial Commission and order the Commission to hear his claim for permanent total disability benefits.

POINT III

IF AN INJURED EMPLOYEE GIVES THE EMPLOYER ADEQUATE NOTICE OF AN ACCIDENT AND THE EMPLOYER AND THE INSURANCE COMPANY HAVE ALL THE MEDICAL RECORDS, MUST THE EMPLOYEE STILL FILE AN APPLICATION FOR HEARING FOR EVERY CAUSE OF ACTION, WHETHER KNOWN OR UNKNOWN, WITHIN THE SIX YEAR STATUTE OF LIMITATION IN ORDER FOR THE INDUSTRIAL COMMISSION TO HAVE CONTINUING JURISDICTION OVER ALL OF HIS CLAIMS?

A. STANDARD OF REVIEW

The Utah Administrative Procedures Act permits this court to grant relief if Mr. Vigos has been substantially prejudiced because the Commission "has erroneously interpreted or applied the law," Utah Code Ann. § 63-46b-16(4)(d) (1989). Velarde v. Board of Review of Indus. Comm'n., 831 P.2d 123, 125 (Utah App. 1992). In the case at hand, the Industrial Commission completely disregarded the language from Utah Code Ann. §35-1-78(1). In considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988). The statute in question does not grant the Industrial Commission discretion.

B. THE INDUSTRIAL COMMISSION HAS CONTINUING JURISDICTION ONCE A CLAIM HAS BEEN MADE

When the Industrial Commission dismissed Mr. Vigos' claim, it totally disregarded Utah Code Ann. §35-1-78(1), which states, "The powers and jurisdiction of the commission over each case shall be continuing." The language in §35-1-78(1) is clear and unambiguous, the commission has continuing jurisdiction over each case. Because the Fund had paid benefits and it was undisputed that an industrial accident occurred, the Commission had jurisdiction. In Utah State Ins. Fund v. Dutson, 646 P.2d 707 (Utah 1982), the Utah Supreme Court stated:

Notwithstanding the fact that the foregoing statutes [§§35-1-99 -100] require either the filing of a claim for compensation or the filing of a written notice of the accident in order to invoke the jurisdiction of the Commission, this Court has long recognized that a claim for compensation need not bear any particular formality. In fact, "great liberality as to form and substance of an application for compensation is to be indulged." However informal the claim may be, it need only give "notice to the parties and to the Commission of the material facts on which the right asserted is to depend and against whom claim is made." (Emphasis added).

Id. at 709 (footnotes omitted). Although §§35-1-99 and 35-1-100 were repealed and §35-1-99(3) controls in this case, §35-1-99(3) does not overrule the Supreme Court's decision in Dutson. In the present case, Vigos gave notice to his employer and his employer paid all of Mr. Vigos' medical bills and his temporary total disability benefits. In fact, in the Fund's Amended Answer to the Application for Hearing, the Fund stated, "The Workers Compensation Fund acknowledges the occurrence of Mr. Vigos [sic] industrial accident on October 13, 1988, but unfortunately it appears Mr. Vigos [sic] claim for additional benefits was not timely filed." (R. 39) The Fund then states, "The Fund originally accepted liability for Mr. Vigos' accident" (R. 39) Clearly, the parties had notice of the material facts. Once the employee meets this burden then the Commission has jurisdiction. Once it has jurisdiction, it can modify any prior awards. Therefore, this court should order the Commission to hear this case because it has jurisdiction.

Perhaps the most disturbing aspect of this case is that Mr. Vigos wrote a letter to the employer's insurance company, wherein

Mr. Vigos states, "I want to thank you personally for hanging in there with me through my recovery. I'm ready to return to work - finally. Thank you so much." (R. 87 emphasis in original) Mr. Vigos looked to the Fund for help and now the Fund claims it has no further responsibility. Then the Industrial Commission condones the Fund's conduct by dismissing Mr. Vigos' claim. Mr. Vigos and the Fund were cooperating, the Fund was paying his bills and his benefits and Mr. Vigos was not represented by counsel at this time. In fact, Mr. Vigos did not seek legal counsel until November 3, 1994, when the Fund denied any further medical treatment. The Fund sent a letter dated November 3, 1994 notifying Mr. Vigos of this denial. However, even if Mr. Vigos had filed an application on the day he received the Fund's letter, then the Fund could still use the Statute of Limitations as a defense because they did not send the letter until after the six years had run! Never did the Fund notify Mr. Vigos prior to that letter that he had six years to file a claim for benefits. On top of all of these circumstances is the fact that Mr. Vigos has a head injury that affects his judgment and the Fund was fully aware of this. In David G. Ericksen, Ph.D.'s report, he stated:

It would, at present, be unfair for Mr. Vigos to put himself in the position where his livelihood, and perhaps large sums of other peoples' [sic] money are riding on his judgment and problem-solving abilities. He would be well-advised to pursue a somewhat more slow-paced, structured line of work, and increase his load and responsibility as appropriate. (Emphasis added).

(R. 222-226).

If the Commission does not have continuing jurisdiction under these facts, then the Supreme Court's ruling in Pinter Constr. Co. v. Frisby, 678 P.2d 305, 306 (Utah 1984), that "The Workmen's Compensation Act is to be construed liberally to secure its humane objectives," would be meaningless. How can it be humane when Mr. Vigos cooperates with the Fund, tries to work for several years despite his head injury, and the Fund tells him, for the first time, that he has the right to file an application for hearing after the six year statute of limitations has run? The employer's position demonstrates why this case cries out for the Commission to have continuing jurisdiction. To allow an insurance company to behave in such a way would be an outrage.

POINT IV

DOES THE INDUSTRIAL COMMISSION'S PRACTICE OF REQUIRING AN APPLICANT, WHO IS CLAIMING PERMANENT TOTAL DISABILITY, TO FIRST OBTAIN A DETERMINATION OF DISABILITY FROM THE SOCIAL SECURITY ADMINISTRATION, TOLL THE STATUTE OF LIMITATIONS FOR A CLAIM FOR PERMANENT TOTAL DISABILITY?

A. STANDARD OF REVIEW

The Utah Administrative Procedures Act permits this court to grant relief if Mr. Vigos has been substantially prejudiced because the Commission "has erroneously interpreted or applied the law," Utah Code Ann. § 63-46b-16(4)(d) (1989). Velarde v. Board of Review of Indus. Comm'n., 831 P.2d 123, 125 (Utah App. 1992). In

considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988).

B. THE STATUTE OF LIMITATIONS SHOULD BE EQUITABLY
TOLLED BECAUSE THE INDUSTRIAL COMMISSION FIRST
REQUIRES A DETERMINATION OF DISABILITY FROM THE SSA

Although Utah courts have never decided this issue, Mr. Vigos should be allowed to use the doctrine of "equitable tolling" of the statute of limitations. Because the Industrial Commission requires an applicant to first obtain a determination of disability from the SSA before an application for hearing can be filed for permanent total disability, this doctrine should apply. In Enron Oil & Gas Company v. Freudenthal, 861 P.2d 1090 (Wyo. 1993), the Wyoming Supreme court considered the doctrine. Although the facts in Enron Oil did not warrant it, the court stated, "[e]quitable tolling applies only where a party has more than one legal remedy available to him. . . . The doctrine acts to toll the statute of limitations for the one remedy while the party is pursuing the other." Id. at 1093, (citation omitted).

In Dayhoff v. Temsco Helicopters, Inc., 772 P.2d 1085 (Alaska 1989), the court stated:

The statute is equitably tolled if (1) pursuit of the initial remedy gives defendant notice of plaintiff's claim, (2) defendant's ability to gather evidence is not prejudiced by the delay, and (3) plaintiff acted reasonably and in good faith. The statute is tolled only when the initial remedy is pursued in a judicial or quasi-judicial forum.

Id. at 1087. (See also, Erickson v. Croft, 760 P.2d 706, 708 (Mont. 1988)). In the present case, the employer knew of the accident and had already done an investigation of the facts. Mr. Vigos acted reasonably and in good faith. Because the Industrial Commission requires a Social Security Award before a claim for permanent total disability can be maintained, an applicant must pursue the one legal remedy before he can pursue the other. Mr. Vigos filed for Social Security in January of 1994, nearly 10 months prior to the time Judge Allen ruled the statute of limitations ran in this case. Therefore, even if Mr. Vigos had filed with the Industrial Commission at the same time as his social security claim, his worker's compensation claim would have been dismissed without prejudice because he did not have a social security award until about 8 months after the Industrial Commission ruled the statute had run. This clearly places an applicant in a "catch 22" position. In following the Industrial Commission's ruling, a claimant must either file a claim without a Social Security award and have it dismissed, possibly after the statute has run, or wait to file until the claimant receives the Social Security award, which may not come until after the statute has run, even if the employer has been put on notice, paid benefits, and has accepted liability. Because many applicants will be placed in this "no win" situation the statute should be equitably tolled.

CONCLUSION

Because the Industrial Commission did not understand that the word "accident" requires an injured employee to be unable to work, for a claim for permanent total disability, the statute of limitations should have begun to run on June 23, 1995 when Mr. Vigos' cause of action accrued. In fact, the Industrial Commission does not recognize that a claim for permanent total disability has accrued until the injured employee first obtains a favorable decision of disability from the Social Security Administration. Because Mr. Vigos did not obtain that decision until more than six years after he fell it would have been impossible for him to have filed within six years. Therefore, "accident" must mean when the cause of action accrues and according to the Industrial Commission that did not occur until June 23, 1995.


If "accident" means the date that Mr. Vigos fell, then the statute of limitations, Utah Code Ann. §35-1-99(3) is a statute of repose and is unconstitutional because it deprived Mr. Vigos his right to pursue his industrial claim before it had accrued. Mr. Vigos could not even file for his claim until after June 23, 1995, which was more than six years after he fell.

Alternatively, the Industrial Commission has continuing jurisdiction when the parties have been given notice of the accident and benefits have been paid. The Fund had all of Mr. Vigos' medical records and paid benefits. Because they were put on

notice of the facts and not prejudiced by Mr. Vigos' claim, the Industrial Commission should have continuing jurisdiction.

Lastly, because the Industrial Commission requires an applicant to first obtain a disability determination from the Social Security Administration the statute of limitations should be equitably tolled when the employer knows all the facts of the accident, has all the medical bills and is not prejudiced by the requirement. In fact, the only one prejudiced is the applicant, because the Commission will dismiss a claim without the social security award. Therefore, equitable tolling is a reasonable alternative in this case.

RESPECTFULLY SUBMITTED this 9th day of September, 1996.



EUGENE C. MILLER, JR.
Attorney for Applicant/Petitioner

CERTIFICATE OF SERVICE

I hereby certify this 9th day of September, 1996 that 2 (to each attorney) true and correct copies of the Brief of Appellant were mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Richard Sumsion, Esq.
Worker's Compensation Fund of Utah
P.O. Box 57929
Salt Lake City, UT 84157-0929

Alan Hennebold, Esq.
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111


EUGENE C. MILLER, JR.
Attorney for Applicant and Petitioner

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ADDENDUM A

RECEIVED
9-20-95

INDUSTRIAL COMMISSION OF UTAH

Case No. 95599

J. DAVID VIGOS,
Applicant,

vs.

ORDER OF DISMISSAL

MOUNTAINLAND BUILDERS
INC., and/or WORKERS
COMPENSATION FUND,

Defendants.

* * * * *

On July 11, 1995 the applicant filed a claim for temporary total compensation and permanent total disability benefits in the above-entitled matter, alleging the same are the result of the industrial accident of October 12, 1988. Thereafter, the defendant raised the statute of limitations defense of Section 35-1-99(3), Utah Code Annotated. Section 99 requires that a claim for weekly compensation benefits must be filed within six (6) years of the date of the accident or the claim is wholly barred. In this case, the file indicates that the applicant was paid temporary total disability by the defendants for the period October 14, 1988 to May 8, 1989. The defendants also last paid medical expenses for the applicant's claim in July of 1989.

Herein, the applicant filed his claims more than 6 years after the accident, namely on July 11, 1995, when the same should have been filed no later than October 13, 1994. Therefore, as a matter of law the claims for permanent total disability and temporary total disability benefits must be denied as required by the foregoing statute, Section 99.

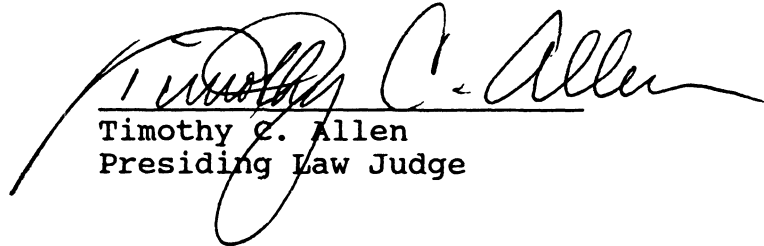
And it appearing that the foregoing constitutes good cause for dismissing the claim,

NOW, THEREFORE, IT IS ORDERED that the claim of the Applicant for permanent total and temporary total disability benefits be, and the same is hereby, dismissed with prejudice.

J. DAVID VIGOS
ORDER
PAGE TWO

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 further review or appeal. In the event a Motion for Review is timely filed, the parties shall have fifteen (15) days from the date of filing with the Commission, in which to file a response with the Commission in accordance with Section 63-46b-12(2), Utah Code Annotated.

DATED this 18th day of September, 1995.



Timothy C. Allen
Presiding Law Judge

CERTIFICATE OF MAILING

I certify that on September 18, 1995 a copy of the attached ORDER OF DISMISSAL was mailed to the following persons at the following addresses, postage paid:

J. David Vigos, 3640 Aurora Circle, SLC, UT 84124

Richard Sumsion, Atty, WCFU, P.O. 57929, SLC, UT 84157

Eugene C. Miller, Jr., Atty, 40 E. So. Temple, #300, SLC, UT 84111

THE INDUSTRIAL COMMISSION OF UTAH

Roxanne Fowler
Roxanne Fowler

ADDENDUM B

RECEIVED
3-29-96

THE INDUSTRIAL COMMISSION OF UTAH

J. DAVID VIGOS,

Applicant,

vs.

MOUNTAIN BUILDERS, INC.
and THE WORKERS COMPENSATION
FUND OF UTAH,

Defendants.

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ORDER DENYING
MOTION FOR REVIEW

Case No. 95-0597

J. David Vigos asks The Industrial Commission of Utah to review the Administrative Law Judge's dismissal of Mr. Vigos' claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53, and Utah Admin. Code R568-1-4.M.

ISSUE UNDER REVIEW

Is Mr. Vigos' claim barred by the statute of limitations found in §35-1-98(2) of the Utah Workers' Compensation Act.

FINDINGS OF FACT

The facts material to the foregoing issue are not in dispute. Mr. Vigos alleges an industrial injury occurring on October 12, 1988. He filed his claim for workers' compensation benefits with the Industrial Commission on July 11, 1995.

ORDER DENYING MOTION FOR REVIEW

J. DAVID VIGOS

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DISCUSSION AND CONCLUSIONS OF LAW

Since July 1 1988, the Utah Workers' Compensation Act has required injured workers to file their claims for disability compensation with the Commission within six years from the date of their industrial accidents. This statute of limitations, now found in §35-1-98(2) of the Act, provides in material part as follows:

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Under the plain language of the foregoing statute, Mr. Vigos' claim was barred when he failed to file it with the Industrial Commission within six years from the date of his accident. The Industrial Commission is compelled to conclude, as did the ALJ, that Mr. Vigos claim must be dismissed.

In reaching this conclusion, the Industrial Commission has considered Mr. Vigos' arguments, but finds them unpersuasive. The appellate decisions cited by Mr. Vigos were not decided under the provisions of §35-1-98(2) and are of no value as precedent in this case. As to the argument that the Industrial Commission has continuing jurisdiction over Mr. Vigos' claim, such jurisdiction attaches only when a timely application for benefits has been filed. In this case, Mr. Vigos' application was untimely. Finally, with respect to Mr. Vigos' contention that the time for filing his workers' compensation claim was "equitably tolled" while he pursued his right to Social Security disability compensation, Mr. Vigos admits that this principle has not been accepted before in Utah. The Industrial Commission declines to apply it now, since it is directly contrary to the provisions of §35-1-98(2).

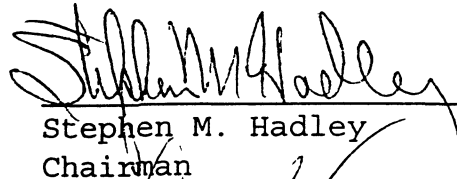
ORDER DENYING MOTION FOR REVIEW
J. DAVID VIGOS
PAGE 3


ORDER

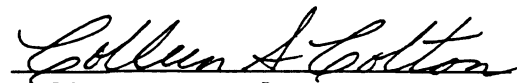
The Industrial Commission affirms the decision of the ALJ and denies Mr. Vigos' motion for review. It is so ordered.

Dated this 28 day of March, 1996.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTICE OF APPEAL RIGHTS

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

ORDER DENYING MOTION FOR REVIEW
J. DAVID VIGOS
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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of J. David Vigos, Case No. 95-0597, was mailed first class postage prepaid this 28 day of March, 1995, to the following:

J. DAVID VIGOS
3640 AURORA CIRCLE
SALT LAKE CITY, UTAH 84124

EUGENE C. MILLER JR.
ATTORNEY AT LAW
40 EAST SOUTH TEMPLE, SUITE 300
SALT LAKE CITY, UTAH 84111

RICHARD G. SUMSION
ATTORNEY AT LAW
THE WORKERS COMPENSATION FUND OF UTAH
392 EAST 6400 SOUTH
SALT LAKE CITY, UTAH 84107

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah