

2001

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

Utah Court of Appeals

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Theodore E. Kanell; Robert C. Olsen; Plant Wallace Christensen and Kanell; Attorneys for Appellnats.

Alan Hennebold; Utah Labor Commission; Counsel for Utah Labor Commission; Kevin Robson; Bertch Robson; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Intermountain Slurry Seal v. Labor Commision of Utah*, No. 20010271 (Utah Court of Appeals, 2001).
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Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH & BIRCH
1996 East 6400 South, Suite 100
Salt Lake City, UT 84121
Telephone: (801) 424-3800
Facsimile: (801) 424-4243
Attorney for Plaintiffs

BEFORE THE UTAH COURT OF APPEALS

INTERMOUNTAIN SLURRY SEAL and/or
CNA INSURANCE,

Respondents/Appellants,

v.

THE UTAH LABOR COMMISSION, and
KYLE STEPHENS,

Appellees
~~Defendants.~~

BRIEF OF APPELLEE STEPHENS

Oral Argument Priority 7

Case No. 20010271-CA

BRIEF OF APPELLEE STEPHENS
On Petition for Review from the Utah Labor Commission

Theodore E. Kanell
Robert C. Olsen
PLANT WALLACE CHRISTENSEN &
KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84110
Attorneys for Appellants

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, UT 84121
Attorneys for Appellee Stephens

Allen Hennebold
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6615
Attorney for Appellee Utah Labor Comm.

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Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH & BIRCH
1996 East 6400 South, Suite 100
Salt Lake City, UT 84121
Telephone: (801) 424-3800
Facsimile: (801) 424-4243
Attorney for Plaintiffs

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Robert C. Olsen
PLANT WALLACE CHRISTENSEN &
KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84110
Attorneys for Appellants

Daniel F. Bertch (4728)
Kevin K. Robson (6976)
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, UT 84121
Attorneys for Appellee Stephens

Allen Hennebold
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6615
Attorney for Appellee Utah Labor Comm.

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has original appellate jurisdiction pursuant to U.C.A. §78-2a-3(2)(a)(2001).

ISSUES PRESENTED ON APPEAL

1. Whether the Labor Commission erred in applying the plain language of Utah Code Ann. §34A-2-413(10)(1997) that an award to an employee entitled to statutory permanent total disability benefits for loss of both legs, is not subject to re-examination for a claim of employability by the employer. A decision of the Utah Labor Commission based upon statutory construction is a legal ruling, review of which is *de novo*. *Esquivel v. Labor Commission of Utah*, 2000 UT 66 (Utah 5/23/2000).

DETERMINATIVE AUTHORITY

The determinative authority whether an employee is entitled to permanent total disability benefits is Utah Code Ann. §34A-2-413(1997)(attached as Addendum D).

STATEMENT OF THE CASE

Nature of the Case

This petition seeks review of an order of the Utah Labor Commission denying the employer's motion for review of an order of Administrative Law Judge Barbara Elicerio, ("ALJ") providing continuing permanent total disability benefits. (Order Denying Motion for Review, attached as Addendum C).

Course of Proceedings Below

The Petitioner below ("Stephens") was injured in an industrial accident on September 8, 1998, which resulted in the amputation of both legs just below the knee. (The facts are set forth in

the preliminary order of the ALJ, and the final order of the ALJ, attached as Addenda A and B, respectively hereto. Since neither party takes issue with the facts as found, recourse to the record is unnecessary, and the orders should be reviewed for correctness). Stephens filed an application for benefits, claiming permanent total disability benefits under U.C.A. §34A-2-413(10). (All subsequent references in this brief to “subsections” are to the various subsections of Section 413). Subsection 10(a) provides that “the loss . . . of both feet . . . constitutes total and permanent disability, to be compensated according to this section” The following subsection, 10(b), provides that “A finding of permanent total disability pursuant to Subsection (10)(a) is final”. The ALJ found that Stephens was entitled to permanent total disability benefits. The Appellant (“Employer”) filed a motion for review with the Utah Labor Commission, which was denied. The Employer then filed a Petition for Review of the Labor Commission’s order with this Court.

Statement of Facts

Stephens was injured in an industrial accident on September 8, 1998, resulting in the amputation of both legs just below the knee. Stephens was contacted by a vocational rehabilitation counselor provided by Employer. Shortly after, Stephens began taking college classes in computer engineering, paid for by Employer. While Stephens was going to college, on September 28, 1999, Employer decided it did not want to pay for Stephens education, and, instead, offered him a job doing telephone work. Stephens decided he did not want to stop his education, and refused the job. About one month later, Employer offered Stephens another job, as a dispatcher, which Stephens again refused.

On February 1, 2000, the ALJ made a preliminary ruling that Stephens would be entitled to his statutory permanent total disability benefits, regardless of his employability. In retaliation,

Employer stopped paying for Stephens education, forcing Stephens to get funding from the State of Utah.

A subsequent hearing was held on the issue of re-employability. At that hearing, the ALJ found that “At best Respondents [Employer] have identified one job that the petitioner [Stephens] MAY be able to perform.” The ALJ placed the word “may” in capitals, apparently to make clear that Employer’s proof failed to reach a preponderance of the evidence. She further characterized Employer’s evidence as “ambiguous”, and noted that Employer failed to offer any evidence that the dispatch position it offered Stephens was “generally available” in the work force.

The ALJ found that Subsection 10 permanent total disability cases are not subject to the re-employment provisions of Subsection 7. On a motion for review, the Utah Labor Commission agreed, and ordered the Employer to continue paying permanent total disability benefits to Stephens.

SUMMARY OF ARGUMENT

It is illogical to assume that the Legislature intended to exempt Subsection 10 applicants from showing an initial showing of lack of employability, only to allow the employer to assert employability by way of a post-award review. Further, the Legislature clearly disallowed employers from re-examining statutory permanent total disability awards in Subsection 11. Therefore, the Legislature has made clear that statutory permanent total disability awards be irrevocable.

DETAIL OF ARGUMENT

POINT ONE

THE LEGISLATURE SPECIFICALLY EXEMPTED SUBSECTION 10 DISABILITY CASES FROM RE-EXAMINATION FOR EMPLOYABILITY

The Legislature provided in Subsection 11 that an employer may not re-examine a Subsection 10 disability case for re-employment:

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

U.C.A. §34A-2-414(11)(a)(1997).

The statutory language is plain and unambiguous. The courts will construe a statute in a way to give effect to all provisions of the statute. *Employers Reinsurance Fund v. Ind. Comm. Of Utah*, 856 P.2d 648 (Utah App. 1993)(“We have a fundamental duty to give effect, if possible, to every word in the statute [citation omitted]”). If re-examination of Subsection 10 cases for employability is allowed, then Subsection 11 is made meaningless.

The reasoning for Subsection 11(a) is clear. A statutory permanent total disability claim is based upon permanent loss of limbs or eyes. No re-examination is going to change the fact that a Subsection 10 claimant has lost use of limbs or eyes. In Stephens case, for instance, no re-examination is ever going to find that he has his amputated legs back. No rehabilitation is going to restore his missing feet.

Alternatively, Employer attempts to divorce Subsection 11 from Subsection 7(b), and argue that while the employer may not re-examine the Subsection 10 claim under Subsection 7(a)(ii), it can provide a job instead of benefits. The problem with this attempted divorce is that a Subsection 11 re-examination is to determine if the worker is still permanently totally disabled under Subsection 7 in its entirety. Subsection 11 does not limit the scope of a re-examination to just Subsection 7(a)(ii). If an employer can re-examine under Subsection 7 at all, and it can, it can re-examine under the whole Subsection.

To accept Employer’s argument would lead to an intolerable result. The practical effect of this argument would be to turn the employee into an permanently indentured servant of the employer.

If a statutory permanent total disability claimant were forced to accept a job with an employer instead of receiving benefits, the worker would be forever tethered to that employer. The employer cannot completely avoid its obligation by showing the employer is capable of “regular, steady work”, as that would violate Subsection 11(a). So instead, the employer forces the worker into life-long servitude, at pain of losing benefits if the worker refuses the job with the employer.

POINT TWO

THE LEGISLATURE DID NOT INTEND TO RELIEVE A SUBSECTION 10 APPLICANT FROM MAKING A SHOWING OF LACK OF EMPLOYABILITY, ONLY TO ADD IT BACK IN AFTER THE AWARD BY WAY OF RE-EXAMINATION

Employer admits that a Subsection 10 applicant need not make an initial showing of unemployability. Employer admits that an injured worker suffering the listed injuries is entitled to an initial award of permanent total disability benefits. However, Employer’s theory is that the employer can bring this issue through the back door after the award is made, by way of a showing of re-employability. Thus, Employer argues that the Subsection 10 employee need not make any showing of inability to perform “regular, steady work” to initially get an award, but immediately must avoid that same showing in order to maintain the award. This is illogical; if the Legislature intended to exempt the Subsection 10 employee in the first place, it surely intended to exempt that employee after the award.

POINT THREE

IT IS CONSISTENT WITH THE WORKERS COMPENSATION SCHEME TO COMPENSATE ACCORDING TO INJURY WITHOUT REGARD TO FUTURE EMPLOYABILITY

To exempt Subsection 10 claimants from any reduction in award is consistent with the overall scheme of employee compensation for industrial injury. In the non-total disability case, the

worker receives an award based upon permanent partial impairment, without regard to actual loss of employability. For example, a loss of a finger might result in a complete loss of employability to a violinist, but no loss of employability to a lawyer or judge. The compensation is not tied to loss of income, but is a set amount based upon the relative severity of the injury, as expressed in percentage of impairment. If the employee never loses a day of work due to the permanent partial disability injury, the same compensation is awarded. The general approach is to compensate according to impairment, i.e. loss of use, without regard to any question of employability. The only exception to an impairment based award is Subsection (1), granting compensation for permanent total disability. Subsection (1) requires a detailed showing of inability to work, without regard to a specific level of injury. A Subsection 10 case is most like a permanent partial disability case, because the award is based on the severity of injury without regard to loss of ability to work. Thus, It is logically consistent to allow the employer to show rehabilitation, or to offer a part-time job in Subsection (1) cases, but not in Subsection (10) cases.

This is the sad explanation that attorneys representing injured workers must repeatedly give. Workers call, explaining that they got a 5% impairment for a back injury, that completely disables them from all but minimum wage sedentary work. The loss of earning capacity may be enormous, but unless there is a basis for claiming permanent total disability, the worker is only compensated for that impairment, not the loss of earnings.

POINT FOUR

THE SUBSECTION 11 EXEMPTION FROM REVIEW IS A SPECIFIC STATUTE WHICH CONTROLS OVER A GENERAL STATUTE ALLOWING RE-EXAMINATION

The Labor Commission denied the Employer's motion for review on the grounds that the

statutory permanent total disability is a specific statute, and the re-examination provisions of Subsection 7 are a general statute. The Labor Commission reasoned that since a specific statute governs over a more general statute, the provisions of Subsection 10 prevail. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1999 UT 18, ¶54 (1999) (“A settled rule of statutory construction . . . provides that a more specific statute governs instead of a more general statute”).

The relevant general category is that of all permanently, totally disabled workers. The specific subset of that general class is those workers who are entitled to permanent, total disability due to loss of two limbs or eyes. Thus, Subsection 10 targets a specific and smaller class of the larger group of permanently disabled workers. Since the specific provisions of Subsection 10 mandate that its award is final, the general re-employment or re-examination provisions of Subsection 7 do not apply at all.

The Labor Commission quoted *Larson's Workers Compensation Law*, §83.08 as follows:

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 be either entirely immaterial, or would have to be extremely convincing to overcome the presumption.

The Commission noted that Utah's statute falls into the first category, where evidence of actual earnings is immaterial, and concluded that Stephens was entitled to permanent total disability benefits regardless of return to work.

The Commission's position makes sense. As Point Two argues, the award of statutory permanent total disability benefits under Subsection 10 is similar to an award of partial disability benefits, in that it is awarded without regard to loss of earnings or earning ability. It is not logical

to subject such an award to the provisions of Subsection 7 regarding return to work.

POINT FIVE

THE EMPLOYER FAILED TO SHOW THAT STEPHENS WAS ABLE TO RETURN TO REGULAR, STEADY WORK

The Employer has the burden under Subsection 11 of showing that Stephens was no longer disabled, and was capable of “regular, steady work”. The ALJ found that Employer failed to present any evidence that the dispatch job it offered Stephens was generally available in the workplace. The ALJ stated that “at best” the Employer identified one job that Stephens may be able to do. The ALJ even put the word “may” in capital letters to indicate the lack of persuasiveness of the Employer’s evidence.

The ALJ contemplated a remand for further evidence if Stephens were to be subject to a re-examination under Subsection 7. However, it is Stephens’ position that the Employer failed to carry its burden of proof at the hearing, it should accept the consequence, through an outright affirmance by this Court, without a remand for further evidence.

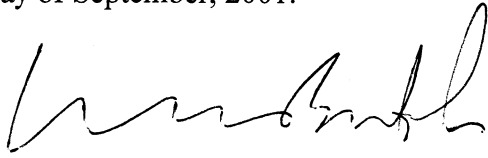
CONCLUSION

The Employer is faced with paying for a statutory permanent total disability claim to Stephens. Its initial plan was apparently to pay for Stephens to go to college, and then to tell him to get a job, and cut off his benefits. Once Stephens applied for a ruling on this issue, and won, Employer retaliated by cutting off funding for his schooling. Employer then offered Stephens a job as a dispatcher, again in an effort to get out of paying a Subsection 10 disability claim.

The problem with Employer’s efforts is that a Subsection 10 disability claim, by statute, is final, and not subject to review under Subsection 11, to allow a showing of employability under Subsection 7. The statute is clear, and Employer’s liability is clear. To adopt Employer’s argument

would turn Stephens into an indentured servant of Employer for the rest of his work life, allowing it to avoid paying disability benefits so long as it agreed to make up a job for Stephens. The Legislature gave no indication that it intended to turn Subsection 10 into a mandatory employment act for permanently injured workers. The petition for review should be denied, and the decision of the Utah Labor Commission upheld.

DATED this 12th day of September, 2001.



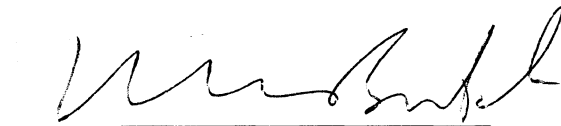
Daniel F. Bertch
Attorney for Appellee/Petitioner Stephens

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2001, I served a true and correct copy of the foregoing APPELLEES' BRIEF upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Allen Hennebold
UTAH LABOR COMMISSION
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6615

Theodore E. Kanell
Robert C. Olsen
PLANT WALLACE CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, UT 84110



ADDENDUM A

Preliminary Conclusions of Law and Order - February 1, 2000

UTAH LABOR COMMISSION
Case No. 99648

KYLE STEPHENS,

Petitioner,

vs.

INTERMOUNTAIN SLURRY SEAL/
CNA INSURANCE,

Respondents.

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.

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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

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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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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.

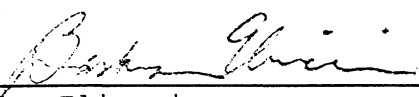
ORDER:

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

PRELIMINARY ORDER
RE: KYLE STEPHENS
PAGE 7

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 THE FINAL DECISION IN THIS CASE 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.

CERTIFICATE OF MAILING

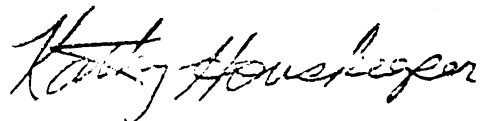
I hereby certify that on the 2 day of Feb, 2000, I mailed a true and correct copy of the foregoing PRELIMINARY CONCLUSIONS OF LAW AND ORDER, in the case of Kyle Stephens v. Intermountain Slurry Seal / CNA Insurance, (Case No. 99648) to the following parties:

POSTAGE PREPAID:

KYLE STEPHENS
408 East 100 North #1
Logan, UT 84321

KEVIN K. ROBSON, ATTY
5296 South Commerce Drive #100
Salt Lake City, UT 84107

THEODORE E. KANELL, ATTY
ROBERT C. OLSEN, ATTY
PLANT, WALLACE, CHRISTENSEN & KANELL
136 East South Temple #1700
Salt Lake City, UT 84111-1131



Kathy Houskeeper

ADDENDUM B

Final Findings of Fact, Conclusions of Law and Order - November 2, 2000

UTAH LABOR COMMISSION
Case No. 99648

KYLE STEPHENS,

Petitioner,

vs.

INTERMOUNTAIN SLURRY SEAL/
CNA INSURANCE,

Respondents.

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

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

FINAL ORDER
RE: KYLE STEPHENS
PAGE 3

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

FINAL ORDER
RE: KYLE STEPHENS
PAGE 5

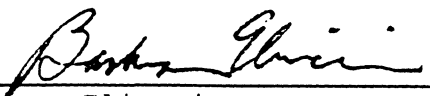
attorney fees (most likely involving a discount to present value) with the carrier, if that is mutually agreeable to the parties. As long as this is arranged per agreement, the ALJ will not need to approve the particulars of this advance payment.

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

FINAL ORDER
RE: KYLE STEPHENS
PAGE 6

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.

CERTIFICATE OF MAILING

I hereby certify that on the 6TH day of November, 2000, I mailed a true and correct copy of the foregoing Settlement of Disputed Claim for Permanent Total Disability Benefits & Order for Approval, in the case of Kyle Stephens v. Intermountain Slurry Seal and CNA Ins., (Case No. 99648) to the following parties:

POSTAGE PREPAID:

KYLE STEPHENS
408 East 100 North, #1
Logan, UT 84321

THEODORE E. KANELL, ESQ.
ROBERT C. OLSEN, ESQ.
PLANT, WALLACE, CHRISTENSEN &
KANELL
136 East South Temple, Ste. 1700
Salt Lake City, UT 84111

KEVIN K. ROBSON, ESQ.
5296 South Commerce Dr #100
Salt Lake City, UT 84107



Vilma Mosier

ADDENDUM C

Order Denying Motion for Review - February 28, 2001

UTAH LABOR COMMISSION

KYLE STEPHENS,

Applicant,

v.

**INTERMOUNTAIN SLURRY SEAL
and CNA INSURANCE,**

Defendants.

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*
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*
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**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. . . .

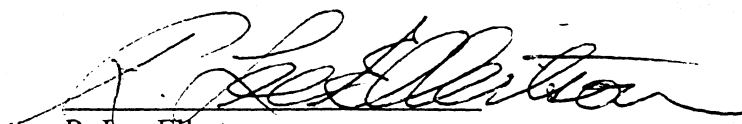
Under such a statute, depending on its wording, evidence of actual earnings would either be entirely immaterial, or would have to be extremely convincing to overcome the presumption.

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.

1

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:

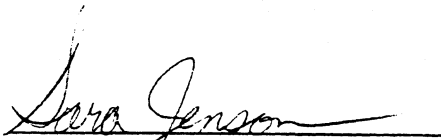
KYLE STEPHENS
408 E 100 N #1
LOGAN UT 84321

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

ADDENDUM D

U.C.A. §34A-2-413 (1997) Permanent total disability - Amount of payments - Rehabilitation

(B) At interphalangeal joint	50
(iv) Index finger	
(A) At metacarpophalangeal joint or with resection of metacarpal bone	42
(B) At proximal interphalangeal joint	34
(C) At distal interphalangeal joint	18
(v) Middle finger	
(A) At metacarpophalangeal joint or with resection of metacarpal bone	34
(B) At proximal interphalangeal joint	27
(C) At distal interphalangeal joint	15
(vi) Ring finger	
(A) At metacarpophalangeal joint or with resection of metacarpal bone	17
(B) At proximal interphalangeal joint	13
(C) At distal interphalangeal joint	8
(vii) Little finger	
(A) At metacarpophalangeal joint or with resection of metacarpal bone	8
(B) At proximal interphalangeal joint	6
(C) At distal interphalangeal joint	4
(b) Lower extremity	
(i) Leg	
(A) Hemipelvectomy (leg, hip and pelvis)	156
(B) Leg at hip joint or three inches or less below tuberosity of ischium	125
(C) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch)	112
(D) Leg below knee with functional stump ...	88
(ii) Foot	
(A) Foot at ankle	88
(B) Foot partial amputation (Chopart's) ..	66
(C) Foot midmetatarsal amputation	44
(iii) Toes	
(A) Great toe	
(I) With resection of metatarsal bone .	26
(II) At metatarsophalangeal joint ...	16
(III) At interphalangeal joint	12
(B) Lesser toe (2nd — 5th)	
(I) With resection of metatarsal bone .	4
(II) At metatarsophalangeal joint	3
(III) At proximal interphalangeal joint ..	2
(IV) At distal interphalangeal joint ...	1
(C) All toes at metatarsophalangeal joints ...	26
(iv) Miscellaneous	
(A) One eye by enucleation	120
(B) Total blindness of one eye	100
(C) Total loss of binaural hearing	109

(5) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This Subsection (5) does not apply to the items listed in Subsection (4)(b)(iv).

(6) (a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

(b) Compensation for any impairment described in Subsection (6)(a) shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section.

(c) Permanent partial disability compensation may not:

(i) exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function; and

(ii) be paid for any permanent impairment that existed prior to an industrial accident.

(7) The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

1997

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.

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34A-2-414. Benefits in case of death — Distribution of award to dependents — Death of dependents — Remarriage of surviving spouse.

- (1) (a) The benefits in case of death shall be paid to one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by an administrative law judge.
- (b) The administrative law judge may apportion the benefits among the dependents in the manner that the administrative law judge considers just and equitable.
- (c) Payment to a dependent subsequent in right may be made, if the administrative law judge considers it proper, and shall operate to discharge all other claims.
- (2) The dependents, or persons to whom benefits are paid, shall apply the same to the use of the several beneficiaries thereof in compliance with the finding and direction of the administrative law judge.
- (3) In all cases of death when:
- (a) the dependents are a surviving spouse and one or more minor children, it shall be sufficient for the surviving spouse to make application to the Division of Adjudi-