

1996

# J. David Vigos v. Mountainland Builders Inc. and Workers Compensation Fund of Utah : Reply Brief

Utah Court of Appeals

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DOCKET NO. 960283 - CA

J. DAVID VIGOS,

Applicant and Petitioner,

v.

MOUNTAINLAND BUILDERS  
INC.                      and  
WORKERS COMPENSATION FUND  
OF UTAH,

Defendants and Respondents

Case No.: 960283-CA

**COURT OF APPEALS**

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IN THE UTAH COURT OF APPEALS

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J. DAVID VIGOS,	)	COURT OF APPEALS
	)	
Applicant and Petitioner,	)	
v.	)	Priority 7
	)	
MOUNTAINLAND BUILDERS	)	
INC. and	)	Case No.: 960283-CA
WORKERS COMPENSATION FUND	)	
OF UTAH,	)	
	)	
Defendants and Respondents	)	

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REPLY BRIEF OF PETITIONER

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

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SUMMARY OF ARGUMENT
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Defendants do not dispute that before a claim for permanent total disability can be made, the employee must prove an injury and a disability. Until a person becomes disabled he cannot successfully bring a claim for permanent total disability in the Industrial Commission; hence, disability is the last event to occur in the cause of action for permanent total disability. Because that is the last event necessary, Mr. Vigos could not file until it occurred. Furthermore, he could not have known of this cause of action on October 13, 1988, which was the date he fell. He did not learn that he was permanently totally disabled until years after the fall. That is when the statute should begin to run.

Defendants fail to address Mr. Vigos' claim that his constitutional rights were violated because he had less than six years to file a claim from the occurrence of the last event, which was his disability. However, even if this court accepted the social security administration determination that Mr. Vigos was disabled on January 1, 1993, then he had until January 1, 1999 to file a claim. Defendants are punishing injured employees who act in good faith to return to the work force. Additionally, the defendants are taking away Mr. Vigos' only remedy before he had any practical opportunity to pursue it.

Utah State Ins. Fund v. Dutson, 646 P.2d 707 (Utah 1982) applies to this case. Defendants claim that employees must file an application for hearing for every claim. However, if an employee

cooperates with the insurance carrier and never has a need to file a formal application for hearing until after the statute of limitations has run, then the Industrial Commission will never get jurisdiction over these cases. To adopt the defendants' position would have a chilling effect on cooperation between the parties undisputed claims.

Defendants failed to dispute factual matters that were raised twice below. Now defendants decide they need to dispute those assertions and they cite to factual matters that are not part of the record. Defendants' action is contrary to well established law in Utah. Defendants also did not move this court to supplement the record. Therefore, this Court should strike the portions of defendants' briefs that rely on facts outside of the record.

ARGUMENT
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## **REPLY POINT I**

**BECAUSE DEFENDANTS FAIL TO ADDRESS THE STATUTORY REQUIREMENT THAT AN INJURED EMPLOYEE MUST BE DISABLED BEFORE PERMANENT TOTAL DISABILITY BENEFITS CAN BE PAID THIS COURT CAN INFER DEFENDANTS CONCEDE THIS ISSUE**

A. UNTIL A PERSON BECOMES DISABLED HE CANNOT SUCCESSFULLY BRING A CLAIM FOR PERMANENT TOTAL DISABILITY IN THE INDUSTRIAL COMMISSION; HENCE, DISABILITY IS THE LAST EVENT TO OCCUR IN THE CAUSE OF ACTION FOR PERMANENT TOTAL DISABILITY

In applicant's first brief he asserted that there must be both, an accident and an injury, before an employee can claim workers' compensation benefits. Applicant also asserted that a



claim for 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. In other words, the employee must also be disabled. The defendants did not address either of these assertions in their briefs. Consequently, this Court can infer that defendants concede these issues.

Frankly, defendants cannot argue otherwise. Utah Code Ann. §35-1-67(1) states:

(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. (Emphasis added).

Id. Nevertheless, defendants try to deny Mr. Vigos his benefits because they simply ignore this requirement. The Fund's assertion on page 16 of its brief is a prime example of this. Defendants claim, "[t]he Petitioner's injuries were apparent on the date of the accident." It is undisputed that Mr. Vigos was not permanently totally disabled on October 13, 1988. His permanent total disability did not manifest until years later.

Defendants also make contradictory statements about when Mr. Vigos became disabled, thus highlighting a very important question of fact that the Industrial Commission never resolved. Defendants

statement that Mr. Vigos' injuries were "apparent" on October 13, 1988 belies their following admissions: 1) that he applied for disability on January 24, 1994<sup>1</sup>; 2) that Social Security Administration decided he was disabled on January 1, 1993; and, 3) that he was still working on October 25, 1994. (The Fund's brief, pp. 16 and 18).

Not only does the Fund make statements that are inconsistent, but the Fund's brief and the Industrial Commission's brief are also at odds. Beginning on page 2 of the Industrial Commission's brief, the Commission sets forth the required "questions and evaluations to be made in sequence" for a claim of permanent total disability. The questions and evaluations are as follows:

1. Is the claimant engaged in a substantial gainful activity?
2. Does the claimant have a medically severe impairment?
3. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509<sup>2</sup>, amended April 1, 1993, and the listed impairments in 20 CFR Subpart P Appendix 1, amended April 1, 1993?
4. Does the impairment prevent the claimant from doing past relevant work?

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<sup>1</sup> The Social Security Administration denied this application on June 14, 1994. (R. 30) Mr. Vigos then asked for reconsideration on October 28, 1994, which was also denied. (R. 30) The second denial was not dated; however, presumably it was denied after the October 28, 1994 request. (R. 30) In following defendants' logic, when Mr. Vigos was denied social security disability benefits he could reasonably conclude that he also did not have a worker's compensation claim, either.

<sup>2</sup> § 404.1509 states:

How long the impairment must last.

Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement. (Emphasis added).

5. Does the impairment prevent the claimant from doing any other work?

Industrial Commission's brief, p. 2-3. It defies logic how Mr. Vigos' injuries "were apparent" on the day he fell when Mr. Vigos could not meet the above requirements for several years after October 13, 1988. Moreover, the Fund cites to the medical records that report Mr. Vigos was released to return to work on May 8, 1989 without restrictions. (R. 207) The Fund also cites Dr. Erickson's report that states:

While his areas of impairment may, at least temporarily, limit his ability to function at the same level of intensity, speed, and acuity to which he was previously accustomed, he clearly continues to be a very bright, capable man, with many options for employment and enjoyable leisure pursuits.

(R. 225) Mr. Vigos is at a loss as to how those two reports make his injury apparent on the day he fell. Clearly there is a question of fact as to whether Mr. Vigos could meet the disability test until after the statute of limitations had run<sup>3</sup>. Defendants' claim that Mr. Vigos knew of his injury on the day he fell is unsupported by the facts and is unpersuasive.

#### B. DEFENDANTS DO NOT UNDERSTAND LARSON

In support of Mr. Vigos' claim he cited to Larson's Workmen's Compensation, §78.42(a). Defendants try to distinguish Mr. Vigos'

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<sup>3</sup> Both the Fund and the Industrial Commission assert that in any claim for permanent total disability, where there is not an award from SSA, the Commission will apply its own independent judgment of whether an employee is disabled or not. If that is so, then the Social Security Administration determination that Mr. Vigos was disabled on January 1, 1993 is totally irrelevant.

case by claiming the statute cited in Larson is only a one year statute of limitation as opposed to a six year statute of limitation. Larson 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. Defendants do not seem to understand that the language used by Larson applies to all "uncompromising time periods," not just a one year time period. Larson then uses the facts of a one year statute of limitation as "[t]he classic illustration . . . ." Larson is criticizing every statute of limitation that has uncompromising time periods, not just a one year statute of limitations.

Therefore, this Court should remand the case to the Industrial Commission and order it to determine when Mr. Vigos became disabled. Then from that date compute when the six year statute of limitations started. To rule otherwise leaves Mr. Vigos with no remedy at all.

## REPLY POINT II

### DEFENDANTS DO NOT ADDRESS THE CLAIM OF A CONSTITUTIONAL VIOLATION IF THE STATUTE OF LIMITATIONS IS SHORTENED.

A. IF THE LAST EVENT FOR PERMANENT TOTAL DISABILITY OCCURS ABOUT 5½ YEARS AFTER THE INITIAL INJURY, THEN A CLAIMANT'S CONSTITUTIONAL RIGHTS ARE VIOLATED IF HE HAS LESS THAN SIX YEARS TO FILE

Defendants position violates Mr. Vigos' due process rights and his constitutional rights to the courts as provided in the Utah Constitution, Article I, §§ 7 and 11. Defendants claim that because Mr. Vigos applied for social security benefits on January 24, 1994<sup>4</sup> he should have also applied for permanent total disability benefits. However, what is lacking in this argument is any discussion of footnote 4 in Lee v. Gaufin, 867 P.2d 572 (Utah 1993), wherein 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

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<sup>4</sup> Defendants also state, "The Petitioner also retained counsel to represent him at his social security disability proceedings where evidence of his industrial injury was presented." The Fund's brief, p. 19. What defendants fail to tell this Court is that Mr. Vigos did not retain counsel for that hearing until February, 1995. Presumably the hearing was after Mr. Vigos retained counsel for the hearing.

constitutional problems. (Cites omitted and emphasis added).

Id. at 576. This was cited in applicant's first brief and defendants simply do not respond to it. This Court can reasonably infer from the defendants failure to respond to footnote 4 of the Lee v. Gaufin case, that defendants perceive the constitutional violation will result in applying the statute as defendants do.

As shown above, defendants do not challenge Mr. Vigos' assertion that a claim for permanent total disability has an additional element of disability before an injured employee can obtain benefits. This is significant in Mr. Vigos' claim that the statute is a statute of repose. Mr. Vigos raised the issue that permanent total disability benefits are more akin to death benefits than other worker compensation benefits. Again, defendants failed to address this claim.

In Hales v. Industrial Comm'n., 854 P.2d 537 (Utah App. 1993), the applicant claimed and the Industrial Commission agreed with the applicant and stated in its order, "that the statutory provision in section 35-1-68(2) violated the Utah Constitution's open courts provision by extinguishing [the applicant's] constitutional right to litigate a valid claim before [the applicant's] right to file that claim arose." This Court came to the same conclusion. Id. at 542. That is exactly the issue in this case. Mr. Vigos' right to litigate his valid claim was extinguished before his right to file the claim arose. Even if the date of January 1, 1993 is accepted, then the cause of action did not accrue until then and the statute would not have expired until January 1, 1999.

Moreover, given a different set of facts the defendants' position would lead to inconsistent results. For example, if Mr. Vigos had filed for social security benefits on October 12, 1994, according to defendants logic, because he filed within the six years he is barred from filing for permanent total disability. However, what if Mr. Vigos had filed for social security on October 15, 1994, one day after the statute had run? Because defendants failed to address this issue at all, it is unclear if they believe a claimant should be denied benefits. However, it can be presumed that defendants do not think they would have this defense.

The only way that a person's constitutional rights can be protected for a permanent total disability claim when there is a delayed onset is to start the statute when the last event necessary to complete the cause of action happens. It is undisputed that the last event is when the employee is disabled. Even if this Court accepts the Social Security Administration's decision that Mr. Vigos was disabled on January 1, 1993, he still had until January 1, 1999 to file. He filed well within that time.

If this Court were to adopt the defendants' position, the Industrial Commission will be flooded with applications so that employees can preserve a possible claim regardless of the extent of the injury. This Court can take judicial notice that thousands of workers are injured each year in Utah. Every one of these people will be required to file a claim for permanent total disability within six years regardless of their medical and physical condition.

Additionally, this type of "draconian" application of the statute will have a chilling effect on injured workers who try to return to the work force. Defendants are punishing workers who attempt to stay in the work force instead of rewarding them for their good faith efforts. This would also fly in the face of Utah Code Ann. §35-10-1, *et seq.* (Utah Injured Worker Reemployment Act). Although this statute was enacted after Mr. Vigos' fall and does not apply in this case, a decision by this Court that concurs with defendants will have a tremendous impact on this statute. In §35-10-2 the intent of this statute is to "promote and monitor the state's and the employer's capacity to assist the injured worker in returning to the work force as quickly as possible and to evaluate the cost effectiveness of the program." *Id.* (emphasis added). Because defendant's are punishing employees who are trying to get back into the work force, many will chose not to return.

#### B. MR. VIGOS ACTED WITH DUE DILIGENCE

Defendants argue that this case is more like Avis v. Board of Review of the Indus. Comm'n, 837 P.2d 584, 588 (Utah App. 1992) and Middlestadt v. Industrial Comm'n, 852 P.2d 1012 (Utah App. 1993). However, in those cases, the employee knew he or she had an injury, the employee was not totally disabled, and there was no delayed onset of the injury. This Court stated in Avis, "[t]he workers' compensation statute, however, does not require stabilization before filing for benefits." Avis, 837 P.2d at 588. However, Mr. Vigos had stabilized and returned to work. In his mind Mr. Vigos



did not have any additional claims to file for until years later. The workers' compensation statute for permanent total disability, "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." (Utah Code Ann. §35-1-67(1) emphasis added)<sup>5</sup>. As shown in Reply Point I, disability means the applicant is not gainfully employed and cannot or will not be for 12 consecutive months.

This case is more like Myers v. McDonald, 635 P.2d 84 (Utah 1981), which this Court cited in Avis. In Myers the district court dismissed the complaint as barred by the statute of limitations. The Utah Supreme Court accepted plaintiffs' claim that they acted with "due diligence" in trying to discover the whereabouts of the decedent. Id. at 87. The Court also concluded that the defendant could not establish that he was prejudiced by having to defend the stale claim. Id. The Court went on to say:

In contrast, plaintiffs could not file an action for damages or even initiate investigative efforts to determine the cause of a death of which they had no knowledge. Plaintiffs therefore had no alternative other than to bring their action after the statutory limitation period had expired. If plaintiffs are denied the opportunity of proceeding with

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<sup>5</sup> It could be argued that the language of this statute requires the Commission to make a finding on every claim for permanent total disability to determine if the claimant is disabled before the statute of limitation's defense is addressed. Such a reading of the statute would be consistent with applicant's position because, if the claimant is disabled, the Commission could then determine when the applicant became disabled. The applicant would then have six years from that date to file a claim. If the claim was filed beyond that time and the defendant properly raised the affirmative defense that the claim was filed after the statute of limitations had run, then the claim could be dismissed.

that action, the law would be in the untenable position of having created a remedy for plaintiffs and then barring them from exercising it before they had any practical opportunity to do so. (Emphasis added).

Id. The Supreme Court concluded that the Myers case had appropriate circumstances to apply the "exceptional 'discovery rule'" and concluded that the cause of action did not accrue until plaintiffs discovered the death, so long as they were able to prove "due diligence"<sup>6</sup>. Id.

In the present case, Mr. Vigos claimed defendants were not prejudiced in this case, and the defendants, again, did not respond. Furthermore, the Industrial Commission's decision creates "the untenable position of having created a remedy for [the applicant] and then barring [him] from exercising it before [he] had any practical opportunity to do so." Id. (Emphasis added).

In footnote 8, of Myers, the Court states, "[t]his is not a case where the fact of death was known but the cause of the fatal accident was not." Id. The present case is analogous because Mr. Vigos did not know the fact of his disability until years later.

If this Court affirms the Commission's decision in this case, it would take away Mr. Vigos' only remedy in violation of his constitutional rights. Therefore, this Court must remand this case and rule that Utah Code Ann. §35-1-99 is unconstitutional and, thereby, allow Mr. Vigos to pursue his benefits.

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<sup>6</sup> The Court remanded the case to the district court and stated, "[a]ll we hold here is that it was improper for the trial court to dismiss plaintiff's action on the pleadings on the basis of the statute of limitations." Myers v. McDonald, 635, P.2d at 87. The Court directed the lower court to allow the Plaintiffs to prove they had acted with due diligence. Id.

### REPLY POINT III

**THE INDUSTRIAL COMMISSION HAS JURISDICTION ONCE THE EMPLOYEE 1) REPORTS AN INJURY TO THE EMPLOYER AND THE COMMISSION AND 2) HE MAKES A CLAIM.**

Defendants try to argue that Utah State Ins. Fund v. Dutson, 646 P.2d 707 (Utah 1982), is not applicable because it interprets different statutes. As can be seen in Mr. Vigos' first brief, that was acknowledged. However, the new language in those statutes did not overrule Dutson. Consequently, Dutson is still good law. It also applies to this case.

What the Supreme Court stated in Dutson, is that an employee must do two things: first, give notice to the parties and the Commission of the material facts and, second, make a claim. If an employee only gives notice of an injury and makes no claim for benefits, then there is no jurisdiction. If an employee was injured and simply notified the employer of the injury, but made no claim, eventhough he knew he had a claim, then the Commission has no jurisdiction. The Commission also could not "modify" the injured employee's benefits because it has no jurisdiction.

Contrary to defendants claim, Mr. Vigos does not totally disregarded §35-1-78(3), which states that the Commission cannot modify statutes of limitations. Mr. Vigos does not even suggest such a position. If a timely claim has been filed, then Commission has jurisdiction and the statute of limitations does not apply. On

the other hand, if an injured employee fails to timely file a claim, then the Commission does not have jurisdiction.

However, if an employee was injured, gave notice to the employer and the Industrial Commission and made a claim for benefits, then the Commission has jurisdiction over that injury. This is consistent with Stoker v. Workers' Compensation Fund of Utah 889 P.2d 409 (Utah 1994), wherein the Utah Supreme Court stated:

Nevertheless, Stoker may still have a remedy under the Act. It would be ironic for the Act to be construed in such a fashion that a worker who undertakes a conservative course of therapy within the time allowed by the statute, which if effective would save the Fund money and be less risky to the worker, would be denied benefits when that course proves ineffective and a more aggressive therapy must then be pursued, resulting in temporary total disability that occurs outside the eight-year period. Had the more aggressive therapy been undertaken at the time of the less aggressive therapy, Stoker would have met the requirements for additional total disability benefits.

Id. at 412. The Supreme Court then concluded that even though it was more than eight years post injury, the Commission had continuing jurisdiction and Stoker could file a claim under §35-1-78(1). Additionally, in Sheppick v. Albertson's, Inc. 297 Utah Adv. Rep. 11 (Utah 1996), in footnote 2, the Utah Supreme Court stated:

The provision granting the Commission continuing jurisdiction emphasizes the exclusivity of the Commission's jurisdiction over workers' compensation claims. Under general common law doctrine, the entry of a

judgment for damages based on personal injuries would bar subsequent actions based on the same injury. Such is not the case under the Act. The Commission is empowered to adjust the award in accordance with changes in circumstances. See Utah Code Ann. § 35-1-78. Such changes could include a deterioration of the former employee's condition or the discovery of a previously unnoticed injury. See, e.g., Stoker v. Workers' Compensation Fund, 889 P.2d 409, 412 (Utah 1994) (commission can reopen case if previously used conservative method of treatment proved ineffective); Barber Asphalt Corp. v. Industrial Comm'n, 103 Utah 371, 135 P.2d 266 (1943) (commission may reconsider case if there has been some new development that suggests award may have been excessive or inadequate); Spring Canyon Coal Co. v. Industrial Comm'n, 60 Utah 553, 210 P. 611 (1922) (commission authorized to alter award when amputated leg failed to heal sufficiently to use prosthesis). (Emphasis added).

Id. at 14.

In the Workers' Compensation Rules, the Industrial Commission has provided a form called, "Claim for Protection of Rights - Form 002." R568-1-3(F). The Commission states that that form is to be, "[u]sed by an injured employee for the sole purpose of protecting his/her rights even though a dispute does not exist. Copies are forwarded to all parties concerned. NOTE: THIS FORM DOES NOT NEED TO BE FILED WHEN ANY OTHER APPLICATION HAS BEEN FILED." (Uppercase in the original and emphasis added). Clearly the Industrial Commission recognizes that an application for any claim gives the Industrial Commission jurisdiction over all subsequent claims.

When an insurance company and an injured employee are cooperating the employee has no need to file a formal application

for hearing. That is why Dutson is still good law and applies to this case. How would the Industrial Commission ever get jurisdiction in a case where the employer and the employee are cooperating for a full six years? The defendants' position would require the applicant to file a formal application for hearing on every case, regardless of the cooperation between the parties. This is contrary to Utah law. see Stoker, 889 P.2d 409. In fact, defendants position would have a chilling effect on any cooperation because, according to defendants, the Industrial Commission does not have jurisdiction unless an employee files an application for hearing for every claim.

Furthermore, the public policy considerations for giving the Industrial Commission continuing jurisdiction are also very compelling. If this Court adopts the defendants' position, then an employer or its insurance company can string an injured employee along until after the six year statute of limitations has run. This can be done in good or bad faith. For example, the employer could provide a severally injured employee a light duty job and conservative treatment. At the end of six years it could terminate the employee. Pursuant to Savage v. Educators Insurance Co., 908 P.2d 862 (Utah 1995) an applicant has no recourse for bad faith in a workers' compensation claim, unless there is privity of contract. Therefore, the insurance company has no liability because the Industrial Commission has no jurisdiction. The employee has no recourse because he trusted the insurance company.

The defendants' callous interpretation of the statute goes far beyond the well established law of Utah concerning the purpose of the Worker's Compensation Act. In Norton v. The Industrial Comm'n., 728 P.2d 1025, 1028 (Utah 1986), the Supreme Court stated, "[i]t need not be restated at great length that the Workmen's Compensation Act is to be liberally construed and that any doubt respective the right of compensation will be resolved in favor of the injured employee." Id. (emphasis added). Therefore, the Commission has continuing jurisdiction in this case or else the statute will be construed so narrowly that Mr. Vigos will be left with no remedy.

## **REPLY POINT IV**

### **PORTIONS OF DEFENDANTS'S BRIEFS MUST BE STRICKEN BECAUSE THEY CITE TO FACTS THAT ARE NOT PART OF THE RECORD.**

Lastly, the Industrial Commission has filed a brief in this matter and has attached to that brief several items that are not included in the record. The Commission's brief is based almost entirely on these additional facts<sup>7</sup>. The Fund states in its brief, "all relevant facts in the Bradley case are addressed in the

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<sup>7</sup> In fact, applicant's attorney could not find one citation to the record in the entire brief.

Industrial Commission's brief." The Fund's brief, p. 11. The defendants failed to move this Court to supplement the record.

It is well settled in Utah that, "[e]vidence not available to the trial judge cannot be added to the record on appeal . . . ." Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 456 (Utah App. 1989). In State v. Mirquet, 844 P.2d 995, 1005, (Utah App. 1992) (Bench, P.J., dissenting), Judge Bench stated, "Our duty is to review the findings actually made by the trial court, not to make our own findings." Id. For what ever reason, the defendants have decided to wait until now to dispute factual matters that were raised twice below.<sup>8</sup> (R. 47-8 and 68-9.) Therefore, this Court should strike the portions of defendants' briefs that rely on facts outside of the record.

CONCLUSION
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Defendants do not dispute that the last event necessary for a claim for permanent total disability to accrue is that the employee must be disabled. Defendants' claim that Mr. Vigos was aware of his injury on October 13, 1988 contradicts their admissions that Mr. Vigos applied for disability on January 24, 1994; that the Social Security Administration determined him to be disabled on

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<sup>8</sup> Applicant's counsel takes offense at defendants' statement that applicant's counsel "misleads this Court by failing to provide the complete facts in Bradley . . . ." The Fund's brief, p. 11. Applicant's counsel made those factual claims in good faith and based upon his honest and best recollection of the Bradley case. Defendants were put on notice when applicant's attorney argued the same facts on two prior occasions in this case, first to the ALJ and then to the Commission. (R. 47-8 and 67-8) Defendants should have raised their contested facts below to make them part of the record. To now dispute the facts, and at the same time, question applicant's counsel's integrity is completely inappropriate.



January 1, 1993; that he was still employed on October 25, 1994; and, that he was released to return to work on May 8, 1989 without any restrictions. Mr. Vigos did not know his claim had accrued until he was disabled. That is when the statute of limitations should have started to run.


If the statute started to run on October 13, 1988 then the statute is a statute of repose because it extinguished Mr. Vigos' constitutional right to litigate a valid claim before his right to file that claim arose. At a minimum it reduced the statute by several years, which also is a violation of his constitutional rights.

If the Industrial Commission does not have continuing jurisdiction, then the Industrial Commission will never have jurisdiction over cases where the insurance company and the employee cooperate for six years. Even if the insurance company does so in bad faith, the employee is left with no remedy, simply because he or she cooperated with the insurance company instead of filing for a claim. Alternatively, the Industrial Commission will be deluged with claims even for the slightest of injury, simply to preserve any potential claims.

Lastly, the Industrial Commission filed a brief that contains facts not in the record. Both defendants rely on these facts; yet, neither defendant filed a motion to supplement the record. Consequently, this Court should strike any portions of the briefs that rely on those facts.

Therefore, this Court should rule that the statute of limitations started to run on the day that Mr. Vigos became permanently totally disabled. Because there is a question of fact as to when that occurred, this Court should remand it back to the Industrial Commission. Alternatively, if the statute began to run on October 13, 1988, then this Court should rule that the statute is a statute of repose because it begins to run before the last event necessary to bring a claim and by so doing deprives Mr. Vigos of his constitutional right to pursue his claim. Alternatively, this Court should rule that the Industrial Commission has continuing jurisdiction.

RESPECTFULLY SUBMITTED this 26th day of November, 1996.

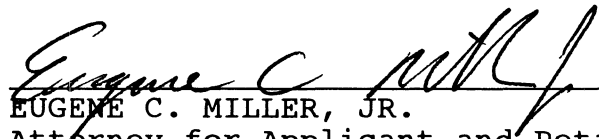
  
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CERTIFICATE OF SERVICE

I hereby certify this 26th day of November, 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:

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