

1996

Warren Hoskings v. Industrial Commission of Utah, Salt Lake City Corporation : Brief in Opposition to Certiorari

Utah Court of Appeals

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BRIEF

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IN THE SUPREME COURT OF UTAH

WARREN HOSKINGS,)	WARREN HOSKINGS' REPLY
)	BRIEF IN OPPOSITION TO
Applicant/Petitioner,)	SALT LAKE CITY'S
)	PETITION FOR WRIT OF
vs.)	CERTIORARI
)	
INDUSTRIAL COMMISSION OF)	Supreme Court
UTAH and SALT LAKE CITY)	Case Number: 960311
CORPORATION,)	
)	Priority 7
Defendant/ Respondent.)	

PETITION FOR REVIEW OF AN ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH

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FILED

AUG 23 1996

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UTAH

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(R. 148-170)

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QUESTIONS PRESENTED FOR REVIEW

Though Salt Lake City has listed five questions with multiple subquestions, respondent Hoskings asserts that there are no questions this Court should consider. The Court of Appeals decision raises only the following issues for which the standards for resolution as followed by the Court of Appeals were established by this Court in its earlier decisions on point.

1. Did Warren Hoskings present a *prima facie* case of "odd lot" "permanent total disability" as a result of his industrial ankle injury and other employability factors as required by the Workers Compensation Act of Utah (§35-1-67 U.C.A., 1987 Cum. Supp., Repl. Vol. 4(B) 1974 Ed.) as interpreted in multiple Utah Appellate Court decisions; and if so,

2. Did Salt Lake City present competent substantive evidence as opposed to uncorroborated hearsay of "...regular, dependable work available for [Mr. Hoskings] without the expectation that he will rely on the sympathy of friends or his own 'superhuman efforts' "? Hardman v. Salt Lake City Fleet Management and Second Injury Fund, 725 P.2d 1323 (Utah 1986) at 1326-1327.

REFERENCE TO THE OPINION ISSUED BY THE COURT OF APPEALS

The Court of Appeals decision is found at Hoskings v. Industrial Commission, 291 Adv. Rep. 17 (Utah App. 1996), ___ P.2d ___ (Utah App. 1996). It is attached hereto in its entirety as Appendix 1.

**STATEMENT OF GROUNDS ON WHICH THE JURISDICTION
OF THE SUPREME COURT IS INVOKED**

The Court of Appeals entered its decision in this matter on May 31, 1996. There was no petition for rehearing filed. No petition for rehearing was filed by Warren Hoskings.

Respondent agrees that the Supreme Court has discretionary jurisdiction to grant or deny petitions for writs of *certiorari* pursuant to §78-2-2(5) U.C.A. and Rules 45 and 46 Utah Rules of Appellate Procedure.

Respondent disagrees with Salt Lake City that the Court of Appeals has incorrectly decided important issues of law which have not been settled by this Court involving "retirement benefits to municipal employees" or that the opinion of the Court of Appeals is in any way in conflict with decisions issued by this Court.

CONTROLLING PROVISIONS OF STATUTES AND RULES

1. Permanent total disability--Amount of payments-- Vocational rehabilitation--Procedure and Payments, §35-1-67 U.C.A., Replacement Volume 4B 1974 Edition, 1987 Cumulative Supplement. (See Appendix 2 hereto.)

STATEMENT OF THE CASE

1. Nature of the Case .

This matter was before the Court of Appeals by means of Warren Hoskings' Petition for Review of an Industrial Commission Order Granting Salt Lake City's Motion For Review (R. 211-215 and Appendix 3 hereto) of an administrative law judge's Findings of Fact, Conclusions of Law and Order (R. 148-170 and Appendix 4

hereto) granting permanent total disability benefits. (R. 317)
Mr. Hoskings had been a fire fighter for Salt Lake City
Corporation until his retirement September 1, 1988. (R. 318)

2. Course of Proceedings at Industrial Commission.

A. Warren Hoskings filed an Application for Hearing
April 16, 1990, in which he claimed that Salt Lake City
Corporation had refused to pay among other things:

1. Medical expenses;
2. Temporary total disability benefits;
3. Permanent partial disability benefits;
4. Permanent total disability benefits.

(R. 1)

B. An evidentiary hearing was conducted on January 8,
1992. (R. 278-372) The administrative law judge referred the
matter to a medical panel in March of 1992. (R. 65-72) The
medical panel report was received by the Industrial Commission on
May 13, 1992. (R. 73-81) Neither party objected to the panel
report. The medical panel found that Mr. Hoskings left ankle
injury was caused by the industrial accident, had been getting
progressively worse and resulted in a whole man impairment of 11%
with an additional 4% whole man impairment resulting from prior
industrial injuries. (R. 80-81)

C. On August 3, 1992, the Administrative Law Judge
found Mr. Hoskings tentatively in the "odd-lot" category and
pursuant to §35-1-67 U.C.A. 1985, referred him to the State
Division of Rehabilitation Services (hereinafter "DRS") for

rehabilitation training. (R. 91) DRS found that applicant Hoskings had cooperated fully and was incapable of being rehabilitated because of his physical limitations and other employability factors. (R. 103-104)

3. Disposition at Industrial Commission.

A. On June 30, 1994, the Administrative Law Judge entered her Findings of Fact, Conclusions of Law and Order (R. 148-170 Appendix 4 hereto) in which permanent total disability benefits were awarded.

B. On July 26, 1994, Salt Lake City Corporation filed a Motion For Review of the administrative law judge's order. (R. 173-174 with Memo in Support R. 175-190) Mr. Hoskings responded by a Reply to Salt Lake City's Motion For Review dated August 10, 1994. (R. 191-206) The Commission overruled the administrative law judge, asserting that Mr. Hoskings is not an "odd-lot" employee and secondly that even if he is there is other work Mr. Hoskings can do. (R. 248-253, Appendix 3 hereto)

4. Disposition by the Court of Appeals

The Court of Appeals entered its opinion on May 31, 1996¹, in which it reversed the Industrial Commission and reinstated the administrative law judge's finding of permanent total disability holding:

A. Warren Hoskings met his *prima facie* burden. He is an "odd-lot" worker by uncontroverted evidence that: (1) he can

¹. Hoskings v. Industrial Commission, 291 Adv. Rep. 17 (Utah App. 1996), ___ P.2d ___ (Utah App. 1996), Appendix 1 hereto.

no longer perform his prior duties as a fire fighter for the Salt Lake City Fire Department as a result of his industrial ankle injury and (2) he fully cooperating with the Division of Rehabilitation Services (DRS) which found he cannot reasonably be rehabilitated. Therefore, the burden shifted to Salt Lake City to prove the reasonable availability to Mr. Hoskings of regular, steady work in a well known branch of the labor market factoring in his age, physical condition, education, work experience and other "employability" factors. *id.* at 18-21.

B. Salt Lake City failed to meet its burden. It presented only a hearsay report by a rehabilitation counselor from a company known as Intracorp. who did not testify at the hearing. Salt Lake City did not present a "residuum" of competent substantive evidence to satisfy its burden. *id.* at 18-21.

C. Even if the substance of the Intracorp. report is considered, it fails to define "job availability" in the context of the disabilities suffered by Mr. Hoskings. Allegations of general job availability to the public at large is not sufficient. *id.* at 18-21.²

². In addition to the rulings A. B. and C., in dicta, the Court of Appeals also concluded that "...[O]nce the DRS certified to the Commission in writing that Hoskings could not be rehabilitated [based on Utah Code Ann. §35-1-67 (1974) (repealed 1988 Utah Laws, ch. 116, §4)], all inquiry into the issue of rehabilitation--a question delegated by the Legislature not to the Commission, but to DRS--should have ended. As we read the statute, the Commission was unable to revisit the issue of rehabilitation or to consider other evidence, such as the Intracorp. report presented by Salt Lake City Corporation." 291 Utah Adv. Rep. 17 at 20.

STATEMENT OF FACTS

I. Background.

Warren Hoskings was born December 6, 1935. He is currently sixty years old. (R. 295) He graduated from Granite High School in Salt Lake City. He attended Trade Tech from 1958 to 1960. He received an associates' degree in electronics. He worked as a test technician for Sperry from about 1960 to 1965. He has had no other jobs in the area of electronics since 1965. He worked as a fire fighter for Salt Lake City from January 3, 1966, to September 1, 1988. (R. 296-299) Throughout his career he was called upon to do all of the physically demanding duties of a fire fighter even as he progressed through the ranks to finally become a Captain. (R. 298-301)

II. Accident of April 6, 1986.

Mr. Hoskings first injured his left leg and ankle in an industrial accident on May 6, 1980. He was involved in fighting a fire and fell through a hole in the floor. He felt a sharp pain in his left leg, burned his hands and hurt his back. He was off work from May 6, 1980 to September of 1980. (R. 303-306; See also Dr. Thomas Noonan office chart and reports at R. 411-434.)

On April 6 1986, Mr. Hoskings reinjured his left leg and ankle when he jumped from one of the crash trucks and landed on a "loaded" hose (one that is full of water). He severely twisted his ankle. (R. 308-311)

Mr. Hoskings did not miss work immediately after the injury. He continued to work from then until his retirement September 1,

1988. The injury plagued him with limitations. The pain continued unabated. The pain was severe enough that he could not sleep at night. He testified that the intensity of the pain varied depending on how much activity he did. It especially hurt when he worked on concrete floors. The symptoms through that period and to the time of the hearing in this matter continually got worse. Mr. Hoskings testified every step he takes has pain associated with it. The distance he can walk is limited though most days he can walk a block or two before the pain becomes too great. Each of the doctors warned him that he would have trouble if he continued fire fighting. He felt he was creating a safety hazard for his fellow fire fighters because of the limitations the ankle was placing on his activities. (R. 67-68; 317-318; 323-324)

III. Medical Treatment

Immediately after the accident, Mr. Hoskings' battalion chief sent him to the Industrial Clinic where he was examined and treated by a number of doctors. (R. 311) Eventually, the applicant went to see Dr. R. Kunz, a podiatrist from June of 1986 through April, 1987. (R. 407-410)

When Mr. Hoskings symptoms did not improve over time, he was examined or treated by the following physicians:

1. At Salt Lake City's request, orthopedic surgeon Dr. Thomas Noonan, June, 1987 (R.427-429);
2. By referral from Dr. Kunz, podiatrist Dr. J. Page, who recommended surgery in August, 1987 (R. 465-466)

3. At Salt Lake City's request, orthopedic surgeon Dr. G. L. Rasmussen, February, 1988 through August 23, 1991 (R. 438-443);³ Dr. Rasmussen acknowledged that surgery was an option to consider to resolve the pain. (R. 442)

4. At Salt Lake City's request⁴, orthopedic surgeon Dr. Robert P. Hansen, July 20, 1989 (R. 397-399);

5. Orthopedic surgeon Dr. Brent M. Pratley, January, 1990 (R. 435-436);

6. At Salt Lake City's request, physiatrist Dr. Scott Knorpp, December, 1993 (R. 226-231)

Not one of the physicians ever opined that Warren Hoskings could return to his former duties as a fire fighter.

The Administrative Law Judge referred the medical issues to a Medical Panel comprised of Drs. Boyd Holbrook and Gerald Moress. The report was admitted into evidence without objection by either party. The Panel found that Mr. Hoskings suffered significant physical limitations resulting from his work related injuries. (R. 76-81)

³. Recalling Mr. Hoskings retirement September 1, 1988, of particular note in Dr. Rasmussen's records are the continuing pain complaints in nine visits from February 22, 1988, through September 12, 1988. (R. 438-439)

⁴. Note that this is within one year of the early retirement. Dr. Hansen's chart reflects that Mr. Hoskings persisted with left knee and foot problems despite his inactivity after the retirement. He recorded that any motion of the foot caused pain and that Mr. Hoskings especially had problems with uneven ground and stairways. He ruled out a return to fire fighting activity. (R. 397)

IV. Early Retirement September 1, 1988.

Mr. Hoskings retired from Salt Lake City effective September 1, 1988. He testified that Salt Lake City was offering early retirement incentives to employees during 1988. Mr. Hoskings qualified for the incentive package because of his long years of service. As shown by the uncontroverted medical evidence, he was having significant and unrelenting problems with his injured ankle. He testified his doctors recommended he should not continue as a fire fighter. He felt he was a safety hazard for his fellow fire fighters. He wanted to continue in the job he loved, but could not. (R. 318-319; 350-351; 356-357)

V. Employment Since Early Retirement.

Mr. Hoskings was able to find a "special" seasonal job opportunity that was adaptable to his limitations during the spring to summer months of 1990 and 1991. From April 22, 1990 through September 23, 1990, he was hired by Hamilton Stores, a concessionaire in Yellowstone National Park, as a fire marshal. His job was to teach fire safety procedures to personnel in stores run by Hamilton within the boundaries of the park. It was a job position required by the Park Service of its concessionaires though the duties were light and very limited. The job paid \$850.00 per month for the five month period.

In 1991, Mr. Hoskings planned to do the seasonal job again. The pay was increased to \$875.00 per month. However, the position was changed to be year-round. Mr. Hoskings could not accept a full time position for two main reasons: (1) he did not

want to abandon his Utah homes; and (2) the very cold winter environment would be too hard on his left ankle. He worked that summer for two months from April to June training his replacement. (R. 324-328; 341-343; 351-353; 360)

VI. Comparison of Vocational Rehabilitation Evaluations.

A. Division of Rehabilitation Services.

As required by the Workers Compensation Act, the administrative law judge referred Mr. Hoskings to the Division of Rehabilitation Services on August 3, 1992. (R. 91) The case was assigned to Certified Rehabilitation Counselor Frank Miera. (R. 472). Mr. Miera is a highly qualified 16 year rehabilitation counseling veteran. (R. 473) He leads a team of highly trained and experienced professionals in evaluating the feasibility and potential of individuals with various handicaps for retraining and placement in viable jobs in the real world. (R. 474, 490)

Counselor Miera performed an intake evaluation which included a review of the complete Industrial Commission file and a thorough interview with Mr. Hoskings. He referred Mr. Hoskings for a five day evaluation from November 2, 1992, to November 6, 1992. The evaluation included testing from 9:00 a.m. to 3:00 p.m. on consecutive days with two fifteen minute breaks and one half to one hour for lunch. (R. 474-476, 490) The evaluator in this instance was Pam VanCura. (R. 480)

Ms. VanCura concluded as follows after the five days of the evaluation:

Evaluation results indicated that **he would experience a high degree of pain and fatigue**

if employed on even a part-time basis of approximately 20 hours per week.

(R. 495) (Emphasis Added) (See also R. 492-494)

After more than one year of telephonic contacts with Mr. Hoskings, Mr. Miera reported to the administrative law judge on October 15, 1993:

Due to this individual's work evaluation, his documented self-reported health problems, it has been determined that he is unable at this time to be involved in any type of rehabilitation program geared toward full-time or part-time employment.

(R. 103-104)

At his deposition, Mr. Miera testified affirming the recommendations and opinions of Ms. VanCura. He further testified that in light of the physical restrictions caused by the industrial accident, coupled with the other employability factors, Mr. Hoskings is not a viable candidate for job placement in the real world competitive job market. (R. 495-499)

B. Intracorp.

After Mr. Miera's report to the administrative law judge, Salt Lake City responded by having Mr. Hoskings evaluated by Jim R. Floyd, M.A., C.R.C., by title a "Rehabilitation Specialist" with a company named "Intracorp". Mr. Floyd prepared a written report dated December 24, 1993. (R. 232-238).

An analysis of the report provides the following limitations among others in its use as evidence in this case:

1. No evidence of Mr. Floyd's credentials as an expert were presented. His opinions are therefore without foundation

and incompetent.

2. There is no indication that Mr. Floyd conducted any testing of Mr. Hoskings. Only an intake interview was conducted on December 22, 1993. He spent other parts of the day reviewing whatever record⁵ Salt Lake City chose to give him and setting up a computerized search of transferrable skills. (R. 233-234)

3. Mr. Floyd did not review the extensive testing and analysis done by the Division of Rehabilitative Services as testified to by Mr. Miera though he asked Salt Lake City to provide that information to him. (R. 234). He had no means of evaluating Mr. Hoskings endurance, pain threshold etc. in performing the physical and mental requirements for any job.

4. Nowhere in his report does Mr. Floyd opine that Mr. Hoskings is capable of returning to his former job as a fire fighter.

5. Mr. Floyd did not have the opportunity to discover and evaluate Mr. Hoskings' propensity to not complain about his significant physical discomfort as did Ms. VanCura. He had no opportunity to understand Mr. Hoskings' symptoms as they relate to reasonable job placement.

6. He made no direct contact with potential employers to see if there truly is a job available for a man with Mr. Hoskings' limitations.

⁵. Neither Salt Lake City nor Mr. Floyd ever identified what records he reviewed for his analysis. Since he was never presented as a witness, there was no opportunity for cross examination to find out what he reviewed.

7. Though Floyd mentions "job availability" as a screening factor, he fails to define the term. (R. 236-237)

8. There is no precise job description provided for any job Floyd asserts is available. There is no discussion of the actual physical activity etc. required in a real job as opposed to the general job classification.

As an example of the substantive failings of the report, Mr. Floyd suggests at page 6 there may be jobs available to Mr. Hoskings as a Fire Marshal. However, he makes only a surmise and did no investigation as to whether such specialty jobs are anywhere availability. Mr. Floyd does concede that the "medium" strength requirements of "some [such] employment settings" is a "caution" in placing Mr. Hoskings in such a job. (R. 237-238)

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARDS OF THE WORKERS' COMPENSATION ACT OF UTAH REGARDING WARREN HOSKINGS' ENTITLEMENT TO PERMANENT TOTAL DISABILITY COMPENSATION BASED ON WELL ESTABLISHED UTAH APPELLATE CASE AUTHORITY. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THE ISSUANCE OF THE WRIT AS PETITIONED BY SALT LAKE CITY.

POINT 1

BY UNCONTROVERTED EVIDENCE, WARREN HOSKINGS CAN NO LONGER PERFORM THE DUTIES OF HIS LIFE LONG PROFESSION AS A FIRE FIGHTER AND HAS BEEN FOUND UNABLE TO BE REHABILITATED INTO ANY REGULAR, STEADY EMPLOYMENT IN THE COMPETITIVE LABOR MARKET BY THE DEPARTMENT OF REHABILITATIVE SERVICES AND IS THEREFORE AN "ODD-LOT" WORKER.

Warren Hoskings is permanently and totally disabled as a result in whole or in part from an ankle injury he suffered on

April 6, 1986, while employed as a fire fighter by Salt Lake City Corporation. His physical impairment, symptoms of pain which limit function, age, work experience, potential for rehabilitation to meaningful work etc. make him an "odd-lot" person:

Some employees, however, cannot be rehabilitated and although not in a state of abject helplessness, 'can no longer perform the duties . . . required in [their] occupation[s].' (citation omitted). These employees fall into the so-called 'odd-lot' category.

Marshall v. Industrial Commission of Utah, 681 P.2d 208 (Utah 1984) at 212 (Emphasis added)

There is no evidence and no contention made by Salt Lake City or the Industrial Commission that Mr. Hoskings can perform the duties of a fire fighter.

The Commission through its administrative law judge as required by §35-1-67 U.C.A. referred the case to the Division of Rehabilitative Services. The Division reported to the administrative law judge that Mr. Hoskings had fully cooperated and that due to his impairments and other employability factors, he was not a candidate for rehabilitation. At that stage, the burden shifted to Salt Lake City to demonstrate that regular full time employment is available to Mr. Hoskings notwithstanding his limitations.

The presence of substantial pain may logically cause an injured worker to fall into this odd-lot category, inasmuch as it directly affects the probable dependability with which the injured worker can sell his services in a competitive labor market,

undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary luck, or the super human efforts of the claimant to rise above his crippling handicaps. (citations omitted) . . .
.
Only where the employee returns to work under normal conditions will the presumption of no loss of earning capacity stay unassailed. (citation omitted). . .

Norton v. Industrial Commission, 728 P.2d 1025 (Utah 1986) at 1028 (Emphasis added)

In response to the Division's assessment, Salt Lake City retained the services of Intracorp. As pointed out in the Statement of Facts and by the Court of Appeals, the foundation is totally lacking for the employability opinions expressed in the report. Salt Lake City did no more through the Intracorp. report than to allege that there are some limited occupations available without providing any substance to the allegation.

It is not enough in such a case to allege that work is available; it must be shown that there is regular, dependable work available for the plaintiff, without the expectation that he will rely on the sympathy of friends or his own 'superhuman efforts'. (citation omitted)

Hardman v. Salt Lake City Fleet Management and Second Injury Fund, 725 P.2d 1323 (Utah 1986) at 1327 (Emphasis added)

POINT 2

THE COURT OF APPEALS CORRECTLY FOUND WARREN HOSKINGS' EARLY RETIREMENT IS NOT A FACTOR IN THE DETERMINATION OF WHETHER OR NOT HE IS ENTITLED TO PERMANENT TOTAL DISABILITY.

The Court of appeals recognized a principle that the Industrial Commission and Salt Lake City refuse to recognize:

...to facilitate the purposes of the

legislation, the Workers Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant (citations omitted).

USX Corporation vs. Industrial Commission of Utah, 781 P.2d 883 (Utah App. 1989) at 886.

Salt Lake City argues that Warren Hoskings "...voluntarily removed himself from City employment and the job market..." and "[i]t is unconscionable to use the workers' compensation laws to force the public treasury to pay, as an afterthought, \$85,800.00 for an ankle injury, years after the employee has retired..." The City also claims it should at least receive a credit against the workers' compensation benefits for the amount Mr. Hoskings receives in retirement benefits. Those arguments are absurd and contrary to the uncontroverted evidence in this case. Workers' compensation law does not support such arguments.

The City cites the case of Peck vs. Eimco, 748 P.2d 572 (Utah 1987) in support of its claim⁶. A fair reading of Peck leads to but one conclusion, the Court of Appeals was correct in its determination herein. The Peck facts are remarkably similar to the case at bar regarding continuing to work after an injury and then taking a retirement earned by many faithful years of service to the employer:

In **Norton**⁷, we held that the fact that the claimant returned to work and continued to work for six years following his

⁶. The case in its entirety is attached as Appendix 5 for the convenience of the Court.

⁷. Norton v. Industrial Comm'n, 728 P.2d 1025 (Utah 1986) at 1028.

industrial accident "did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate[d] that throughout the remainder of his employment he was not restored to health." **Id.** (Citations omitted.)...

...Eimco next contends...that Peck "just plain retired"... (footnote omitted) In **Marshall**⁸, however, we held that the determination whether to award permanent total disability benefits must focus on the decline in claimant's wage-earning capacity and not on the claimant's eligibility to retire. 681 P.2d at 213. The mere fact that an employee has retired will not adversely affect a determination of permanent total disability when the employee has demonstrated that his disability from the industrial injury significantly influenced [that decision]. (Citations omitted.)

748 P.2d at 577-578

The un rebutted evidence is contrary to Salt Lake City's assertions that Mr. Hoskings' injury was not a significant influence on his retirement and his inability to be a fire fighter. The City had direct knowledge of the continuing severe problems he was having with his ankle injury. It sent him to doctor after doctor in an attempt to resolve the worsening problems. The doctors the City sent him to unanimously reported at various times that he could not perform fire fighting duties. It is contrary to reason for the City to deny that knowledge.

The Court of Appeals was left with but one conclusion--the same conclusion this Court reached in Peck:⁹

⁸. Marshall v. Industrial Comm'n, 681 P.2d 208 (Utah 1984)

⁹. The Peck Court was citing approvingly from Marshall, *supra*.

He presented uncontroverted evidence of his impairment, his inability to perform the work required by his job and the opinion of the division of vocational rehabilitation that he could not be rehabilitated. He also testified that prior to his injury he had fully intended to work rather than to retire.

681 P.2d at 213

...Eimco relied only on the facts that Peck returned to work following his injury and then retired ten months later. Thus, Eimco failed to show any reasonable wage-earning capacity which rebutted Peck's prima facie entitlement to permanent total disability benefits.

748 P.2d at 578-579.

POINT 3

THE COURT OF APPEALS CORRECTLY FOUND THAT THERE WAS NOT A RESIDUUM OF COMPETENT EVIDENCE TO SUPPORT THE CONCLUSIONS OF THE INTRACORP. REPORT REGARDING REHABILITATION AND JOB AVAILABILITY IN THE REAL WORLD COMPETITIVE LABOR MARKET. (291 Utah Adv. Rep. at 18-19)

The Court of Appeals statement of the "residuum rule" comports with this Court's and the Court of Appeals' prior opinions that a finding cannot be based on hearsay or other incompetent evidence alone. See for example Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 P. 57 (1918); Industrial Power Contractors v. Industrial Commission of Utah, 832 P.2d 477 (Utah App. 1992).

Salt Lake City argues it has satisfied the residuum requirement because:

1. Hoskings did not miss work until his retirement;
2. Hoskings elected to take advantage of an early

retirement incentive program;

3. Hoskings worked a unique specialty light duty job as a seasonal fire marshal in Yellowstone Park for two seasons; (See Salt Lake City's Brief at pages 11-14.)

As argued elsewhere, none of those factors is sufficient to take Mr. Hoskings from the "odd-lot" category. Further, none of those factors supports the conclusory unsubstantiated opinions regarding real world job availability expressed in the Intracorp. report.

We have but to look at Salt Lake City's cornerstone case to find the fallacy of its arguments. The Peck Court placed emphasis on the primary treatise on workmen's compensation law:

Professor Larson states:

"Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn **occasional wages or perform certain kinds of gainful work** does not necessarily rule out a finding of total disability nor require that it be reduced to partial.

...The essence of the test is the **probable dependability with which a claimant can sell his services in a competitive labor market**, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

2 Larson, **The Law of Workmen's Compensation** Section 57.51(a), at 10-164.65, 10-164.84(18) (1987) (footnotes omitted)

748 P.2d at 575 (Emphasis added.)

The only non-hearsay evidence regarding rehabilitation and

job availability is that presented by the DRS through witness Frank Miera.

At Point III of its brief, Salt Lake City asserts that the Court of Appeals reweighed the evidence. That is not the case. Rather, the Court of Appeals looked at the record and found no independent competent evidence to support the conclusions of the Intracorp. report.

Salt Lake City makes another disingenuous argument at Point V in its brief that Mr. Hoskings' "occupation is retirement" and that the Court of Appeals is making the City an employment agency to find Mr. Hoskings a "second job". To the contrary, the Court of Appeals merely enunciated the burden placed on the City by this Court's prior decisions cited hereinbefore. Intracorp. did not identify even one specific job available to Warren Hoskings.

CONCLUSION

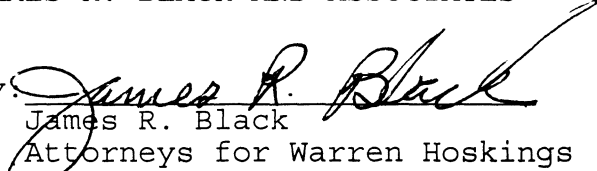
The Court of Appeals decision herein does not raise any issues the Supreme Court has not already considered in its prior opinions regarding the standards: (1) for finding permanent total disability in the workers' compensation context; (2) the burden shifting effect of the "odd-lot" doctrine; and (3) the principle that an administrative agency cannot base a finding on hearsay evidence alone and that a "residuum" of legally competent substantive evidence independent of the hearsay must support the finding. The opinion of the Court of Appeals is in no respect contrary to prior Utah Supreme Court decisions. It merely applies them to this case. There are no other important reasons

as provided in Rule 46 Utah Rules of Appellate Procedure that
justify issuance of the writ as petitioned by Salt Lake City.

DATED this 23 day of August, 1996.

JAMES R. BLACK AND ASSOCIATES

By:


James R. Black
Attorneys for Warren Hoskings

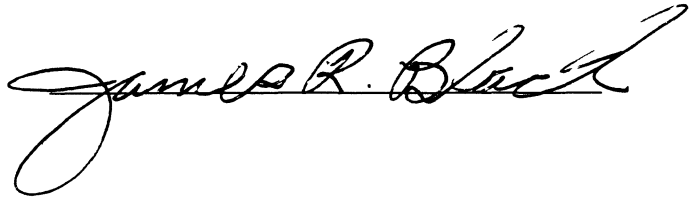
CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing WARREN HOSKINGS' BRIEF IN OPPOSITION TO SALT LAKE CITY'S PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, on this 23 day of August, 1996 to the following:

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A handwritten signature in black ink, reading "James R. Black". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke at the end.

Tab 1

Appendix 1

Hoskings v. Industrial Commission, 291 Adv. Rep. 17 (Utah
App.1996), ____ P.2d ____ (Utah App. 1996)

Cite as
291 Utah Adv. Rep. 17

IN THE
UTAH COURT OF APPEALS

Warren HOSKINGS,
Petitioner,
v.
INDUSTRIAL COMMISSION of Utah and
Salt Lake City Corporation,
Respondents.

No. 950236-CA
FILED: May 31, 1996

Original Proceeding in this Court

ATTORNEYS:
James R. Black, Salt Lake City, for Petitioner
Alan L. Hennebold, Frank Nakamura, and
Erie V. Boorman, Salt Lake City, for
Respondents

Before Judges Orme, Davis, and Billings.

This opinion is subject to revision before
publication in the Pacific Reporter.

ORME, Presiding Judge:

Petitioner Warren Hoskings seeks review of an Industrial Commission order that overturned an administrative law judge's decision granting him permanent total disability benefits. We reverse the Commission's order and remand with instructions to reinstate the administrative law judge's decision.

FACTS

We recite the facts as found by the Commission.¹ In 1966, Hoskings began work as a fireman for Salt Lake City Corporation. He was promoted to lieutenant in 1974, and then to captain in the early 1980's.

In 1980, Hoskings injured his left ankle while fighting a fire. As a result of this injury, he underwent surgery but continued to experience pain. In April 1986, Hoskings reinjured his left ankle in the course of his employment. The next day, he sought medical attention and was diagnosed with an acute left ankle sprain and calcaneus/cuboid joint problem. He was later diagnosed with the additional condition of traumatic osteoarthritis.

Hoskings did not miss any time from work as a result of this injury. However, after the injury, he experienced chronic pain and difficulty in walking. Various physicians examined him and attempted to treat his injuries with conservative remedies. However, none of these treatments produced any significant improvement in Hoskings's left ankle.

In 1988, Hoskings took early retirement from Salt Lake City Corporation, apparently to take

advantage of an attractive early retirement package. At the time of his retirement, Hoskings did not inform Salt Lake City Corporation that his decision to retire was related in any manner to his left ankle injury. However, he testified before an administrative law judge in this proceeding that his injury did contribute to his decision to retire early. There is no evidence that his work performance was unsatisfactory prior to his retirement.

During the summers of 1990 and 1991, after his retirement, Hoskings worked for Hamilton Stores as a fire marshall in Yellowstone National Park. A significant portion of his work day consisted of driving in a vehicle from one store to another, making inspections and teaching fire safety procedures. Hoskings reported no difficulties in performing the duties of this job. However, when the job was changed to a year-round position, he chose to resign because he believed the cold winter temperatures might aggravate his ankle pain.

INDUSTRIAL COMMISSION
PROCEEDINGS

In 1990, Hoskings filed an Application for Hearing with the Industrial Commission. In his Application for Hearing, he claimed that Salt Lake City Corporation had refused to pay him medical expenses, temporary total disability benefits, permanent partial disability benefits, and permanent total disability benefits due him by reason of his ankle injury. An evidentiary hearing before an administrative law judge was held on January 8, 1992. After the hearing, the ALJ referred the matter to a medical panel. The medical panel found that Hoskings's foremost orthopedic problem was the calcaneus/cuboid arthritis of his left ankle. The medical panel opined that the origin of this problem was definitely industrial and that it had worsened since the 1986 industrial accident.

The ALJ then made a tentative finding of permanent total disability and, as required by statute, referred the case to the Division of Rehabilitation Services (DRS) for an evaluation of Hoskings's susceptibility to rehabilitation.² According to the testimony of Frank Miera, the rehabilitation counselor assigned to evaluate Hoskings's case, DRS performed a one-week work evaluation during November 1992. Mr. Miera testified that Hoskings fully cooperated with the DRS during the evaluation and was very truthful and honest about his condition throughout the process. The evaluation was conducted by DRS rehabilitation counselors trained to administer such evaluations. Mr. Miera testified that in the regular course of his work as a DRS rehabilitation counselor, he refers applicants to trained DRS personnel and relies on their written reports in assessing an applicant's potential for rehabilitation. After the evaluation, Mr. Miera requested Hoskings to update him periodically on his condition. Mr. Miera testified that Hoskings did update him on his condition and reported that he was having

the same problems with his left ankle. Mr. Miera concluded that it was not feasible for Hoskings to enter into a rehabilitation program.

Salt Lake City Corporation then requested that Hoskings undergo a vocational evaluation to be performed by Intracorp, a private rehabilitation firm, which evaluation was completed during December 1993. Salt Lake City Corporation submitted the Intracorp report to the ALJ.

The Intracorp report concluded that Hoskings could be rehabilitated. The Intracorp evaluator, Jim Floyd, found that Hoskings demonstrated the capacity to learn and would be successful in formal training to prepare for more challenging and higher paying jobs. In his report, Mr. Floyd noted that Hoskings had improved physical stamina and that DRS's finding of poor physical stamina was no longer accurate. In addition, Mr. Floyd identified several jobs that Hoskings would qualify for given some limited training or schooling. Finally, the Intracorp report identified the regions of Utah that would provide the greatest opportunity for employment in the identified jobs.

After receiving the DRS letter, Miera's testimony, and the Intracorp report, the ALJ entered her Findings of Fact, Conclusions of Law and Order. Applying the "odd lot" doctrine, the ALJ first found that Hoskings had met his burden of proving that the 1986 industrial accident caused his ankle injury and that he could not return to work as a fire fighter. Next, the ALJ found that Hoskings met his burden of proving he could not be rehabilitated. The ALJ then concluded that Salt Lake City Corporation had not met its burden to show that regular steady work was nonetheless available to Hoskings. Accordingly, the ALJ held that Hoskings was entitled to an award of permanent total disability benefits.

Salt Lake City Corporation filed a Motion for Review with the Commission. The Commission reversed the ALJ's decision and held that Hoskings was not entitled to permanent total disability benefits. In reaching its decision, the Commission found that Hoskings could be rehabilitated and that regular, dependable employment was available to him in other branches of the labor market.

On appeal, Hoskings argues that the Commission misinterpreted the "odd lot" doctrine by failing to apply the correct burdens of proof to the evidence introduced by the parties. In addition, he argues that the Commission's findings are not supported by competent legal evidence. Before turning to the specific claims, we review the legal principles applicable to this case, i.e., the "odd lot" doctrine and the residuum rule.

"ODD LOT" DOCTRINE

Under the "odd lot" doctrine,³ the Commission may find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render the claimant unable to obtain

suitable employment. See *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1326 (Utah 1986); *Marshall v. Industrial Comm'n*, 681 P.2d 208, 212 (Utah 1984). A finding of permanent total disability under the odd lot doctrine requires the following: (1) the employee must prove that he or she cannot perform the duties required in his or her occupation; (2) after being referred to the Division of Rehabilitation Services by the Industrial Commission, the employee, with the assistance of the DRS, must prove that he or she cannot be rehabilitated; (3) if the employee meets the first two requirements, the burden then shifts to the employer to prove the existence of regular, steady work the employee can nonetheless perform, taking into account such factors as the employee's age, mental capacity, and education. *Hardman*, 725 P.2d at 1326-27.

In meeting its burden, it is insufficient for the employer to simply show that the employee is generally capable of performing some type of work. Rather, in order to prove the existence of regular and steady work the employee can perform, the employer must prove that "regular, dependable work [is] available" to the employee. *Marshall*, 681 P.2d at 212 (emphasis added). This requires the employer to introduce evidence of "an actual job within a reasonable distance from [the employee's] home which he is able to perform or for which he can be trained." *Lyons v. Industrial Special Indem. Fund*, 565 P.2d 1360, 1364 (Idaho 1977) (construing Idaho statute). See *ARA Servs., Inc. v. Industrial Comm'n*, 590 N.E.2d 78, 83-84 (Ill. App. 1992) (holding burden shifts to employer to show some kind of suitable work is available to claimant); *Durbin v. State Farm Fire & Cas. Co.*, 558 So. 2d 1257, 1260 (La. App. 1990) (requiring employer to prove some form of gainful occupation is regularly and continuously available to employee within reasonable proximity of his residence). Moreover, the employer must also show that the employee "has a reasonable opportunity to be employed at that job." *Lyons*, 565 P.2d at 1364.⁴

RESIDUUM RULE

Utah Code Ann. §35-1-88 (1994) provides that "[n]either the Commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence." Therefore, hearsay evidence, even if objected to, is admissible in an administrative hearing before the Commission. *Industrial Power Contractors v. Industrial Comm'n*, 832 P.2d 477, 478 (Utah App. 1992). However, the Commission's findings of fact "cannot be based exclusively on hearsay evidence." *Yacht Club v. Utah Liquor Control Comm'n*, 681 P.2d 1224, 1226 (Utah 1984) (emphasis in original). To support the Commission's findings, "there must be a residuum of evidence, legal and competent in a court of law." *Hackford v. Industrial Comm'n*, 11 Utah 2d 312, 315, 358 P.2d 899, 901

(1961).

The residuum rule requires that each finding of fact made by an administrative agency be supported by a residuum of legally competent evidence. *See Yacht Club*, 681 P.2d at 1227; *Industrial Power*, 832 P.2d at 479; *Wagstaff v. Department of Employment Sec.*, 826 P.2d 1069, 1072 (Utah App. 1992); *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 32-33 (Utah App. 1991). For example, in *Wagstaff*, a former Air Force civilian employee, discharged for drug use, challenged a decision of the Board of Review of the Industrial Commission denying him unemployment compensation benefits. The employee claimed that since the Air Force disciplinary regulations in effect at the time of his drug use did not sanction discharge for first-time drug offenders, he was not terminated for just cause. 826 P.2d at 1070-71.

In evaluating whether the employee was discharged for just cause, the Commission made a factual finding that he had used cocaine during his lunch break on one occasion. *Id.* at 1072. The Commission based its finding on an internal Air Force investigation report, as well as on the employee's own admission in testimony to the one-time drug use. *Id.* at 1071. The report contained the employee's admission to the one-time drug use, obtained in the course of investigation, as well as his co-workers' statements concerning the incident. *Id.* However, the report also contained statements from co-workers regarding the employee's drug use on other occasions. *Id.* In finding that the employee had engaged in drug use on one occasion, the Commission also made reference to the fact that the majority of the Board was not entirely persuaded that he had used drugs only on the one occasion. *Id.* at 1072 n.3.

This court held that the Commission's finding of a single incident of drug use was supported by the employee's own admissions, and thus was supported by a residuum of competent, non-hearsay evidence. *Id.* at 1072. *See Utah R. Evid.* 801(d)(2). However, although no actual finding of additional drug use was made by the Commission, this court was concerned that even the subtle reference to additional drug use contained in the Commission's written opinion, which could only be supported by the co-workers' hearsay statements not buttressed by a residuum of competent legal evidence, tainted its decision. *Id.* Therefore, in reviewing whether the employee's termination was for just cause, we evaluated the Board's decision solely with reference to the employee's single admitted instance of drug use. *Id.*

Similarly, in this case, we must determine whether the Commission's findings of fact regarding rehabilitation and job availability are supported by a residuum of competent, non-hearsay evidence. If the Commission's findings of fact are not supported by a residuum of such evidence, Hoskings is entitled to appropriate relief.

ANALYSIS

Under the odd lot doctrine, as explained above, the employee has the initial burden to prove he or she cannot perform the duties required in his or her occupation and that he or she cannot be rehabilitated. If the employee fails in meeting these burdens, the employer's burden to prove the existence of actual work the employee can perform is not triggered and we need not evaluate whether that burden was actually met.

In its order, the Commission reversed the ALJ's decision and found that Hoskings could be rehabilitated. Therefore, we first review the Commission's finding regarding Hoskings's potential for rehabilitation.

A. Rehabilitation

In finding that Hoskings could be rehabilitated, the Commission relied on the conclusion to that effect in the Intracorp report. However, this report clearly meets the definition of hearsay under Rule 801, Utah Rules of Evidence.⁶ The author of the report, Jim Floyd, never testified at a hearing before the ALJ or the Commission. Therefore, although the Intracorp report was admissible in the Commission's proceedings, it could not form the sole basis for the Commission's factual finding regarding Hoskings's potential for rehabilitation. Consequently, the Commission's factual finding that Hoskings could be rehabilitated cannot be sustained unless there is some other, non-hearsay evidence to support it.

In its order, the Commission stated that "Intracorp's conclusion [regarding rehabilitation] is corroborated by the fact that Hoskings found other work at Hamilton Stores and successfully performed his employment duties there." Salt Lake City Corporation argues that this fact supports the Commission's decision and provides the requisite residuum of competent legal evidence. However, this fact is essentially irrelevant to the issue of whether Hoskings could be rehabilitated into a well-known branch of the labor market.

Hoskings testified at the evidentiary hearing that Hamilton Stores was seeking someone to work year round, including the winter months. Hoskings testified he was unable to work during the winter months because he could not stand the pain in his foot and ankle caused by the cold weather. Salt Lake City Corporation presented no contradicting evidence on this point. The mere fact that Hoskings was able to work for a few months during the summers of 1990 and 1991 as a fire marshall in Yellowstone National Park, hundreds of miles from Salt Lake City and his permanent residences in Ivins and Vernal, Utah, does not support a finding that he can be successfully rehabilitated into any well-known branch of the labor market.⁷

Although we base our decision regarding rehabilitation on the residuum rule, which the parties have addressed in their briefs, there is an additional basis on which our decision could be

premised. The applicable law regarding permanent total disability at the time of Hoskings's April 16, 1986, injury read, in pertinent part, as follows:

If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the [Division of Rehabilitation Services] for rehabilitation training If the division . . . certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division . . . in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission *shall* order that there be paid to the employee weekly benefits

Utah Code Ann. §35-1-67 (1974)(repealed 1988 Utah Laws, ch.116, §4) (emphasis added). A plain reading of this statute suggests the determination of rehabilitation is vested in DRS, with no discretion left with the Commission to revisit the question and decide it anew. Therefore, it would appear that once DRS certified to the Commission in writing that Hoskings could not be rehabilitated, all inquiry into the issue of rehabilitation—a question delegated by the Legislature not to the Commission, but to DRS—should have ended. As we read the statute, the Commission was unable to revisit the issue of rehabilitation or to consider other evidence, such as the Intracorp report presented by Salt Lake City Corporation.⁵

B. Job Availability

Once it is determined that an employee cannot be rehabilitated—and such is the conclusion that must be drawn about Hoskings on the record before us—the burden then shifts to the employer to prove, notwithstanding the employee's general inability to be rehabilitated, the "existence of regular, steady work the employee can perform, taking into account such factors as the employee's age, mental capacity and education." *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1326-27 (Utah 1977). However, as indicated above, the employer must introduce evidence of "an actual job within a reasonable distance from [the employee's] home which he is able to perform or for which he can be trained." *Lyons v. Industrial Special Indem. Fund*, 565 P.2d 1360, 1364 (Idaho 1977). In addition, the employer must also show that the employee "has a reasonable opportunity to be employed at that job." *Id.*

In this case, the Commission relied exclusively on the Intracorp report to find that regular, dependable work was available to Hoskings. However, and totally aside from residuum rule concerns, a review of the substance of the Intracorp report reveals that it fails to prove that an actual job was available to Hoskings. Moreover, the Intracorp report fails to provide any analysis regarding whether or not Hoskings had a reasonable opportunity to be employed at

any particular job, due regard being had for his age, mental capacity, and education.

In assessing Hoskings's employability, Mr. Floyd, the author of the Intracorp report, ran three computer searches and two manual searches. In the first computer search, for occupations with skills that are directly transferrable from those of a firefighter, only one occupation emerged: surveillance-system monitor. The second computer search revealed three occupations that Hoskings could allegedly perform given some limited schooling or short term training. Finally, a third computer search was conducted which considered less closely related occupations using the same tools and machinery that Hoskings had used in his previous jobs. Two job titles emerged from this final computer search.

After the computer searches were finished, the report indicates that two manual searches were conducted. The first search considered Hoskings's entire work history, including his military experience. In this search, three occupations emerged. Finally, using the Utah Department of Employment Security publication, "Occupations in Demand," for the period of January-June, 1993, four job titles were identified.

Although the searches contained in the report identified several job titles that existed in the Wasatch Front region, no evidence shows that these jobs were actually available to Hoskings. First, nowhere in the report is there a meaningful discussion of the duties required in the occupations described. The report lacks any analysis of whether Hoskings could actually perform the duties required in these occupations given his disabilities. Furthermore, the report fails to show that these particular occupations are actually available, i.e., that the demand for such jobs has not been fully met by the workforce. Moreover, no evidence is contained in the report that would indicate Hoskings himself had a reasonable opportunity to be employed in these jobs, i.e., assuming some of these positions are available in general, what is the realistic prospect that an employer will choose a man in his mid-fifties with a bad ankle and other health problems to fill one of them?

Although the report claims to have considered "job availability" in the computer searches, no discussion as to what is meant by this term is contained in the report. In describing the second manual search, the report alleges that the four occupations found are "reasonably available in southwestern or northeastern regions of Utah." However, the report contains no evidence that these particular jobs are actually available to a person with the same disabilities as Hoskings. It is insufficient for Salt Lake City Corporation to allege that a particular occupation is generally available to the public at large, without providing further evidence that the particular occupation is actually available to Hoskings. In other words, in order to sustain its burden under the odd lot doctrine, an employer must prove

that an actual job is regularly and continuously available to the applicant, within a reasonable proximity of his or her usual residence or residences, and that the applicant has a reasonable opportunity to be employed in the particular job.³

Although we conclude that Salt Lake City Corporation failed in a more general way to meet its burden in this regard under the odd lot doctrine, we also conclude that the Commission's finding as to job availability was, at a more technical level, not based on a residuum of competent legal evidence.

The Commission based its finding that other work was available to Hoskings exclusively on the Intracorp report. However, as we indicated above, the Intracorp report is hearsay. Thus, although this report was admissible during the administrative proceedings held before the Commission, it cannot be the sole basis for the Commission's finding. Rather, the Commission must base its findings on legally competent evidence--a finding cannot be based solely on hearsay.

CONCLUSION

In view of the statute regarding permanent total disability in effect at the time of Hoskings's injury, it may have been improper for the Commission to consider the Intracorp report on the issue of rehabilitation. If not, the Commission nonetheless erred, given the residuum rule, in finding that Hoskings could be rehabilitated. Further, Salt Lake City Corporation failed to sustain its burden under the odd lot doctrine to prove the existence of a regular, steady job that was actually available to Hoskings. Alternatively, in light of the residuum rule, the Commission erred in finding that Salt Lake City Corporation had met this burden.

Accordingly, we reverse the Commission's order and remand with instructions to reinstate the administrative law judge's decision.

Gregory K. Orme, Presiding Judge

I CONCUR:

James Z. Davis, Associate Presiding Judge

I CONCUR IN THE RESULT:

Judith M. Billings, Judge

1. Although an administrative law judge initially hears the evidence, the Commission is the ultimate fact finder. *Virgin v. Board of Review*, 303 P.2d 1284, 1287 (Utah App. 1990).

2. The applicable law regarding permanent total disability, in effect at the time of Hoskings's second injury, read, in pertinent part, as follows:

If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation [since renamed the Division of Rehabilitation Services] under the state board of education for rehabilitation training If the division of vocational rehabilitation . . . certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the

division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits

Utah Code Ann. §35-1-67 (1974)(repealed 1988 Utah Laws, ch.116, §4).

3. The term "odd lot" was first used by Judge Moulton in the case of *Cardiff Corp. v. Hall*, 1 K.B. 1009 (1911):

[T]here are cases in which the onus of sh[o]wing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market--if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market, I think it is incumbent upon the employer to sh[o]w that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must sh[o]w that a customer can be found who will take it.

Id. at 1020-21 (quoted in 1C Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* §57.51(b), at 10-330 (1995)).

4. After his retirement, Hoskings moved from Salt Lake City, Utah. He now has homes in Ivins and Vernal, Utah. As the Idaho Supreme Court stated, "[a] claimant should not be permitted to achieve permanent disability by changing his place of residence." *Lyons*, 565 P.2d at 1364 n.3. Therefore, in this case, in considering whether Salt Lake City Corporation met its burden, evidence of job availability in Salt Lake City, Ivins, and Vernal, Utah, would all be germane. *See id.*

5. The first prong of the odd lot doctrine, whether the employee can perform the duties required in his or her occupation, is not at issue in this appeal.

6. Utah R. Evid. 801 provides in pertinent part:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

7. One of the motives behind the "odd lot" doctrine is a desire to encourage efforts by a claimant to rehabilitate himself. *See* 1C Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* §57.51(f), at 10-357 to -359 (1995). Therefore, courts are careful to avoid penalizing or discouraging a claimant from attempting to rehabilitate himself in some type of special work setting. *Id.* *See also* note 4.

8. To the extent this interpretation raises a possible due process concern, as suggested by Salt Lake City Corporation at oral argument, we note that the Legislature has amended this statute to allow for a mandatory hearing regarding the issue of rehabilitation. Utah Code Ann. §35-1-67 (1994) currently reads, in pertinent part, as follows:

(6)(a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

(iii) the commission, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii)

9. Of course, the employer does not become an employment agency for the applicant. The employer is not required to find a particular position for an applicant, much less arrange for an interview. Rather, the employer must only prove that an actual job does exist in the usual residence or residences of the applicant and that he or she has a reasonable opportunity to be employed in that job.

Cite as

291 Utah Adv. Rep. 22

IN THE UTAH COURT OF APPEALS

Joyce A. PENDLETON,
Plaintiff and Appellee,

v.

Robert L. PENDLETON,
Defendant and Appellant.

No. 950314-CA
FILED: May 31, 1996

Third District, Salt Lake County
The Honorable Kenneth Rigtrup

ATTORNEYS:

Kathryn Schuler Denholm, Salt Lake City, for
Appellant

J. Bruce Reading and Wesley D. Hutchins,
Salt Lake City, for Appellee

Before Judges Orme, Davis, and Billings.

**This opinion is subject to revision before
publication in the Pacific Reporter.**

ORME, Presiding Judge:

Robert Pendleton appeals the trial court's denial of his petition to terminate alimony based on his claim that his ex-wife is cohabitating with a person of the opposite sex. We reverse.

PROCEDURAL HISTORY

Robert Pendleton and Joyce Pendleton were divorced in March 1991. Joyce was awarded monthly alimony. Paragraph 13 of the divorce decree states that Robert is to pay alimony until Joyce's death, remarriage, or cohabitation. The divorce decree provision reflects the requirement of Utah Code Ann. §30-3-5(6) (1989) that

[a]ny order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.¹

In August 1993, Robert became aware that Joyce had entered into a relationship with Bill. Suspecting Joyce and Bill were cohabiting, Robert filed a petition to terminate alimony in October 1993, ceased making alimony payments to Joyce, and deposited the alimony payments otherwise due into an escrow account pending the resolution of his petition.

The trial court found that Bill was not "residing" with Joyce and, therefore, that alimony should not be terminated. The court concluded that "residence" required "some sort of duration" and because Bill's sharing of Joyce's residence was for a temporary period of time, Bill was not a resident. The court did not make clear why it regarded the arrangement as temporary, a characterization that is somewhat curious in view of the fact it had gone on for some time and was still going on as of the time of trial, albeit with less consistency.

STANDARD OF REVIEW

Whether Joyce was "residing" with Bill is a mixed question of fact and law. *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985). While we defer to the trial court's factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness. *See id.*

APPLICABLE LAW

The issue in this case is whether or not Bill "resided" with Joyce. "Common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah 1985). It implies continuity, not simply a habit of visiting or a sojourn. *Id.* at 673. In *Haddow*, the Utah Supreme Court determined that Ms. Haddow did not share a common residence with Mr. Hudson although the two spent considerable time together. *Id.* at 673-74. The Court focused on whether Mr. Hudson traveled freely in and out of Ms. Haddow's home. *Id.* at 673. The two determinative facts were that Mr. Hudson had no key to the house and that he did not spend time there when Ms. Haddow was away. The Court explained its focus on these facts as follows:

These circumstances seem particularly significant on the question of whether Mr. Hudson was living with appellant, since a resident will come and go as he pleases in his own home, while a visitor, however regular and frequent, will schedule his visits to coincide with the presence of the person

Tab 2

APPENDIX 2

§35-1-67 U.C.A., CUM. SUPP., REPL. VOL. 4(B), 1974 ED., PERMANENT
TOTAL DISABILITY-AMOUNT OF PAYMENT-VOCATION REHABILITATION-
PAYMENTS AND PROCEDURES

35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments.

In cases of permanent total disability the employee shall receive $66\frac{2}{3}\%$ of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68 (1), not to exceed \$1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under § 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of $66\frac{2}{3}\%$ of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68 (1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than \$120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is

ANALYSIS

Prior accidents contributing to disability.
 Statute of limitations.
 Total disability.
 —Question of fact.
 Cited.

Prior accidents contributing to disability.

Employee who was permanently and totally disabled due to a combination of prior and present accidents was entitled to lifetime benefits payable from the special fund provided for in 35-1-68. *McPhie v. Industrial Comm.* (Utah 1977) 567 P 2d 153.

Statute of limitations.

This section governs permanent total disability claims and contains no statute of limitations for such claims; therefore, where employee suffered an injury in October of 1961 and notice of injury and claim was properly given and filed in accordance with requirements of 35-1-99 and 35-1-100, and employee was found to have suffered permanent partial disability and received 40 weeks of compensation through December of 1964 and payment of medical bill through 1966, employee's claim filed in December of 1982 for permanent total disability resulting from slow deterioration of a condition caused by 1961 injury was timely filed under this section and, under 35-1-78, industrial commission had continuing jurisdiction to award permanent total disability compensation. *Mecham v. Industrial Comm.* of Utah (Utah 1984) 692 P 2d 783.

Total disability.

Where an employee demonstrates that he can no longer perform his normal duties as a result of a work-related accident, and that he

cannot be rehabilitated, the burden shifts to the employer to prove that suitable, steady work is available, considering the age, mental capacity, and education of the employee, in order to preclude a determination of total and permanent disability under the odd-lot doctrine. *Marshall v. Industrial Comm. of Utah* (Utah 1984) 681 P 2d 208.

For discussion of the odd-lot doctrine, see *Hardman v. Salt Lake City Fleet Mgt. & Second Injury Fund*, 725 P.2d 1323 (Utah 1986).

Employee, who was almost 60, with a limited education and an even more limited work background, presented a prima facie case of tentative permanent total disability, where he suffered from headaches and dizziness after sustaining a skull fracture, and despite his employer's contentions that it offered various jobs to employee, the record was devoid of any concrete evidence that he was offered work of the general nature that he had been performing. *Hardman v. Salt Lake City Fleet Mgt. & Second Injury Fund*, 725 P.2d 1323 (Utah 1986).

—Question of fact.

The question of whether an employee was totally and permanently disabled was one of fact to be decided by the commission, upon all of the evidence in the case. *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1985).

Cited in *Booms v. Rapp Constr. Co.*, 720 P.2d 1363 (Utah 1986).

35-1-68. Second Injury Fund — Injury causing death — Burial expenses — Payments to dependents.

(1) There is created a Second Injury Fund for the purpose of making payments in accordance with Chapters 1 and 2. This fund shall succeed to all monies heretofore held in that fund designated as the "Special Fund" or the "Combined Injury Fund" and whenever reference is made elsewhere in this code to the "Special Fund" or the "Combined Injury Fund" that reference shall be deemed to be to the Second Injury Fund. The state treasurer shall be the custodian of the Second Injury Fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the Second Injury Fund in all proceedings brought to enforce claims against it.

(2) If injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of

Tab 3

APPENDIX 3

ORDER GRANTING MOTION FOR REVIEW DATED MARCH 3, 1995.
(R. 211-215)

THE INDUSTRIAL COMMISSION OF UTAH

WARREN HOSKINGS,

Applicant,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

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ORDER GRANTING
MOTION FOR REVIEW

Case No. 90-0401

Salt Lake City Corporation asks The Industrial Commission of Utah to review an Administrative Law Judge's decision awarding permanent total disability compensation to Warren Hoskings under the Utah Workers' Compensation Act.

The Industrial Commission of Utah 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.

FINDINGS OF FACT

Beginning in 1966, Mr. Hoskings worked for Salt Lake City as a fireman. He was promoted to lieutenant in 1974, then captain in the early 1980's.

While fighting a fire in 1980, Mr. Hoskings injured his left ankle. He underwent surgery, but continued to experience pain. On April 6, 1986, in the course of his employment, he reinjured his left ankle. He received medical attention the next day and was diagnosed with an acute ankle sprain and "calcaneus/cuboid joint problem," later additionally diagnosed as "traumatic osteoarthritis".

Mr. Hoskings did not miss any work as a result of the April 1986 injury. However, he experienced chronic pain and difficulty walking. He was examined by a number of different physicians who attempted various conservative remedies without producing any significant improvement.

On September 1, 1988, Mr. Hoskings accepted early retirement from Salt Lake City. There is no indication that Mr. Hoskings' work performance was unsatisfactory prior to his retirement, nor is there any evidence Mr. Hoskings informed Salt Lake City that his decision to retire was related to his ankle injury. However, Mr. Hoskings now claims that his decision to retire was motivated by his ankle injury.

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ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE TWO

Mr. Hoskings' impairment from his ankle injury has been rated by several doctors in a range from 8% to 17% of the whole person. The doctors also agree the injury causes Mr. Hoskings significant pain and limits the mobility of the ankle.

After retiring, Mr. Hoskings worked as fire marshall for Hamilton Stores in Yellowstone Park during the summers of 1990 and 1991. Mr. Hoskings spent a substantial amount of his work day driving from one store to another. He had no difficulty performing the duties of the job. However, he chose to resign when the job was changed to a year-around position because he believed the cold winter temperatures in Yellowstone might aggravate his ankle injury as well as a nonindustrial pulmonary condition.

At the time of his injury, Mr. Hoskings was 50 years old. He is of above average intelligence and performs well on vocational aptitude tests. He has completed a one-year technical program in electronics and two years of university education. He has work experience in electronics, as well as eight years experience with the National Guard in transportation and supply services.

Two vocational rehabilitation studies have been performed on Mr. Hoskings. The first was conducted by the Division of Rehabilitation Services ("DRS") and concludes that Mr. Hoskings cannot be rehabilitated. The second was conducted at Salt Lake City's request by Intracorp and concludes that Mr. Hoskings is a suitable candidate for rehabilitation. The Intracorp study also identifies work available throughout Utah which Mr. Hoskings can perform. For reasons set forth below, the Industrial Commission finds the Intracorp report to be persuasive on the issues of Mr. Hoskings' suitability for rehabilitation and the availability of alternative work.

DISCUSSION AND CONCLUSIONS OF LAW

The ALJ has applied the correct framework in considering Mr. Hoskings' claim for permanent total disability compensation. First, the ALJ concluded that Mr. Hoskings' industrial accident caused the ankle injury which is now claimed to render him disabled. The ALJ then applied the "odd-lot" doctrine to determine whether Mr. Hoskings was permanently and totally disabled.

The odd lot doctrine is a three part test. Mr. Hoskings must first prove that his ankle injury prevents him from returning to his former occupation. Then he must demonstrate that he cannot be rehabilitated. If Mr. Hoskings is successful in establishing these two factors, the burden shifts to Salt Lake City to prove that other work is available to Mr. Hoskings despite his injury.

ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE THREE

While the Industrial Commission agrees with the analytical framework applied by the ALJ to Mr. Hoskings' claim, the Industrial Commission does not agree with the ALJ's conclusions on two points: First, the Industrial Commission finds that Mr. Hoskings can be rehabilitated. Second, the Industrial Commission finds that other work is available that Mr. Hoskings can perform, despite his ankle injury.

On the issue of Mr. Hoskings' ability to be rehabilitated, the Industrial Commission has carefully reviewed the DRS report, which concludes that Mr. Hoskings was "unable to demonstrate the stamina and endurance needed to work in full-time employment." However, the report makes no distinction between sedentary work and more strenuous employment. It does not address the fact that Mr. Hoskings' employment at Hamilton Stores demonstrated some ability to work. It makes no reference to Mr. Hoskings' intelligence, education, adaptability, or wide range of prior work experience. The Industrial Commission has also reviewed the deposition of Mr. Miera, a rehabilitation counselor with DRS, but Mr. Miera's testimony adds little to support the DRS report.

In contrast to the DRS report, the Intracorp report identifies Mr. Hoskings' training, experience and abilities. It specifically addresses the effects of Mr. Hoskings' ankle injury and other medical conditions. The Intracorp report then analyzes the foregoing factors and concludes that Mr. Hoskings can be rehabilitated. Intracorp's conclusion is corroborated by the fact that Mr. Hoskings found other work at Hamilton Stores and successfully performed his employment duties there. The Industrial Commission is persuaded by Intracorp's objective data and subjective analysis.

Although Mr. Hoskings can be rehabilitated and therefore fails to meet the second element of the odd lot doctrine, the Industrial Commission will consider the third element of the odd lot doctrine. This third element requires Salt Lake City to show that other work is available to Mr. Hoskings.

The Intracorp report contains a detailed list and discussion of employment opportunities within Mr. Hoskings' abilities. Such employment opportunities exist primarily in the Salt Lake metropolitan area, but also are present throughout Utah. The record contains no significant evidence contradicting the Intracorp report on this point. Consequently, the Industrial Commission finds that regular, dependable employment is available within Mr. Hoskings' abilities.

ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE FOUR

In summary, the Industrial Commission agrees with the ALJ that Mr. Hoskings' industrial accident caused his ankle injury and that he cannot return to work as a fire fighter. However, contrary to the ALJ's decision, the Industrial Commission finds that Mr. Hoskings can be rehabilitated and that regular, dependable work is available to him in other branches of the labor market. The Industrial Commission therefore concludes that Mr. Hoskings is not entitled to permanent total disability compensation within the meaning of §35-1-67 of the Utah Workers' Compensation Act.

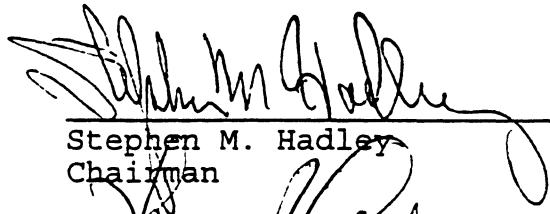
In light of the Industrial Commission's determination that Mr. Hoskings is not entitled to permanent total disability compensation, it is unnecessary to address Mr. Hoskings' argument regarding the date on which compensation should begin.

ORDER


The Industrial Commission reverses the ALJ's decision in this matter and hereby denies Mr. Hoskings claim for permanent total disability compensation. It is so ordered.

Dated this 3rd day of March, 1995.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTIFICATION OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a Request for Reconsideration with the 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.

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ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE FIVE

CERTIFICATION OF MAILING

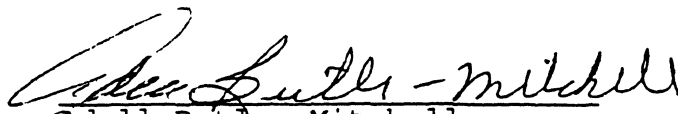
I certify that a copy of the foregoing Order Granting Motion For Review in the matter of Warren Hoskings v. Salt Lake City Corporation, Case No. 90-0401, was mailed, first class postage prepaid, this 32nd day of March, 1995, to the following:

WARREN HOSKINGS
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SALT LAKE CITY, UTAH 84114-6611


Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

Tab 4

APPENDIX 4

ADMINISTRATIVE LAW JUDGE'S FINDING OF FACTS, CONCLUSION OF LAW
DATED JUNE 30, 1994. (R. 148-170)

INDUSTRIAL COMMISSION OF UTAH

Case No. 90000401

WARREN H. HOSKINGS,

Applicant,

vs.

SALT LAKE CITY CORPORATION
(Self-Insured) and
EMPLOYERS REINSURANCE FUND,

Defendants.

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FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

* * * * *

HEARING: Hearing Room 332, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah, on
January 8, 1992 at 1:00 o'clock p.m. Said hearing
was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was represented by Susan Black,
Attorney, at the time that the application for
hearing was filed and until 1993. James Black,
Attorney took over representation of the applicant
in 1993.

The defendant, Salt Lake City Corporation (Self-
Insured), was initially represented by Ray
Montgomery, Attorney. Frank Nakamura, Attorney,
took over representation of Salt Lake City
Corporation in 1994.

The Employers Reinsurance Fund was represented by
Erie Boorman, Attorney/Administrator.

This case involves a claim for permanent total disability
benefits associated with an April 6, 1986 industrial fall. Salt
Lake City Corporation accepted liability for this injury and paid
medical expenses only associated with the foot and ankle injury
that resulted. Salt Lake City Corporation has denied liability for
permanent total disability benefits because the employer argues
that the applicant is not totally disabled, and if he is, his
disability is related to conditions unrelated to the left ankle and
foot. It should be noted that the applicant initially also claimed
that he had lung problems resulting from a 1988 fire he fought, but
that claim was withdrawn prior to hearing.

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ORDER
RE: WARREN HOSKINGS
PAGE 2

PROCEDURAL HISTORY AND CURRENT STATUS:

Due to the length of the litigation in this matter, it is appropriate to outline chronologically the procedures that have occurred in this case. Prior to the filing of the application for hearing in this matter, a dispute arose between the applicant and Salt Lake City Corporation as to the extent of impairment that the applicant had sustained as a result of his April 6, 1986 industrial accident. Several physicians had offered different impairment ratings. The application for hearing, claiming permanent total disability benefits, was filed with the Industrial Commission on April 20, 1990. Most of the initial correspondence and filings in this matter mistakenly note June 4, 1986 as the date of injury at issue. This was corrected post-hearing, and thereafter, the corrected date of April 6, 1986 was substituted on all documentation. Discovery matters delayed the scheduling of the hearing and it was ultimately held on January 8, 1992. Because of the controversy over the extent of impairment related to the industrial injury and because of questions regarding the applicant's pulmonary problems, the matter was referred to a medical panel in March of 1992. The medical panel report was received at the Commission on May 13, 1992 and was distributed to the parties on June 8, 1992. No objections to the medical panel report were filed, and as a result, the ALJ made a tentative finding of permanent total disability on August 3, 1992. The matter was referred over to the Division of Rehabilitation Services (DRS), as required by statute, on that same date.

DRS determined to do what that agency refers to as an "extended evaluation." As a result, the DRS report was not submitted to the ALJ until October 18, 1993. The report was distributed to the parties on October 19, 1993 and on November 2, 1993, counsel for Salt Lake City Corporation filed objections to the DRS report. On November 5, 1993, the ALJ notified the parties that a Hearing on Objections to the Rehabilitation Report would be scheduled in order to deal with Salt Lake City's objections. This hearing was originally scheduled for January 1994, but was continued a number of times due to scheduling conflicts and additional discovery measures conducted by Salt Lake City Corporation. The final scheduling was for June 14, 1994, but prior to that date, the attorneys called the ALJ in a telephone conference call. Pursuant to that call, counsel for Salt Lake City Corporation indicated that Salt Lake City waived any right it had to a Hearing on Objections to the Rehabilitation Report and stipulated that the matter was ready for order based on the written

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ORDER
RE: WARREN HOSKINGS
PAGE 3

objections earlier filed by Salt Lake City. The attorneys also stipulated to submit the transcript of the deposition of the rehabilitation counselor who drafted the DRS report in lieu of his testimony that would have been taken at the Hearing on Objections to the Rehabilitation Report. The matter was considered ready for order as of June 9, 1994, the date of the telephone conference call with the attorneys.

FINDINGS OF FACT:

The applicant is a male who was 50 years old on the date of injury and who is currently 56 years old. At the time of his injury in 1986, the applicant was married, but had no minor children. The applicant was employed as a firefighter for Salt Lake City Corporation on April 6, 1986 and at that time he was a captain. Per the application for hearing, he was earning \$3,500.00 per month as of the date of injury, but the applicant later stipulated that the figure in the personnel records of \$3,191.00 per month was the correct monthly salary. The applicant worked most of his life as a firefighter, but he did have some other work experience prior to 1966. The applicant graduated from Granite Highschool in Salt Lake City in 1954. He went to trade school thereafter from 1958 thorough 1960 and got a degree in electronics. From 1960 through 1965 he worked as at test technician for Sperry and then was laid off. He worked for Litton for 2 months after that as a gyro technician and then, on January 3, 1966, he was hired by Salt Lake City Corporation as a firefighter. He began working on a crew fighting fires, presenting educational information and doing inspections. As part of the ongoing training and conditioning and when actually fighting fires, he was required to climb ladders, carry people or dummies out of buildings, pull and carry hoses, etc. In 1973 or 1974, he was promoted to lieutenant. He continued to do all the regular duties of a fireman, but he was also given supervisory duties and training duties. At some point in the early 1980's, he was promoted to captain and once again he maintained all the regular firefighting duties along with his additional supervisory responsibilities.

Chronologically, the first industrial injury that the applicant can recall was an injury that occurred in the winter of 1967. The applicant recalls spraining his back as a result of having a problem with one of the hoses. He was off work for 1 or 2 weeks and he recalls continuing to see a doctor on and off for a couple years thereafter when his back gave him problems. The next injury that he recalls occurred on May 6, 1980. The applicant

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RE: WARREN HOSKINGS
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testified at hearing that he was fighting a fire in a multi-storied building and he was pulling a hose into a boiler room. As he did so, he fell through a hole in the floor of the boiler room and he fell 5 or 6 feet. Varying accounts of this incident are noted in the medical records, but most of the accounts are consistent with the applicant's testimony at hearing. The applicant recalls that his left ankle was the most noticeable of his injuries from the fall. The medical records show that X-rays of the left knee, left lower leg and left ankle were taken at Cottonwood Hospital on May 6, 1980 (Exhibit A-1, Tab #34). The films were read to show no abnormalities. The applicant recalls indicating to the employer that the left leg was too painful for him to work the morning following the accident and he believes he was sent to some clinic at that time. He was eventually referred to Dr. T. Noonan, an orthopedic surgeon, but the medical records do not contain any records for the period between May 6, 1980 and July 23, 1980 when Dr. Noonan apparently first saw the applicant (Exhibit A-1, Tab #24).

The applicant was admitted to St. Mark's Hospital on August 6, 1980 and surgery was performed there on August 7, 1980 (Exhibit A-1, Tabs #26-#28). The impression on admission was: 1) acute lumbar strain, 2) probable enchondroma 4th metatarsal with possible pathological fracture, and 3) interdigital neuroma 3-4 toes, left. It is indicated that the applicant was admitted for surgical correction of the interdigital neuroma, repair of the enchondroma and conservative management of the lumbar strain. The procedure that was performed on August 7, 1980 is listed as: open biopsy, left 4th metatarsal, excision interdigital neuroma between 3rd and 4th metatarsal heads. The applicant was discharged from the hospital on August 8, 1980 and Dr. Noonan's letter to the City/County Medial Assessment Center was that the traumatic interdigital neuroma was removed and that the lesion on the 4th metatarsal appeared to have been a healed stress fracture (Exhibit A-1, Tab #29). The applicant testified that what he understood was that the bone had opened up and a nerve got caught, thereby necessitating the surgery. The applicant returned to work on September 8, 1980, but he recalls that the left ankle was easily aggravated thereafter. Dr. Noonan's records indicate that the applicant returned to see him regarding the left ankle in June of 1981 and January of 1982. His notes indicate that the applicant had episodes of swelling and discomfort brought on particularly by walking or standing on concrete floors (Exhibit A-1, Tab #29). Dr. Noonan prescribed naprosyn and clinoril and the applicant testified that Dr. Noonan told him the pain would eventually go away.

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RE: WARREN HOSKINGS
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The applicant stated at hearing that he recalls his left ankle caused him to trip on the stairs at work at some point after the 1980 fall and he remembers that he injured his wrist in this incident. The applicant stated that he missed no time from work as a result. Not mentioned at hearing, but noted in the medical records is a work injury noted by Dr. Noonan. Dr. Noonan filed a First Medical Report for an injury on April 9, 1982. The description of the injury is "stepped back at work and hit his heel on wall, twisted left foot." A sprained left ankle and foot was diagnosed and Dr. Noonan indicates that he anticipated only 2 days off work (Exhibit A-1, Tab #32). Prior to the 1986 injury at issue, there were two more visits to Dr. Noonan in November of 1982 and May of 1983 where Dr. Noonan noted continued episodes of discomfort in the left foot (Exhibit A-1, Tab #33). Dr. Noonan continued to prescribe anti-inflammatories.

On April 6, 1986, the applicant recalls being at the #11 firestation at the Salt Lake City airport. The applicant was inside the "crash truck" and he needed to get out. The applicant described the crash truck as having a very high first step. He indicated that the first step up into the truck from the ground was 3 feet high. As the applicant went to step to the ground from the truck his left foot hit a 2.5 inch diameter hose filled with water that was laying on the ground. The applicant did not expect to step onto the hose, and as he did so, he felt a sharp pain in his left ankle and he fell to the ground. The applicant stated that the pain in his ankle was located where he always had pain in that ankle. The applicant recalls that the fall to the ground also hurt his left knee. The applicant recalls finishing his shift that day, but his battalion chief informed him that he should go to the industrial clinic the next day. The applicant was seen at the clinic on April 7, 1986 and from the somewhat unclear record it appears that an acute ankle sprain was diagnosed. However, there is also note of a calcaneous/cuboid joint problem that is noted to possibly be due to previous trauma (Exhibit A-1, Tab #15 and 16). An X-ray of the left ankle taken at the Salt Lake Industrial Clinic was read as normal (Exhibit A-1, Tab #17).

Eventually, the applicant went to see Dr. R. Kunz, a podiatrist. He tried a number of conservative measures to try and relieve the pain in the left ankle. Strapping, orthotics and injections were all tried over a period extending from June 1986 through April of 1987 (Exhibit A-1, Tab # 22). The applicant recalls that his ankle hurt upon returning to work and even prevented him from sleeping at times. He indicated that he just

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tried not to walk on it too much and tried to be careful so as not to cause additional problems with the foot. The applicant testified that he especially had problems with the concrete floors in the firestation and he recalls that the pain gradually got worse in both the knee and ankle. In June of 1987, Salt Lake City Corporation requested that the applicant see Dr. Noonan again regarding the left foot. After seeing the applicant, Dr. Noonan wrote Salt Lake City Corporation and indicated that the applicant had had pain in the left foot since 1983 and that he had also developed left knee and left hip pain a swell. All his symptoms were aggravated by walking and standing per Dr. Noonan's letter (Exhibit A-1, Tab #33). X-rays of the hip, knee and ankle were read as normal and Dr. Noonan prescribed Orudis. In July of 1983, the applicant went to see Dr. J. Page, a podiatrist that Dr. Kunz suggested for a second opinion. Dr. Page ordered a CT scan at Cottonwood Hospital and he read it to show fracture fragments between the calcaneus and the cuboid joints with subchondral cuboid cysts (Exhibit A-1, Tab #21). Dr. Page apparently tried an injection that provided relief for only a short time. In an August 17, 1987 office note, he indicated that traumatic arthritis and partial coalition were contributing to the applicant's pain and he opined that conservative measures would not be helpful. He recommended surgery, but the applicant was reluctant to get surgery at that point (Exhibit A-1, Tab #50).

In October of 1987, the applicant returned to Dr. Page and indicated that he was ready to have the surgery (Exhibit A-1, Tab #50). However, apparently the surgery was cancelled and the applicant saw Dr. Noonan in November of 1987, with Dr. Noonan finding the ankle somewhat improved (Exhibit A-1, Tab #35). Dr. Noonan recommended an elastic ankle and knee support. Apparently, sometime after November of 1987, Salt Lake City Corporation wanted a second opinion again, and per the applicant, he was sent to Dr. M. Anderson. Dr. Anderson in turn referred the applicant over to see Dr. G. L. Rasmussen and the applicant saw Dr. Rasmussen in February of 1988. Dr. Rasmussen scheduled the applicant for a diagnostic triple joint injection at LDS Hospital that apparently was done on March 1, 1988 (Exhibit A-1, Tab #37). After the injection, Dr. Rasmussen prescribed a polypropelene AFO leaf spint because the applicant had experienced some relief for the knee when he wore a canvas ankle brace with metal straps. The applicant was fitted for the brace on March 8, 1988 (Exhibit A-1, Tab #37). Dr. Rasmussen wrote Dr. Anderson on March 15, 1988 and he indicated in that letter that he read the CT scan of the foot the same as Dr. Page had (Exhibit A-1, Tab #38). His overall impression was that the applicant had osteoarthritis affecting the triple joints of the

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foot and the medical and patellofemoral compartments of the knee. Dr. Rasmussen noted in that letter that fusion surgery for the ankle was an option.

On April 12, 1988, the applicant had a bone scan done of the foot which showed increased uptake in the calcaneal cuboid joint (Exhibit A-1, Tab #37). When Dr. Rasmussen saw the applicant on April 29, 1988, he had the applicant fitted for an orthotic with a lateral wedge and this gave the applicant significant relief in the ankle and knee. In May of 1988, Dr. Rasmussen scheduled the applicant for physical therapy, but there are no actual physical therapy records in the medical record exhibit (Exhibit A-1). Dr. Rasmussen continued with alternative conservative measures including an injection during the summer of 1988. He felt the non-operative approach was better and the applicant testified at hearing that this was because the fusion surgery that was recommended for relief of pain would significantly reduce the mobility of the ankle. Per the applicant, Dr. Rasmussen told him that walking on uneven ground would be difficult with a fused ankle.

On September 1, 1988, the applicant retired from his job as captain with the firefighting department of Salt Lake City corporation. The applicant testified at hearing that he retired because the doctors had been telling him that he would continue to have problems with the ankle and because Salt Lake City Corporation offered an early retirement incentive package which included a lump sum payment for a percentage of accrued leave that he had. Per the applicant, he actually had wanted to stay with the firefighting department at least until his 25th anniversary there because "it was the best job in the world." As it worked out, the applicant explained that he actually would have done better financially to have continued working, but he was concerned about his ankle and the safety implications for himself and other and the city was encouraging him to take the early retirement incentive package.

After retiring, in November of 1988, the applicant was seen at Humana Hospital Sunrise in Las Vegas, Nevada for chest pain. The impression while he was there was: 1) right lower lobe pneumonia, 2) right pleural effusion, 3) partial right middle lobe collapse and 4) positive protein derivative. (Exhibit A-1, Tab #42). The applicant followed up with Dr. D. Wilhelm at the Salt Lake Clinic and he was hospitalized from December 14, 1988 through December 22, 1988 at LDS Hospital for evaluation of the continued

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lung problems he was having (Exhibit A-1, Tabs #1-#6). Several surgical procedures were accomplished during the hospital stay and the surgeon, Dr. M. Collins, indicated that the best diagnosis that the pathologist could come up with was fibrinous pleuritis. He suggested that the applicant possibly had a reaction to a noxious or toxic substance when he was involved at a chemical fire at the airport (Exhibit A-1, Tab #7). The applicant had additional follow-up with Dr. Collins and Dr. Wilhelm after his hospital stay through February of 1989 when it was determined that the effusion had resolved (Exhibit A-1, Tabs #42, #9, #10). When the applicant had an episode of left chest pain, this was determined to be musculoskeletal (Exhibit A-1, Tab #42).

On June 20, 1989, Dr. G. L. Rasmussen wrote Salt Lake City Corporation and indicated that the applicant's left lower extremity impairment was 21% of the lower extremity, or 8% whole person (Exhibit A-1, Tab #39). Salt Lake City Corporation requested a second opinion evaluation from Dr. R. Hansen of Utah Orthopedic Associates in Salt Lake City. In his letter to Salt Lake City Corporation, Dr. Hansen notes that the applicant peristed with left knee and foot problems despite of his inactivity. Dr. Hansen noted that any motion of the foot caused pain and that the applicant especially had problems with uneven ground and stairways. Dr. Hansen's impression was that the applicant had post-traumatic left foot calcaneal cuboid arthrosis and he recommended the fusion surgery that had been suggested for sometime (Exhibit A-1, Tab #13). Dr. Hansen noted that he doubted that the applicant would be able to return to firefighting. In a follow-up letter dated August 25, 1989, Dr. Hansen rated the applicant at 10%, without specifying if this was a whole man impairment or a lower extremity impairment (Exhibit A-1, Tab #14).

On January 18, 1990, the applicant saw Dr. B. Pratley for another opinion regarding the impairment in his left lower extremity. Dr. Pratley wrote Salt Lake City Corporation with the following diagnoses: 1) calcaneal cuboid arthrosis, 2) subtalar osteoarthritis, 3) calaneal cuboid osteoarthritis, 4) fascitis, plantar, chronic, 5) flexion contracture left knee (Exhibit A-1, Tab #36). Dr. Pratley indicated that the applicant had sustained a significant injury in 1986 and had been able to get along the past 8 or 9 years by altering his gait and his activities. He found that the osteoarthritic changes that he noted were caused by the trauma in 1986. He rated the applicant's left lower extremity at 43% lower extremity or 17% whole person. Salt Lake City declined to pay the applicant based on this rating and offered to

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pay permanent impairment benefits based on a compromise between Dr. Rasmussen's 21% lower extremity rating and Dr. Hansen's rating, which Salt Lake City feels is a 10% lower extremity rating. The compromise offer was for 15.5% of the lower extremity or just over 19 weeks of benefits (as compared to 53 weeks of benefits which would be allowed, if Dr. Pratley's rating were accepted). The parties could not reach an agreement regarding the manner in which to figure the applicant's entitlement to permanent impairment benefits (PPI), resulting in the applicant filing his application for hearing claiming permanent total disability benefits in April of 1990.

For the summer of 1990, from April 22, 1990 through September 23, 1990, the applicant got a fulltime job with Hamilton Stores in West Yellowstone, Wyoming. This job paid him \$850.00 per month. The applicant's job was as a fire marshall and he taught safety and did fire protection education at the several stores that the company operated within Yellowstone Park. The applicant testified that the job was very non-strenuous and consisted of primarily driving from one store to the other. The applicant estimated that he spent 4 of the 8 hour workday driving. In 1991, the applicant had planned to do the seasonal work again, but the company wanted to bring someone on for a year-round position. The applicant worked that summer from May 6, 1991 through June 14, 1991 just to train in the person that was to take the year-round position. The applicant was paid \$875.00 per month during this time frame. The applicant testified that he felt that the cold weather in Yellowstone during the winter would be too hard on his left ankle and his lungs for him to have taken the year-round position.

When the applicant saw Dr. Rasmussen on August 23, 1991, Dr. Rasmussen noted on the X-rays that the foot appeared to be about the same, but that the knee had deteriorated significantly with lateral patellar tilt and medial joint narrowing. Apparently, Dr. Rasmussen recommended knee surgery at that time in addition to the ankle surgery that had been earlier recommended (Exhibit A-1, Tab # 37). The applicant testified at hearing that his foot has been about the same in 1990 and 1991. He stated that the conservative measures that have been attempted in order to alleviate the pain have not been very successful. He felt that physical therapy was not beneficial and that the muscle relaxants only gave him temporary improved range of motion. Some of the braces he had tried for the ankle reduced his range of motion so severely that he did not use them much. The applicant did note that the wedged

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inner sole supports, that Dr. Rasmussen had prescribed, did help him. With respect to activity, the applicant stated that he could fish, camp (with no walking), and that he could play golf once every 2 or 3 months if he used a golf cart. He stated he could not walk for any prolonged period, could not lift or twist and had to avoid concrete floors and any quick movement that would effect the ankle.

The medical panel that was appointed to review the applicant's overall impairment consisted of chairman, Dr. G. Moress and pulmonologist, Dr. R. Farney. The panel found that the applicant's foremost orthopedic problem was his calcaneal cuboid arthritis in the left ankle. The panel found that the origin of this condition was definitely industrial, with progression of the condition having occurred over the years since the 1986 industrial accident. The panel stated in its April 15, 1992 report that the condition caused significant pain and marked limitation of range of motion in the left ankle and foot. The panel concluded that the appropriate impairment rating for the left ankle/foot was that which would be assigned if the applicant had already had the arthrodesis surgery that had been recommended. This was apparently based on the panel's feeling that the surgery would improve only the applicant's pain level, with the limitation of range of motion remaining the same. The panel concluded that the appropriate rating would be 11% whole person. The panel also found that the left knee could be assigned a rating of 4% whole person, but the panel found that the knee problems were not associated with the 1986 industrial accident. With respect to the applicant's pulmonary problems, Dr. Farney found that the applicant had no functional pulmonary impairment. Dr. Farney found that the applicant had chronic bronchitis and sensitivity to environmental conditions, but this apparently is not ratable. Dr. Farney also noted that the applicant had gastro-esophageal reflux and hypertension.

Based on the applicant's indication that his left ankle condition was a significant contributor to his decision to retire in 1988, and based on the consensus of medical opinion that the industrial accident caused the applicant to have serious left ankle impairment with associated pain that deteriorates with time, and because there was no evidence presented at hearing that the applicant was capable of returning to his work as a firefighter, the ALJ made a tentative finding that the applicant was permanently totally disabled as a result of the April 6, 1986 industrial

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accident. On August 3, 1992, the ALJ referred the matter over to DRS, as required by U.C.A. 35-1-67, for an analysis of the applicant's potential for return to work.

Based on the transcript of the deposition of the DRS rehabilitation counselor assigned to evaluate the applicant's case (Frank Miera), the applicant underwent a one-week work evaluation from November 2, 1992 through November 6, 1992. This evaluation was conducted by DRS personnel trained to administer work evaluations. Miera indicated that in the regular course of his work as a DRS rehabilitation counselor, he refers applicants for work evaluations to be conducted by trained DRS personnel and does not administer these tests himself. Miera indicated that he relies on the written reports of the evaluators in assessing an applicant's potential for rehabilitation. He noted that, based on the applicant's IQ and general aptitude, that the applicant did qualify for retraining in all categories.

Miera indicated that he understood that the applicant did complete the testing that occurred over a 5-day period from 9:00 AM through 5:00 PM. However, per the reports that he received, the evaluators noted that the applicant showed definitive physical signs of exhaustion during the testing. Per Miera, and per the reports of the work evaluators, the applicant cooperated fully in the testing and was very truthful and honest throughout the evaluation process. Miera indicated that the evaluators noted that the applicant was reluctant to tell the evaluators regarding the physical problems he was having during the testing, but when pressed, did indicate that he had a constant burning and aching in the left knee, ankle and foot. The evaluator noted that the applicant had to frequently shift his weight during the testing, while he was both sitting and standing, to relieve the symptoms in the left lower extremity. This was noted to occur more frequently as the testing progressed. It was also noted that the applicant walked slowly and had gait problems as a result of the left lower extremity symptoms.

Per Miera, the conclusion of the evaluators was that the applicant was unable to demonstrate the physical stamina and endurance to perform sedentary work activities, even on a part-time basis. Miera stated that he found the conclusion of the evaluators to be supported by the applicant's medical records and therefore adopted those conclusions. Miera and the evaluators concluded that, if the applicant was to work part-time, he would need a

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position that did not exceed 20 hours per week and that would allow flexibility in completing the 20 hours. Because Miera felt that the applicant's physical condition might improve, the applicant was requested to report-in, over a period of months following the testing. Miera stated that the applicant's periodic self-reports during the next year did not reflect any improvement in his physical condition. As a result, Miera concluded that the applicant's limitations, noted on examination in November of 1992, were permanent. He stated at the end of his deposition that it was possible that the applicant could find a position that would accommodate his limitations, but that the availability of such a position would be very limited.

The above-stated DRS conclusions were noted in Miera's report to the ALJ, received at the Commission on October 18, 1993. However, that report is fairly short and does not contain all the foundational information that was provided pursuant to the March 1994 deposition of Miera. The report was distributed to the parties on October 19, 1993, and on November 2, 1993, Salt Lake City Corporation filed objections to the report, along with a reiteration of argument made prior to the hearing. With respect to the DRS report, Salt Lake City argued that the report was based on a finding of limited physical stamina, with no medical confirmation to support that such a limitation existed. With respect to Salt Lake City's defenses generally, counsel argued that the applicant was not in fact disabled, as is demonstrated by the fact that the applicant was able to perform a full-time job during the summers of 1990 and 1991. Counsel also argued that there was no indication that the April 6, 1986 industrial accident was the cause of the applicant's current non-work status. Counsel notes that the applicant never lost any work time as a result of the April 6, 1986 accident and then decided to retire in 1988 based on an early retirement incentive program offered by Salt Lake City, with no mention at that time regarding any problems with the left foot and ankle. Finally, counsel argues that the applicant has had unrelated lung and possible heart problems develop since his retirement, and that these problems are the true cause of any current disability.

On November 5, 1993, the ALJ wrote the parties and indicated that she would schedule the matter for an additional hearing to deal with Salt Lake City's objections to the DRS report. On November 9, 1993, the ALJ received a written response to Salt Lake City's objections from counsel for the applicant. In this response, counsel argues that, in its objections/argument, Salt

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Lake City did not address the ALJ's prior finding that the applicant had suffered physically with his left ankle/foot problems prior to his retirement, and had decided to retire primarily because several physicians had indicated to him that the left ankle and foot would continue to give him problems. Counsel also notes that Salt Lake City did not address the medical panel findings that the applicant's left ankle/foot condition had progressed since the date of injury and warranted a higher rating than was earlier assessed by other physicians. Finally, counsel argues that case law precedent requires that Salt Lake City show that there is suitable steady work available to the applicant, once there is a finding that the applicant is not susceptible to rehabilitation. Because Salt Lake City has not been able to show that steady work is available to the applicant, counsel argues that case law requires a finding that he is entitled to permanent total disability benefits. Counsel comments that the permanent total disability benefits should be determined to begin as of the date that the applicant retired, notwithstanding his work thereafter, because the applicant was only capable of work in a sheltered workshop after his retirement.

The initial scheduling of the Hearing on Objections to the Rehabilitation Report was in January of 1994. Prior to that scheduling, Salt Lake City requested that the applicant undergo a vocational evaluation to be performed by a private rehabilitation firm, Intracorp, and requested that he be evaluated for permanent impairment by a physician, Dr. S. Knorrpp. The applicant underwent both evaluations in December of 1993. The Intracorp report notes that the evaluator felt that the physical stamina limitations noted by DRS in its report do not apply any longer. This apparently was based on what the applicant told the evaluator, but further explanation of this conclusion is not provided in the Intracorp report. The report identifies some job positions that the applicant would qualify for after some short-term training, apparently based on a computer-generated analysis. However, the report is very equivocal regarding whether there are current position openings in these jobs available to the applicant and whether or not placement into these jobs would require that the applicant move to the Salt Lake City area. Dr. Knorrpp's report seems to contradict the Intracorp report somewhat in that Dr. Knorrpp concedes that the applicant's left foot/ankle condition causes significant work activity restrictions resulting from the pain being aggravated by cold, prolonged sitting, standing and walking. Dr. Knorrpp also notes that the applicant feels that the pain continues to progress. Despite the fact that the recommended surgery would probably improve the pain, Dr. Knorrpp finds the

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applicant's decision to live with the pain and avoid surgery as reasonable, because he notes that the surgery would predictably result in reduced range of motion as well as development of gait, hip and low back problems. Dr. Knorrp finds that the 4th Edition of the Guides to the Evaluation of Permanent Impairment would allow an 8% whole person rating for the left foot/ankle and 11% only after the proposed fusion surgery was performed.

There were problems finding a date when all necessary participants could be in attendance at the Hearing on Objections to the Rehabilitation Report. A final scheduling was made for June 14, 1994. Prior to this date, in April of 1994, Salt Lake City notified the applicant that he needed to attend a 2-week work tolerance test that Salt Lake City had arranged in May of 1994. Counsel for the applicant objected to this further evaluation, indicating that the applicant had already agreed to 2 other evaluations requested after distribution of the DRS report. Counsel stated that the Industrial Commission rules did not allow for unlimited evaluations at the request of the employer/carrier. In addition, counsel noted that U.C.A. 35-1-67, as it read as of the date of injury in this matter, did not provide for a mandatory hearing on the issue of rehabilitation, as it now does (since it was amended in 1988). As such, counsel argues that it is questionable that such a hearing is even warranted in this matter. On April 27, 1994, the ALJ wrote Salt Lake City and indicated she agreed with counsel for the applicant and found that the applicant would not be considered to be infringing on any inferred discovery rights that Salt Lake City might have, if he decided not to attend the work tolerance testing. In addition, the ALJ noted that, at the time of the June 14, 1994 hearing, she would take argument on the retroactivity of the 1988 amendment to U.C.A. 35-1-67, which amendment specifies that a hearing on the issue of rehabilitation is mandatory after the DRS report is submitted.

As noted at the beginning of this order, pursuant to a June 9, 1994 telephone conference call, and as documented in a June 9, 1994 letter to the ALJ from counsel for Salt Lake City, Salt Lake City agreed to waive any right it might have to a Hearing on Objections to the Rehabilitation Report and agreed to submit the matter based on argument already in the record and based on the deposition testimony of Frank Miera, the DRS rehabilitation counselor.

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CONCLUSIONS OF LAW:

Entitlement to Permanent Total Disability Benefits:

The ALJ agrees with counsel for the applicant that the Hardman case specifies the burden-shifting that applies when analyzing an applicant's entitlement to permanent total disability benefits, if the industrial injury at issue occurred prior to the 1988 amendment to U.C.A. 35-1-67, as is here the case. Hardman v. SLC Fleet Management, 725 P. 2d 1323 (Utah 1986). That case deals with "odd lot" cases, or cases in which the industrial injury combines with other limitations to effect employability. As specified in Hardman, the first requirement of the "odd lot" test is that the applicant must show that he can no longer perform the duties required in his occupation. If such a finding is made, Hardman specifies that a tentative finding of permanent total disability is required. Although Salt Lake City has noted that the applicant voluntarily retired from his firefighter position, at no point has Salt Lake City suggested that the applicant is physically capable of returning to that position. As a result of no argument being made that the applicant could return to his firefighter job, the ALJ felt that this was not really a contested issue. Therefore, the ALJ made a tentative finding of permanent total disability in August of 1992. That tentative finding was not contested by Salt Lake City, which further reinforces the ALJ's feeling that Salt Lake City did not then, nor does it now, contest the fact that the applicant is unable to return to his prior position. The first requirement of the test having been met, the second requirement must be analyzed.

The second requirement of the "odd lot" test, as specified in Hardman, is that the applicant must show that he cannot be rehabilitated. On this point, the DRS report indicates that the applicant is not physically capable of retraining or return to work in a full time position. This conclusion was based on the applicant's medical records and a week-long work evaluation conducted by DRS. The DRS report identifies the left ankle pain as a significant contributor to the applicant's overall stamina or lack thereof. Although the Intracorp report suggests that the applicant does not have any stamina limitations that would prevent him from being rehabilitated, as noted above, it is very unclear how Intracorp came to this conclusion. The Intracorp report appears to suggest that the applicant himself feels that he no longer has these limitations, but the ALJ is unaware of any

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statements from the applicant or his counsel that would suggest that he concedes to having improved physically since November of 1992, when it was determined that he in fact did have stamina limitations. The Intracorp report does not indicate that any testing or observation of the applicant's stamina was conducted or served as a basis for its conclusion. In addition, the Intracorp report appears to indicate that no review of medical records was made by the vocational evaluator preparing the report. The ALJ therefore finds that the Intracorp evaluator was not fully informed regarding the nature of the applicant's physical problems or his stamina so as to be able to render an opinion on this aspect of the applicant's work capacity. The ALJ finds the DRS report to be better supported by documentation and examination and therefore adopts the DRS conclusion that the applicant does not have the stamina to undergo rehabilitation training.

It should also be noted that the employer's own physician, Dr. Knorrrp, states that the applicant, in fact, has progressive deterioration in his left ankle which is causing increasing pain which limits his ability to do any position that requires prolonged sitting, standing or walking. This statement appears to be in line with the DRS finding that the applicant is incapable of fulltime work or rehabilitation retraining. Finally, the medical panel report also confirms the progressive deterioration and significant pain and limitation of range of motion in the ankle. Taken as a whole, the ALJ finds that the preponderance of the well-founded expert opinion on the applicant's susceptibility to rehabilitation supports a finding that the applicant's physical condition, even if only the left ankle is taken into consideration, is impaired to the extent that he would not be able to undergo rehabilitation training.

Having established that rehabilitation is not feasible, the Hardman case specifies that the burden of proof shifts to the employer to show that regular steady work is available to the applicant. The ALJ finds that the employer has not demonstrated any "regular steady work" that is available to the applicant. The DRS report notes that the applicant would be capable of only very part-time work, with flexible hours, and notes that such a position would be very difficult to find. The Intracorp report is the only evidence that has been presented by the employer that even arguably suggests that regular steady work is available. However, that report only lists some positions that the applicant might be able to perform after some limited training. The report does not establish that any of these positions are available generally and

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certainly does not establish that the positions are available to the applicant. Therefore, the Intracorp report does not support a finding that regular steady work is available to the applicant. In addition, as noted above, the preponderance of the medical evidence indicates that the applicant has a steadily deteriorating condition in the ankle that results in significant pain and significant activity restrictions as a result. The medical evidence therefore supports a finding that the applicant's work capacity is very limited, which finding is in turn supportive of the conclusion that regular steady work is not readily available to the applicant. Per Hardman, if the employer cannot show the availability of regular steady work, then the applicant is entitled to an award of permanent total disability benefits.

With respect to the specific arguments set forth by Salt Lake City, Salt Lake City has argued that the applicant's current non-work status is a result of his decision to accept an early retirement package offered by Salt Lake City in 1988 and that it is not the result of inability to work caused by the left ankle. However, as noted above, the ALJ has found otherwise. The applicant credibly testified that his left ankle condition was a major contributor to his decision to retire. This testimony is supported by the medical records which verify continuing treatment for the left ankle after the 1986 injury, with no lasting improvement resulting and increasing pain and limitation of motion noted with the passage of time. Considering that the preponderance of the evidence supports a finding that the left ankle condition caused the applicant to discontinue working as a firefighter, the fact that the applicant did not specifically tell Salt Lake City his reason for retiring is not particularly probative.

Salt Lake City has also argued that the applicant missed no time from work as a result of his 1986 ankle injury, apparently as support for the proposition that the ankle injury was not a serious one. Although it is unusual for a significant injury to result in no work time lost, in the instant case, this unusual result is explained by the fact that the ankle condition is one that deteriorates with time. While the condition was fairly new and had not progressed to its current status, the applicant was able to continue working, albeit with some difficulty. When it got to the point that it was causing the applicant considerable concern and the doctors verified to him that he should not plan on it getting better, the applicant decided to discontinue firefighting. The sequence is logical and understandable, even if it is unusual that there was no lost time immediately following the injury.

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Salt Lake City has argued that the applicant's ability to work is demonstrated by the fact that he in fact did work in 1990 and 1991 at a fulltime job. Although the ALJ would not characterize this work as a "sheltered workshop" situation as counsel for the applicant has described it, certainly the temporary seasonal Fire Marshall position that the applicant worked for a couple months during the summers of 1990 and 1991 was a very unique and unusual job. His ability to perform in that position does not suggest that he is capable of truly gainful work. That position was not a permanent all-year job at the time and it involved minimal exertion due to the amount of driving it entailed. That position is no longer available, having been eliminated to create a fulltime permanent position that the applicant could not perform in significant part because of his ankle. There has been no evidence presented to establish that similar positions are available to the applicant. The applicant was simply lucky to have found the position at a time when he was still capable of performing in the limited capacity that was required by the job. The fact that he was able to perform the job at that time does not detract from the fact that he currently is more limited, as noted by the DRS evaluation.

Finally, Salt Lake City has argued that the applicant developed lung and heart problems after his retirement and that these problems are the source of his current disability. The ALJ finds no evidence of confirmed heart problems in the medical records. There is some evidence that the applicant did in fact have some pulmonary problems in late 1988 and early 1989 and Dr. Farney (medical panel member) did confirm that the applicant has chronic bronchitis currently. There are some references to the applicant's pulmonary problems in the DRS report and apparently the problems do contribute to his decreased stamina. However, the extent of the applicant's pulmonary problems is very ill-defined at this point. It simply is unclear to what extent these problems contribute to any disability. There is no impairment associated with the pulmonary problems and there has been no evidence presented that in fact the pulmonary problems are the source of the applicant's inability to work. In addition, when the applicant decided to discontinue working, he apparently did not have the pulmonary problems and was only faced with the left ankle and knee condition. It appears that the pulmonary problems developed after the ankle condition had deteriorated to the point that the applicant could not do firefighting and thus the pulmonary problems were not the cause of the applicant's discontinuance of work.

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Having found that the case law precedent applicable to permanent total disability awards, as applied to this case, requires an award of benefits in this case, and having addressed the defenses raised by Salt Lake City and found that they do not alter the results reached by application of the case law precedent, the ALJ finds that an award of permanent total disability benefits is appropriate.

Computation of Benefits:

The most significant finding with respect to the computation of the award in this case is the date on which the permanent total disability benefits should begin. Presumably, the benefits should begin at the point at which it appears that the applicant became totally disabled. Counsel for the applicant has suggested that this is the date of his retirement in 1988, because thereafter he worked only in a sheltered workshop scenario. Salt Lake City has not addressed this issue at all. The ALJ finds that the seasonal Fire Marshall job was not truly a sheltered workshop. It was a seasonal job requiring minimal exertion and maximal experience/training. It is clear in the record that the applicant has not worked since he discontinued the seasonal work on June 14, 1991. Therefore, the ALJ finds that the applicant's disability began at least as of June 14, 1991. The question then becomes whether he became disabled before that date.

It is unclear exactly what the applicant's physical condition was just after retiring. He was having pulmonary problems in late 1988 and early 1989 which required some hospitalization. There has been no testimony and there are no medical records (excepting impairment evaluations) for the period of March 1989 through when he began work again in May of 1990. Thereafter, there is also no information regarding the applicant's physical condition during the time he was off work until he began work in May of 1991. Any disability as early as late 1988 and early 1989 would seem to be attributable to the applicant's need for hospitalization for pulmonary problems at that time. Thereafter, he was able to work at least seasonally. No other information regarding his disability status between 1988 and 1991 has been presented. As such, the ALJ finds that the preponderance of the evidence does not support a finding of total disability until the applicant discontinued his seasonal work on June 14, 1991. The ALJ therefore finds that permanent total disability benefits should begin as of June 15, 1991.

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Based on a monthly salary of \$3,191.00 at the time of the injury, the average weekly wage, per U.C.A. 35-1-75, would be \$736.95 ($\$3,191.00 \div 4.33$). Taking $2/3$ of that amount, the compensation rate would be \$491.55 ($\$736.95 \times .667$). That exceeds the maximum rate for permanent total disability as of April 6, 1996 and thus the maximum of \$275.00/week applies.

The ALJ finds that no apportionment of the initial 312 weeks is applicable as between Salt Lake City and the Employers Reinsurance Fund. This is because the only impairment that has been rated (per the medical panel) is the applicant's ankle (11% whole person) and his knee (4% whole person). The panel did not indicate that the ankle injury aggravated the knee condition and thus the only way the Employers Reinsurance Fund would have liability for the initial 312 weeks would be if the applicant had at least an overall 20% impairment, with at least 10% industrial (per U.C.A. 35-1-69). The applicant has not been rated as having at least 20% overall impairment and thus no apportionment of the initial 312 weeks is applicable. As a result, Salt Lake City is responsible for the initial 312 weeks of benefits, with the Employers Reinsurance Fund taking over payment of the benefits thereafter. Salt Lake City's total liability would therefore be \$85,800.00 (312 weeks \times \$275.00/week). Accrued benefits as of July 2, 1994 is equal to 159 weeks or \$43,725.00. Thereafter, Salt Lake City needs to pay the applicant periodically at the rate of \$275.00/week until June 9, 1997 when the Employers Reinsurance Fund will begin to pay benefits.

Attorney fees are figured on the generation of 312 weeks of benefits, or \$85,800.00. Per Commission rule R568-1-7 the attorney fee would be \$5,250.00 (20% of the first \$15,000.00 plus 15% of the next \$15,000.00 generated) plus 10% of the remainder of \$55,800.00 or \$5,580.00, for a total of \$10,830.00. This exceeds the maximum fee specified by rule so the maximum of \$7,500.00 applies.

ORDER
RE: WARREN HOSKINGS
PAGE 21

ORDER:

IT IS THEREFORE ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay the applicant, Warren Hoskings, permanent total disability benefits at the rate of \$275.00 per week, for 312 weeks, or a total of \$85,800.00 for his April 6, 1986 industrial injury. The accrued amount of \$43,725.00 is due and payable in a lump sum, plus interest at 8% per annum, per U.C.A. 35-1-78, and less the attorney fees to be awarded below. The remaining liability should be paid periodically to the applicant, at the rate of \$275.00 per week, until June 9, 1997.

IT IS FURTHER ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay all medical expenses incurred as the result of the April 6, 1986 industrial accident; said expenses to be paid in accordance with the medical and surgical fee schedule of the Industrial Commission of Utah.

IT IS FURTHER ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay Susan Black and James Black, attorneys for the applicant, the sum of \$7,500.00, plus the percentage of interest that is appropriate per R568-1-7, for services rendered in this matter, the same to be deducted from the aforesaid accrued award to the applicant, and to be remitted directly to the office of James Black.


IT IS FURTHER ORDERED that the Administrator of the Employers Reinsurance Fund shall prepare the necessary vouchers directing the State Treasurer, as Custodian of the Employers Reinsurance Fund, to place the applicant, Warren Hoskings, on the Employers Reinsurance Fund payroll as of June 9, 1997, with weekly payments to be made to him at the rate of \$275.00 per week. Said payments to the applicant shall continue for the remainder of his life, or until further notice from the Commission.

00465

ORDER
RE: WARREN HOSKINGS
PAGE 22

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. 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 written response with the Commission in accordance with Section 63-46b-12(2) Utah Code Annotated.

DATED this 30 day of June, 1994.



Barbara Elicerio
Administrative Law Judge

MAILING CERTIFICATE

I certify that on June 20, 1994, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Warren H. Hoskings, was mailed to the following persons at the following addresses, postage paid:

Warren H. Hoskings
5202 Lucky Clover Lane
Murray UT 84123

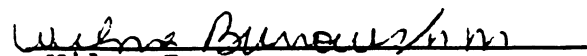
James Black
Attorney at Law
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SLC UT 84133

Frank Nakamura
Attorney at Law
451 South State Street, #505
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Attorney/Administrator
P O Box 146611
SLC, UT 84114-6611

Salt Lake City Corporation
451 South State Street, Rm. 425
SLC, UT 84111

INDUSTRIAL COMMISSION OF UTAH


Wilma Burrows
Adjudication Division

00476

Tab 5

Appendix 5

Peck v. Eimco, 748 P.2d 572 (Utah 1987)

RTER, 2d SERIES

manent total disability benefits under odd-lot doctrine.

Reversed and remanded.

1. Workers' Compensation ¶1636

Employee seeking permanent total disability benefits under odd-lot doctrine must first present prima facie case that no regular, dependable work is available to him, and to do that, employee must present evidence that he can no longer perform duties required in his occupation and that he cannot be rehabilitated to perform some other type of employment. U.C.A.1953, 35-1-67.

2. Workers' Compensation ¶1375

Once employee seeking permanent total disability benefits under odd-lot doctrine has presented prima facie case, burden shifts to employer to prove existence of regular, steady work that employee can perform, taking into account employee's education, work experience, mental capacity and age. U.C.A.1953, 35-1-67.

3. Workers' Compensation ¶1636

Employee presented prima facie case of permanent total disability under odd-lot doctrine; evidence, including letters from physicians, medical panel's report, and evaluation of employee by Division of Rehabilitation Services showed that employee was unable to perform normal duties of his occupation, that he required eight of his fellow employees to perform the bulk of his work for him, and that he suffered continual pain as a result of his industrial injuries. U.C.A.1953, 35-1-67.

4. Workers' Compensation ¶1636

Although fact that employee returned to work following industrial injury may be relevant in determining employee's ability to perform duties of occupation, and thus, may be factor in assessing whether employee has suffered any loss of earning capacity entitling him to permanent total disability under odd-lot doctrine, that fact alone is not conclusive of his ability to work nor is it dispositive of issue of earning capacity. U.C.A.1953, 35-1-67.

Alma E. PECK, Plaintiff,

v.

EIMCO PROCESS EQUIPMENT CO.,
Second Injury Fund and Industrial
Commission of Utah, Defendants.

No. 20914.

Supreme Court of Utah.

Dec. 31, 1987.

Workers' compensation claimant challenged Industrial Commission order denying him permanent total disability benefits. The Supreme Court, Stewart, Associate C.J., held that claimant was entitled to per-

1. See generally, *Utah Hotel Co. v. Industrial Commission*, 107 Utah 24, 151 P.2d 467 (1944).

5. Workers' Compensation ¶1375

At most, fact that employee returns to work after industrial injury creates rebuttable presumption that he has not sustained permanent and total disability under odd-lot doctrine. U.C.A.1953, 35-1-67.

6. Workers' Compensation ¶1636

Fact that employee returned to work following industrial injury did not prevent him from recovering permanent total disability under odd-lot doctrine; employee presented uncontroverted evidence, not only of his physical impairment, but also of his inability to perform his job. U.C.A. 1953, 35-1-67.

7. Workers' Compensation ¶803

Mere fact that employee has retired will not adversely affect determination of permanent total disability when employee had demonstrated that his disability from industrial injury significantly influenced his decision to retire. U.C.A.1953, 35-1-67.

8. Workers' Compensation ¶803

Only when finding is made and supported by evidence that employee's retirement is not substantially motivated by his industrial injury, but is due primarily to personal or other reasons, will denial of disability benefits be upheld on basis of voluntary retirement. U.C.A.1953, 35-1-67.

9. Workers' Compensation ¶803

Fact that worker retired on the day after he turned 65 did not preclude him from recovering permanent total disability benefits under odd-lot doctrine in the face of evidence that retirement was substantially related to his industrial injury. U.C.A.1953, 35-1-67.

10. Workers' Compensation ¶847

Industrial Commission's adoption of medical panel's findings of physical impairment, without further evaluation of effect which that impairment, when combined with other factors, might have on workers' compensation claimant's wage-earning capacity, constituted failure by Commission to carry out its administrative responsibilities under odd-lot doctrine. U.C.A.1953, 35-1-67.

Roger D. Sandack, Salt Lake City, for Peck.

Robert R. Finch, Salt Lake City, for Eimco.

Erie Boorman, Salt Lake City, for Second Injury Fund.

David L. Wilkinson, Ralph L. Finlayson, Salt Lake City, for Indus. Comm.

STEWART, Associate Chief Justice:

This is an action by plaintiff Alma E. Peck challenging an Industrial Commission order denying him permanent total disability benefits. We reverse and remand.

While employed by Eimco Processing Equipment Company as an industrial maintenance mechanic, Peck suffered two compensable industrial injuries which resulted in permanent physical impairment. The first injury, on September 12, 1980, required surgery on Peck's right knee and caused a two percent impairment of the body. The second injury, on December 29, 1982, necessitated surgery on Peck's lower back and resulted in a ten percent loss of body function. Peck was then sixty-three years old.

Although Peck's last injury occurred in December, 1982, he continued to work until March 7, 1983, when his doctor prescribed surgery. On March 17, back surgery was performed. On June 27, 1983, Peck returned to work under light-duty restrictions. Peck applied to the Commission for temporary total disability benefits from March 7 to June 27 and for permanent partial disability benefits thereafter, claiming that the surgery on his back failed to restore his ability to return to his normal work. The Commission set a hearing for October 17, 1983.

After the hearing, the administrative law judge appointed a medical panel to evaluate Peck's case. The medical panel concluded that Peck suffered a twenty-four percent preexisting physical impairment and that the industrial injuries combined with the preexisting impairments to produce a thir-

ty-three percent permanent physical impairment.

On April 27, 1984, Peck turned sixty-five years old. The next day, April 28, ten months after returning to work following the back surgery, Peck retired. Peck then requested a determination regarding permanent total disability from the Commission. A second hearing was set for September 25, 1984. After the second hearing, the Commission sent Peck to the Division of Rehabilitation Services to determine whether he could be rehabilitated for other employment. The rehabilitation officer concluded that due to his age and physical impairments, Peck was not a good candidate for rehabilitation.

On February 28, 1985, the administrative law judge issued his findings of fact and conclusions of law. Among his findings, the judge stated:

The Applicant worked effectively before the December 1982 injury despite his 27% pre-existing impairment.... The December 1982 incident only added a 10% impairment. The Applicant was able to work effectively in his job for about a year after his injuries healed. There is no evidence of new injury, nor is there any medical evidence that the Applicant was taken off the job April 28, 1984, because of his old injuries. The Applicant just plain retired.

The judge ruled, however, that Peck was entitled to temporary total disability benefits for the period from March 7 to June 27 and, "[w]ith great reluctance," that Peck was permanently and totally disabled under existing Utah case law and entitled to benefits accordingly.

Defendant Second Injury Fund appealed to the Commission to reverse the award of permanent total disability benefits. Although the Commission upheld the award of temporary total disability benefits, it reversed the award of permanent total disability benefits. The Commission based its reversal on the judge's findings that Peck "did not leave work on April 27, 1984 because of old or new injuries" and that Peck "just plain retired." The Commission concluded that Peck failed to meet "his burden

in showing an inability to return to work," as required by Utah Code Ann. § 35-1-67 (Supp.1987).

Peck seeks review of the Commission's order denying permanent total disability benefits. The issues raised are (1) whether Peck is entitled, due to his industrial injuries, to permanent total disability benefits under the odd-lot doctrine pursuant to Utah Code Ann. § 35-1-67, and (2) whether there is evidentiary support for the findings of fact made by the administrative law judge and adopted by the Commission that Peck was "able to work effectively in his job for about a year after his injuries healed" and that he "just plain retired."

I.

The ultimate issue presented by this case is whether Peck is entitled to permanent total disability benefits provided by Utah Code Ann. § 35-1-67 under the odd-lot doctrine enunciated in *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984).

In *Marshall*, the Court stated, "Under the odd-lot doctrine, ... total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 681 P.2d at 212 (quoting 2 Larson, *The Law of Workmen's Compensation* § 57.51, at 10-164.24 (1983)). The Court further stated:

[A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do....

Id. at 211 (quoting *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 412, 393 P.2d 800, 801-02 (1964)) (emphasis omitted). The Court further stated that the term "disability" means the loss of wage-earning capacity and that a disability must be assessed in terms of the specific individual who has suffered a work-related injury, taking into account such factors as age, education, training, and mental capacity. "It is the unique configuration of these

factors that together will determine the impact of the impairment on the individual's earning capacity." *Id.* at 211. See also *Norton v. Industrial Comm'n*, 728 P.2d 1025, 1027 (Utah 1986); *Hardman v. Salt Lake City Fleet Management*, 725 P.2d 1323, 1326-27 (Utah 1986). Furthermore, Professor Larson states:

"Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial....

... The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

2 Larson, *The Law of Workmen's Compensation* § 57.51(a), at 10-164.65, 10-164.84(18) (1987) (footnotes omitted).

[1.2] We enunciated in *Marshall* the procedure for an employee to prove that he is entitled to permanent total disability benefits under the odd-lot doctrine. The employee must first present a prima facie case that no regular, dependable work is available to him. To do this, the employee must present "evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated" to perform some other type of employment. *Marshall*, 681 P.2d at 212. Once the employee has presented a prima facie case, "the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education [work experience], mental capacity and age." *Id.* Failure by the employer to meet its burden of proof entitles the employee to permanent total disability benefits.

[3] Peck argues that he presented a prima facie case of permanent total disabili-

ty under the odd-lot doctrine by proving that he was sixty-three years old at the time of his last industrial accident, had no formal education beyond high school, worked his entire life in heavy manual labor, was no longer capable of performing the duties of his job, and could not be rehabilitated. The administrative law judge, however, found that Peck "was able to work effectively in his job for about a year after his injuries healed" and that Peck "just plain retired" the day after he turned sixty-five years old.

In reviewing the evidentiary basis for findings of fact made by the Industrial Commission, this Court inquires only whether the Commission's findings are supported by substantial evidence. *Bigfoot's Inc. v. Industrial Comm'n*, 714 P.2d 1152, 1153 (Utah 1986). On a thorough review of the record, we conclude that the findings of fact made by the administrative law judge and adopted by the Commission are unsupported by the evidence and must be set aside.

The record contains evidence introduced primarily in two hearings, including letters from physicians, a medical panel's report, and an evaluation of Peck by the Division of Rehabilitation Services. The record is replete with evidence that Peck was unable to perform the normal duties of his occupation, that he required the aid of his fellow employees who performed the bulk of his work for him, and that he suffered continual pain as a result of his industrial injuries.

For example, in the first hearing, on October 17, 1983, four months after returning to work following his back surgery, Peck testified that he could no longer perform the duties of his job. He testified that his doctor told him to "be careful, move slow and not lift any more than I have to" and that he "hoped my co-workers would take the brunt of the load and help me so that I could carry on." He also testified that he was unable to lift anything or bend over because of pain in his legs and back and that after working a few days, his leg would go numb. Peck's own testimony was supported in the record by two letters written to Eimco by Peck's doctor. In the

first letter, dated one week before Peck returned to work June 27, 1983, the doctor advised Eimco that Peck would require light-duty work and good care in the exercise of his duties. The doctor also stated, "Cooperation from his supervisors and co-workers would be helpful to [Peck]." In the second letter, dated one month after Peck returned to work, the doctor notified Eimco that Peck was "concerned about his ability to perform [the] heavy work assigned to him" because of his impairments. The doctor stated that Peck was "trying to do his work and I believe is conscientiously pursuing this goal," but "[w]hether or not he will continue to be able to carry out the duties assigned to him we will simply have to wait and see."

In addition to Peck's testimony, three of his fellow employees were present at the hearing and, upon agreement of the parties, proffered their testimony through Peck's attorney. According to the proffered testimony, one of the witnesses "would testify as to [Peck's] limitations from and after [his back injury and] how people have had to help him, [and] the fact that he has really been getting along with their help."

At the second hearing, on September 25, 1984, five months after Peck retired from Eimco, Peck again testified that he could not adequately perform his work. When asked what kind of job activities he did upon returning to work, Peck answered:

Well, I was still in maintenance, but I wasn't able to do my work. I couldn't have stayed there, but the guys I worked with were kind enough to take the buffer and make it possible for me to hang on.

....

They did all the lifting. If I had required any extra lifting or anything, they helped me with it because I couldn't do it.

When asked to specify the work constituting his normal duties that he could no longer perform, Peck stated:

Well, in lifting, a lot of that machinery you have to work it into place. You take a big gearbox out, you have to let it down, and you have to manhandle it, or

you take out gears and they're hard to lift.... I couldn't do the work that I had done all the years I'd been there.

When asked his reasons for retiring, Peck responded that one day he and a fellow employee were moving a big gearbox, trying to get it into place, when "[m]y back gave out on me, my legs went, I fell down, I hit my head ... and if someone had been depending on me supporting my share of it ... somebody could have been hurt very bad." He also testified that another reason he retired was that his department had just undergone a reorganization which split-up the crew he had been working with and would require that each employee do more jobs by himself and that he just could not do the work.

At the second hearing, Dr. Holbrook, who headed the medical panel, testified. When Peck's attorney asked Dr. Holbrook his opinion of whether Peck was physically capable of doing his work at Eimco, he replied:

I think it's a reasonable assumption that he might or might not ... you just about have to follow him around all day for a lot of days. But, if Mr. Peck says he can't do it, I believe that would be a reasonable assumption to make, based upon all the various impairments that he has.

Additional evidence supports Peck's claims that he was unable to adequately perform his job following his injuries. The medical panel's report, issued prior to the second hearing, states that Peck's knees are "aggravated by his work activities because of the weakness of his back throwing more stress on his knees when he lifts" and that his right knee "does occasionally pop," but that mostly there "is a deep ache that becomes very sore with a lot of activities." Referring to Peck's back, the report states, "He does still get some numbness and tingling in the right lower extremity particularly with lifting...." The report also states that Peck "has returned to work but is working more as a helper." In further support of Peck's claims, the Rehabilitation Services evaluation of Peck states that his "back and knee are a continuing problem"

and that he "is not a good candidate for Rehabilitation."

Nowhere in the record did Eimco ever contradict either Peck's testimony or that of his fellow employees that he was unable to perform his job. Nor did Eimco present any evidence or testimony that Peck could, and did, adequately perform his job or the duties of any other job generally available. Eimco attempts to support the Commission's finding that Peck worked effectively in his job following his injuries by citing that portion of the record wherein Peck was asked if he had ever "had to turn down any jobs that had been assigned to" him and Peck answered that he had not.

However, a proper reading of the context of Peck's answer quickly dispels any notion that it supports the Commission's finding. Peck was asked, "[A]re you able to perform the jobs assigned to you?" He responded, "[J]ust with help." Eimco's attorney then rephrased the question and asked, "[H]ave you had to turn down any jobs?" Peck replied that he had not accepted any. At that point, the judge intervened:

THE COURT: You haven't been assigned any jobs or you haven't—

THE WITNESS: Any jobs that weren't very minor jobs. The jobs I have worked on, others have been with me and taken the brunt of it and I have been more a helper than anything else and that's about all I have been, is a helper.

THE COURT: The question was, have you had to turn down any jobs that have been assigned to you.

THE WITNESS: No.

In this context, Peck's response that he had not turned down any jobs that had been assigned to him does not support a conclusion that he was capable of performing the tasks required in his job. On the contrary, Peck not only explained that he was unable to perform his normal duties, but also that Eimco had not assigned him the types of jobs he had performed prior to his injury.

Next, Eimco argues that Peck's return to work following his last injury supports the judge's findings. Evidently, the fact that Peck returned to work and continued to work until he retired at age sixty-five was

a principal factor in the Commission's denial of permanent total disability benefits. The Commission stated:

In the *Marshall* case, the Applicant was unable to return to work after his industrial accident. Here, [Peck] was obviously able to return to work because in fact he did. [Peck] worked for nearly one full year after his final industrial accident, and retired on the day after he turned sixty-five years old. The facts in this case do not show that [Peck] has met his burden of proof in showing inability to return to work as is required by [Utah Code Ann. § 35-1-67].

[4] Although the fact that an employee returns to work following an industrial injury may be relevant in determining the employee's ability to perform the duties of his occupation and thus may be a factor in assessing whether the employee has suffered any loss of earning capacity, that fact alone is not conclusive of his ability to work, nor is it dispositive of the issue of his earning capacity. We have recently held that "[o]nly where the employee returns to work under normal conditions will the presumption of no loss of earning capacity stay unassailed." *Norton v. Industrial Comm'n*, 728 P.2d at 1028.

[5] In *Norton*, we held that the fact that the claimant returned to work and continued to work for six years following his industrial accident "did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate[d] that throughout the remainder of his employment he was not restored to health." *Id.* Other jurisdictions have also awarded permanent total disability benefits even though the claimant returned to work following the industrial injury. See *Roberts v. WPBT*, 395 So.2d 233, 234 (Fla. Dist. Ct. App. 1981); *Liberty Mut. Ins. Co. v. Archer*, 108 Ga. App. 563, 564, 134 S.E.2d 204, 205 (1963); *Schober v. Mountain Bell Tel.*, 96 N.M. 376, 381, 630 P.2d 1231, 1236 (N.M. Ct. App. 1980); *Harmon v. SAIF*, 71 Or. App. 724, 727, 693 P.2d 1366, 1368 (1985); *Texas Employer's Ins. Ass'n v. Armstrong*, 572 S.W.2d 565, 566 (Tex. Civ. App. 1978). See also *Allen v. Fireman's*

Fund Ins. Co., 71 Or.App. 40, 45-46, 691 P.2d 137, 140 (1984). *But see Special Indem. Fund v. Stockton*, 653 P.2d 194, 196 (Okla.1982). At most, the fact that an employee returns to work after an industrial injury creates a "rebuttable presumption that the claimant has not sustained permanent and total disability." *Special Indem. Fund v. Stockton*, 653 P.2d at 196.

[6] In this case, Peck presented uncontroverted evidence not only of his physical impairment, but also of his inability to perform his job, including evidence that he was in continual pain and that his fellow employees did much of his work for him. Eimco did not controvert Peck's evidence, and as the record stands, Peck clearly rebutted any presumption that he was able to work effectively following his injuries.

[7] Eimco next contends that the judge's finding that Peck "just plain retired" the day after he turned sixty-five years old supports the Commission's denial of permanent total disability benefits.¹ In *Marshall*, however, we held that the determination whether to award permanent total disability benefits must focus on the decline in claimant's wage-earning capacity and not on the claimant's eligibility to retire. 681 P.2d at 213. The mere fact that an employee has retired will not adversely affect a determination of permanent total disability when the employee has demonstrated that his disability from the industrial injury significantly influenced his decision to retire. *See Arizona Pub. Serv. Co. v. Industrial Comm'n*, 145 Ariz. 117, 119, 700 P.2d 504, 506 (Ariz.Ct.App.1985); *Liberty Mut. Ins. Co. v. Archer*, 108 Ga.App. 563, 564, 134 S.E.2d 204, 205 (1963); *Molyneux v. New York Tel. Co.*, 101 A.D.2d 903, 903, 475 N.Y.S.2d 599, 600 (N.Y.App.Div. 1984); *Bahor v. New York Tel. Co.*, 91 A.D.2d 756, 756, 458 N.Y.S.2d 24, 25 (N.Y. App.Div.1982); *Robinson v. New York Tel. Co.*, 86 A.D.2d 916, 916, 448 N.Y.S.2d 252, 253 (N.Y.App.Div.1982); *Wheeling-Pittsburgh Steel Corp. v. Workmen's Compens-*

sation Appeal Bd., 70 Pa.Cmwth. 100, 452 A.2d 611, 613 (1982). *See also Tsuchiya-ma v. Kahului Trucking and Storage*, 2 Haw.App. 659, 633 P.2d 1381, 1382 (Haw. Ct.App.1982).

[8] Only when a finding is made and supported by evidence that the employee's retirement is not substantially motivated by his industrial injury, but is due primarily to personal or other reasons, will a denial of disability benefits be upheld on the basis of voluntary retirement. *See Saenger v. Liberty Carton Co.*, 231 N.W.2d 693, 695 (Minn.1979); *Cameron v. Carrier Air Conditioning Co.*, 85 A.D.2d 864, 865, 446 N.Y.S.2d 499 (N.Y.App.Div.1981); *Osowski v. Board of Coop. Educ. Serv.*, 78 A.D.2d 740, 741, 432 N.Y.S.2d 729, 730 (N.Y.App. Div.1980).

[9] Since none of the defendants has produced evidence that Peck was able to perform his job adequately or that his retirement was not substantially related to his industrial injury, we must conclude that the Commission's findings are wholly unsupported by the evidence.

We find that Peck presented a prima facie case entitling him to permanent total disability benefits under the odd-lot doctrine, as set forth in *Marshall*. The following language from *Marshall* controls this case:

He presented uncontroverted evidence of his impairment, his inability to perform the work required by his job and the opinion of the division of vocational rehabilitation that he could not be rehabilitated. He also testified that prior to his injury he had fully intended to work rather than to retire.

681 P.2d at 213.

On this showing, the burden shifted to Eimco to demonstrate the availability of regular work which Peck could perform to indicate whether he had any reasonable wage-earning capacity. Eimco relied only on the facts that Peck returned to work

1. The fact that Peck retired is, of course, true. If that is all that the Commission meant by its finding, it would have little significance. However, we read the finding to indicate that the

Commission believed that Peck retired because he simply desired to do so rather than being, in effect, compelled to do so.

following his injury and then retired ten months later. Thus, Eimco failed to show any reasonable wage-earning capacity which rebutted Peck's prima facie entitlement to permanent total disability benefits.

ability and a recomputation of benefits based on permanent total disability.

HALL, C.J., and HOWE, DURHAM
and ZIMMERMAN, JJ., concur.

II.

[10] This Court may set aside the Commission's award if unsupported by the findings of fact. Utah Code Ann. § 35-1-84(2) (1974). In this case, the administrative law judge adopted the findings of the medical panel that Peck's total physical impairment was thirty-three percent. However, neither the judge nor the Commission in its review of the judge's decision made any separate assessment of Peck's disability by calculating the effect that factors such as age, education, and training, in addition to his permanent physical impairments, had on his wage-earning capacity and his ability to compete in a competitive job market. We have previously held that the Commission's adoption of a medical panel's findings of physical impairment, without further evaluation of the effect which that impairment, when combined with other factors, might have on a claimant's wage-earning capacity, constitutes a failure by the Commission to carry out its administrative responsibilities under the well-recognized odd-lot doctrine. See *Norton*, 728 P.2d at 1027; *Hardman v. Salt Lake City Fleet Management*, 725 P.2d at 1326. In short, the Commission's findings on disability are therefore inadequate to support a denial of permanent total disability benefits.

III.

In sum, we hold that the Commission's finding that Peck "was able to work effectively in his job for about a year after his injuries" and that he "just plain retired," are unsupported by the evidence and must therefore be set aside. We also hold that the denial of permanent total disability benefits is unsupported by the Commission's findings of fact. Accordingly, we reverse and remand this case to the Commission for further proceedings consistent with this opinion, including a reassessment of dis-