

1992

# John W. Zupon v. Kaiser Steel Corporation, the Uninsured Employers' Fund, the Employers' Reinsurance Fund and the Industrial commision of Utah : Brief of Petitioner

Utah Court of Appeals

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## Recommended Citation

Legal Brief, *Zupon v. Kaiser Steel Corporation*, No. 920569 (Utah Court of Appeals, 1992).  
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CKET NO.

920569CA

UTAH COURT OF APPEALS

JOHN W. ZUPON,

Petitioner,

vs.

KAISER STEEL CORPORATION,  
the UNINSURED EMPLOYERS' FUND,  
the EMPLOYERS' REINSURANCE FUND  
and the INDUSTRIAL COMMISSION  
OF UTAH,

Respondents.

Case No. 920569-CA

Priority No. 7

BRIEF OF PETITIONER

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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### **JURISDICTION OF THE COURT**

This is a Petition for Review of the Industrial Commission's August 3, 1992 Order Denying Petitioner's Motion for Review alleging entitlement to workers' compensation benefits sustained as a result of an industrial accident. A Petition for Review of that Order was timely filed with this Court on September 1, 1992.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2) (1988), 35-1-86 (1988), 63-46b-16 (1988), and 78-2a-3(2)(a) (1988); and Rule 14 of the Utah Rules of Appellate Procedure.

### **STATEMENT OF THE ISSUE(S)/STANDARD OF APPELLATE REVIEW**

There are three substantial issues presented for review:

(1) whether the Industrial Commission applied the wrong standard of proof to Petitioner's injuries and did not properly shift the burden to the employer to find a line of work the Petitioner could do;

(2) whether the Industrial Commission committed error in ignoring it's prior findings and decisions that at least 10% of Petitioner's whole body, permanent partial impairment was directly and exclusively attributable to the industrial accident; and,

(3) whether the Industrial Commission improperly failed to award Petitioner permanent, total disability compensation due to Petitioner's injuries and inability to return to work which were occasioned by his 1975 industrial accident.

The standard of appellate review which is to be applied to the resolution of the above issues is one involving "correction of error", since they involve questions of law, and no deference to the agency's view of the law is required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4) (d) (1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991).

#### **DETERMINATIVE STATUTE(S)/RULE(S)**

Utah Code Annotated, Section 35-1-67 (1975) is the determinative statute in this case. It is set forth in full in the Addendum thereto as Exhibit A.

#### **STATEMENT OF THE CASE**

##### **Nature of the Case**

Mr. Zupon seeks review of the Industrial Commission Order denying his Motion for Review wherein he alleged entitlement to workers' compensation benefits occasioned by his industrial accident.

##### **Course of Proceedings**

Mr. Zupon filed an application for permanent, total disability compensation benefits sustained as the result of an industrial injury which occurred on or about August 7, 1975. (R. at 1). Respondents alleged that Mr. Zupon failed to prove medical causation and is thus not entitled to permanent, total disability

benefits. (R. at 4, 21). A formal hearing was held before an Administrative Law Judge on February 6, 1992. (R. at 7).

#### Disposition Below

On May 24, 1991 Petitioner filed for permanent total disability benefits alleging that as the result of his August 7, 1975 industrial injury he was no longer able to work. The Administrative Law Judge on March 18, 1992, found that there was no medical causal connection between the industrial accident and the Petitioner's total disability. His claim for permanent, total disability benefits was dismissed with prejudiced. (R. at 21-31, copy attached to Addendum as Exhibit B).

Mr. Zupon filed a Motion for Review with the Industrial Commission which was subsequently denied on August 3, 1992. (R. at 46-51, copy attached to Addendum as Exhibit C). He challenges that final agency action in this Petition for Review.

#### Statement of the Facts

On August 7, 1975, Mr. Zupon experienced an industrial injury to his lower back while employed by Kaiser Steel Corporation. (R. at 83). At that time, Mr. Zupon was lifting an acetylene tank which was 5 feet long and 18 inches in diameter and weighed around 200 pounds. As he started to lift the tank off the ground the tank was off to his side and thus he was twisting as he lifted the tank. (R. at 22). He immediately felt a sharp pain in his low back just below his belt line. (R. at 22).

He was seen the day of the accident by Dr. S. Smoot at Carbon Medical Services Association, who continued to treat him until



November 13, 1975. (R. at 85, 100-110). He was also subsequently seen by Dr. Chapman, who on June 22, 1976 found that he was permanently disabled. (R. at 220). Mr. Zupon never returned to work after the industrial injury and he was awarded social security disability benefits beginning on January 1, 1977. (R. at 239).

A Medical Panel was appointed which subsequently found that Mr. Zupon suffered from a 60% whole body permanent, partial impairment and that 10% of that impairment was due to the 1975 industrial accident. (R. at 87-89). The Panel specifically agreed with Mr. Zupon's treating physician "... that the claimant cannot do mining or mechanic work," and further referenced his "... inability to work". (R. at 88). On February 10, 1977 the Industrial Commission awarded him permanent, partial impairment benefits based on the 10% related to the 1975 industrial accident only. (R. at 90-92).

On May 24, 1991, Mr. Zupon filed a new claim for additional benefits, i.e., permanent, total disability benefits, alleging that as a result of his August 7, 1975 industrial injury he was no longer able to work. (R. at 1).

#### **SUMMARY OF ARGUMENT(S)**

Mr. Zupon is entitled to have the benefit and presumption in the law as it existed at the time of his industrial injury. Under pre-1988 law, the employer had the burden of finding a line of employment which an employee could perform. The employer wholly failed to meet this burden in this case.

There was absolutely no evidence whatsoever to support the Administrative Law Judge's conclusion that Mr. Zupon's lumbar condition and his subsequent inability to work was the exclusive result of conditions which pre-dated his 1975 industrial accident. Rather the Medical Panel found that there was a 10%/50% industrial/pre-existing split of his substantial overall, whole body permanent, partial impairment, and there is uncontroverted evidence in the record of his total disability status as well.

### ARGUMENT

#### I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v.

Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra at 1021-1022, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

We are also reminded that our statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

\* \* \* \* \*

In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to 'employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. (Emphasis added).

The Administrative Law Judge in rendering her Findings of Fact and Conclusions of Law failed to apply this vital rule of construction. Nowhere in her Findings or Conclusions is there any evidence of a "liberal construction" or the "resolution of doubt in favor of the claim". Whenever any doubt or uncertainty appears in the record, the Administrative Law Judge construed it against the injured worker. Her finding of a lack of medical causation, for the reasons set forth below, is simply not supported by the record. The "findings" and "conclusions" do not evidence "humane and beneficent purposes" as required by law. The entire underlying basis of her Order is thus flawed. This same defect carried over to the Industrial Commission's final agency action, and it is similarly flawed. The final Order should be reversed due to these conceptional flaws.

## II

### THE INDUSTRIAL COMMISSION FAILED TO SHIFT THE BURDEN TO THE EMPLOYER TO FIND A LINE OF WORK THE PETITIONER COULD DO.

This case involves a claim for permanent total disability benefits related to an August 7, 1975 industrial back accident and thus pre-1988 law applies. The Administrative Law Judge in her Findings of Fact, Conclusions of Law and Order required Applicant to met a higher standard of proof than is found in the law. Mr. Zupon is entitled to the benefit of the law as it existed at the time of his injury, as stated in the Supreme Court decision of Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985).

Under pre-1988 law, the fact that the employee cannot go back to work at his usual line of employment shifts the burden of proof to the Employer to find a line of employment that the employee can in fact do or learn to do. It was never disputed that Mr. Zupon was unable to return to his usual line of employment, or that Mr. Zupon was trained to do something else, or could have done something else. In addition, the Medical Panel in its Findings of Fact Number 3, specifically noted "... this man's inability to return to work". (R. at 89).

In this case, there was no testimony or evidence whatsoever indicating the Employer's willingness or efforts to attempt to employ Mr. Zupon in another line of work, nor was there any evidence of any attempt to retrain him in another job. The Employer thus failed to meet the shifted burden, the result of which must be an appropriate compensation award on remand.

The Administrative Law Judge in her Order stated that "I found ... that the applicant did not show that his lumbar problems alone prevented him from returning to his usual line of employment." (R. at 29) (Emphasis added). There is no such requirement in Utah workers compensation law and in fact the law is that a combination of industrial and non-industrial factors may result in a permanent, total disability award. To the extent that the Administrative Law Judge made such a finding, she further did so without reference or citation to the testimony or medical records. The evidence at the hearing, was directly contrary, i.e., that the Employer did not take Mr. Zupon back to work because of his back problem. Their

refusal to continue to employ him was based entirely on his lumbar condition and had little to do with his subsequent arthritis in his hands, or the difficulties he later developed in his upper extremities.

As a result of Mr. Zupon's not being able to return to work, Respondents then had the burden to prove that Mr. Zupon was capable of performing, or being vocationally retrained to perform, substantial, gainful employment. Such evidence was neither argued nor supported by documentary or testimonial evidence of any kind whatsoever. The record does, however, show that Mr. Zupon made several unsuccessful attempts to return to work, and even contacted the Division of Rehabilitative Services of the Utah State Board of Education for their assistance, all of which unfortunately failed to produce any meaningful vocational results.

In conclusion, the Utah Supreme Court ruling in Marshall, supra, instructs that once an injured worker is unable to return to his former employment - as in this case - the burden shifts to the employer to find work for the employee, or train the employee to learn to do some other line of work in which he could become substantially, gainfully employed. There is not evidence in this case that the Employer did anything to enhance Mr. Zupon's employment possibilities, and in fact, the uncontroverted evidence is to the effect that it simply declined to permit him to return to work as a coal miner, and took no further actions whatsoever to assist him in locating suitable employment. Therefore, the

Employer failed to meet its burden, and the entry of an appropriate permanent, total disability award is now required.

### III

**THE INDUSTRIAL COMMISSION COMMITTED ERROR IN IGNORING IT'S PRIOR FINDINGS AND DECISIONS THAT AT LEAST 10% OF PETITIONERS WHOLE BODY, PERMANENT PARTIAL IMPAIRMENT WAS DIRECTLY AND EXCLUSIVELY ATTRIBUTABLE TO THE INDUSTRIAL ACCIDENT.**

The Administrative Law Judge's conclusion that Mr. Zupon's lumbar condition is almost entirely the result of conditions that pre-existed his 1975 industrial accident is totally unsupported by anything in the record. The Medical Panel report found that there was a 10%/50% split of his rather substantial overall, whole body permanent, partial impairment with 10% due to the industrial accident and 50% due to pre-existing conditions.

There was no evidence presented which indicated in any way that Mr. Zupon's inability to work was related to his asymptomatic degenerative arthritis in his back as distinguished from that portion that was directly attributable to his industrial accident. The Administrative Law Judge does not specifically refer to any evidence to back up that allegation and in fact none exists. The Industrial Commission's acceptance of that view - also without support - is similarly defective.

There was no medical evidence offered at the hearing which would even slightly suggest that Petitioner's disability was not at least partially the result of the industrial accident, and the Respondents failed to offer any conflicting medical evidence.

Significantly, Mr. Zupon continued to work with his pre-existing problems and only ceased working at a very young age immediately after his 1975 industrial accident. The Industrial Commission cannot summarily ignore or arbitrarily discount competent, uncontradicted evidence without some rational basis for doing so. Kaiser Steel Corp. v. Industrial Commission., 709 P.2d 1168 (Utah 1985). Frito-Lay, Inc. v. Jacobs, 689 P.2d 1335 (Utah 1984).

The actual Findings of Fact portion of the Order in this matter are grossly inadequate and do not meet recent legal requirements. No specific Findings are made, rather the Administrative Law Judge merely summarized, with editorial comments, the evidence presented. Such summary conclusions do not constitute proper fact-finding. The Industrial Commission's Order is similarly flawed. In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991), the Utah Court of Appeals stated, as follows:

While the purported 'Findings of Fact' written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a 'finding of fact,' it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of



the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

Although none of the parties, including the Administrative Law Judge, dispute the fact that Petitioner is presently permanently and totally disabled, neither the Administrative Law Judge nor the Industrial Commission support their conclusion that Mr. Zupon's permanent, total disability was not caused by the 1975 industrial injury. The Administrative Law Judge and the Industrial Commission spend a great deal of time discussing Petitioner's prior medical problems, but do not make concise findings as to why Petitioner's permanent, total disability status is not related to his 1975 industrial accident. That failure further manifests itself here in inadequate findings.

The Utah Court of Appeals has recently informed this Commission that:

In order for us to meaningfully review the findings of the Commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' Action v. Deliran, 737 P.2d 996 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979))...[T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Industrial Commission's as well as the Administrative Law Judge's purported Findings of Fact, Conclusions of Law and Order should at a minimum be vacated and remanded with instructions to

enter a new Order with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to do so, denies Petitioner the ability to marshal the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App. 1989). If the Industrial Commission were required to do this, its result would probably be different since its denial of benefits is simply unsupportable.

#### IV

**THE INDUSTRIAL COMMISSION IMPROPERLY FAILED TO AWARD PETITIONER PERMANENT, TOTAL DISABILITY COMPENSATION DUE TO PETITIONER'S INJURIES WHICH WERE OCCASIONED BY HIS 1975 INDUSTRIAL ACCIDENT.**

It is not disputed that the Mr. Zupon suffered from a pre-existing impairment of 50% of the whole body that was attributable to matters present before his industrial accident occurred. Mr. Zupon has never been compensated for the pre-existing component of his industrial accident.

Although it is true, as the Administrative Law Judge argues that the application for hearing did not indicated that a claim for additional impairment was being made, a claim was made for the 50% permanent, partial impairment at the hearing level. No adverse party raised the eight-year Statute of Limitation contained in the prior law.

The Industrial Commission on Motion for Review for the first time, did not attempt to defend the rational of the Administrative Law Judge, but rather argued that under Utah Code Annotated,

Section 35-1-66 (1974) a claim for permanent, partial disability benefits must have been filed within eight (8) years of the date of injury, noting that Mr. Zupon filed his Application for Hearing some 16 years after the injury. The defense of the statute of limitations is an affirmative defense and was never raised by the Employer or the Uninsured Employers' Fund at the hearing level. As such, they were barred from asserting it then and are barred from asserting it now.

It is appropriate that the Industrial Commission enter an appropriate award for the amount of Mr. Zupon's 50% pre-existing impairment.

#### **CONCLUSION/STATEMENT OF RELIEF SOUGHT**

In conclusion, the parties readily acknowledge that Mr. Zupon is permanently and totally disabled, the only dispute appears to whether the evidence indicates that it was his pre-existing conditions rather than his industrial accident which precipitated that status.

However, the uncontroverted evidence in this case reflects that Mr. Zupon worked a substantial portion of his life with his pre-existing conditions, and did not cease working until the occurrence of his industrial accident in 1975. As a result of that injury, the uncontroverted evidence further is, that Mr. Zupon was unable to return to his former work as an underground coal miner; that Kaiser Coal Corporation refused to rehire him or continue his employment for them in any capacity; that vocational rehabilitation

efforts made by the Division of Rehabilitation Services did not result in his being able to be retrained; and that after the occurrence of his industrial accident, he was forced into premature retirement at age 50 and was never able to return thereafter to substantial, gainful employment.

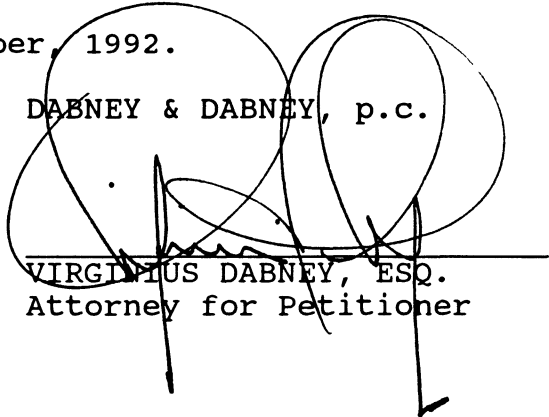
Because of Mr. Zupon's significant overall whole body impairment equivalent to 60%, his age, his limited formal education which ended in the 11th grade, and the undisputed fact of his inability to return to work after the occurrence of the industrial injury, and his extensive work history which was essentially limited to heavy work in underground coal mine employment, the burden shifted to the Employer to find work for him, or retrain him to perform some work that he could do. The Employer utterly failed to respond to its obligation in this regard, which must result in reversal of the Industrial Commission's final agency action, and remand with instructions to enter an appropriate award granting permanent, total disability benefits to Mr. Zupon.

And finally, Mr. Zupon is further entitled to an award for 50% whole body permanent, partial impairment compensation for that portion of his overall permanent, partial impairment attributable to conditions which preceded his industrial accident. The Employer's failure to timely raise the affirmative defense of the Statute of Limitations constitutes waiver with the result that the Industrial Commission's raising it as a bar for the first time following Mr. Zupon's filing of his Motion of Review of the Administrative Law Judge's Order is similarly untimely and

defective. An appropriate award should issue; however, the necessity for the entry of this additional award would be moot in the event Mr. Zupon is awarded permanent, total disability compensation since permanent, partial impairment would be merged in his life-time award.

DATED this 23rd day of November, 1992.

DABNEY & DABNEY, p.c.



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**ADDENDUM**

**EXHIBIT A:**        Utah Code Annotated, Section 35-1-67 (1975).

**EXHIBIT B:**        Findings of Fact, Conclusions of Law and Order  
                         (March 18, 1992).

**EXHIBIT C:**        Order Denying Motion for Review (August 3, 1992).

**35-1-67. Permanent total disability—Amount of payments—Vocational rehabilitation—Procedure and payments.**—In cases of permanent total disability the employee shall receive 66⅔% 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 and 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 66⅔% 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.

#### EXHIBIT A



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.

Case No. 91000568

AND ORDER

\* \* \* \* \*

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

Pursuant to the stipulation, the Employers Reinsurance Fund stipulated to a 5/6 proportionate share of liability if permanent total disability benefits are awarded. However, the Employers Reinsurance Fund (ERF) argued at hearing that the applicant is not entitled to an award of permanent total disability benefits. ERF argues that the industrial injury at issue contributed very little to the applicant's overall disability and that the 10% whole man impairment that a prior medical panel awarded to the applicant, as related to the August 7, 1975 industrial accident, is not well founded. Even if there is a 10% whole man impairment related to the August 7, 1975 industrial accident, ERF argues that that small amount, compared with the 50% whole man impairment that was found to be related to pre-existing ankylosing spondylitis, was a minor contribution to

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the applicant's significant existing disability. ERF cites two cases which deal with injured employees whose permanent disabilities were found to have been caused by problems unrelated to the relatively minor compensable industrial injury involved. Hodges v. Western Piling & Sheeting Co., 717 P.2d 713 (Utah 1986), Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988). ERF also argues that it was the advancement of the arthritis to the applicant's hands and fingers, which occurred sometime after the industrial accident and was unrelated to the industrial accident, which caused the applicant to become truly disabled. ERF points to the Social Security Disability records as support for this argument.

In a letter to the Employers Reinsurance Fund, dated February 5, 1992, the applicant's attorney summarized the basis for the applicant's claim of permanent total disability related to the August 7, 1975 industrial accident. In referring to the causal connection between the industrial accident and the permanent total disability, that letter indicates that the applicant relies primarily on: 1) the failure to return to work after the August 7, 1975 industrial accident and 2) the award of Social Security Disability beginning January 1, 1977 with a primary diagnosis of ankylosis of the lumbar spine. The letter states:

The Decision of the Social Security Administration, Administrative Law Judge confirms that when the lumbar problem extended into Mr. Zupon's extremities causing him to lose hand and finger dexterity, he then became totally disabled. ... Please also note that Mr. Zupon never had any problems with his arms, hands or fingers prior to the industrial accident, and that problems with regard to his extremities were subsequent to that event.

Based on the explanation above, the ALJ understands that the applicant claims that his hand and finger problems are somehow related to the lumbar problem.

After the hearing, the ALJ took the matter under advisement so that she could review the medical records submitted at hearing (Exhibit A-1). The matter was considered ready for order as soon as the records were reviewed.

#### FINDINGS OF FACT:

The applicant is a male who was 51 years old on the date of injury and who is currently 67 years old. The applicant's compensation rate has been set by prior Commission order at \$155.00 per week (Exhibit E). At the time of the applicant's industrial injury, on August 7, 1975, the applicant was employed by Kaiser Coal Corporation in Sunnyside, Utah. He was working in mine #3 when he was injured. The applicant's duties at the mine included maintenance and repair of mechanical and electrical equipment and he was also the fireboss. On the date of injury, the applicant was lifting an acetylene tank which he described as being 5 feet long and 18 inches in diameter. The applicant estimated that the tank weighed around 200 pounds. As he started to lift the tank off the ground, the applicant's weight was not under the tank. The tank was off to the side of him and thus he was twisting as he lifted the tank. The applicant stated that he felt a sharp pain in his low back just below the beltline as he attempted to lift the tank. The applicant stated that he could hardly walk after that.

The applicant was seen the same day by Dr. S. Smoot at Carbon Medical Services Association in Dragerton, Utah. Dr. Smoot's medical report for that day indicates that X-rays were taken of the lumbar spine. The X-ray report indicates that the film was read to show extensive degenerative changes and early spur formation. Dr. Smoot decided to treat the applicant conservatively and he had the applicant return approximately a week later (the date on the office note is not legible). Per the office note for this follow-up visit, Dr. Smoot noted that the applicant had aches and pains all over his body at that time. Dr. Smoot noted that this was probably a generalized arthritic reaction. He prescribed some wygesic and butazolidine. On August 27, 1975, Dr. Smoot again saw the applicant and he noted that the applicant was feeling somewhat better, but that his generalized discomforts continued. He continued the applicant on the same medication. The September 3, 1975 office note indicates that the applicant was still complaining of pain in the back and shoulders and "all over." Dr. Smoot changed the applicant's medication and a week later he noted that the applicant was still having some pain in the mid-thoracic and lumbar area. On September 17, 1975, Dr. Smoot noted that the applicant's complaints remained the same and he gave the applicant instructions for exercises. In follow-up on September 24, 1975, Dr. Smoot noted that the exercises had made the applicant feel worse and that at that time he even had pain in his ears. At the applicant's request, Dr. Smoot provided the applicant with additional pain medication.

On October 1, 1975, Dr. Smoot saw the applicant again and he noted that the pain was worse in the shoulder. He re-X-rayed the lumbar spine and again noted only the degenerative changes. He indicated that the applicant would probably need an orthopedic consultation. This was not scheduled until later in the month and thus Dr. Smoot saw the applicant twice more. On October 7, 1975 Dr. Smoot noted that the applicant had aches in all his joints. Dr. Smoot's office note for that date also indicates that the applicant had been talking to his brother-in-law who worked for Social Security. As a result, the applicant asked Dr. Smoot about being "totaled out." On that same day, the applicant filed his initial application for Social Security Disability benefits. The applicant saw Dr. Smoot one more time on October 15, 1975 and Dr. Smoot's note for that date indicates only that the applicant was feeling worse and that he was to see a Dr. E. Chapman on October 20, 1975 for an orthopedic consultation.

Dr. Chapman's October 20, 1975 office note indicates that the applicant's treatment to that point had been limited to rest and medication. He noted that the applicant was having continued pain in the mid and lower spine with radiation to the hips (left greater than right), with neck pains and right arm pain. Dr. Chapman read X-rays of the dorsal spine, the lumbar spine and the pelvis to show arthritic spurring. His assessment was that the applicant was experiencing the residuals of an acute strain of the lower lumbar spine. He prescribed a book on back care, a Taylor back brace, a cervical pillow and he recommended that the applicant rest frequently and put a board under his mattress. When Dr. Chapman saw him again on October 24, 1975, he noted that the applicant had improved and had "taken to" the Taylor brace. Dr. Chapman's office note states that the applicant still had back pain and was quite certain that he could not return to his regular job at Kaiser. However, Dr. Chapman noted that the applicant was a master electrician and would be able to do other electrical work that was compatible with his limitations. Nonetheless, he did not release the applicant to return to work at that time.

When Dr. Chapman saw the applicant again on November 13, 1975, he noted that the applicant had experienced a recurrence of pain when he tried to be more active. He noted that the applicant's side talent as an electrician would not be helpful to him since it involved activities such as crawling in attics and pulling on conduit. He prescribed darvon for the applicant and indicated he did not need to return for another 3 months, at which time he would be rated. He again indicated that the applicant was unable to return to work at that time.

The next medical treatment noted in the medical records was an admit to Castlevew Hospital from January 8, 1976 to January 13, 1976 for a hemorrhoidectomy. The applicant saw Dr. Chapman again on February 2, 1976 and Dr. Chapman noted that the applicant was progressively getting worse with pain throughout his lumbar spine and pain in the elbows and shoulders. Dr. Chapman was of the opinion that surgery would not be helpful. He opined that the applicant would not be able to return to work as a miner and he determined that the applicant had a 50% loss of body function as a result of the industrial injury. This apparently was some kind of a rough estimate and was not an impairment rating, because in the same office note, Dr. Chapman indicates that he would not assign a disability rating due to the complicated nature of the disability. He recommended that the applicant obtain a rating from an Industrial Commission medical panel. When Dr. Chapman completed his "final bill" for the carrier, on February 19, 1976, he indicated on it that the applicant was still unable to return to work. He noted that the applicant had a severe residual disability and that it was difficult to separate the possible pre-existing problem from the industrial portion. He again noted on this billing that the applicant should be seen by an Industrial Commission medical panel to be rated.

The applicant apparently did file an application for hearing with the Industrial Commission sometime after his February visit with Dr. Chapman. While the application was being processed and the matter was being set for hearing, the applicant again returned to Dr. Chapman on June 22, 1976. On this visit, the applicant complained of pain in the shoulders, elbows and hands. Per Dr. Chapman's office note, this had been present prior to the date of injury for 6 or 7 years, but had gradually become worse and quite severe within the last year. Dr. Chapman did shoulder X-rays and found these to be negative, but elbow and hand X-rays were read to show arthritic narrowing and spurring. After reviewing the X-rays, Dr. Chapman listed the applicant's diagnoses as: 1) progressive arthritis of the spine, shoulders, elbows and hands and 2) possible entrapment of flexor tendon, middle finger, right hand. Dr. Chapman concluded that the applicant was permanently disabled for his regular occupation in the coal mine due to progressive generalized arthritis. This was the applicant's last visit with Dr. Chapman.

On August 23, 1976, the applicant attended a hearing at the Industrial Commission. The ALJ who heard that case referred the matter to a medical panel. Thereafter, the applicant saw Dr. A. MacArthur, presumably an orthopedic physician, on September 28, 1976. Dr. MacArthur's records are found in the medical record exhibit under the tab for Dr. Chapman's records. Dr. Chapman is associated with the Central Utah Orthopedic Clinic in Provo, Utah and it may be that Dr. MacArthur is also associated with that clinic. That information is not in the medical record exhibit. Another possibility is that Dr. MacArthur has a separate practice and Dr. Chapman referred the applicant there for a second opinion. At any rate, Dr. MacArthur's analysis of the applicant's condition is quite different from that of Dr. Chapman. Dr. MacArthur noted that the

applicant's chief complaint was back pain subsequent to an acute lumbar strain from which the applicant did not improve. He noted that the applicant was experiencing constant pain and stiffness, but no leg pain. Per Dr. MacArthur's office note, the applicant's symptoms were aggravated by any activity and the applicant felt he was getting worse. Dr. MacArthur's office note indicates that there was no numbness or weakness, no abnormal gait or stance, no spinous process tenderness, no sensory or motor deficits, and no spasm. He noted that the applicant had been under no active treatment program. He concluded that he did not believe that the applicant had back pain significant enough to keep him from working. He recommended return to work unless something could be detected by way of radiological studies. When Dr. MacArthur reviewed films on October 5, 1976, he noted that the X-rays showed only very minimal arthritic changes and nothing he could put together with the applicant's history and physical which would cause the applicant to be unable to return to work or to be restricted in his work.

On November 24, 1976, the Industrial Commission medical panel issued its report (Tab D, Exhibit A-1). The medical panel read the applicant's X-rays to show sacroiliac sclerosis and arthritic changes along the entire lumbar spine consistent with the clinical impression of ankylosing spondylitis. The panel concluded that the applicant was physically capable of doing light work but was unable to do mining or mechanical work. The panel rated the applicant as having a 60% whole person permanent impairment (without taking into consideration his loss of eyesight in the left eye) and the panel attributed 10% of that impairment to the industrial injury because there was "a one-in-six chance that the ankylosing spondylitis was aggravated by the lumbar back strain on the basis of the progression of the X-ray changes, and this man's inability to return to work." The panel concluded that there was no need for future medical care related to the August 7, 1975 industrial accident. On February 10, 1977, the prior ALJ in this matter issued an order awarding the applicant permanent impairment benefits based on the 10% whole person impairment rated by the panel as being related to the industrial accident.

While the matter was under adjudication at the Industrial Commission, the applicant was going through the process of applying for Social Security Disability benefits (see Tab L, Exhibit A-1 generally). The applicant's initial application was denied and the applicant applied for a hearing that was held on June 15, 1976. After the hearing, the applicant was again denied in a decision issued on November 19, 1976. This decision was affirmed on appeal to the Appeals Council on January 18, 1977, but the matter was reopened in late 1977 as will be noted to follow.

In April of 1977, the applicant was apparently rerated by the VA with respect to his impairment or disability. There is a medical record indicating that the rating was apportioned as follows: 40% ankylosing spondylitis, 30% left eye, and 10% right elbow, for a combined rating of 60%. The ALJ is not real sure how these military ratings are determined, but understands that the rating system is not consistent with the system specified in the AMA Guides to the Evaluation of Permanent Impairment.

In December of 1977, the applicant filed unspecified "new evidence" with Social Security that resulted in the U.S. District Court remanding the matter to Social Security for consideration of the new evidence. A supplemental hearing was conducted on May 31, 1978 and the decision to award benefits was issued on

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July 11, 1978. That decision (found under Tab L, Exhibit A-1, pp. 157-161) notes that the applicant's arthritis in his hands became much worse starting in January of 1977. In contrast, the applicant actually noted some improvement in his back pain as a result of losing 30 pounds between January and May 1978 (Exhibit A-1, p. 158). The decision goes on to note that the industrial injury most likely had only a minimal effect on the applicant's disability and notes that the applicant was not considered disabled until the arthritis in the hands and fingers became acute in January 1977. The decision states:

Assuming that the medical panel was correct, his percentage of disability was increased only 10% by the industrial accident. It does not appear the additional impairment resulting from the back strain would be sufficient to preclude claimant from all substantial work. However, the claimant maintains that in addition he has lost hand and finger dexterity. ... The administrative law judge is impressed with the sincerity of the claimant when he testified that beginning in January 1977 he lost the dexterity of in his hands. Until that time the claimant is not deemed to have been disabled but considering the credibility of the claimant's testimony as to the effect of arthritis in his hands and fingers together with his other impairments, it is found that he claimant became disabled January 1, 1977 which disability has been continuing.

(Exhibit A-1, pp. 160-161). The Social Security ALJ noted that prior to the problems with the hands, the vocational expert indicated that the applicant was capable of performing light electrical work.

There are no medical records in the medical record exhibit (Exhibit A-1) indicating any actual treatment for back pain or lumbar problems after 1976. In December of 1981, the applicant was reevaluated by Dr. C. Bench, apparently to determine whether Social Security Disability benefits would continue at that point. Dr. Bench's report is located at Tab L, Exhibit A-1 (pp. 164-165). After examination his impression was: 1) history of low back pain and low back injury, rule out ankylosing spondylitis, 2) rule out rheumatoid arthritis, 3) cervical spondylosis with headaches, 4) traumatic injury left eye, rendered blind, 5) chronic sinusitis and 6) obesity. In an addendum report, Dr. Bench noted that the rheumatoid factor tests were negative and he revised his impressions as follows: 1) early cervical spondylosis with early degenerative disk disease of C5-6, 2) low back pain secondary to degenerative disk disease L5-S1 moderate in severity, 3) pain in the right shoulder secondary to some right sub-acromial bursitis and degenerative arthritis of the right AC joint, to a minimal degree. His comment was: "I think this patient's symptoms are way out of proportion to the objective findings which are presented."

From February 10, 1983 through May 25, 1983, the applicant was an inpatient in Castlevue Hospital and the University of Utah Hospital with extensive intestinal problems and several surgeries. The applicant had postoperative septicemia and renal failure with gastrointestinal bleeding and it was necessary for him to be monitored in the intensive care unit for several weeks. It is unclear what if any impairment resulted due to this extended intensive treatment and surgery. In May and June of 1988, the applicant apparently underwent cardiac evaluation as noted by the Holter Monitor tests done

at the Salt Lake Clinic. Those records are somewhat unclear with respect to what conclusions were made as a result of the tests.

With respect to pre-existing conditions, the applicant sustained a perforating wound to his left cornea while working in a mine in October of 1954. There are a couple medical records from this incident under Tab H in the medical record exhibit. The applicant testified at hearing that he was hit in the left wrist by a pitched ball when playing baseball in 1941, but there are no medial records from this incident and the applicant indicated that he had had no problems with the wrist subsequent to 1941. He stated that he had no breathing problems resulting from his years of work in the mines.

The applicant completed the 11th grade in highschool. The applicant's work history includes working for the railroad for 2 years, some electrical work and training in the service for 4 years and thereafter in underground mines (from 1946 through 1975). The applicant indicated that while he was employed working in the mines he also did some electrical contracting and furnace installation on the side. The applicant stated that after his back injury in 1975, he tried to get work as a fireboss again but was denied jobs because he could not pass the physical. His wife testified that the applicant did try to find work, but the X-rays of his back always prevented him from passing the physicals.

The applicant was paid 25 weeks of temporary total compensation by the employer from August of 1976 to February of 1976. In February of 1976, he began receiving union disability pension benefits (amount unspecified) and he apparently continues to receive this along with his social security benefits (amount also unspecified). In February of 1977, he began receiving non-service connected VA disability benefits (\$200.00 per month).

#### CONCLUSIONS OF LAW:

The ALJ finds that the applicant has failed to sustain his burden of proof in establishing a medical causal connection between his permanent inability to work and the August 7, 1975 industrial injury. The ALJ finds that there are two main reasons why the evidence does not support the requisite causal connection. First, the evidence shows that it was the arthritic condition in the hands and fingers that truly caused the applicant to be unable to work, not the ankylosing spondylitis in the lumbar spine. Second, even if one were to presume that the ankylosing spondylitis was causing the applicant to be disabled, the industrial injury did not cause the ankylosing spondylitis and only questionably aggravated it.

#### A. The Cause of the Inability to Work:

The July 11, 1978 Social Security Disability (SSD) decision makes it very clear that Social Security found that the applicant became unable to perform gainful employment when the arthritis in his hands and fingers became severe in January 1977, and not before that. The applicant was denied Social Security Disability benefits in a series of decisions prior to when SSD gave consideration to the onset of arthritis in the extremities. Therefore, Social Security found that the applicant's lumbar problems, even with the aggravation that may have



been caused by the industrial back injury, was not a sufficient disabling condition to cause him to be unable to perform any gainful work. The vocational expert who testified at the May 1978 SSD hearing indicated that there were jobs in the region where the applicant lived that he could have performed in 1978 (after the industrial injury) if he had not lost the dexterity in his hands and fingers. The July 11, 1978 Social Security decision re-emphasizes this in very plain terms. Although this ALJ is not bound in any way by the findings of the Social Security Administration, this ALJ finds the SSD decision very relevant and convincing. It is convincing because other evidence presented to this ALJ, to be discussed below, is consistent with the SSD determination that it was the arthritis in the hands that caused the applicant to be totally disabled, and not the ankylosing spondylitis in the lumbar spine, which caused the applicant to be only partially disabled (unable to perform the demanding work in the mines and as a building construction electrician).

The applicant has argued that the arthritis in the hands and fingers is somehow related or was somehow caused by the lumbar condition. The February 5, 1992 letter to the Administrator of the Employers Reinsurance Fund, noted at the beginning of this Order, refers to when the "lumbar problem extended into Mr. Zupon's extremities." Unfortunately, there is no medical evidence at all which even suggests that the lumbar condition and the condition in the hands and fingers is somehow related. The applicant has pointed out that he had no problems in his hands until after the industrial accident, but there needs to be more than just a sequential finding to say that the lumbar back strain on August 7, 1975 caused the progressive degenerative arthritis in the hands and fingers. In addition, the applicant's argument in this regard is not clearly supported by the medical records. Dr. Chapman noted that the applicant had been having problems with his hands and fingers for 6 or 7 years prior to the date of injury and that it became more severe in 1977. It is the applicant's burden to present supportive medical evidence for his theories on the medical causal connection between the work injury and the disabling condition. In arguing that the arthritis in the extremities is related to the back strain, the ALJ finds that the applicant has failed to sustain this burden.

#### B. The Contribution of the Industrial Injury:

Although the ALJ finds that the analysis under A. above is sufficient to sustain a finding that permanent total disability benefits are not payable, the ALJ feels it is appropriate to also discuss the limited role the industrial injury played in the applicant's overall disability. The applicant has emphasized that he did not return to work after the industrial injury and has pointed out that a prior medical panel found that the industrial injury permanently aggravated his pre-existing ankylosing spondylitis. However, the medical evidence presented for this adjudication leaves the ALJ with some question regarding why the applicant did not return to work after the industrial injury and leaves the ALJ with some real questions regarding the prior medical panel's finding that the applicant sustained a 10% whole person impairment as a result of the industrial injury.

After the industrial back strain on August 7, 1975, the applicant received only conservative care for his back for several months. No acute injury to the spine was ever diagnosed radiologically. Surgery was never recommended or performed. There are no medical records regarding treatment for the back from 1976 forward. The 1976 medical panel concluded that the applicant would need no

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future treatment for the back related to the industrial injury. The office notes of the doctors that treated the applicant just after the industrial injury (Dr. Smoot and Dr. Chapman) include regular mention of pain or limited use in many areas of the body besides the lumbar spine. The shoulders, the mid-thoracic spine, the hips, the neck and the elbows are all mentioned. Dr. Smoot noted aches in "all joints" at one point and even mentions ear pain. The medical evidence seems to suggest that the applicant was experiencing symptoms related to what Dr. Chapman diagnosed as "progressive arthritis of the spine, shoulders, elbows and hands." Dr. MacArthur concluded in September 1976 that the applicant's back pain was not so severe as to prevent him from working and Dr. MacArthur went so far as to state that the applicant needed no work restrictions. As late as 1981, when the applicant was re-evaluated for SSD by Dr. Bench, the medical conclusion was that the applicant's symptoms greatly exceeded any objective findings.

In spite of the above findings, this ALJ would probably have done what the previous Industrial Commission ALJ did and would have given the applicant the benefit of the doubt by awarding the 10% whole person impairment that the medical panel attributed to the industrial injury. However, this would have been giving the applicant the extreme benefit of the doubt. This ALJ has never seen a medical panel finding of impairment that is based on a 1 in 6 chance that there might have been an aggravation. The ALJ recognizes that there is some doubt in any medical conclusion, but the ALJ has always been of the impression that there should be a greater than 50% chance before the medical experts can say something probably caused something else. If it is less than 50%, or a lot less as in this case, then the ALJ would think that the panel would have to say it is NOT more likely than not that the connection exists.


Notwithstanding the highly questionable analysis of the prior panel, even if one concedes that the industrial injury caused 10% whole person impairment, this is still a very minimal portion of the applicant's overall disability or impairment. If not for the causation problems discussed above, the ALJ might find that the 1/6 contribution was sufficient to support a finding that the industrial injury caused the total disability. However, considering all the other evidence, the ALJ must conclude that there is insufficient supportive evidence to find that the industrial injury caused the applicant's total disability. As such, the applicant's claim for permanent total disability benefits related to the August 7, 1975 industrial injury must be dismissed.

ORDER:

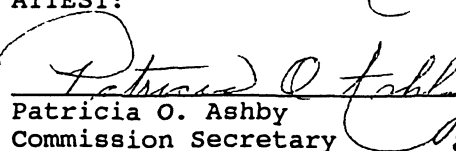
IT IS THEREFORE ORDERED that the applicant's claim for permanent total disability benefits related to the August 7, 1975 industrial accident is dismissed for failure to establish a medical causal connection between the industrial accident and the applicant's total disability.

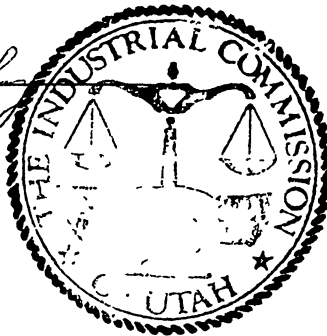
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

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Barbara Elicerio  
Administrative Law Judge

Certified by the Industrial Commission  
of Utah, Salt Lake City, Utah, this  
18th day of March, 1992.  
ATTEST:

  
Patricia O. Ashby  
Commission Secretary



CERTIFICATE OF MAILING

I certify that on March 18th 1992, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of John Zupon, was mailed to the following persons at the following addresses, postage paid:

John Zupon  
292 Welby Street  
Helper, UT 84526

Virginius Dabney  
Attorney at Law  
350 South 400 East, #202  
SLC, UT 84111

Edwin C. Barnes  
Attorney At Law  
77 West 200 South, #200  
SLC, UT 84111

Erie V. Boorman  
Administrator  
Employers Reinsurance Fund

Cynthia Anderson  
Associate Legal Counsel  
Uninsured Employers Fund

Pamela Hayes  
Uninsured Employers Fund

INDUSTRIAL COMMISSION OF UTAH

BY Wilma Burrows  
Wilma Burrows  
Adjudication Division

THE INDUSTRIAL COMMISSION OF UTAH  
Case Number 91000568

John Zupon

Applicant,  
vs.

Kaiser Steel Corporation,  
(Self-Insured)/Uninsured  
Employers Fund, and Employers  
Reinsurance Fund,

Respondents.

\*\*\*\*\*

ORDER DENYING  
MOTION FOR REVIEW

The Industrial Commission of Utah reviews the Motion for Review of respondent in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant filed a claim for permanent total disability benefits related to an industrial injury on August 7, 1975. A hearing was held on February 6, 1992. In her decision of March 18, 1992, the administrative law judge (ALJ) denied the applicant's claim. The applicant timely filed this motion for review and was granted additional time to submit a memorandum in support of his motion. The applicant submitted a memorandum two months after the time had expired for submission of his memorandum.

1. DID THE ALJ APPLY THE WRONG STANDARD OF PROOF?

The applicant asserts that he was prejudiced by the ALJ's use of a "higher standard of proof than is found in the law." It is unclear what "higher standard" the applicant believes was used here, but examination of the record indicates that the ALJ correctly applied the preponderance of the evidence standard to the issue of medical causation. See Allen v. Industrial Commission, 729 P.2d 15, 23 (Utah 1986). The ALJ found that the applicant failed to establish medical causation by a preponderance of the evidence and denied the applicant's claim for permanent total disability.

The ALJ relied on Large v. Industrial Commission, 758 P.2d 954 (Ct. App. 1988) which held that a showing of medical causation was required under Allen. U.C.A. 35-1-69 was construed to require a showing of medical and legal causation to support an award for permanent total compensation. Id.

2. DID THE ALJ IMPROPERLY ANALYZE THE CLAIM AS ONE  
BASED ON LUMBAR PROBLEMS IN CONJUNCTION WITH  
ARTHRITIC DISABILITY IN THE HANDS AND FINGERS?

Utah Code Annotated 35-1-69 provided that:

If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care . . . shall be awarded."

U.C.A. 35-1-69 (Supp. 1974). The statute contemplates that the compensation and medical care for the preexisting impairment will be paid out of the Second Injury Fund. Chavez. v. Industrial Commission, 709 P.2d 1168, 1170 (Utah 1985); See Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977).

U.C.A. 35-1-69 must be read in light of the other provisions of the statute. In Large v. Industrial Commission, 758 P.2d 954 (Ct. App. 1988) the Utah Court of Appeals agreed with an ALJ of the Industrial Commission who found that the language of 35-1-67 implies that there must be a causal connection between the industrial injury and the permanent total disability. Id. at 956. The Court of Appeals held that proof of a causal connection is required under Allen v. Industrial Commission Id. Therefore, the applicant "for permanent total disability benefits must prove medically that his disability was caused by an industrial accident." Id. It is important to note that Large construes language in the statute that predates the 1988 amendment. Therefore, it appears that Large is controlling in this case and the applicant must show a causal connection between his industrial accident and his permanent total disability in order to receive benefits.

The applicant asserts that Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985) requires the Commission to apply the law as it existed at the time of the applicant's injury. Marshall stands for the proposition that benefits to be awarded in workers' compensation cases are to be determined based on the statute as it existed at the time of injury. Although the applicant was injured in August 1975, he did not file his application for a hearing on permanent total disability until May 24, 1991. The relevant language in 35-1-67 was amended to require a showing of a causal connection in 1988. Thus, all case law construing the statute prior to 1988 should apply in the interpretation of the statute. Under Large, the applicant is required to show a causal connection

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between his industrial accident and his permanent disability. The applicant failed to show the requisite causal connection and, therefore, his request for permanent total disability was properly denied by the ALJ.

3. DID THE ALJ IMPROPERLY FIND THAT THE INDUSTRIAL  
ACCIDENT WAS NOT THE MEDICAL CAUSE OF  
THE APPLICANT'S DISABILITY?

The applicant attempted to show that the August 7, 1975 industrial accident was the medical cause of his permanent total disability by showing that he never returned to work after the accident and that he was awarded social security disability benefits beginning on January 1, 1977.

The social security decision to award benefits noted that the arthritis in the applicant's hands became much worse beginning in January 1977 and observed that the applicant's industrial injury most likely had minimal effect on the applicant's disability. The Social Security Administration (SSA) did not consider the applicant to be disabled until the arthritis in his hands and fingers became acute in 1977. Prior to that time, the vocational expert who testified at the SSA hearing indicated that there were jobs that the applicant could perform in 1978 had he not lost dexterity in his hands and fingers. Although the SSA hearing is not binding on the commission under the statute in effect at the time of the applicant's injury, it is relevant to determining the extent of the applicant's disability as well as its causal connection to the applicant's industrial injury.

Examination of the applicant's medical records shows that he received no treatment for back pain or lumbar pain after 1976. Office notes of the doctors who treated the applicant immediately following the industrial accident regularly mention pain or limited use in many areas of the body, suggesting that the applicant was experiencing symptoms of progressive arthritis of the spine, shoulders, elbows and hands. Upon examination of the applicant in 1976, Dr. MacArthur concluded that the applicant's back pain was not so severe as to prevent him from working. In 1981, when the applicant was re-evaluated for SSA by Dr. Bench, the doctor concluded that the applicant's symptoms greatly exceeded his objective findings. Thus, the medical records do not establish a medical causal connection between the applicant's August 7, 1975 industrial injury and his permanent total disability.

4. SHOULD THE ALJ HAVE AWARDED THE APPLICANT A  
FIFTY PERCENT WHOLE PERSON IMPAIRMENT FOR THE  
PRE-EXISTING IMPAIRMENT IDENTIFIED BY THE  
1976 MEDICAL PANEL?

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Review of the applicant's Application for Hearing and the record, indicates that the applicant never requested consideration of a claim for permanent partial disability. Under 35-1-66 (Supp. 1974), a claim for permanent partial disability benefits must be filed within 8 years of the date of injury. In the present case, the applicant filed his application for hearing sixteen years after the injury. Therefore, the time for filing an application for permanent partial disability benefits had run when the applicant filed his application for permanent total disability benefits on May 24, 1991.

5. DID THE ALJ FAIL TO DELINEATE ADEQUATE  
FINDINGS OF FACT AND CONCLUSIONS OF LAW?

The applicant asserts that the Order fails to delineate adequate findings of fact and conclusions of law. Review of the ALJ's Order in light of Adams v. Board of Review, 173 Utah Adv. Rep. 18 (1991), indicates that the ALJ made findings sufficient to "disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached." Milne Truck Lines, Inc. v. Public Service Comm'n, 720 P.2d 1336, 1338 (Utah 1979) cited in Adams, at 20. The ALJ's findings of fact and conclusions of law are sufficient to show what issues were decided, legal interpretations and applications made, as well as the subsidiary factual findings which support her decision. See Adams at 21. Therefore, the commission finds that the ALJ's Order contains sufficient findings of fact and conclusions of law to support her decision to deny benefits to the applicant.

6. WAS THE ALJ'S DECISION ARBITRARY AND CAPRICIOUS?

Review of the record indicates that there is substantial evidence to support the ALJ's findings. The applicant failed to delineate his specific objections in sufficient enough detail to allow the commission to address them. However, review of the entire record indicates that the ALJ's findings are not arbitrary and capricious.

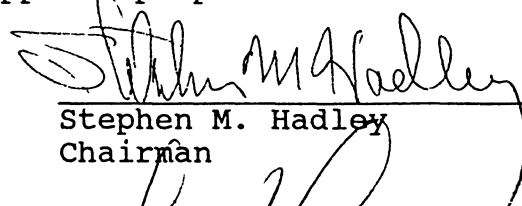


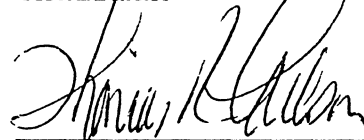
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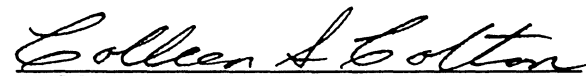
ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 18, 1992 is affirmed.

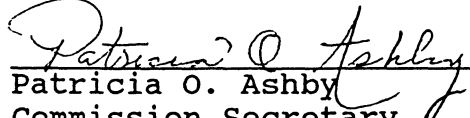
IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

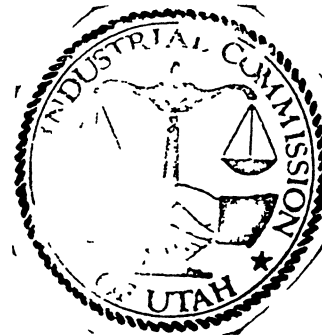
  
\_\_\_\_\_  
Stephen M. Hadley  
Chairman

  
\_\_\_\_\_  
Thomas R. Carlson  
Commissioner

  
\_\_\_\_\_  
Colleen S. Colton  
Commissioner

Certified this 3rd day of August 1992.  
ATTEST:

  
\_\_\_\_\_  
Patricia O. Ashby  
Commission Secretary



CERTIFICATE OF MAILING

I certify that on August 3, 1992, a copy of the attached Order Denying Motion for Review in the case of John W. Zupon was mailed to the following persons at the following addresses, postage paid:

Virginius Dabney  
350 South 400 East Suite 202  
Salt Lake City, Utah 84111

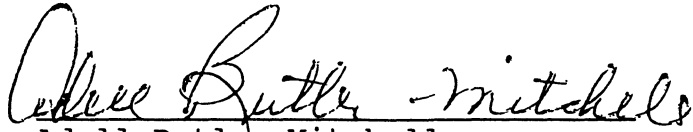
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