

2001

Intermountain Slurry Seal, CNA Insurance v. Labor Commision of Utah, Kyle Stephens : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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| |) | 20010271-CA |
| vs. |) | |
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| THE LABOR COMMISSION OF UTAH |) | Labor Commission |
| |) | Case No. |
| |) | |
| Respondents. |) | Priority 7 |

BRIEF OF RESPONDENT, LABOR COMMISSION OF UTAH

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| |) | |
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| and KYLE STEPHENS, |) | Case No. |
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BRIEF OF RESPONDENT, LABOR COMMISSION OF UTAH

Petition for Review from Orders of the
Labor Commission of Utah

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JURISDICTION

Pursuant to Utah Code Ann. §78-2a-3(2)(a) and Utah Code Ann. §34A-2-801(8), the Utah Court of Appeals has jurisdiction over Intermountain Slurry Seal and CNA Insurance's petition for review. (Intermountain Slurry and CNA are referred to as "Intermountain" hereafter).

ISSUE AND STANDARD OF REVIEW

All parties agree that Kyle Stephens, whose lower legs were amputated after a work-related accident at Intermountain, qualifies for permanent total disability benefits under §34A-2-413(10) of the Utah Workers' Compensation Act (Title 34A, Chapter 2, Utah Code Annotated; "the Act"). The only issue raised by Intermountain's petition for appellate review is whether Mr. Stephens' right to continue to receive benefits is subject to the requirement found in §413(7)(a)(ii) that he be incapable of returning to work.

Preservation of Issue For Appeal: Intermountain raised the foregoing issue before the ALJ (Record at 77-84) and the Utah Labor Commissioner (R. 116-118), thereby preserving the issue for judicial appellate review.

Standard of Review: Intermountain's petition for review presents a question of statutory construction. Section 63-46b-16(4)(d) of the Utah Administrative Procedures Act ("UAPA") authorizes Utah's appellate courts to grant relief from agency actions that erroneously interpret the law. "Matters of statutory construction are questions of law that are reviewed for correctness. This Court will not defer to the Appeals Board's interpretation of

§34A-2-413, but will apply a "correctness" standard and determine the proper interpretation of the statute for itself." Esquivel v. Labor Commission, 7 P.3d 777, 780 (Utah 2000) (citations omitted).

DETERMINATIVE STATUTE

Mr. Stephens' right to receive permanent total disability benefits for the loss of his feet is governed by §34A-2-413 of the Act, set out in full in Addendum A.

STATEMENT OF THE CASE

Nature of the Case: Intermountain seeks review of a Commission's order (Addendum B) affirming the ALJ's decisions (Addenda C and D) awarding permanent total disability benefits to Mr. Stephens pursuant to §34A-2-413 of the Utah Workers' Compensation Act. In awarding benefits, the Commission concluded that §413(7)(a)(ii), which requires recipients of permanent total disability benefits to be incapable of regular, steady work, does not apply to individuals who qualify for benefits under §413(10), such as Mr. Stephens.

Course of Proceedings: On July 8, 1999, Mr. Stephens filed an Application For Hearing with the Commission, seeking permanent total disability benefits from Intermountain. (R. 2) One of the Commission's ALJs conducted a hearing and issued a preliminary decision that Mr. Stephens was entitled to permanent total disability benefits under §413(10). (R. 77-84l; also Addendum C.) After a second hearing, the ALJ issued a final decision ratifying award of benefits. (R. 88-94; also Addendum D) Intermountain requested Commission review of the ALJ's decision. (R. 103) On February 28, 2001, the

Commission affirmed the ALJ's decision. (R. 116-118; also Addendum B) Intermountain then filed a petition for review of the Commission's decision with this Court. (R. 119-120)

Statement of Facts: Mr. Stephens' claim is based on simple, but tragic, facts. On September 8, 1998, while working for Intermountain, he was run over by a heavy equipment roller. His legs were crushed in the accident; they were amputated below the knees. (R. 77)

One year after Mr. Stephens' accident, Intermountain offered him two different office jobs. The Commission has made no determination whether the work offered by Intermountain is regular, steady employment within Mr. Stephens' capabilities. (R. 90)

SUMMARY OF ARGUMENT

Section 413 of the Act recognizes two methods of qualifying for permanent total disability benefits. The first method, under subsections (1) and (6) of §413, requires the injured worker to prove his or her work-related injuries preclude reemployment or rehabilitation. The second method, provided by subsection (10) of §413, establishes a conclusive presumption of permanent total disability for certain catastrophic injuries:

(a) The loss . . . of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability compensation pursuant to Subsection (10)(a) is final.

Because Mr. Stephens' lost both his feet in the accident at Intermountain, he qualifies for a final award of permanent total disability benefits under subsection (10). However,

Intermountain argues that Mr. Stephens' subsection (10) benefits can be divested by another subsection (7)(a)(ii) of §413 if Mr. Stephens is "capable or returning to regular, steady work."

The ALJ and Commission have rejected Intermountain's argument. Thus, the issue before this Court is the correct construction of subsections (7)(a)(ii) and (10) of §413.

Read in isolation, without reference to other provisions of §413, subsections (7)(a)(ii) and (10) are ambiguous. They can be read as supporting the position of either the Commission or Intermountain. But this ambiguity is resolved when subsections (7)(a)(ii) and (10) are considered in context with other provisions of §413. Furthermore, the history of §413, the purposes of the Workers' Compensation Act, and authority from other jurisdictions and scholars all support the Commission's conclusion that benefits awarded under subsection (10) are not subject to the limitation of subsection (7)(a)(ii).

The Commission believes it has correctly interpreted subsections (7)(a)(ii) and (10). However, if this Court concludes the Commission has erred, the Court should remand Mr. Stephens' claim to the Commission for the fact-finding necessary to apply subsection (7)(a)(ii).

ARGUMENT

POINT ONE: THE PROVISIONS OF SECTION 413 SHOWS A LEGISLATIVE INTENT THAT SUBSECTION (10) BENEFITS ARE NOT CONDITIONED ON AN INABILITY TO WORK.

When the provisions of a statute are unclear, this Court will examine the entire statutory scheme to attempt to harmonize the statute's provisions. Anabasis, Inc. v. Labor

Commission, 427 Utah Adv. Rep. 18, 19 (Utah Ct. App. 2001), citing V-1 Oil Co. v. Dept. of Env'tl. Quality, 904 P.2d 214 217 (Utah Ct. App. 1995) and Mesa Dev. Co. v. Sandy City, 948 P.2d 366, 368-69 (Utah Ct. App. 1997). In this case, when §413 is read as a whole, the various provisions of the statute indicate that subsection (10) benefits were not intended to be subject to the limitations of subsection (7)(a)(ii).

Section 413 of the Act recognizes two methods of qualifying for permanent total disability benefits. The first method, under subsections (1) and (6) of §413, requires the injured worker to prove his or her work-related injuries preclude reemployment or rehabilitation. The second method, provided by subsection (10) of §413, establishes a conclusive presumption of permanent total disability for certain catastrophic injuries.

Most claims for permanent total disability benefits are of the first type and are subject to the standards set forth in subsections (1) and (6) of §413. Subsection (1) establishes criteria for evaluating whether a work-related injury rises to the level of a permanent total disability. Subsection (6) then imposes the additional requirement, prohibiting any "final" award of permanent total disability benefits until the Commission has considered the injured worker's possibilities for rehabilitation under the Utah Injured Worker Reemployment Act, Title 34A, Chapter 8, Utah Code Annotated. The Commission must also consider any reemployment plan submitted by the employer or insurance carrier. No subsection (1) claim can become final without consideration of the claimant's ability to return to work.

This is in direct contrast to the second category of permanent total disability claims, governed by subsection (10) of §413. Subsection (10) claims are limited to catastrophic loss of limbs or sight. Subsection (10) requires **no** showing that the injured worker cannot work. Instead, subsection (10) simply provides that loss of two limbs or eyes "constitutes total and permanent disability" and "is final."

Thus, in those instances where a worker has suffered any of the enumerated catastrophic injuries, subsection (10) establishes a conclusive presumption of permanent total disability. Utah State Road Commission v. Industrial Commission, 168 P.2d 319, 322 (Utah 1946). By the plain language of subsection (10), such a finding of permanent total disability "is final." In light of this conclusive presumption and "finality" of permanent total disability established by subsection (10), without reference to the claimant's ability to work, it would be nonsensical to conclude that benefits could then be immediately divested under subsection (7)(a)(ii) on the grounds of the claimant's ability to work.

Subsection (11) of §413 provides an additional indication that subsection (10) benefits are not subject to the "return to work" limitation of subsection (7)(a)(ii). Subsection (11) establishes a method for insurance carriers to prove that an injured worker is no longer permanently and totally disabled. Such proof of ability to work can then be used to trigger the application of subsection (7)(a)(ii) and cut off the injured worker's right to future permanent total disability benefits. Specifically, subsection (11)(a) provides (emphasis added.) :

An insurer or self-insured employer may periodically reexamine a permanent total disability claim, **except those based on Subsection (10)**, . . . to determine whether the worker remains permanently totally disabled.

In other words, subsection (11) explicitly precludes any reexamination of subsection (10) claims to determine if the claimant has regained his or her ability to work.

Once again, it would be nonsensical to assume that on one hand the Legislature intended that subsection (10) benefits could be divested under subsection (7)(a)(ii) on the grounds the claimant can work, while on the other hand the Legislature specifically precluded any reexamination of the subsection (10) claimant's ability to work.

**POINT TWO: THE HISTORY OF §413 INDICATES THAT
SUBSECTION (10) BENEFITS ARE NOT SUBJECT TO THE
"RETURN TO WORK" PROVISION OF SUBSECTION (7)(a)(ii)**

"In construing the meaning of a statute, the courts must consider the history of the subject matter involved, the end to be achieved, the mischief to remedied and the purpose to be accomplished." *Sutherland Statutes & Statutory Construction*, 6th ed., Vol. 2A, §45.02. Or, as once observed by Justice Oliver Wendell Holmes, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). In this case, the historical development of §413 provides further evidence that subsection (10) benefits are not subject to the "return to work" provisions of subsection (7)(a)(ii).

Provisions similar to §413(10) have been present in Utah's Workers' Compensation

Act since at least 1933.¹ In 1951, what was then §42-1-63 governed claims for permanent total disability compensation. (See Addendum E, which includes copies of all versions of the permanent total disability statute since 1951.) Although the 1951 statute had not yet been divided into subsections, it nevertheless recognized the same two categories of permanent total disability that are recognized by the current §413.

The first category of claim under the 1951 statute is similar to subsection (1) claims under current law. For such claims, the 1951 statute required that the Commission tentatively determine whether the injured worker was permanently and totally disabled. If so, the Commission was required to refer the injured worker to vocational rehabilitation. Benefits could be denied if the injured worker failed to cooperate.

The second category of claims under the 1951 statute is essentially identical to what are now subsection (10) claims. For these claims, the 1951 statute provided (emphasis added):

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes or any two thereof; shall constitute total and permanent disability. **to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances;**

¹

In Utah State Road Commission, 168 P.2d at 322, the Utah Supreme Court referenced §41-2-63, Revised Statutes of Utah, 1933, as providing that certain injuries entitled injured workers to “a conclusive presumption of permanent disability.”

The following points are significant regarding the language of the 1951 statute: First, the two categories of claims that exist in the current §413 were already recognized in 1951. Second, the category of claims which corresponds to the current subsection (10) claims were already exempt from any requirement that the claimant be incapable of work or rehabilitation. Finally, in addressing the compensability of what are now subsection (10) claims, the 1951 statute already included the phrase that such claims were to "to be compensated according to the provisions of this section." It is clear from the context of the 1951 statute that the foregoing phrase signified only that the dollar amount of benefits were to be computed according to the formula set forth in the statute.

The foregoing statutory scheme was maintained for the next thirty seven years. In 1988, the permanent total disability statute was reenacted and divided into subsections. The 1988 statute recognized the same two categories of permanent total disability claims that had existed under prior statutes. The first category, governed by subsections (1) and (5), continued the requirement that no finding of permanent total disability could be final until the Commission had determined whether the claimant could be rehabilitated. Subsection (5)(b) then added the following new language:

If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.

The foregoing language from the 1988 statute marks the first appearance of any provision explicitly limiting permanent total disability benefits to injured workers who were incapable of "returning to regular, steady work." However, by its placement within subsection (5), this new limitation applied only to the first category of permanent total disability claims. The limitation did not apply to the second category of claims arising from loss of limbs or sight which were governed by subsection (6) of the 1988 statute. In fact, the plain language of subsection (6) carried forward the long-standing provision that loss of limbs or sight established a conclusive presumption of permanent total disability. In 1992, subsection 5(b) was further subdivided, but with no change to the statutory language itself. Among the new subdivisions to subsection 5(b) was the following:

(iv) The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.

In 1994, the statute was amended again and the foregoing subsection (5)(b)(iv) became subsection (7). No change whatsoever was made to the language of the subsection.

The Commission has set forth this long history of the permanent total disability statute in order to make three points.

First, it has been a constant historical feature of the Utah workers' compensation system that there are two types of permanent total disability claims. The first category required a finding that the injured worker cannot be rehabilitated. But the second category

of permanent total disability claims, arising from catastrophic loss of limbs or sight, has not been subject to any requirement that the injured worker be unable to work.

Second, Intermountain argues that the 1994 amendment, changing only the placement of subsection (7) but not its language, was intended to make the second category of permanent total disability claims subject to a requirement that the injured worker be unable to work. Intermountain has cited nothing in the legislative record to support its theory that in 1994 the Legislature intended to undo decades of established workers' compensation law and practice. The Commission has itself reviewed recordings of legislative action on the 1994 amendments and can find no debate, comment or discussion that supports Intermountain's position.

Finally, Intermountain contends the 1994 amendment was intended to be "sea change" in workers' compensation law by conditioning the compensability of subsection (10) claims on the reemployment provisions of subsection (7)(a)(ii). But in fact, Mr. Stephens' claim is the first time such an argument has been raised before the Commission. The Commission is unaware that any subsection (10) claims arising during the seven years since 1994 have been subjected to subsection (7)(a)(ii)'s requirements.

POINT THREE: AUTHORITY FROM OTHER JURISDICTIONS AND SCHOLARS SUPPORT THE COMMISSION'S INTERPRETATION OF SUBSECTIONS (10) AND (7)(a)(ii)

Provisions such as subsection (10) and (7)(a)(ii) are relatively common among the various states' workers' compensation statutes. As noted in *Larson's Workers'*

Compensation Law, §83.08:

Special statutory provisions may supersede the general principles controlling the relation between medical and wage loss factors in determining total disability. The commonest example of this type of statute is the familiar provision that certain combinations of losses of members shall be presumed to constitute total disability. The presumption may be *prima facie* or conclusive. A typical statute applies the presumption to loss or loss of use of both hands, both arms, both legs, both feet, both eyes, or any two of these. . .

Under such a statute, depending on its wording, evidence of actual earnings would either be entirely immaterial, or would have to be extremely convincing to overcome the presumption.

99 CJS, 201, Workers' Compensation §581: "Loss of Member-Declared Total Disability," discusses the issue as follows:

A statute may provide that the loss of both hands or arms, or both feet or legs, or both eyes, or any two of these members, is compensated as a total disability. Such a provision should be complied with, rather than following a provision for loss of the specific member.

Where certain injuries constitute total disability under the act, the schedule compensation is awarded without regard to the effect of the injury on earning power, even though the claimant obtains employment at a better wage than before the loss.

In Shoop v. Chambersburg Baking Co., 149 A.2d 179, 181 (Pa. 1959), the Pennsylvania court confronted facts and statutory provisions analogous to those presented here. The Shoop court rejected arguments similar to those raised by Intermountain in this case:

Our decisions have consistently adhered to the proposition that compensation for specific losses under Section 306(c) [the provision of Pennsylvania law equivalent to Utah's subsection (10)] is governed by

different principles than compensation for total and partial disability under Sections 306(a) and 306(b). For all injuries, except those which fall within Section 306(c), the statute provides compensation according to the nature of the injury, and the degree of disability which may result therefrom is immaterial. (Citations omitted.) The economic consequence of a specific loss under Section 306(c) has no bearing on the right to compensation for that injury. (Citations omitted.) Section 306(c) contemplates payment for the permanent injuries specified without considering, but including, any disability, whether total, partial, or none at all. (Citations omitted.)

The Commission believes that §413 Utah's Act in general, and subsection (10) in particular, are consistent with the comments and analysis of the foregoing authorities.

POINT FOUR: THE WORKERS' COMPENSATION ACT IS LIBERALLY CONSTRUED IN FAVOR OF COMPENSATION.

The Utah Workers' Compensation Act is liberally construed in favor of coverage and compensation. In Chandler v. Industrial Commission, 184 P. 1020, 1021 (Utah 1919), decided only a few years after enactment of the Utah Employers' Liability Act (predecessor to the Utah Workers' Compensation Act), the Utah Supreme Court applied this principle of liberal construction, stating: "Upon the question that the Employers' Liability Act should be liberally construed so as to effectuate its purposes, all courts agree." (Citation omitted.)

After Chandler, Utah's appellate courts continued to apply the principle. For example, in Park Utah Consol. Mines v. Industrial Commission, 84 Utah 841, 36 P.2d 979, 981 (Utah 1934), the Utah Supreme Court stated:

If there is any doubt "respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be." (Citing Chandler v. Industrial Commission, supra.)

More recently, in Heaton v. Second Injury Fund, 796 P.2d 676, 679 (Utah 1990), the Court stated:

It is the duty of the courts and the commission to construe the Workers' Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction.

Recently, both the Utah Supreme Court and this Court have reaffirmed the continued vitality of the principle of liberal construction: See Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257 at 260 (Utah 1998); see also Burgess v. Siaperas Sand & Gravel, 965 P.2d 583, 588 (Utah App. 1998).

So, for the last 80 years, Utah's appellate courts have enforced "the common law principle of liberal construction in favor of injured employees that is at the heart of the Act." Burgess, 965 P.2d at 588.

The Commission recognizes that this principle of liberal construction does not mean that compensation should be allowed in every claim. Walls v. Industrial Commission, 857 P.2d 964, (Utah App. 1993). However, in cases such as Mr. Stephens, where "statutory terms reasonably admit" compensation, the principle of liberal construction supports the Commission's decision in Mr. Stephens' favor.

CONCLUSION

For more than 50 years, Utah has recognized some industrial injuries as so severe as to warrant a conclusive presumption of permanent total disability compensation. This category of "statutory" permanent total disability compensation remains a part of Utah's

workers' compensation as §413(10).

Intermountain argues that statutory amendments in 1994 were intended to make a drastic change to §413(10) benefits by subjecting injured workers who would otherwise qualify for §413(10) benefits to the additional requirement that such workers be incapable of performing other work. However, Intermountain's arguments are inconsistent with other provisions of §413, as well as the historical development, legislative history and long-accepted practice under §413. Intermountain's argument is contrary to authority from other jurisdictions and scholars. Finally, it is contrary to the principle that workers' compensation statutes should be liberally construed in favor of compensation.

For these reasons, the Commission respectfully requests that this Court affirm the Commission's award of permanent total disability compensation benefits to Mr. Stephens. However, if the Court concludes the Commission has erred in its interpretation of subsections (10) and (7)(a)(ii), the Commission requests that the Court remand Mr. Stephens' claim to the Commission for the fact-finding necessary for the application of subsection (7)(a)(ii).

Submitted this 19th day of September, 2001.



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CERTIFICATE OF MAILING

I hereby certify that on the 19th day of September, 2001, two true and correct copies of the foregoing brief were mailed, first-class postage prepaid by U.S. Mail to the following:

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Tab A

34A-2-413. Permanent total disability - Amount of payments - Rehabilitation.

(1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

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

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

(b) compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum

of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 34A-2-703.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for

any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

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

(i) an administrative law judge reviews a summary of **reemployment** activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, 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).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the **reemployment plan**. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

(7) (a) The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but

the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both **hands, both** arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

- (i) the review of medical records;
- (ii) employee submission to **reasonable medical evaluations;**
- (iii) employee submission to reasonable rehabilitation evaluations and **retraining efforts;**
- (iv) employee disclosure of Federal Income Tax Returns;
- (v) employee certification of compliance with Section 34A-2-110; and
- (vi) employee completion of sworn affidavits or questionnaires approved by the division.

(d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

(e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability

compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

(g) In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

(h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

(12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

History: C. 1953, 35-1-67, enacted by L. 1988, ch. 116, § 4; 1988 (2nd S.S.), ch. 12, § 1; 1991, ch. 136, § 12; 1992, ch. 53, § 2; 1994, ch. 266, § 2; 1995, ch. 177, § 2; renumbered by L. 1996, ch. 240, § 156; renumbered by L. 1997, ch. 375, § 121.

Tab B

UTAH LABOR COMMISSION

KYLE STEPHENS,

Applicant,

v.

**INTERMOUNTAIN SLURRY SEAL
and CNA INSURANCE,**

Defendants.

**ORDER DENYING
MOTION FOR REVIEW**

Case No. 99-0648

Intermountain Slurry Seal and its workers compensation insurance carrier, CNA Insurance (jointly referred to as "Intermountain") ask the Utah Labor Commission to review the Administrative Law Judge's award of benefits to Kyle Stephens under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Pursuant to §34A-2-413(10) of the Act, is Mr. Stephens entitled to continuing permanent total disability compensation?

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in the decision of the ALJ. The facts material to the issue now before the Commission may be summarized as follows. On September 8, 1998, while working for Intermountain, Mr. Stephens was run over by a heavy equipment roller, resulting in amputation of both legs below the knees. Mr. Stephens received compensation for his injuries pursuant to §34A-2-413(10) of the Act, which provides that loss of any two body members constitutes a permanent total disability.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2413(10) of the Act provides:

(a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensation according to this section.

ORDER DENYING MOTION FOR REVIEW
KYLE STEPHENS
PAGE 2

(b) A finding of permanent total disability pursuant to Subsection 10(a) is final.

The foregoing provision has long been a part of Utah's workers' compensation system. It has consistently been interpreted and applied as creating a conclusive presumption of permanent total disability. Such a provision is relatively common among the various states' workers' compensation statutes. As noted in *Larson's Workers' Compensation Law*, §83.08:

Special statutory provisions may supersede the general principles controlling the relation between medical and wage loss factors in determining total disability. The commonest example of this type of statute is the familiar provision that certain combinations of losses of members shall be presumed to constitute total disability. The presumption may be *prima facie* or conclusive. A typical statute applies the presumption to loss or loss of use of both hands, both arms, both legs, both feet, both eyes, or any two of these. . . .

Under such a statute, depending on its wording, evidence of actual earnings would either be entirely immaterial, or would have to be extremely convincing to overcome the presumption.

As previously noted, Utah's statute falls in the former category, where evidence of actual earnings is immaterial. Consequently, Mr. Stephens is entitled to continuing permanent total disability compensation.¹

ORDER

The Commission affirms the decision of the ALJ and denies Intermountain's motion for review. It is so ordered.

Dated this 28th day of February, 2001.


R. Lee Ellertson

Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

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This does not mean that the parties cannot, **by mutual agreement and with the approval of the Commission**, enter into some other arrangement that commutes Mr. Stephens' right to continuing permanent total disability compensation in exchange for vocational training or some other reemployment plan.

ORDER DENYING MOTION FOR REVIEW
KYLE STEPHENS
PAGE 3

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor 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 the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Kyle Stephens, Case No. 99-0648, was mailed first class postage prepaid this 28th day of February, 2001, to the following:

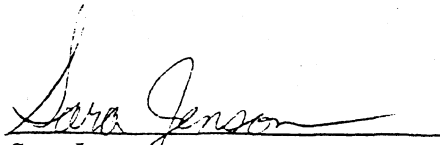
KYLE STEPHENS
408 E 100 N #1
LOGAN UT 84321

INTERMOUNTAIN SLURRY SEAL
1000 N WARM SPRINGS RD
P O BOX 30429
SALT LAKE CITY UT 84130

CNA INSURANCE
P O BOX 17369
DENVER CO 80217-0369

KEVIN K ROBSON
BERTCH ROBSON ATTORNEYS
1996 E 6400 S
SALT LAKE CITY UT 84121

THEODORE E KANELL
PLANT WALLACE CHRISTENSEN & KANELL
136 E SOUTH TEMPLE #1700
SALT LAKE CITY UT 84111


Sara Jenson
Support Specialist
Utah Labor Commission

Tab C

UTAH LABOR COMMISSION
Case No. 99648

KYLE STEPHENS,

Petitioner,

vs.

INTERMOUNTAIN SLURRY SEAL/
CNA INSURANCE,

Respondents.

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PRELIMINARY

CONCLUSIONS OF LAW

AND ORDER

HEARING: Room 334, Labor Commission, 160 East 300 South, Salt Lake City, Utah, on November 29, 1999 at 11:00 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The petitioner was represented by Kevin K. Robson, Attorney.

The respondents were represented by Theodore Kanell, Attorney.

This case involves a claim for permanent total disability benefits related to a September 8, 1998 industrial injury. It is uncontested that the petitioner had both legs amputated below the knee, after a heavy equipment roller ran over his legs, at work, on September 8, 1998. It is also uncontested that the applicable permanent total disability benefits statute, U.C.A. 34A-2-413(10), requires a final finding of permanent total disability in this case, due to the petitioner's loss of both feet and/or legs. The issue that is in dispute is whether or not another section of the applicable statute, U.C.A. 34A-2-413(7), allows for cessation of the permanent total disability benefits, due to the petitioner's alleged current ability to return to regular steady work. The petitioner argues that, legally, the provision allowing cessation of benefits, due to ability to return to regular steady work, does not apply to "statutory" (i.e. specifically designated in subsection (10) of the statute) permanent total disabilities, like the petitioner's. In addition, the petitioner argues that, even if that provision does apply to the petitioner's case, he is not capable of returning to "regular steady" work, sufficient to provide for his needs. The respondents argue that the cessation provision of the statute applies to all cases of permanent total disability and that this is consistent with the main purpose of the revised statute, which encourages rehabilitation and return to work.

PRELIMINARY ORDER
RE: KYLE STEPHENS
PAGE 2

At the hearing, the ALJ did not take testimony. It was unclear if both parties were ready to present evidence on the disputed factual issue regarding the petitioner's ability to return to work and thus the ALJ indicated that she would reschedule to allow for a hearing aimed at presentation of evidence on this reemployment/rehabilitation issue. The ALJ found that the matter was at least ready for an order awarding permanent total disability benefits, since the statute requires a final order of permanent total disability, for the type of severe injury incurred by the petitioner. The ALJ finds that it is also appropriate to make a preliminary ruling on the issue of whether subsection (7), of the applicable statute, applies to subsection (10) permanent total disabilities. The parties made their arguments at hearing, on this issue, and the ALJ feels she understands the arguments asserted by both parties, so that a ruling can be made now. The ALJ will make it a preliminary ruling at this time. Because this issue is one of first impression and involves a threshold right-to-compensation dispute, the ALJ wants to make sure that her final ruling is made based on consideration of all the possible arguments. To allow for this, the ALJ will make a preliminary ruling now, but will reconsider this ruling at the time of the next hearing, if the parties present argument, at that time, that the ALJ has not considered in this order.

ARGUMENT OF THE PETITIONER:

The petitioner argues that subsection (10) makes it clear that the legislature intended that the severe loss of several limbs was to be compensated, without requiring the petitioner to establish the list of facts other individuals claiming permanent total disability need to establish. The petitioner argues that the legislature made a point of indicating that the finding of permanent total disability in these cases was "final" or not subject to reconsideration (subsection (10)(b)). In fact, the petitioner points out that the legislature went on to emphasize the finality of the finding in these cases, by indicating that the reexamination privileges (referring to the privileges granted employers/carriers to later challenge an award of permanent total disability benefits), allowed in other permanent total disability cases, are not allowed in "statutory" (i.e. subsection (10)) cases. U.C.A. 34A-2-413(11)(a). The petitioner argues that it makes no sense to disallow reexamination in statutory permanent total disability cases, if the employer can simply stop paying benefits, because it believes the petitioner is capable of returning to work. Considering the consistency in the statute, of exempting statutory permanent total cases from the challenges and hurdles provided for in other cases of permanent total disability, the petitioner argues that it is illogical and inconsistent to suggest that the "final" award of benefits can simply be set aside, if the petitioner is deemed capable of returning to work.

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ARGUMENT OF THE RESPONDENTS:

The respondents argue that the legislature clearly wanted to encourage reemployment when they revised the prior permanent total disability statute. The respondents argue that this was accomplished in the revised statute, by the trade-off of requiring employers to pay the full life-time award in permanent total disability cases, without assistance from the Employers Reinsurance Fund, but allowing employers to arrange for reemployment or rehabilitation of injured employees, so as to mitigate the cost of paying life-time benefits. The respondents argue that, to accomplish this trade-off of additional burden for the employer, subject to limitations, it is necessary to allow the employer/carrier to discontinue benefits, once the injured employee can return to work. With respect to statutory permanent total cases, the respondents argue that the legislature wanted to exempt these cases only from the requirement of establishing the initial list of elements and not from the requirement of inability to perform work. The respondents argue that the legislature intended that employers/carriers would be relieved of paying benefits in all cases where the injured employee was capable of returning to work, including statutory cases. The respondents argue that this intention is manifested in subsection (7) where it is stated that, after a final order awarding permanent total disability benefits, those benefits cease when the employee is capable of returning to work, with no special exemption specified for statutory, subsection (10), cases.

PRELIMINARY CONCLUSIONS OF LAW:

The ALJ preliminarily finds that "statutory," or subsection (10), permanent total disability cases are not, as a matter of law, subject to the subsection (7)(b) cut-off of benefits, when they are capable of return to regular steady work. There are several reasons why the ALJ finds this to be the appropriate interpretation of the statutory language (absent any specific exemption stated in (7)(b) itself).

1. The ALJ finds that, if the legislature had intended that benefits for "statutory" permanent total disability cases could be cut off, as with other cases, there would be no need to create a special category for these cases, as the legislature did in subsection (10).

The respondents argue that the legislature wanted subsection (10) cases to be exempt only from the initial permanent total disability provisions in

subsection (1)(c) of the statute, but not from the cut-off provisions of subsection (7)(a)(ii). The ALJ finds this argument illogical. Using this interpretation of the statute, for purposes of obtaining an initial award of benefits, a subsection (10) case would be exempted from showing inability to perform other work than had been performed prior to injury. However, the subsection (10) case would then would need to establish the inability to work after an award of permanent total disability benefits, if the employer/carrier challenged the award under the subsection (7)(a)(ii) provisions. It does not seem logical to the ALJ that the legislature would want to exempt subsection (10) cases from a requirement, only to place that burden back on the subsection (10) case, immediately after an award was made. It seems much more logical to presume that the legislature simply wanted subsection (10) cases to get benefits, without the need to ever establish total inability to work. To suggest that subsection (10) cases need to show inability to perform other work, either before or after an award, results in a conclusion that subsection (10) cases simply need to show what all other claimants need to establish. If this is the case, then there is no need for the subsection (10) special designation for loss of multiple limbs. The ALJ cannot accept that subsection (10) was added to the statute for no reason. Rather it seems more logical that the legislature intended some meaningful exemptions for those with extremely severe losses, i.e. exemption from the normal requirement of showing inability to perform all kinds of work.

2. Since the legislature disallows the carrier to "reexamine" statutory permanent total disability awards, it appears the legislature intended that the awards be irrevocable.

Subsection (11)(a) specifies that the reexamination rights, allowed to employers/carriers after an award of permanent total disability benefits is made, are not available to employer/carriers in subsection (10) cases. Since the legislature intended that there be no post-order investigation of employability in subsection (10) cases, it appears logical to presume that the legislature felt employability was irrelevant in subsection (10) cases. If the legislature wanted subsection (10) cases to be subject to the same subsection (7) cessation of benefits for employability

PRELIMINARY ORDER
RE: KYLE STEPHENS
PAGE 5

that other cases are subject to (as argued by the respondents), then it would seem illogical to disallow reexamination in subsection (10) cases. The more consistent interpretation of the disallowance of reexamination for subsection (10) cases, is that the legislature intended employability to be a non-issue for subsection (10) cases, both before an award, as noted above, and after award, as noted in subsection (11)(a).

For the consistency reasons stated above, the ALJ preliminarily finds that the award of permanent total disability benefits made in this order is not revocable under subsection (7)(a)(ii) of the statute. This finding/conclusion will become final at the time of the ALJ's final ruling/order in this case, unless revised or rescinded in the final ruling/order. The matter will be rescheduled for a hearing on the factual issue of the petitioner's current ability to return to regular steady work. This hearing is intended to resolve all factual issues that may be relevant to any appeal or request for review on a final award of permanent total disability benefits.

BENEFITS DUE:

Because of this preliminary ruling, or alternatively because of the subsistence benefits provision in U.C.A. 34A-2-413(6)(b), the respondents should continue paying the petitioner at the permanent total disability rate, until further order of the Commission indicating otherwise. It is presumed that the respondents have not discontinued paying benefits and that the respondents have been paying the benefits at the rate of at least the maximum permanent total disability of \$414.00 per week. Benefits should continue at the \$414.00/week rate.

ATTORNEY FEES:

Unless this award is rescinded or adjusted, the petitioner's attorney is entitled to the maximum fee award (\$9,100.00), to be deducted from the award to the petitioner. Presumably, the respondents have never discontinued paying benefits, so there is no accrued award out of which an attorney fee award can be deducted. If this presumption is incorrect, the parties should notify the ALJ immediately. As a result of the absence of an accrued amount due the petitioner, the only way to pay the attorney is by a deduction or withholding from the ongoing weekly benefits. The petitioner's attorney should discuss the withholding with the petitioner to determine what amount he and the

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PRELIMINARY ORDER
RE: KYLE STEPHENS
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attorney agree upon can be deducted from each payment for purpose of the fee. The attorney should then notify the ALJ regarding the amount agreed upon (no more than 20% of the weekly payments, but less can be agreed upon). The ALJ will do a supplemental order specifying how the attorneys fee will be handled or will include a provision in the final order specifying how the attorney fee should be paid. If the attorney or the petitioner have questions or concerns regarding the attorney fee award, they can contact the ALJ at the Commission.


ORDER:

IT IS THEREFORE ORDERED that the respondents, Intermountain Slurry/CNA Insurance, pay the petitioner, Kyle Stephens, permanent total disability benefits at the rate of \$414.00 per week, beginning on date of injury, September 8, 1998, and continuing until the death of the petitioner or until further order of the Commission altering the award herein. The benefits should be paid less the deduction for attorney fees, the amount of which shall be specified in a later supplemental order or in the final order in this matter.

IT IS FURTHER ORDERED that the respondents pay Kevin Robson, attorney for the petitioner, the sum of \$9,100.00, plus the percentage of interest that is appropriate per R602-2-4, for services rendered in this matter. This amount is to be deducted from the aforesaid award to the petitioner, in a periodic deduction, the amount of which deduction is to be specified in an order to be issued in the future. The attorney fees are to be remitted directly to the office of Kevin Robson.

IT IS FURTHER ORDERED that this case be rescheduled for further hearing on the issue of the petitioner's current employability, with the parties receiving hearing notices indicating the date and time of the rescheduled hearing.

DATED this 1 day of February, 2000.



Barbara Elicerio
Administrative Law Judge

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Tab D

UTAH LABOR COMMISSION
Case No. 99648

KYLE STEPHENS,

Petitioner,

vs.

INTERMOUNTAIN SLURRY SEAL/
CNA INSURANCE,

Respondents.

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FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

2ND HEARING: Room 334, Labor Commission, 160 East 300 South, Salt Lake City, Utah, on June 8, 2000 at 3:00 o'clock p.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The petitioner was represented by Kevin Robson, Attorney.

The respondents were represented by Theodore Kanell, Attorney.

PROCEDURAL STATUS OF LITIGATION:

On February 1, 2000, the ALJ issued Preliminary Conclusions of Law and Order in the above-captioned matter, concluding that the petitioner was entitled to payment of permanent total disability benefits, regardless of what his capacity was for returning to work. Although the ALJ allowed for additional legal argument on that statutory construction issue, relating to the award of permanent total disability benefits, the parties presented no further argument on that legal issue. A second hearing was held as indicated above, to address the factual issues surrounding the petitioner's ability to return to work. This Order addresses the facts related to the petitioner's ability to return to work currently and affirms the ALJ's preliminary analysis and ruling on the legal issue (addressed in the prior order).

FINDINGS OF FACT:

Soon after the petitioner's September 8, 1998 industrial injury, in which he lost both legs just below the knee, the respondents had a vocational rehabilitation counselor/analyst review the petitioner's work

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FINAL ORDER
RE: KYLE STEPHENS
PAGE 2

background and skills. The counselor/analyst issued a report, dated October 12, 1998, Exhibit D-4, which concludes that the petitioner had potential for returning to work with his prior employer, Granite Construction/Concrete Products and also had transferable skills that would allow him to perform work in a number of occupations. Apparently, sometime in 1999, the petitioner began going to college, taking courses in computer electronics, with the respondents funding this endeavor. The respondents indicated that they decided to pay for this rehabilitative effort, because they presumed that they would be relieved of the payment of permanent total disability benefits, once the petitioner was rehabilitated and returned to work. It is unclear why the respondents did not offer work or identify work for the petitioner instead.

On September 28, 1999, the respondents offered the petitioner a job with his prior employer (Granite Construction, aka Concrete Products). This job involved primarily telephone work, per the job description submitted at hearing (Exhibit D-2). The salary level for the job is not indicated on the exhibit. About a month later, a second position was offered to the petitioner. This second position was a dispatcher position, paying \$2,000.00 per month (Exhibit D-3). It appears undisputed that the position could be performed from a wheelchair. The position is apparently located in Ogden and would require the petitioner to travel from his home in Logan to Ogden each day. The petitioner indicated, at hearing, that his disability would not necessarily prevent him from making the somewhat lengthy commute. The petitioner stated that he wants to keep his residence in Logan, where his extended family resides, as this family has been supportive and helpful in his recovery from the work injury. The petitioner's salary in his prior position, as of the date of injury, per the application for hearing, was approximately \$3,200.00 per month (\$18.00/hour x 22 days x 8 hours/day). The petitioner stated that he was in school when the jobs were offered and he wanted to complete his schooling.

After the ALJ issued her order on February 1, 2000, the respondents discontinued payment on the petitioner's college courses. The respondents indicated at hearing that, since the ALJ's order indicated that the respondents would be liable for permanent total disability benefits for life, the respondents no longer had any motivation for rehabilitating the petitioner. The petitioner was disappointed and confused by this discontinuance of payment of his college, as the respondents initially encouraged him to pursue the education. Previously, the petitioner had been attending college classes 2 hours per day, 5 days per week, with about 3-4 hours study time per day. The petitioner took a bus to and from his classes. Although he has a van with hand controls in it, so that he can drive

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FINAL ORDER
RE: KYLE STEPHENS
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himself, the petitioner stated that the van does not run real well and probably needs a new engine, which he cannot afford. He stated that he was able to ambulate using a wheelchair, his prosthetic devices, or crutches. The petitioner wants to continue with his courses and thus he has arranged for payment of his education through the Division of Rehabilitation Services.

The petitioner stated that he has been trying to manage without the wheelchair, as much as possible, using his prosthetic devices, but has been having problems with getting the devices to fit. He stated that his legs continue to shrink, causing gaps between his legs and the prosthetic devices. The gaps cause blisters. In addition, the petitioner stated he has begun to see a physician for severe back pain that is caused by use of the prostheses. The petitioner indicated that considering all the problems he has been having with the prosthetic devices, in order to return to work, he would need to rely exclusively on the wheelchair. He stated he would also need to be gone for a good portion of every work day, because he is currently getting physical therapy for 1-2 hours per day. It is unclear if this would be accommodated with paid leave time.

CONCLUSIONS OF LAW:

The respondents argue that the petitioner is capable of returning to regular steady work and thus his permanent total disability benefits cease, as indicated in U.C.A. 34A-2-413 (7)(a)(ii). As indicated in the ALJ's prior order, the ALJ concludes that this provision for cessation of benefits does not apply to subsection (10) cases, involving loss of both limbs. If this analysis is incorrect, and the petitioner's benefits are subject to cessation per subsection (7)(a)(ii), the ALJ finds that the evidence of the petitioner's ability to return to "regular, steady work" is somewhat inconclusive at this point. At best, the ALJ finds that the respondents have identified one job that the petitioner MAY be able to perform. The ALJ has the following questions regarding whether the petitioner can perform this job:

1. Considering the petitioner's recent development of back pain, can the petitioner manage the commute from Logan to Ogden on a daily basis and can the petitioner manage confinement to a wheelchair?

2. How much accommodation in pay and leave will the respondents offer, to allow for the petitioner's treatment needs (i.e. physical therapy and physician appointments, etc.)?
3. Is 2/3 of his prior income sufficient to meet the petitioner's income requirements, considering financial needs he will have that will not be covered by workers compensation insurance (for example: the cost of a new vehicle, so that he can make the commute)?

In addition to the foregoing concerns about the petitioner's ability to perform the job in question, the ALJ has concerns regarding whether one job position opening that the petitioner might be able to perform translates to capacity to return to "regular, steady work." The respondents have alleged that the dispatcher position is "generally available" in the work force. This may or may not be true (no evidence was actually submitted with respect to the general availability of these positions), especially depending on the number and type of accommodations that may be necessary to address the petitioner's disability and complicating factors, such as back pain.

Considering the above-noted concerns, the ALJ finds that if the Commission, or other appellate body, should determine that the petitioner's benefits are subject to cessation per subsection (7), as the respondents have argued, the matter should be remanded for further consideration of the petitioner's ability to perform "regular, steady work," at the point in the future, when this case may be finally decided.

BENEFITS DUE:

Because the ALJ has determined that the petitioner is due benefits, regardless of his ability to perform regular steady work, the ALJ will confirm the award of benefits made in the earlier order below. Attorney Robson has indicated that he and the petitioner have decided that the full amount of benefits shall go to the petitioner until 18 months following August 2000 (February 2002). After that, the respondents should pay the petitioner his compensation rate (\$414.00 per week) less 20% (\$82.80 per week), or \$331.20 per week, for 110 weeks (\$82.80/week x 110 weeks = \$9,100.00), or until approximately March 2004, thereafter returning to full benefit payment of \$414.00 per week. Attorney Robson can arrange for a lump sum advance payment of his

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attorney fees (most likely involving a discount to present value) with the carrier, if that is mutually agreeable to the parties. As long as this is arranged per agreement, the ALJ will not need to approve the particulars of this advance payment.

ORDER:

IT IS THEREFORE ORDERED that the respondents, Intermountain Slurry(aka Granite Construction and Concrete Products)/CNA Insurance, pay the petitioner, Kyle Stephens, permanent total disability benefits at the rate of \$414.00 per week, beginning on date of injury, September 8, 1998, and continuing until February 2002. Thereafter, to account for the attorney fee award below, the respondents shall pay the benefits at the rate of \$331.20 for 110 weeks or until approximately March 2004. From March 2004 forward the benefit rate shall be returned to \$414.00 until the death of the petitioner or until further order of the Commission altering the award herein.

IT IS FURTHER ORDERED that the respondents pay Kevin Robson, attorney for the petitioner, the sum of \$9,100.00, plus the percentage of interest that is appropriate per R602-2-4, for services rendered in this matter. This amount is to be deducted from the aforesaid award to the petitioner, in a periodic deduction, as indicated in the preceding order paragraph. The attorney fees are to be remitted directly to the office of Kevin Robson.

DATED this 2 day of November, 2000.



Barbara Elicerio
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

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Tab E

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35-1-67. Id. For permanent total disability.

In cases of permanent total disability, the award shall be 60 per cent of the average weekly wages for five years from date of injury, and thereafter 45 per cent of such average weekly wages, but not to exceed a maximum of \$27.50 per week and not less than \$17.50 per week, plus 5 per cent of such award for each dependent minor child under the age of 18 years up to a maximum of 5 such dependent minor children; *provided however*, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$11,000.00; and *provided further*, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$520.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$27.50 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or

refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$11,000.00.

[Effective 1951-May 9, 1955.]

1955 Amendment

35-1-67. Disability benefits -- Permanent total disability.

In cases of permanent total disability the award shall be 60 per cent of the average weekly wages for five years from date of injury and thereafter 45 per cent of such average weekly wages, but not to exceed a maximum of \$30.00 per week and not less than \$19.50 per week, plus seven per cent of such award for each dependent minor child under the age of 18 years up to a maximum of 5 such dependent minor children; *provided, however*, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$12,100.00; and *provided further*, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$600.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$30.00 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to

perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind, including loss of function, in excess of \$12,100.00.

[Effective May 10, 1955-June 30, 1957.]

1957 Amendment

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

In cases of permanent total disability the award shall be 60 per cent of the average weekly wages for five years from date of injury, and thereafter 45 per cent of such average weekly wages, but not to exceed a maximum of \$35.00 per week and not less than \$22.75 per week, plus 7 per cent of such award for each dependent minor child under the age of 18 years up to a maximum of 5 such dependent minor children; *provided, however*, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$14,116.71; and *provided, further*, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$700.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$35.00 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of

bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$14,116.71.

[Effective July 1, 1957-June 30, 1959.]

1959 Amendment

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

In cases of permanent total disability the award shall be 60 per cent of the average weekly wages for five years from date of injury, and thereafter 45 per cent of such average weekly wages, but not to exceed a maximum of \$37.00 per week and not less than \$24.00 per week, plus \$2.50 for a dependent wife and \$2.50 for each dependent minor child under the age of 18 years up to a maximum of four such dependent minor children; *provided, however*, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$14,822.55; and *provided further*, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$735.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$37.00 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both

legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$14,722.55.

[Effective July 1, 1959-May 8, 1961.]

1961 Amendment

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

In cases of permanent total disability the award shall be 60 percent of the average weekly wages for five years from date of injury, and thereafter 45 percent of such average weekly wages, but not to exceed a maximum of \$39.00 per week and not less than \$24.00 per week, plus \$2.75 for a dependent wife and \$2.75 for each dependent minor child under the age of 18 years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$15,415.00 and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by Section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$735.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under Section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$39.00 per week, out of that special fund provided for by Section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total

disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$15,415.00.

[Effective May 9, 1961-June 30, 1963.]

1963 Amendment

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

In cases of permanent total disability the award shall be 60 percent of the average weekly wages for five years from date of injury, and thereafter 45 percent of such average weekly wages, but not to exceed a maximum of \$40.00 per week and not less than \$25.00 per week, plus \$2.85 for a dependent wife and \$2.85 for each dependent minor child under the age of 18 years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$15,800.00 and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by Section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$753.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under Section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$40.00 per week, out of that special fund provided for by Section 35-1-68, Utah Code Annotated, 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon

partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$15,800.00.

[Effective July 1, 1963-June 30, 1965.]

1965 Amendment

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

In cases of permanent total disability the award shall be sixty per cent of the average weekly wages for five years from date of injury, and thereafter forty-five per cent of such average weekly wages, but not to exceed a maximum of \$42.00 per week and not less than \$25.00 per week, plus \$3.60 for a dependent wife and \$3.60 for each dependent minor child under the age of eighteen years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$18,720.00; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by Section 35-1-68, Utah Code Annotated, 1953, as amended, subdivision 1, not to exceed \$830.00 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under Section 35-1-69, Utah Code Annotated, 1953, as amended, relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of forty-five per cent of his average weekly earnings, but not to exceed \$42.00 per week, out of that special fund provided for by Section 35-1-68, Utah Code Annotated, 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to cooperate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of

disabilities of any kind including loss of function, in excess of \$18,720.00.
[Effective July 1, 1965-June 30, 1967.]

1967 Amendment

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

In cases of permanent total disability the award shall be sixty per cent of the average weekly wages for five years from date of injury, and thereafter forty-five per cent of such average weekly wages, but not to exceed a maximum of \$44 per week and not less than \$25 per week, plus \$3.60 for a dependent wife and \$3.60 for each dependent minor child under the age of eighteen years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$19,344; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated, 1953, as amended, subdivision 1, not to exceed \$830 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated, 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of forty-five per cent of his average weekly earnings, but not to exceed \$44 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated, 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$19,344.
[Effective July 1, 1967-June 30, 1969.]

1969 Amendment

35-1-67. Permanent total disability -- Amount of payments -- Vocational rehabilitation -- Procedure and payments -- Maximum compensation payable.

In cases of permanent total disability the award shall be sixty per cent of the average weekly wages for five years from date of injury, and thereafter forty-five per cent of such average weekly wages, but not to exceed a maximum of \$47 per week and not less than \$27 per week, plus \$3.60 for a dependent wife and \$3.60 for each dependent minor child under the age of eighteen years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$20,280; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, subdivision 1, not to exceed \$890 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, Utah Code Annotated 1953, as amended, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of forty-five per cent of his average weekly earnings, but not to exceed \$47 per week, out of that special fund provided for by section 35-1-68, Utah Code Annotated 1953, as amended, 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, however, shall be entitled to any such payments if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$20,280.

[Effective July 1, 1969-June 30, 1971.]

1971 Amendment

35-1-67. Permanent total disability benefits -- Vocational rehabilitation -- Maximum benefit.

In cases of permanent total disability the award shall be 60% of the average weekly wages for five years from date of injury, and thereafter 45% of such average weekly wages, but not to exceed a maximum of \$54 per week and not less than \$29 per week, plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years up to a maximum of four such dependent minor children; provided, however, that in no case of permanent total disability shall the employer or its insurance carrier be required to pay more than \$24,648; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68, not to exceed \$890 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such employee weekly benefits at the rate of 45% of his average weekly earnings, but not to exceed \$54 per week, out of that special fund provided for by section 35-1-68, 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, however, shall be entitled to any such payments if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

Commencing July 1, 1971, all persons who are permanently and totally disabled and now receiving compensation benefits from the special fund provided for by section 35-1-68 shall be paid compensation benefits at the rate of \$44 per week. This section shall apply to all persons permanently and totally disabled who are now receiving or hereafter become entitled to receive compensation benefits from the special fund.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of \$24,648.

[Effective July 1, 1971-June 30, 1973.]

1973 Amendment

35-1-67. Permanent total disability -- Limitation of weekly compensation -- Referral procedures to division of vocational rehabilitation -- Partial permanent disability -- Statutes of limitations.

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 $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not to exceed $66\frac{2}{3}\%$ 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not to exceed $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury per week out of that special fund provided for by section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of \$50 per week.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been

rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective July 1, 1973-April 3, 1974.]

1974 Amendment

35-1-67. Permanent total disability benefits.

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 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not to exceed 66 $\frac{2}{3}$ % 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not to exceed 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week out of that special fund provided for by section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of \$50 per week.

Commencing July 1, 1974, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68(1) at a rate

sufficient to bring their weekly benefit to \$50 when combined with employer or insurance carrier compensation payments.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of $66\frac{2}{3}$ of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective April 4, 1974-May 12, 1975.]

1975 Amendment

35-1-67. Schedule of benefits for permanent total disability.

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 wife and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 wife and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such

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 that special fund provided for by section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of \$60 per week.

Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68(1) at a rate sufficient to bring their weekly benefit to \$60 when combined with employer or insurance carrier compensation payments.

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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 13, 1975-May 9, 1977.]

1977 Amendment

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 88% 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 eighteen years, up to a maximum of four such 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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: Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory

that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 eighteen years, up to a maximum of four such 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 that special fund provided for by section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

All persons who are permanently and totally disabled and entitled to benefits from the special fund designated in subsection (1) of section 35-1-68 including those injured prior to March 6, 1949, shall receive not less than \$75 per week when paid only by the special 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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 10, 1977-May 7, 1979.]

1979 Amendment

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 88% 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 eighteen years, up to a maximum of four such 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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: Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 eighteen years, up to a maximum of four such 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 that special fund provided for by section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

All persons who are permanently and totally disabled and entitled to benefits from the special fund designated in subsection (1) of section 35-1-68 including those injured prior to March 6, 1949, shall receive not less than \$85 per week when paid only by the special 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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon

partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 8, 1979-May 11, 1981.]

1981 Amendment

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 88% 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 eighteen years, up to a maximum of four such 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 such weekly compensation payments for more than 312 weeks; and provided further, that 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: Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such 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 such vocational rehabilitation division, out of the second injury fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated 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, then the commission shall order that there be paid to such 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 eighteen years, up to a maximum of four such 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 section 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, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund designated in subsection (1) of section 35-1-68 including those injured prior to March 6, 1949, shall receive not less than \$100 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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 12, 1981-May 9, 1983.]

1983 Amendment

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 88% 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 section 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 co-operated 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 co-operate 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 \$110 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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 10, 1983-March 17, 1985.]

1985 Amendment

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 88% 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 section 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 co-operated 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 co-operate 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 qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective March 18, 1985-June 30, 1988.]

1988 Repeal and Reenactment

Section 35-1-67 was repealed in 1988 and reenacted to read as follows:

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

- (1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f)(1) and (2), as revised.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be $6\frac{2}{3}\%$ of the employee's average weekly wage at the time of the injury, limited as follows:

- (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
 - (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.
 - (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, and 35-1-66, in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.
- (4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.
- (5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:
 - (a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the vocational rehabilitation agency under the State Board of Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68(1), for use in the rehabilitation and training of the employee.
 - (b) If the vocational rehabilitation agency under the State Board of Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any

case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

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

[Effective July 1, 1988-July 14, 1988.]

Subsequent 1988 Amendment

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

- (1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f)(1) and (2), as revised.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66 $\frac{2}{3}$ % of the employee's average weekly wage at the time of the injury, limited as follows:
 - (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
 - (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.
 - (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, and 35-1-66, in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.
- (4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers'

Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

- (5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:
- (a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the Utah State Office of Rehabilitation under the State Board for Vocational Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68(1), not to exceed \$3,000 for use in the rehabilitation and training of the employee.
 - (b) If the Utah State Office of Rehabilitation under the State Board for Vocational Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.
- (6) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section. No tentative finding of permanent total disability is required in any such instance.

[Effective July 15, 1988-April 28, 1991.]

1991 Amendment

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

- (1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f)(1) and (2), as revised.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66⅔% of the employee's average weekly wage at the time of the injury, limited as follows:
 - (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

- (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.
 - (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.
- (4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.
- (5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:
 - (a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the Utah State Office of Rehabilitation under the State Board for Vocational Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68(1), not to exceed \$3,000 for use in the rehabilitation and training of the employee.
 - (b) If the Utah State Office of Rehabilitation under the State Board for Vocational Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's

rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

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

[Effective April 29, 1991-June 30, 1992.]

1992 Amendment

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

(1)

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

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

- (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
- (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.
- (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3)

- (a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69.
- (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).
- (c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(4)

- (a) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.
 - (b) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69.
 - (c) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.
- (5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:
- (a)
 - (i) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the Utah State Office of Rehabilitation under the State Board for Applied Technology Education for rehabilitation training.
 - (ii) The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68(1), not to exceed \$3,000 for use in the rehabilitation and training of the employee.
 - (b)
 - (i) If the Utah State Office of Rehabilitation under the State Board for Applied Technology Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation.
 - (ii) The parties may waive the right to a hearing.
 - (iii) If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits.
 - (iv) The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.
 - (v) In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability.
 - (vi) An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.
- (6)
- (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) No tentative finding of permanent total disability is required in any such instance.
[Effective July 1, 1992-June 30, 1994.]

1994 Amendment

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

- (1)
 - (a) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section.
 - (b) Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised.
 - (c) The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f)(1) and (2), as revised.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66 $\frac{2}{3}$ % of the employee's average weekly wage at the time of the injury, limited as follows:
 - (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
 - (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury.
 - (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:
 - (a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69 as in effect on the date of injury.
 - (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).
 - (c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.
 - (d) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

- (e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69.
- (4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:
 - (a) The employer or its insurance carrier is liable for permanent total disability compensation.
 - (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).
 - (c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.
- (5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.
- (6)
 - (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:
 - (i) the commission reviews a summary of reemployment activities undertaken pursuant to Title 35, Chapter 10, Utah Injured Worker Reemployment Act;
 - (ii) the employer or its insurance carrier submits to the commission a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the commission notice that the employer or its insurance carrier will not submit a plan; and
 - (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).
 - (b) Prior to the finding becoming final, the commission shall order the initiation of permanent total disability compensation payments to provide for the employee's subsistence. The commission shall order the payment of any undisputed disability or medical benefits due the employee. The employer or its insurance carrier shall be given credit for any disability payments against its ultimate disability compensation liability under Chapter 1 or 2.
 - (c) The commission may not order an employer or its insurance carrier to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan:
 - (i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.
 - (ii) The plan shall include payment of reasonable disability compensation to provide for

the employee's subsistence during the rehabilitation process.

- (iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the commission on its own motion to order a final finding of permanent total disability.
- (d) If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits.
- (7) The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.
- (8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.
- (9) As determined by the commission, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this title.
- (10)
 - (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.
 - (b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

[Effective July 1, 1994-April 30, 1995.]

1995 Amendment

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

- (1)
 - (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.
 - (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:
 - (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
 - (ii) the employee is permanently totally disabled; and
 - (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.
 - (c) To find an employee permanently totally disabled, the commission shall conclude that:
 - (i) the employee is not gainfully employed;
 - (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
 - (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and
 - (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical

capacity, and residual functional capacity.

- (d) Evidence of an employee's entitlement to disability benefits other than those provided under this title, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under Chapter 1 or 2.
- (2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 662/3% of the employee's average weekly wage at the time of the injury, limited as follows:
 - (a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.
 - (b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury.
 - (c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.
- (3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:
 - (a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69 as in effect on the date of injury.
 - (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).
 - (c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.
 - (d) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.
 - (e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69.
- (4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:
 - (a) The employer or its insurance carrier is liable for permanent total disability compensation.
 - (b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

- (c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.
- (5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.
- (6)
 - (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:
 - (i) the commission reviews a summary of reemployment activities undertaken pursuant to Chapter 10, Utah Injured Worker Reemployment Act;
 - (ii) the employer or its insurance carrier submits to the commission a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the commission notice that the employer or its insurance carrier will not submit a plan; and
 - (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).
 - (b) Prior to the finding becoming final, the commission shall order the initiation of permanent total disability compensation payments to provide for the employee's subsistence. The commission shall order the payment of any undisputed disability or medical benefits due the employee. The employer or its insurance carrier shall be given credit for any disability payments against its ultimate disability compensation liability under Chapter 1 or 2.
 - (c) The commission may not order an employer or its insurance carrier to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan:
 - (i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.
 - (ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.
 - (iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the commission on its own motion to order a final finding of permanent total disability.
 - (d) If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits.
- (7)
 - (a) The period of benefits commences on the date the employee became permanently totally

- disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work.
- (b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.
 - (c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.
 - (d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.
 - (e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).
 - (f) The commission shall:
 - (i) establish rules regarding the part-time work and offset; and
 - (ii) adjudicate disputes arising under Subsection (7).
 - (g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.
 - (h) The commission may:
 - (i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause;
 - (ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.
- (8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.
- (9) As determined by the commission, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this title. The commission shall dismiss without prejudice the claim for benefits of an employee who fails to fully cooperate, unless the commission states specific findings on the record justifying dismissal with prejudice.
- (10)
- (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.
 - (b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.
- (11)
- (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker

- remains permanently totally disabled.
- (b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.
 - (c) The reexamination may include:
 - (i) the review of medical records;
 - (ii) employee submission to reasonable medical evaluations;
 - (iii) employee submission to reasonable rehabilitation evaluations and retraining efforts;
 - (iv) employee disclosure of Federal Income Tax Returns;
 - (v) employee certification of compliance with Utah's Workers' Compensation Fraud Prevention Act; and
 - (vi) employee completion of sworn affidavits or questionnaires approved by the commission.
 - (d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.
 - (e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, the commission may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.
 - (f)
 - (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the commission for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.
 - (ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, the commission shall adjudicate the issue at a hearing.
 - (iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.
 - (g) In accordance with Section 35-1-87, the commission may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.
 - (h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.
- (12) If any provision of this section, or the application of any provision to any person or

