

1996

J. David Vigos v. Mountainland Builders, Inc., Workers Compensation Fund of Utah, and Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 960283-CA

J. DAVID VIGOS

Applicant/ Petitioner,

v.

MOUNTAINLAND BUILDERS, INC.,
WORKERS COMPENSATION FUND OF
UTAH, and INDUSTRIAL COMMISSION
OF UTAH

Defendants/Respondents.

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Case No. 96-0283-CA

Priority No. 7

BRIEF OF RESPONDENT

Response to Petition by Applicant for Review of an
Order of the Industrial Commission of Utah
Dismissing Workers' Compensation Claim

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OCT 25 1996

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

J. DAVID VIGOS	*	
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Applicant/Petitioner,	*	
v.	*	Case No. 96-0283-CA
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MOUNTAINLAND BUILDERS, INC.,	*	Priority No. 7
WORKERS COMPENSATION FUND OF	*	
UTAH, and the INDUSTRIAL	*	
COMMISSION OF UTAH	*	
	*	
Defendants/Respondents.	*	

BRIEF OF RESPONDENT

There has not been an evidentiary hearing in this case before the Industrial Commission, but the facts of the case pertaining to the statute of limitation issue are essentially not in dispute and this case warrants a summary disposition without the necessity of oral argument.

JURISDICTION

The Utah Court of Appeals has jurisdiction over this Appeal pursuant to Utah Code Ann. § 35-1-82.53(2)(1994), § 63-46b-16 (1993) and § 78-2a-3(2)(a)(1992 & Supp.1996).

STATEMENT OF THE ISSUES

A. Does the Industrial Commission require a social security disability award before an application for hearing for workers' compensation permanent total disability can be filed?

B. Is the Petitioner's claim for workers' compensation permanent total disability barred by the six year statute of limitation found in Utah Code Ann. § 35-1-99(3) (1988)?

C. Is the six year period of time allowed for filing an application for hearing with the Industrial Commission a statute of limitation or a statute of repose?

D. Does the continuing jurisdiction of the Industrial Commission under Utah Code Ann. § 35-1-78(1) (1988) have any impact upon the statute of limitation periods set forth in § 35-1-99(3) in light of the restrictive language contained in § 35-1-78(3) (a)&(b) (1988)?

E. Does the general doctrine of "equitable tolling" of statutes of limitations apply to workers' compensation permanent total disability if an applicant has filed for social security disability?

STANDARD OF REVIEW

The Standard of Review to be applied in the review of all issues outlined above is the Correction of Error Standard. The Court is to review the administrative agency's Conclusions of Law without deference to determine whether the agency has erroneously interpreted or applied the law.¹

¹ Utah Code Ann. § 63-46b-16(4) (d); Morton International v. Auditing Div. of the Utah State Tax Commission, 814, P.2d 581 (Utah 1991); Moreflow Industries v. Board of Review, 817 P.2d 328 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution, Article I, Section 11.

Utah Code Ann. § 35-1-67(1) (1988) (subsequently amended).

Utah Code Ann. § 35-1-78 (1988) (subsequently amended).

Utah Code Ann. § 35-1-98(2) (1994).

Utah Code Ann. § 35-1-99(3) (1988) (repealed 1990).

Utah Administrative Rule R563-1-17 (1995).

The complete text to the statutory provisions and rules can be found in Addendum C.

STATEMENT OF THE CASE

A. Nature of the Case.

On October 13, 1988, the Petitioner, J. David Vigos, fell and sustained injuries to his head and back while working for Mountainland Builders, Inc. (R.1) Compensation and medical bills were paid through May 8, 1989. (R.39) No ratings were ever given by any of the Petitioner's treating physicians for any residual impairment and he was released to work without restrictions on May 8, 1989, although some precautions were recommended for a period of time. (R.207,226) On July 11, 1995 the Petitioner filed an application for hearing for workers' compensation permanent total disability benefits. (R.13) The essential issue in this case is whether the six year statute of limitation for permanent total disability found in Utah Code Ann. § 35-1-99(3) (1988) bars the Petitioner's claim.

B. Course of Proceedings.

After the Petitioner filed his Application for Hearing with the Industrial Commission, the Defendants/Respondents filed an Answer asserting the Petitioner's claim was barred under the provisions of Utah Code Ann. § 35-1-99(3) (1988), and moved the Industrial Commission for a dismissal of the Petitioner's claim with prejudice as a matter of law. On August 21, 1995, the administrative law judge advised counsel for the Petitioner that he had 15 days within which to respond to Respondents' Motion to Dismiss. The Petitioner filed his Memorandum in Opposition to Dismiss on September 5, 1995. An Order of Dismissal was entered by the administrative law judge on September 18, 1995 based upon the Petitioner's failure to file his claim within six years after his industrial accident of October 13, 1988 as required by Utah Code Ann. § 35-1-99(3). (Addendum A.) The Petitioner filed his Motion for Review with the Industrial Commission on October 16, 1995 to which the Defendants/Respondents responded on October 27, 1995.

C. Disposition in Trial Court or Agency.

On March 28, 1996, the Industrial Commission entered its Order denying the Petitioner's Motion for Review based upon the plain language of Utah Code Ann. § 35-1-98(2), because the Petitioner had failed to file his Application for Hearing with the Industrial Commission within six years from the date of his

accident.² (Addendum B.) The Industrial Commission found the Petitioner's arguments unpersuasive and further found the Appellate decisions cited to be of no precedential value because they were decided under former case law. As to jurisdiction, the Industrial Commission found the argument with respect to continuing jurisdiction to be inapplicable because such continuing jurisdiction attaches only after a timely application for benefits has been filed. The Industrial Commission further found that the time for filing the Petitioner's claim with the Industrial Commission was not "equitably tolled" while he pursued Social Security disability compensation because that principle has not been accepted before in Utah and, furthermore, it is directly contrary to the provisions of the statute.

D. Statement of Facts.

The Petitioner, David Vigos, was employed by Mountainland Builders, Inc., as a carpenter. On his third day of employment, the plank he was standing on broke causing him to fall to the floor below injuring his head and back. (R.1) The Workers Compensation Fund of Utah, Mountainland Builders' insurance carrier, (the Respondents) paid medical expenses through July of 1989 and temporary total disability benefits from October 14, 1988 to May 8, 1989. (R.39) The Petitioner was released to return to work on May 8, 1989 without restrictions. (R.207) The

² The language in Utah Code Ann. § 35-1-98(2)(1994) is essentially the same as the language of § 35-1-99(3)(1988) (repealed 1990), the provision effective at the time of the Petitioner's industrial accident.

Petitioner was seen by Dr. David G. Ericksen, a Clinical Psychologist, for a neuropsychological evaluation on December 14, 15, & 16, 1988. (R.222-226) Dr. Ericksen reported that, "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) Dr. Ericksen further recommended that the Petitioner "[n]ot place himself in a position to be responsible for large-scale development projects, for approximately 12 months following his injury...[h]e would be well advised to pursue a somewhat more slow pace, structured line of work, where he can go at his own mental and physical pace, and increase his load and responsibility as appropriate." (R.226)

The Petitioner sought no further treatment from May 8, 1989 to sometime in 1994 except, perhaps, for his assertion that he had been to a chiropractor on Redwood Road at some unspecified time. (R.114)

On January 25, 1994, the Petitioner applied for Social Security disability benefits. (R.24) On October 25, 1994, the Petitioner called Michael Bordiga, a claims adjuster for the Workers Compensation Fund of Utah, indicating that he was experiencing increasing problems in his back and neck. (R.114) He was advised of the three year statute of limitation with respect to medical expenses. (R.114) On November 3, 1994, Petitioner was notified by letter from the claims adjuster that his request for

ongoing medical treatment was being denied based on the provisions of § 35-1-98 of the Workers' Compensation Act. (R.115)

The Petitioner was awarded Social Security disability benefits on June 23, 1995 effective as of January 1, 1993.

(R.23-25) The Petitioner filed an Application for Hearing form with the Industrial Commission on July 11, 1995 seeking payment for medical expenses, travel expenses, temporary total disability compensation and permanent total disability compensation. (R.13)

The Defendants/Respondents moved for an Order dismissing the Petitioner's claim because it was not filed within six years after the date of his injury as required under the provisions of Utah Code Ann. § 35-1-99(3). (R.39) On September 18, 1995, the administrative law judge granted the Defendants/Respondents' Motion and dismissed the Petitioner's claim with prejudice.

(Addendum A.) The Order of Dismissal was affirmed by the Industrial Commission on March 28, 1996. (Addendum B.)

SUMMARY OF ARGUMENT

The Industrial Commission does not require a disability award from the Social Security Administration (SSA) prior to filing an application for hearing for permanent total disability and does not dismiss applications because this information is not provided. The Petitioner provides no credible evidence that this is the Industrial Commission's practice. The Application for Hearing form states that information on a SSA disability award must be provided with the application if the applicant has a SSA

disability award. The workers' compensation statute and Industrial Commission's rules require the Industrial Commission to use the same SSA decision making process SSA uses to determine disability. The workers' compensation statute and rules do not require a SSA disability award prior to filing an application for hearing for a permanent total disability claim.

The permanent total disability statute of limitation clearly and unequivocally states that an application for hearing must be filed within six years of the industrial accident for claims for permanent total disability. This statute of limitation is not a statute of repose in violation of the open courts provision of the Utah Constitution. The Petitioner's cause of action arose on the date of his industrial accident and he had six years in which to file a permanent total disability claim. The Petitioner provides no credible reason to toll the statute of limitation in this case. The continuing jurisdiction of the Industrial Commission does not give it the authority to change or ignore statutes of limitations for workers' compensation benefits.

ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION DOES NOT REQUIRE A SOCIAL SECURITY DISABILITY AWARD BEFORE AN APPLICATION FOR HEARING FOR WORKERS' COMPENSATION PERMANENT TOTAL DISABILITY CAN BE FILED.

A. The Industrial Commission Does Not Dismiss a Permanent Total Disability Claim Because A Claimant Does Not Have A Social Security Disability Award.

An injured employee does not need a disability award from the Social Security Administration (SSA) prior to filing a workers' compensation claim for permanent total disability. The Petitioner states that "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." (Petitioner's Brief, p.18.) The Petitioner provides no evidence that this is the practice of the Industrial Commission. Instead the Petitioner pieces together a memo and letters from the Industrial Commission to create a procedure that does not exist.

The Petitioner points to a memorandum from Administrative Law Judge Timothy C. Allen to Marge Mele dated January 31, 1994. (Petitioner's Brief, p.18.) This memorandum clarifies "what evidence from Social Security (SSA) is needed to establish a prima facie case of permanent total disability for injuries occurring on or after July 1, 1988." (R.80) Contrary to the Petitioner's assertion, this memorandum does not say that all applications for hearing will be returned without a SSA disability award. Nor does it establish that a SSA disability

award is a statutory element for a permanent total disability claim. It simply outlines the evidence an injured employee needs to establish a *prima facie* case for a permanent total disability claim, i.e. a Notice of Award and a Disability Determination and Transmittal or Decision from SSA must be provided, if available.

Furthermore, the information on the back of the Application for Hearing form indicates that a SSA disability award is not an absolute requirement. The back of the form lists the documents which must accompany the form; this list includes " in permanent total disability claims only, copy of Social Security Award Certificate, Decision of Administrative Law Judge or Appeals Council and/or Disability Determination and Transmittal Sheet (form SSA 831-U5), if Social Security total disability has been awarded." (R.13) (Emphasis added.) This directly contradicts the Petitioner's assertion that a SSA disability award is required before an application for hearing is filed. SSA disability award information is only required if an award has been made.

The Petitioner states on page 18 of his brief that "[p]ursuant 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.'"

(Incorrectly quoting Judge Allen's January 31, 1994 memorandum.) (Emphasis in Petitioner's Brief.) Further, the Petitioner states that "[i]f this is not done then the Industrial Commission will return the application to the applicant [and] [e]ventually, if

the applicant has not submitted the required information, then the case will be dismissed without prejudice." The Petitioner cites Judge Allen's January 31, 1994 memorandum and the Bradley case to support these assertions. In doing so, the Petitioner misleads this Court by failing to provide the complete facts in Bradley so that this Court can evaluate its relevance to this case. In any event, Bradley has no precedential value.

Judge Allen's January 31, 1994 memorandum is not a rule, it is an inter-office memorandum. The Industrial Commission's practices and procedures and all the relevant facts in the Bradley case are addressed in the Industrial Commission's brief. Mr. Bradley's Application for Hearing form was not returned for non-compliance with Judge Allen's memorandum but for failure to comply with the revised Application for Hearing procedures then in effect, as explained in the Industrial Commission's brief.

B. The Petitioner Had No Knowledge Of And Was Not Prejudiced By The Industrial Commission's Alleged Procedure Of Requiring A SSA Disability Award Before Filing An Application For Hearing.

Even if the Industrial Commission's procedures were to require a SSA disability award before an application for hearing could be filed, it would be of no consequence to the Petitioner. The Petitioner provides no evidence that he was aware of this alleged procedure for filing a permanent total disability claim and did not file an application for hearing because of this alleged procedure. The Petitioner provides no evidence that he was prejudiced by this alleged procedure in any way. It is likely that the Petitioner was informed of the alleged procedure by his

current attorney after the statute of limitation had already run.³

POINT II.

THE PETITIONER'S CLAIM FOR PERMANENT TOTAL DISABILITY IS BARRED BECAUSE HE DID NOT COMPLY WITH THE STATUTORY REQUIREMENT OF FILING AN APPLICATION FOR HEARING WITHIN SIX YEARS OF HIS ACCIDENT.

A. Section 35-1-99(3) Sets Forth In Clear And Unequivocal Terms What Is Required For Permanent Total Disability Claims.

Under the plain meaning of Utah Code Ann. § 35-1-99(3) (1988) the Petitioner was required to file an application for hearing within six years of the accident. Questions of statutory construction are resolved by first looking at the plain language of the statute. CIG Exploration, Inc. v. Utah State Tax Comm'n., 897 P.2d 1214, 1216 (Utah 1995). The assumption is made that statutory terms are used advisedly and thus should be read literally, unless such a reading is unreasonably confused or inoperable. K & T, Inc. V. Korolis, 888 P.2d 623, 627 (Utah 1994).

Section 35-1-99(3) states that " a claim for compensation for . . . permanent total disability benefits is wholly barred, unless an application for hearing is filed with the Industrial

³ The Affidavit of the Petitioner's attorney, Eugene C. Miller, states "[o]n November 3, 1994 the applicant came to my office because the Workers' Compensation Fund of Utah denied Mr. Vigos' request for additional medical benefits. Prior to that time I had not represented Mr. Vigos in his industrial claim." (R.99-100) It should also be noted that Mr. Miller was the attorney in the Bradley case. (R.82)

Commission within six years after the date of the accident.” Utah Code Ann. 35-1-99(3)(1988). The Petitioner argues that the term “accident” should include the date he could no longer work because an injured employee cannot apply for workers' compensation permanent total disability benefits until he has a SSA disability award. (Petitioner Brief, p.13-14.) This conclusion is based on the Petitioner's interpretation of the Utah Code Ann. § 35-1-67(1)(1988) which states that “[p]ermanent 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 Regulation as revised.” (R.13-18)

The Petitioner's interpretation of § 35-1-67(1) is inaccurate. The plain language of this section states that the Industrial Commission will follow the sequential decision-making process of the Social Security Administration (SSA) to make a finding of total disability. There is nothing confusing or misleading about the language in § 35-1-67(1). There is no requirement that an injured employee must be found disabled by the SSA before filing a workers' compensation claim for permanent total disability.⁴ The Industrial Commission is merely required to use the SSA disability decision making process.

⁴ Not all workers' compensation permanent total disability claimants qualify for SSA disability benefits. For example, an injured employee who is 65 or over would not be able to get social security disability benefits, only retirement benefits.

This conclusion is consistent with the administrative rules promulgated by the Industrial Commission regarding permanent total disability claims. Utah Administrative Rule R568-1-17B states that "[i]n the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf." This section recognizes that a claim for permanent total disability may be made without filing for SSA disability (the language "in the event"). It also recognizes that a SSA decision on disability is not required before filing (the language "or is in the process of making"). Finally, the Commission is not required to use the information from SSA but "may use this information in lieu of instituting the process on its own behalf." (Emphasis added.)

In addition, Subsection D. states that "[t]o make a tentative finding of permanent total disability the Commission incorporates the rules of disability determination in 20 CFR 404.1520 . . . the sequential decision making process referred to requires a series of questions and evaluations to be made in sequence" Utah Admin. R568-1-17D(1995). This indicates that the Industrial Commission is to use the same decision making process used by SSA. It does not state, nor does it imply that a SSA disability award is needed before an applicant can file for workers' compensation permanent total disability benefits.

In conclusion, both § 35-1-67(1) and R568-1-17 confirm that the statutory relationship between workers' compensation permanent total disability benefits and SSA disability benefits is limited to the requirement that the Industrial Commission use the SSA decision making process to determine disability. These provisions do not support the Petitioner's claim that the statute and the rules require a SSA disability award prior to filing an application for hearing for permanent total disability.⁵

B. The Statute Of Limitation Began To Run October 13, 1988, The Date Of The Petitioner's Industrial Accident. The Petitioner's Reasons For Tolling The Statute Of Limitations Are Without Merit.

Section 35-1-99(3) states that the application for hearing must be filed within six years of the date of the accident. The term "accident" is not defined in the statute. In Allen v. Industrial Comm'n., 729 P.2d 15, 22 (Utah 1986) "accident" was defined as "an unexpected or unintended occurrence that may either be the cause of or the result of an injury." The unexpected or unintended occurrence was the Petitioner's fall on a construction site on October 13, 1988. This fall caused the Petitioner's injuries. The Petitioner's cause of action for a permanent total disability claim accrued on October 13, 1988 as this is the date he was injured.

This determination is consistent with the decisions in Avis v. Board of Review of the Industrial Comm'n., 837 P.2d 584 (Utah

⁵ The argument that the Industrial Commission's procedure is to require a SSA disability award before filing is also without merit. See Point I.

App. 1992) and Middlestadt v. Industrial Comm'n., 852 P.2d 1012 (Utah App. 1993). In Avis, the employee's claim for permanent partial disability due to a back injury was denied per § 35-1-99. The court concluded that the employee's cause of action accrues when the accident occurred, stating:

The petitioner knew of his injury on July 4, 1968 [the date he injured his back due to a motorcycle accident]. He received medical treatment for his injury and was aware of recurring back pain over a period of several years. Therefore, 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. Petitioner seeks a rule which would postpone running of the statute until he "discovered" the full extent of his injury. The workers' compensation statute, however, does not require stabilization before filing for benefits.

Id. at 588. See also, Middlestadt v. Ind. Comm'n., 852 P.2d 1012 (Utah App. 1993) (adopting the Avis conclusion and rejecting the argument that the statute of limitation is tolled until the claimant discovers the full extent of his injury.)

Likewise, in the instant case the statute of limitation should not be tolled until the Petitioner was no longer able to work. The Petitioner's injuries were apparent on the date of accident. He received medical treatment and temporary total disability payments for this injury. The Petitioner apparently had continuing problems during the six year limitation period. He filed for SSA disability benefits on January 24, 1994, well within the six year statutory period. SSA found he was unable to work after January 1, 1993. Thus, the Petitioner knew of his injury and disability, and could have filed an application for

hearing for permanent total disability within the six year period.

The Petitioner argues that he was not aware of his right to file an application for hearing for permanent total disability benefits. In Avis, the court stated that "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitation." Id. at 587-88 (citation omitted).

The Petitioner also suggests that the Respondents neglected to inform him of his right to file a hearing until after the statute of limitation barred him from doing so. (Petitioner's Brief, p.30.) A review of the record indicates that the Petitioner never requested payment of disability benefits. The last medical expense payment made by the Respondents was in July of 1989. (R.39) The three year statute of limitation on the Petitioner's medical expenses ran in July of 1992.⁶ The Respondent's claim file shows no contact with the Petitioner between November, 1989 and October, 1994. (R.114) On October 25, 1994 the following computer log was made regarding a phone conversation with the Petitioner on that date:

Claimant called to state that he has been experiencing increasing problems in his low, mid and upper back and neck. He stated that it is related to his original industrial injury. He cannot remember when he had treatment last although he explained that he saw a chiropractor on Redwood Road who apparently didn't understand his problem and worsened his condition. He couldn't state when this occurred, but it seemed that it may have been some time ago.

⁶Utah Code Ann. § 35-1-99(2) (1988) (repealed 1990) imposed a three year limitation period for medical expenses. Three year statute of limitation is currently found in § 35-1-98(1).

He is currently employed in his own business called Wild West Enterprises, which, according to the claimant, finds work for other people. His pager is #535-3015 and his home number is #272-7770. He states that his worsening condition has made it impossible at times to work. I explained that we would retrieve his claim from archives and evaluate. He wants to go to his original chiropractor, Dr. Craig Buhler. I also explained the three year treatment rule.

(R.114)

The Respondents' records show that the Petitioner first contacted them regarding additional medical expenses 2 years after the statute of limitation for medical expenses had passed. The Petitioner said nothing about being unable to work. In fact, he said he was currently employed in his own business. The Respondent's November 3, 1994 letter notifying the Petitioner that he had a right to a hearing was regarding the medical expenses statute of limitation because that is what was discussed in the October 25, 1994 conversation. There was never any discussion regarding the statute of limitation for disability claims.

The Petitioner claims he contacted the Respondents at least 50 times, and spoke to the claims adjuster at least a dozen times starting about a year after his release. (R.111) The Petitioner was released for work on May 8, 1989. (R.207) Thus, the Petitioner maintains that since mid 1990 he tried to get the Respondents to pay additional medical treatment, yet the only record of these attempts is one computer log made on October 25,

1994 - two years after the statute of limitation for medical expenses had expired.⁷

The Petitioner is a highly educated business man. He has a Ph.D in higher education/management science and has taught at the University of Utah in the Management Department and at Westminster College. (R.222) He has been involved in high-intensity, high-stake business dealings in the past. (R.226) As recently as October 1994 he had his own business. (R.114) The Petitioner also retained counsel to represent him at his social security disability proceedings where evidence of his industrial injury was presented. (R.30,33) The Petitioner had ample opportunity to investigate his rights under workers' compensation laws and file an application for hearing for permanent total disability within the six year period.

The Petitioner cites the treatise Workmens' Compensation Law, by Arther Larson to support the tolling of the statute of limitations. However Larson was criticizing jurisdictions with short periods of limitation. The scenario described in § 78.42 (a) of 2B Larson, Workmens' Compensation Law referred to by Petitioner has no application in the instant case. In that case, the Applicant had been struck in the eye by a metal chip. The injury had been dismissed by the company doctors as a petty accident with no present injury or disability. Eighteen months

⁷ The claims adjuster recalled speaking to the Petitioner two to three times, although he did not recall whether it was before or after the October 25, 1994 conversation. (R.114)

later, a cataract developed and Applicant was denied a remedy because the statute in that jurisdiction barred claims filed more than one year after the accident. The harshness of a one year statute of limitations was obvious in that case because the worker could not claim compensation during the year because he had no compensable injury and he could not claim compensation after the year because the statute had run. That case is totally dissimilar to the instant case. The Petitioner sustained a compensable injury and was compensated for such. The Petitioner had six years from the date of his accident to claim permanent total disability, but failed to file an application for hearing even though he knew, or should have known long before the filing deadline expired, that he might have a claim for permanent total disability.

C. The 1988 Changes In The Statute Of Limitation Provisions Clarified The Procedures For Filing A Claim For Permanent Total Disability.

Prior to 1988, Utah Code Ann. §§ 35-1-99 and 35-1-100 addressed the statutes of limitations for workers' compensation claims. Claims for compensation were barred unless filed within three years after the date of accident or the date of last payment of compensation. Neither section provided a statute of limitation specifically for permanent total disability claims. In fact, in Mecham v. Industrial Commission, 692 P.2d 783, 785 (Utah 1984) the court determined that the applicant could file her petition for permanent total disability at any time so long as her disability arose from the original injury because she had

given notice during the three year limitation period found in section 35-1-99.

The statute of limitation prior to 1988 was also vague as to what a claimant must do to toll the statute of limitation. Section 35-1-99(1987) stated that "if no claim for compensation is filed with the industrial commission within three years . . . the right to compensation shall be barred." Section 35-1-100 indicated the claimant must "file with the commission in writing notice of such accident. . . ." In Utah State Insurance Fund v. Dutson, 646 P.2d 707 (Utah 1982), the Utah Supreme Court addresses the notice provisions of §§35-1-99 & 35-1-100. The Court acknowledged that a claim for compensation did not need to "bear any particular formality," finding that it "need only give notice to the parties and to the commission of the material facts on which the right asserted is to depend." Id. at 709 (citations omitted). However, contrary to the Petitioner's assertion, Dutson is not applicable to this case because it interprets statutory provisions not in effect at the time of the Petitioner's injury.

In 1988, section 35-1-99 was revised to clarify the statute of limitation for workers' compensation benefits. Subsection 35-1-99(3) was added which specifically addressed permanent total disability claims. This subsection barred permanent total disability claims "unless an application for a hearing is filed with the Industrial Commission within six years of the date of the accident." Utah Code Ann. § 35-1-99(3) (1988). Thus, the legislature, likely as a result of the above two cases, added a

statute of limitation for permanent total disability claims and unequivocally outlined what an injured employee must do to claim permanent total disability. The language in § 35-1-99(3) is not ambiguous, confusing or inoperable. The Industrial Commission must have notice that an injured employee wants a hearing for permanent total disability within six years of the employees' industrial accident.

In conclusion, the Petitioner's claim for permanent total disability is barred because he did not file an application for hearing within six years of the date of his industrial accident. Neither the statute or administrative rules require a SSA disability award before a permanent total disability claim can be filed. The Petitioner was aware of his injury and his inability to work during the six year period and could have filed an application for hearing during the six years.

POINT III.

THE SIX YEAR LIMITATION FOR FILING FOR WORKERS' COMPENSATION PERMANENT TOTAL DISABILITY BENEFITS IS NOT A STATUTE OF REPOSE VIOLATING THE OPEN COURTS PROVISION IN THE UTAH CONSTITUTION.

The six year limitation on permanent total disability claims applicable at the time of the Petitioner's industrial injury is a statute of limitation not a statute of repose. Utah Courts have distinguished statutes of limitations from statutes of repose. A statute of repose begins to run from a date or event independent and unrelated to the date of legal injury. Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252, 1258 (Utah App. 1996). A statute

of limitation does not begin to run until the cause of action has accrued. Id.

Statutes of repose violate the open courts provision of Article I, Section 11 of the Utah Constitution.⁸ Statutes of limitation do not. Statute of limitations promote justice by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Avis v. Bd. Of Review of Ind. Comm'n., 837 P.2d 584, 587 (Utah App. 1992). Statute of limitations are presumptively constitutional. Id.

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." Utah Code Ann. § 35-1-99(3) (1988). This statute is not a statute of repose. It does not begin to run from a date or event independent and unrelated to the date of legal injury. Rather, it runs from the date of the legal injury - the date of the industrial accident. The Petitioner's cause of action for

⁸ Art I. § 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."

workers' compensation benefits arose on the date of his industrial injury on October 13, 1988. There was no dispute as to whether the Petitioner was injured. The Petitioner's medical expenses were paid as were temporary total disability benefits.

On two occasions this court has decided that workers' compensation statutes of limitations are not statutes of repose just because an injured employee did not discover the full extent of his injuries within the limitation period. In Avis, a claimant filed for permanent partial disability benefits after the statute of limitation period in § 35-1-99 expired, arguing that he could not file his claim for disability benefits until he received a disability rating. The court rejected the claimant's argument that the statute of limitation should be tolled until the claimant "discovered" the full extent of his injury. Id. at 588. The court determined that section 35-1-99 did not violate the open courts provision of the Utah Constitution.⁹

Similarly, in Middlestadt v. Industrial Comm'n., 852 P.2d 1012 (Utah App. 1993) the claimant filed for additional disability benefits after the eight year limitation period for benefits found in Utah Code Ann. §§ 35-1-65 and 35-1-66 (1977). The court, following Avis, stated that "a workers' cause of action accrues when the industrial accident occurs. A statute

⁹ At the time section 35-1-99 imposed a three year statute of limitation on filing a claim. The court was asked to declare that version and the 1988 version (the version applicable to this case) unconstitutional. The court stated that "our ruling on the earlier statute's constitutionality renders this point moot." Avis, 837 P.2d at 586.

requiring filing within a set period following the accident is therefore a statute of limitation not a statute of repose." Id. at 1013 (citations omitted). The court determined that if the claimant knew that his condition was still unstable, he could have filed for an increase in his permanent partial award during the statutory time frame to allow for future loss of earnings. Id. at 1014. If the claimant did not anticipate future disability, then he was no better off than he would be in a civil suit where he would have been required, but unable to prove his future damages. Id.¹⁰

In the instant case, the Petitioner is also arguing that § 35-1-99(3) is a statute of repose, and that the statute should not begin to run until the Petitioner knew the full extent of his injury, i.e. that he was unable to work. Section 35-1-99(3) is a statute of limitation because the Petitioner's cause of action arose on the date of his industrial accident. Like the claimants in Avis and Middlestadt, the Petitioner should not be allowed to toll the statute of limitation because he had not "discovered" the full extent of his injury.¹¹ In fact, the Petitioner had

¹⁰ Regardless of the exclusive remedy provisions in workers' compensation law, the Petitioner would not have a remedy in a civil action because the applicable statute of limitation is four years per Utah Code Ann. 78-12-25 (1992 & Supp. 1996).

¹¹ The "discovery" rule is used for occupational diseases which recognizes that the onset of the occupational disease likely does not occur for a period of time after exposure thus the statute of limitations is tolled until the cause of action arises - when the employee knows of his/her occupational disease. This is in contrast to the Petitioner who, like the claimants in Avis and Middlestadt knew of his injury on the date of the

discovered the full extent of his injury during the six year statute of limitation found in § 35-1-99(3). He filed for Social Security disability benefits on January 25, 1994, within this six year period. The SSA determined he was disabled as of January 1, 1993 and awarded benefits back to that date. Clearly, the Petitioner was aware of his disability within the six year statute of limitation period. His failure to file an application for hearing within six years bars his claim for permanent total disability per Utah Code Ann. Section 35-1-99(3).

POINT IV.

THE INDUSTRIAL COMMISSION'S CONTINUING JURISDICTION OVER WORKERS' COMPENSATION CLAIMS DOES NOT GIVE IT AUTHORITY TO MODIFY OR IGNORE STATUTES OF LIMITATIONS.

Utah Code Ann. § 35-1-78(1) states that the "powers and jurisdiction of the commission over each case shall be continuing." However, Utah Code Ann. § 35-1-78(3) states

(a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law.

(b) The commission has no power to change the statutes of limitations referred to in Subsection (a) in any respect.

Utah Code Ann. § 35-1-78(3) (1988) (subsequently amended).¹²

The Petitioner argues that the Industrial Commission "totally disregarded" § 35-1-78(1) when it dismissed his claim.

industrial accident.

¹² This subsection is currently found in Utah Code Ann. § 35-1-78(4) (1994).

(Petitioner's Brief, p.27.) However, the Petitioner totally disregards § 35-1-78(3) which states that the Industrial Commission's continuing jurisdiction over claims does not modify statutes of limitations, and that the Industrial Commission has no power to change statutes of limitations.

POINT V.

THE DOCTRINE OF EQUITABLE TOLLING IS NOT APPLICABLE TO THE PETITIONER'S CLAIM FOR PERMANENT TOTAL DISABILITY.

The doctrine of equitable tolling of a statute of limitation is used when a plaintiff has multiple legal remedies available. Gudenau & Co., Inc. v. Sweeney Ins., 736 P.2d 763, 768 (Alaska 1987). Courts do not require a plaintiff to pursue two separate and duplicative remedies. Id. If the plaintiff adopts a single course of action which is dismissed or fails, "courts generally allow the plaintiff to pursue a second remedy *based on the same right or claim*, tolling the limitations period during the pendency of the initial defective action." Id. (emphasis added).

The Petitioner's right to social security disability benefits and workers' compensation disability benefits are not duplicative remedies based on the same right or claim. The rights to social security benefits and workers' compensation benefits are separate and distinct rights. Equitable tolling applies when there are different legal remedies for the same right or claim. Thus, the doctrine is not applicable to the Petitioner's case.


The Petitioner argues that the doctrine of equitable tolling should apply 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." (Petitioner's Brief, p.31) As indicated in Point I. this assertion is incorrect. The Industrial Commission does not require a SSA disability award before an application for hearing can be filed. Furthermore there is no evidence the Petitioner mistakenly believed this was the Industrial Commission's procedure. Thus, the Petitioner was in no way prejudiced and has no basis for asking this Court to equitably toll the statute of limitation on his workers' compensation permanent total disability claim.

CONCLUSION

Utah's workers' compensations laws and the Industrial Commission's rules do not require a social security disability award before a claim for permanent total disability can be filed. The Industrial Commission's procedures also do not impose this requirement. The Petitioner failed to file an application for hearing for permanent total disability within six years of his industrial accident, as required by the workers' compensation law in effect at the time. The Order of the Industrial Commission should be affirmed.

Respectfully submitted this 25 day of October, 1996.


RICHARD G. SUMSION,


TERESA J. MARECK

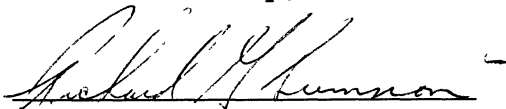
Attorneys for the Respondents,
Mountainland Builders, Inc.
and Workers Compensation Fund of
Utah

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of October, 1996
two true and correct copies of the Brief of
Defendants/Respondents were hand delivered or mailed by U. S.
Mail, postage prepaid addressed as follows:

Eugene C. Miller, Jr.
Attorney for the Petitioner
40 East South Temple, Suite 300
Salt Lake City, Utah 84111

Alan Hennebold
Attorney for the Industrial Commission
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111



ADDENDUM

ADDENDUM A

RECEIVED

INDUSTRIAL COMMISSION OF UTAH

Case No. 95599

SEP 20 1995

Workers Compensation Fund
Legal Department

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 defedants 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.

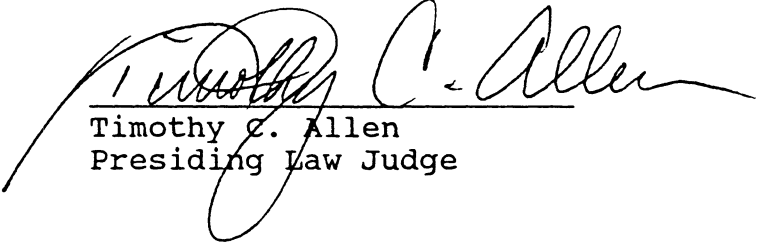
And it appearing that the foregoing constitutes good cause for dismissing the claim,

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

FILED
JUL 29 1996

THE INDUSTRIAL COMMISSION OF UTAH

J. DAVID VIGOS,	*	
	*	
Applicant,	*	ORDER DENYING
	*	MOTION FOR REVIEW
vs.	*	
	*	
MOUNTAIN BUILDERS, INC.	*	
and THE WORKERS COMPENSATION	*	
FUND OF UTAH,	*	Case No. 95-0597
	*	
Defendants.	*	

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
PAGE 2

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).

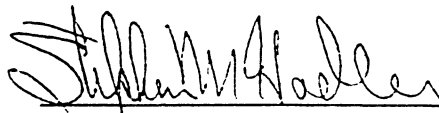
ORDER DENYING MOTION FOR REVIEW
J. DAVID VIGOS
PAGE 3

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.

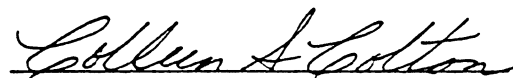




Stephen M. Hadley
Chairman



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
PAGE 4

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

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

ADDENDUM C

Utah State Constitution, 1986 Utah L. Rev. 319.

Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

Am. Jur. 2d. — 47 Am. Jur. 2d Jury § 7 et seq.

C.J.S. — 50 C.J.S. Juries § 9 et seq.

A.L.R. — Driving while intoxicated or similar offense, right to trial by jury in criminal prosecution for, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Automobiles: validity and construction of legislation authorizing revocation or suspen-

sion of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Jury trial rights in, and on appeal from, small claims court proceeding, 70 A.L.R.4th 1119.

Key Numbers. — Jury ⇐ 9 et seq.

Sec. 11. [Courts open — Redress of injuries.]

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.

History: Const. 1896.

NOTES TO DECISIONS

ANALYSIS

Action under Civil Rights Act of 1871.

Actions by court.

Actions by state.

Actions not created.

Arbitration Act.

Assignments.

Attorneys' duties.

Criminal law.

—Suspension of execution of death sentence.

Debt collection.

District court jurisdiction.

Election contest.

Forum non conveniens.

Injury or damage to property.

Intoxicating liquor.

Land Registration Act.

Limitations.

—Limitations of actions.

—Statutory limitation of review.

Occupational disease law.

Sovereign immunity.

Torts.

—Action by wife against husband.

—Loss of consortium.

Unlicensed law practice.

Waiver of rights.

Workmen's compensation law.

Cited.

Action under Civil Rights Act of 1871.

Jurisdiction over actions brought under the Civil Rights Act of 1871, 42 U.S.C. 1981 et seq., is vested originally in the federal courts, but the exercise of concurrent jurisdiction by state courts is not thereby prohibited; in view of the provisions of this section, therefore, it was error for trial court to dismiss for lack of jurisdiction otherwise proper action brought under 42 U.S.C. 1983. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

Trial court would not err in dismissing action brought under 42 U.S.C. 1983 on the ground of forum non conveniens in a proper case, but such dismissal should be without prejudice so that the plaintiff might move his suit to another forum without harm to his claim. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

Actions by court.

Court of equity has jurisdiction to open probate proceeding and to proceed against bond of administratrix where she has practiced extrinsic fraud on the court. *Weyant v. Utah Sav. & Trust Co.*, 54 Utah 181, 182 P. 189, 9 A.L.R. 1119 (1919).

Actions by state.

This section did not alter the law with respect to certain rights which are vested in the

35-1-67. Permanent total disability — Amount of payments.

(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), (e), and (f) (1) and (2), as revised.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be $66\frac{2}{3}\%$ of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

(c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, and 35-1-66, in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:

(a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the vocational rehabilitation agency under the State Board of Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68 (1), for use in the rehabilitation and training of the employee.

(b) If the vocational rehabilitation agency under the State Board of Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

(6) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members, constitutes total and permanent disability, to be compensated according to this section. No tentative finding of permanent total disability is required in any such instance.

History: C. 1953, 35-1-67, enacted by L. 1988, ch. 116, § 4.

Repeals and Reenactments. — Laws 1985, ch. 116, § 4 repeals former § 35-1-67, as last amended by Laws 1985, ch. 160, § 1, relating to permanent total disability, effective July 1, 1988, and enacts the present section.

Amendment Notes. — The 1985 amend-

ment substituted "\$120" for "\$110" in the first sentence of the second paragraph.

Effective Dates. — Section 2 of Laws 1985, ch. 160 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case of a veto, the date of veto override." Approved March 18, 1985.

NOTES TO DECISIONS

See 35-10-1 by W. J. Winkler Act
ANALYSIS

Arm injuries.
Commencement of benefits.
Determination of character of disability.
Estoppel.
Eye injuries.
Findings.
Law in effect.
Maximum benefits.
Multiple injuries.

Qualifications of panel members.

Statutory requirement that medical panel member specialize in "treatment of the disease" was met where practice consisted of representing businesses and teaching, even though physician did not actually treat patients on an appointment basis *Edwards Tillery*, 671 P 2d 195 (Utah 1983).

Referral to panel.**—Discretion.**

As the evidence of the causal connection between an employee lifting a very heavy beam and the perforation of his ulcer was not uncertain or highly technical, the failure to refer the case to a medical panel was not an abuse of discretion *Champion Home Bldrs v Industrial Comm'n*, 703 P 2d 306 (Utah 1985).

Report, statements and admissions.

In a proceeding for supplemental award of workmen's compensation for deterioration of condition caused by original injury where the commission had appointed a medical panel to make an independent investigation and report for the guidance of the commission, neither party was bound by any statement or admission made either in the report or in the testi-

mony of the chairman of the panel, a doctor, in support of the report *Mollerup Van Lines v Adams*, 16 Utah 2d 235, 398 P 2d 882 (1965).

In proceeding by widow of deceased oil driller to recover compensation for his death from coronary occlusion on ground that death was caused by inhalation of fumes while mixing mud compound designed to flush out clogged pipes during oil drilling operations, the industrial commission did not have to accept the most probable of three theories advanced as possibilities by the panel *Williams v Industrial Comm'n*, 17 Utah 2d 169, 406 P 2d 707 (1965).

Supplemental award.

Supplemental award of workmen's compensation for deterioration of condition caused by original injury was properly granted by the commission where evidence of the medical panel, appointed by the commission, showed that claimant's subsequent injuries had not advanced deterioration of condition resulting from original injury *Mollerup Van Lines v Adams*, 16 Utah 2d 235, 398 P 2d 882 (1965).

Cited in *Hone v J F Shea Co*, 728 P 2d 1008 (Utah 1986), *Greyhound Lines v Wallace*, 728 P 2d 1021 (Utah 1986).

COLLATERAL REFERENCES

C.J.S. — 100 C J S Workmen's Compensation § 590

A.L.R. — Workmen's compensation use of medical books or treatises as independent evidence, 17 A L R 3d 993

Key Numbers. — Workers' Compensation
 ☞ 1694

35-1-78. Continuing jurisdiction of commission to modify award — Authority to destroy records — Interest on award — No authority to change statutes of limitation.

(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 orders. 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.

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

(3) (a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law.

(b) The commission has no power to change the statutes of limitation referred to in Subsection (a) in any respect.

History: L. 1917, ch. 100, § 83; C.L. 1917, § 3144; R.S. 1933 & C. 1943, 42-1-72; L. 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1981, ch. 287, § 5; 1988, ch. 116, § 8.

Amendment Notes. — The 1988 amendment, effective July 1, 1988, designated the

previously undesignated two paragraphs as Subsections (1) and (2), added Subsection (3) and, in Subsection (1), divided the formerly undivided language into three sentences and rewrote the contents thereof

NOTES TO DECISIONS

ANALYSIS

Additional compensation
Application for rehearing
Award for permanent, partial or total disability
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Circumstances justifying reopening
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Continuing medical expenses
Discretion of commission
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Interest
Interest on past-due benefits
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Interest on settlements
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Medical expenses
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Purpose of section
Record keeping
Res adjudicata
Retention of jurisdiction
Retroactive effect of order
Review on appeal
Scope and extent of continuing jurisdiction
Supplemental award
Theory of grant of further hearings
Time of application

Additional compensation.

Where stump of amputated leg failed to heal and stump was not sufficient to permit use of artificial leg, commission, in exercise of continuing jurisdiction, could change award and grant employee additional compensation *Spring Canyon Coal Co v Industrial Comm'n*, 60 Utah 553, 210 P 611 (1922)

Where commission, more than thirty days after it had set aside previous award granting compensation, upon application of claimant as if no prior hearing were held, awarded compensation and set aside its previous award setting aside award granting compensation, commission proceeded without jurisdiction notwithstanding its continuing jurisdiction to modify award under this section, since it was not intended by this section that commission might resume jurisdiction of case once regularly de-

termined without some change or new development in injury not known to parties when previous award was made *Salt Lake City v Industrial Comm'n*, 61 Utah 514, 215 P 1047 (1923)

Under this section the commission may, in exercising its continuing jurisdiction, reopen case and award additional compensation for change of new development in injury or disability since award, but such additional compensation may be made effective only from date of discovery of changed condition and cannot be made retroactive to date of original award *Aetna Life Ins Co v Industrial Comm'n*, 69 Utah 102, 252 P 567 (1926)

Where original award contemplated change in condition of employee for better, which change did not occur after employee received compensation for number of weeks awarded,

Dutson, 646 P.2d 707 (Utah 1982).

Filing of insurance report.

Insurance carriers filing of final report of injury and statement of total losses following final payment made to injured worker is required by Industrial Commission and does not confer any jurisdiction of the settled matter upon the Industrial Commission; the injured workman's claim was barred by this section where he had not attempted to invoke the jurisdiction of the Industrial Commission for more than three years after the last payment was made and the commission was correct in refusing to grant a hearing on the matter. *Sterson v. Industrial Comm'n*, 29 Utah 2d 446, 51 P.2d 721 (1973).

Notice.

Where foreman saw accident, this section was inapplicable. *Hartford Accident & Indem. Co. v. Industrial Comm'n*, 64 Utah 176, 228 P. 513 (1924).

Where applicant lost his eye as a result of trauma, being hit in the eye by a handball while playing at the fire station and while on duty, and lieutenant, who was in charge of the fire station at the time the injury occurred, was playing handball with applicant at time hand-

ball struck him in the eye, this was equivalent of notice of accident and injury to city. *Salt Lake City v. Industrial Comm'n*, 104 Utah 436, 140 P.2d 644 (1943).

Report of accident.

The report made under the authority of this section may establish identity of employer at time of injury. *Burke v. Industrial Comm'n*, 75 Utah 441, 286 P. 623 (1930) (decided under former § 35-1-97).

These reports and supplemental reports are made on printed blanks which are furnished to employers. *Utah Delaware Mining Co. v. Industrial Comm'n*, 76 Utah 187, 289 P. 94 (1930) (decided under former § 35-1-97).

Report of employer to Industrial Commission stating that employee was injured on particular day was insufficient to establish time and manner of accident, where shown by subsequent investigation to have given erroneous date. *General Mills, Inc. v. Industrial Comm'n*, 99 Utah 293, 105 P.2d 340 (1940) (decided under former § 35-1-97).

Self-employed worker is not affected by requirement that employee must notify employer of accident and injury within one year, since requirement is automatically fulfilled. *State Ins. Fund v. Perkes*, 672 P.2d 101 (Utah 1983).

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 454.

5-1-98. Claims and benefits.

(1) Except with respect to prosthetic devices, in nonpermanent total disability cases an employee's medical benefit entitlement ceases if the employee does not incur medical expenses reasonably related to the industrial accident, and submit those expenses to his employer or insurance carrier for payment, for a period of three consecutive years.

(2) 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.

(3) A claim for death benefits is barred unless an application for hearing is filed within one year of the date of death of the employee.

History: C. 1953, 35-1-98, enacted by L. 1990, ch. 69, § 6.

Repeals and Reenactments. — Laws 1990, ch. 69, § 6 repeals former § 35-1-98, as

last amended by Laws 1967, ch. 66, § 2, relating to control of physicians, and enacts the present section, effective April 23, 1990.

Form of report.

The attending physician makes his report on a printed blank furnished for that purpose in

which he describes the injury. *Utah Delaware Mining Co. v. Industrial Comm'n*, 76 Utah 187, 289 P. 94 (1930).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. *Workmen's Compensation* § 266.

Key Numbers. — *Workers' Compensation* ⇐ 979.

35-1-99. Notice of injury and claim for compensation — Limitations of action.

(1) If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission of the time and place where the accident and injury occurred, and of the nature of the accident and injury, the employee's claim for benefits under this chapter is wholly barred. If, for any reason, an employee is himself unable to provide this written notice, the employee's next-of-kin or attorney may file it within the required 180-day period. Receipt of written notice is presumed if the employer complies with the terms of Section 35-1-97 by filing with the commission an accident report, or if the employer or its insurance carrier pays disability or medical benefits to or on behalf of the injured employee.

(2) In nonpermanent total disability cases, an employee's medical benefit entitlement, except with respect to prosthetic devices, ceases if the employee does not incur, and submit to his employer or insurance carrier for payment, for a period of three consecutive years, medical expenses reasonably related to the industrial accident.

(3) 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.

(4) A claim for death benefits is wholly barred, unless an application for hearing is filed within one year of the date of death of the employee.

History: C.L. 1917, § 3156x, added by L. 1921, ch. 67, 1; R.S. 1933, 42-1-92; L. 1939, ch. 51, § 1; C. 1943, 42-1-92; L. 1981, ch. 287, § 6; 1986, ch. 211, § 11; 1988, ch. 116, § 9.

Amendment Notes. — The 1986 amendment, effective July 1, 1986, in the first sentence, substituted "accident and injury" for "same", substituted "in the notice subjects" for "therein shall subject" and made minor word changes; made stylistic changes in the second sentence; divided the former third sentence into three sentences and made stylistic changes therein; and, in the fourth sentence, deleted "industrial commission and" before "employee" and made minor word changes.

The 1988 amendment, effective July 1, 1988, designated the previously undesignated language as Subsection (1), added Subsections (2) through (4) and, in Subsection (1), substituted

the present second and third sentences for the former last four sentences, relating to the same subject matter, and, in the first sentence, deleted the proviso clause at the end, relating to knowledge being equivalent to notice and to defect or inaccuracies in the notice, and, in the remaining language, substituted "If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission" for "When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer" and "the employee's claim for benefits under this chapter is wholly barred" for "within 48 hours, when possible, or fails to report for medical treatment within that time, the compensation provided for herein shall be reduced 15%."

F. The Commission shall suggest a format for use by parties desirous of settling claims of doubtful compensability.

R568-1-17. Permanent Total Disability.

A. The Commission is required under Section 35-1-67, U.C.A., to make a finding 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, amended April 1, 1993. The use of the term "substance of the sequential decision-making process" is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability. The Commission does not interpret the code section to eliminate the requirement that a finding by the Commission in permanent and total disability shall in all cases be tentative and not final until rehabilitation training and/or evaluation has been accomplished.

B. In the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf.

C. In evaluating industrial claims in which the injured worker has qualified for Social Security disability benefits, the Commission will determine if a significant cause of the disability is the claimant's industrial accident or some other unrelated cause or causes.

D. To make a tentative finding of permanent total disability the Commission incorporates the rules of disability determination in 20 CFR 404.1520, amended April 1, 1993. The sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. In short, these are:

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

E. After a tentative finding of permanent total disability, the applicant shall be referred to the Utah State Office of Rehabilitation for evaluation and rehabilitation work-up. If the Utah State Office of Rehabilitation determines that the applicant is unable to do any other work because of his age, education, and previous work experience, and as a result of an industrial accident, there shall be a hearing to review the determination of the Utah State Office of Rehabilitation and any objections thereto, unless the parties waive the right to a hearing.

F. After a hearing, or waiver of the hearing by the parties, the Commission shall issue an order finding or denying permanent total disability based upon the preponderance of the evidence and with due consideration of the vocational factors in combination with the residual functional capacity which the commission incorporates as published in 20 CFR 404 Subpart P Appendix 2, amended April 1, 1993.