

1992

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

Utah Court of Appeals

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May/June

IN THE 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.

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Case No. 920569-CA

Priority No. 7

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STATEMENT OF JURISDICTION

The Petitioner, Mr. Zupon, filed this petition for review of the Commission's August 3, 1992, Order affirming the Administrative Law Judge's February 6, 1992, Findings of Fact, Conclusions of Law, and Order, both of which orders denied Mr. Zupon's application for permanent total disability benefits. Respondents Kaiser Steel Corporation ("Kaiser"), Uninsured Employer's Fund ("UEF"), Employer's Reinsurance Fund ("ERF") and Industrial Commission of Utah ("Commission") (collectively referred to herein as "Respondents") agree with the statutory bases for jurisdiction cited in Mr. Zupon's brief.

STATEMENT OF THE ISSUES

The Respondents agree that this appeal presents the issue of whether the Commission applied the proper standard of proof. The second two issues listed by Petitioner, whether the Commission ignored a prior finding and improperly failed to award permanent total disability compensation, are really just a request that the Court of Appeals re-weigh the evidence considered by the Administrative Law Judge.

Accordingly, the standard of appellate review to be applied to the first issue is that of correction of error. Utah Code Ann. §63-46b-16(4)(d); King v. Industrial Commission, 209 Utah Adv. Rep. 33, 34 (Utah App. March 18, 1993). The remaining issues call into question the Commission's factual findings. Accordingly, the

proper standard of appellate review for those issues is whether the Commission's findings are "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. §63-46b-16(4)(g); King v. Industrial Commission, 209 Utah Adv. Rep. at 34.¹

DETERMINATIVE STATUTES

With the exception of the provisions of the Utah Administrative Procedures Act cited above, Respondents agree that Utah Code Ann. §35-1-67 is the determinative statute in this case. Mr. Zupon also raises in the body of his brief the limitations provision in Utah Code Ann. §35-1-66. A copy of that Section as it existed at the time of the accident is attached to this Brief as Exhibit "A." In 1975, there was no statute of limitations applicable to permanent total disability claims. Cf. Utah Code Ann. §35-1-98(2) (1990 amendment setting limitations period for compensation claims).

¹ Although not raised as an issue in the Docketing Statement (Record, p. 59) or in the Statement of Issues in the Brief (Brief, p. 1), Mr. Zupon also questions the adequacy of the Commission's detailed Findings of Fact (Brief 11). The adequacy of the findings themselves is a legal determination for this Court, Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991). The Respondents will demonstrate the adequacy of those findings.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a denial of Mr. Zupon's May 24, 1991, application for compensation for permanent total disability allegedly caused by an industrial injury which occurred on August 7, 1975.

Course of Proceedings

Shortly following Mr. Zupon's August 7, 1975 accident he filed an application for hearing alleging entitlement to temporary total and permanent partial disability compensation. On February 10, 1977, an Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order finding Mr. Zupon entitled to 25 and 4/7 weeks of temporary total compensation benefits and 31.2 weeks of permanent partial disability compensation benefits (Record, pp. 90-92).

Nearly 16 years later, on May 24, 1991, Mr. Zupon filed an application for permanent total disability benefits as a result of his 1975 accident (Record, p. 1). Kaiser and the UEF answered the application for hearing and moved to join the ERF as a respondent (Record, pp. 3-5). After all parties had executed a stipulation apportioning liability for any potential benefits between Defendants (Record, pp. 18-20), a formal hearing was held on February 6, 1992 (Record, p. 21).

Agency Disposition

On March 18, 1992, the Administrative Law Judge entered her detailed Findings of Fact, Conclusions of Law and Order concluding that Mr. Zupon failed to sustain his burden of establishing that his accident was the medical cause of his disability. The ALJ therefore denied the claim for permanent total disability benefits (Record, pp. 21-30, copy attached as Exhibit "B" to Mr. Zupon's brief).

Mr. Zupon filed a Motion for Review with the Commission assigning five points of error (Record, pp. 32-34). When no supporting memorandum was filed, the ALJ clarified her ruling and responded to each point (Record, pp. 38-39). Mr. Zupon belatedly filed a "Reply Memorandum in Response to Administrative Law Judge's Comments In Re Motion for Review" (Record, pp. 40-45). The Commission then entered its August 3, 1992, Order Denying Motion for Review separately addressing each of Mr. Zupon's points (Record, pp. 46-50, copy attached as Exhibit "C" to Mr. Zupon's brief). The Commission's action is the subject of Mr. Zupon's Petition for Review.

STATEMENT OF FACTS

Mr. Zupon strained his back in an industrial accident at Kaiser on August 7, 1975 (Record, pp. 22, 83). No party has contested either the event of the accident or how it occurred. He was promptly, but conservatively, treated by Dr. Smoot at Carbon

Medical Services Association (Record, pp. 23, 100-110). Mr. Zupon was subsequently seen by Dr. Chapman who first suggested a 50% loss of body function due to the accident; Dr. Chapman later retrenched and acknowledged he should not assign a disability rating, and he ultimately concluded "It is my opinion that this man is permanently disabled for his regular occupation in the coal mine by nature of his progressive generalized arthritis" (Record, p. 226).

A hearing on Mr. Zupon's claim for permanent partial disability benefits was held on August 23, 1976, and his case was referred to a medical panel. That panel issued its report on November 24, 1976, finding that Mr. Zupon's "total physical impairment resulting from all causes and conditions, including the industrial injury, but excluding the eye, is 60%" (Record, p. 89).² The panel attributed a 10% permanent physical impairment to the industrial injury "on the basis that there is a one-in-six chance that the ankylosingspondylitis was aggravated by the lumbar back strain" (Record, p. 89). The panel also found that no future medical treatment for the industrial injury would be necessary. Notwithstanding the patently speculative nature of the panel's finding, but in the absence of any objection by the parties, the ALJ entered his order adopting the medical panel's findings (Record, pp. 90-92). The compensation ordered by the ALJ was paid by Kaiser (Record, p. 19).

² Mr. Zupon had lost the sight of his left eye twenty years before (Record, p. 88).

Nearly contemporaneously with the medical panel's deliberations, Mr. Zupon saw Dr. McArthur whose impressions were "Residuals of a back strain. I do not believe this man has sufficient enough back pain to keep him from working" (Record, p. 225).

While Mr. Zupon's application for permanent partial disability compensation was pending with the Commission, he initiated a claim for Social Security disability benefits. His initial claim was filed October 7, 1975 (Record, pp. 23, 239). That application was denied, the claim was denied again on reconsideration, and the denial was affirmed by the appeals counsel on January 18, 1977. (Record, p. 240). A supplemental hearing was conducted on May 31, 1978, resulting in a detailed decision based upon medical reports and a vocational expert (Record, pp. 240-244). Noting that Mr. Zupon had suffered a "back strain" as a result of his 1975 industrial accident, the Social Security ALJ found that level of impairment did not preclude him from working. After summarizing the uncontroverted evidence of a progressive arthritic condition, the ALJ stated:

The administrative law judge is impressed with the sincerity of the claimant when he testified that beginning in January 1977 he lost the dexterity 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 the claimant became disabled January 1, 1977, which disability has been continuing.

(Record, p. 244) Social Security benefits were then awarded.³

There are no medical records indicating any progression or deterioration of Mr. Zupon's condition. Indeed, there is no evidence of any back treatment after 1977. The only medical record relating to Mr. Zupon's back from the period between the 1978 Social Security Administration hearing and the present is a December 9, 1981 medical evaluation by Clyde Bench, M.D. Dr. Bench concluded his final December 8, 1981, report with a series of findings relating to degenerative arthritis and concluded "I think this patient's symptoms are way out of proportion to the objective findings which are presented" (Record, pp. 26, 249). Dr. Bench offered no opinion that Mr. Zupon's remaining conditions were due to the industrial accident.

In 1991, Mr. Zupon filed his new claim for permanent total disability benefits alleging that, at age 67, he was now unable to work as a result of his August 7, 1975, industrial injury. His claim was denied by the ALJ (Record, pp. 21-30), and that denial was affirmed by the Commission (Record, pp. 46-50). Between his accident and the time of hearing, he had been awarded temporary total and permanent partial disability benefits from the Industrial Commission, Union Disability benefits, Social Security benefits,

³ Notably, Dr. M.B. Jensen who examined Mr. Zupon on March 24, 1977, apparently in connection with his Social Security claim, did not even mention an industrial accident in his medical evaluation (Record, pp. 96-97). None of his diagnoses implicated any industrial cause.

non-service connected VA disability benefits and federal Black Lung total disability benefits (Record, pp. 4, 27).

SUMMARY OF ARGUMENT

The Commission properly found that Mr. Zupon failed to carry his affirmative burden of proof of establishing by a preponderance of the evidence that his industrial injury was the medical cause of his disability. Contrary to his argument, the "liberal policy" behind the Worker's Compensation laws is not a substitute for this burden of proof.

There is no affirmative medical evidence that the 1975 accident rendered the applicant permanent totally disabled. He never underwent surgery for his back and obtained no impairment rating beyond what was already paid by Kaiser. The record contains no medical evidence indicating any new development since the Commission's earlier award, with the exceptions of the Social Security Administration records (which document a disability caused instead by a loss of dexterity in his hands) and Dr. Bench's assessment that his symptoms are out of proportion with the objective findings.

The ALJ carefully and comprehensively analyzed this largely uncontradicted evidence. Her denial of benefits, and the Commission's order affirming that denial, are amply supported by substantial evidence and should be affirmed.

ARGUMENT

I. THE COMMISSION APPLIED THE CORRECT BURDEN OF PROOF.

The ALJ found, on two alternative bases, that Mr. Zupon failed to sustain his burden of establishing medical causation (Record, pp. 27-29). In denying Mr. Zupon's motion for review, the Commission found that ALJ had properly required proof of causation by preponderance of the evidence (Record, p. 46). The findings of both the ALJ and the Commission are appropriate and should be affirmed.

The Utah courts have consistently required proof of a causal connection between the injury and the employment. Allen v. Industrial Commission, 729 P.2d 15, 22 (Utah 1986). In Allen, the Supreme Court adopted a two-part test for causation. In order to identify compensable injuries, consideration must first be given to the legal cause of the injury and then to its medical cause, which is to prove that "the disability is medically the result of an exertion or injury that occurred during a work-related activity." Id. at 27. Proof of medical causation is required, according to the court, to prevent the employer from becoming "a general insurer of his employees." Thus, it remains the claimant's burden to show that "the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability. In the event the claimant cannot show a medical causal connection, compensation should be denied." Id. at 27.

The Allen holding was followed by this Court in the case of Large v. Industrial Commission of Utah, 758 P.2d 954 (Utah App. 1988). In Large, a truck driver suffered a lower back injury while applying for a job. Much like the present case, he received an initial award of temporary total disability benefits which was not appealed. Some time later, he filed an application alleging entitlement to permanent total disability benefits because 5% of his impairment was due to the 1985 accident. This Court rehearsed the legal/medical causes tests under Allen and noted that the standard of proof for causation is that of a preponderance of the evidence. Id. at 956. In light of the applicant's history of prior back problems, including surgeries, the court found substantial evidence to support the Commission's finding that the 1985 injury with its 5% additional impairment was not the medical cause of permanent total disability. Id. at 957. These standards were expressly followed by both the ALJ and the Commission in the present case.

Mr. Zupon makes two arguments to suggest that the Commission should have applied a different burden of proof. He first argues that the "liberal construction" required of the Worker's Compensation Act is somehow a substitute for his burden of proof. Then, he argues that the burden of proof is not his, but rather that it rests with the employer to find a line of employment that the employee can do. Both arguments fail.

Mr. Zupon argues that all doubts, no matter how remote, must be resolved in favor of an award of compensation and that it is error if the judge's "liberal construction" is not obvious from the face of the order (Brief pp. 5-7). While the well-recognized beneficial policies of the Worker's Compensation Act are acknowledged by the Respondents, the argument that even the slightest question of fact requires an award of benefits greatly distorts the policies of the law. His argument, if adopted, would effectively result in a presumption of entitlement to benefits. Employers would then have the burden in each case of rebutting the presumption. Such a presumption has never been a part of Utah Workers' Compensation law.

As noted above, the Utah courts have held that the burden remains with the applicant to establish his entitlement to benefits by a preponderance of the evidence. Benefits are to be awarded based upon evidence, not speculation. In Kaiser Steel Corp. v. Industrial Commission, 709 P.2d 1168 (Utah 1985), a case cited by Mr. Zupon, Chief Justice Hall observed:

"The acknowledged purpose of the Worker's Compensation Act is to compensate for the incapacities attributable to industrial injuries. However, it is not the purpose of the Act to provide a general health insurance plan covering and providing for compensation for any and all preexisting incapacities an employee may suffer from, and this Court has never so indicated."

709 P.2d at 1172 (Hall, J., dissenting, emphasis by the Court, citation omitted).

Mr. Zupon's theory that this policy requires an award of benefits regardless of how the evidence preponderates would effectively remove the element of proof and make of the Worker's Compensation program a general health insurance plan. Even the most "liberal" construction of the law cannot require this result. Rather, those cases cited by Mr. Zupon must be read to apply to substantial doubts raised by equally probative but contradictory evidence. Even in such cases, care must be taken not to ignore the requirements that the evidence preponderate in the applicant's favor before an award of benefits is made.

Caution must also be exercised in applying a "liberal construction" to make sure that the rights of all parties are safeguarded, not just those of the injured worker. The United States Supreme Court, in a case involving the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"), has discussed the balance struck in Workers' Compensation legislation:

Implicit in [respondents'] argument, however, is the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries. The inaccuracy of this implicit assumption undercuts the validity of respondents' argument.

The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind to not purport to provide complete compensation for the wage earner's

economic loss. . . . [L]ike most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers.

Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268, 282-283 (1980). The Utah Workers' Compensation Act also reflects such a compromise.

Nevertheless, the Administrative Law Judge did afford Mr. Zupon the "extreme benefit of the doubt" in the present case (Record, p. 29). Expressing her skepticism about the speculative "one-in-six chance" basis for the 10% whole person impairment previously adopted to support Mr. Zupon's permanent partial disability award, she analyzed the evidence on that basis and still found the required proof of causation lacking.

Similarly, the applicant's reliance on Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985) is misplaced. In the first place, that case ("Marshall II") treats the subject of an applicant's entitlement to interest on an award of benefits. Mr. Zupon apparently meant to cite Marshall v. Industrial Commission, 681 P.2d 208 (1984), ("Marshall I"), in which the Supreme Court formally adopted the "odd lot doctrine." Under Marshall I, the burden shifts to the employer in such cases to show that regular work is available, but only after the employee has demonstrated that his work-related impairment prevents him from performing his former work and that he cannot be rehabilitated. Id. at 212-213; Ortiz v. Industrial Commission, 766 P.2d 1092, 1094 (Utah App. 1989).

Marshall I does not excuse an applicant's failure to prove that his disability is work-related, and it implicitly contemplates that an application for hearing will be filed in a timely fashion so that the questions of rehabilitation and available work can be addressed while the evidence is fresh and the applicant is motivated and of employment age. In the present case, as demonstrated below, Mr. Zupon did not demonstrate that his disability was caused by his industrial accident. Moreover, his 16-year delay in claiming permanent total disability benefits would work to the extreme prejudice of Respondents, should the odd lot doctrine be applied.⁴ At least where the delay is responsibility of the applicant for benefits, and was not contributed to in any meaningful way by the Respondents, any shifting of the burden of proof would be grossly prejudicial and unfair to Respondents.

**II. THE COMMISSION'S DENIAL OF BENEFITS AS SUPPORTED BY
SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.**

The ALJ exhaustively reviewed the evidence in this claim and found that Mr. Zupon had not met his burden of proof. Accordingly, permanent total disability benefits were denied. The ALJ later clarified her findings in a separate letter filed in response to

⁴ Indeed, in this case, the applicant has conceded that the employer (the party to whom the burden shifts under the odd lot analysis) satisfied all its obligations to the applicant (Record, pp. 18, 19). Mr. Zupon's burden-shifting argument becomes even more inapposite when the impact of his suggested burden falls sixteen years later on the various state funds that are called upon to supplement and/or continue payments of benefits.

Mr. Zupon's unsupported Motion for Review (Record, pp. 38, 39). After the Motion was supplemented with a "Reply Memorandum" the full Commission considered the Motion for Review and entered its Order Denying Motion for Review (Record, pp. 46-50).

Mr. Zupon, in the second and third issues presented on appeal (Brief, p. 1) essentially asks the Court of Appeals to reweigh the evidence and decide the case differently. In Merriam v. Board of Review, 812 P.2d 447 (Utah App. 1991), this Court restated its rule that, under the Utah Administrative Procedures Act, findings of fact will be affirmed if they are supported by substantial evidence. Reaffirming that it remains the appellant's burden to marshal the evidence to show that the findings are not supported by substantial evidence, and citing Allen for the proposition that a claimant must prove the alleged disability was medically caused by work-related activity, the Court acknowledged that "if a claimant cannot demonstrate a medical causal connection, compensation should be denied. Medical causation is a factual matter." Id. at 450 (citations omitted).

This standard of review is consistent with this Court's recent comprehensive discussion of standard of review applicable to Industrial Commission appeals in King v. Industrial Commission, 209 Utah Adv. Rep. 33 App. (Utah March 18, 1993) (factual findings are reviewed under substantial evidence standard; interpretations of law reviewed under a correction of error standard). The factual findings entered by the Administrative Law Judge and by the

Commission in this case all enjoy the support of substantial evidence.

Mr. Zupon attempts once again to twist the burden of proof by arguing in the double negative: "There was no evidence presented which indicated in any way the Mr. Zupon's inability to work was related to his asymptomatic degenerative arthritis. . ." (Brief, p. 10). Even though there was ample evidence of that fact, he ignores the conclusion his argument dictates: the lack of evidence means he failed to meet his burden of proof.

Mr. Zupon then criticizes the Findings of Fact entered by the ALJ as "grossly inadequate," citing Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991). Her findings are not susceptible to that criticism. The ALJ discussed the evidence at length in her 10 page opinion (Record, pp. 21-30). She made findings as to how the accident occurred and traced in meticulous detail the course of Mr. Zupon's medical treatment. Her task was made easier by the fact that there was little or no contradiction in the medical evidence. Importantly, all of the medical evidence in the record was offered by Mr. Zupon in Exhibits "A" to "M" (Record, pp. 83-258). The Respondents offered no medical documents. Thus, Mr. Zupon's burden on appeal is to marshal his own medical evidence to show that the findings are inadequate, as he provided no transcript against which to evaluate his contentions. King v. Industrial Commission, 209 Utah Adv. Rep. at 34. He has not met this burden.

Although the ALJ did not make her findings in separately numbered paragraphs, nevertheless, they explicitly reveal the steps she took in reaching her decision. Adams v. Board of Review, 821 P.2d at 5. Having described the accident (Record, p. 22) the ALJ noted Mr. Zupon's complaints of pain "all over" and that he applied for Social Security disability benefits after asking Dr. Smoot about being "totalled out" (Record, p. 23). She traced Mr. Zupon's treatment by Dr. Chapman who initially suggested the 50% loss of body function, but then declined to issue a disability rating. In particular, she acknowledged Dr. Chapman's conclusion that "the applicant was permanently disabled for his regular occupation in the coal mine due to progressive generalized arthritis" (Record, pp. 23-24, emphasis added). She then discussed the medical panel findings and Dr. McArthur's concurrent finding that the applicant did not have sufficient pain from his acute lumbar strain to keep him from working. She juxtaposed that finding with the medical panel's 10% impairment rating based on a "one-in-six chance that his preexisting problems were aggravated by the lumbar back strain" (Record, p. 25). Finally, she made findings relating to the denial of Social Security benefits and a later award of those benefits based upon the progression of arthritis in the applicant's hands and fingers (Record, pp. 25-26).

Based upon these findings, the ALJ made alternative conclusions about Mr. Zupon's failure to establish medical causation, either of which will support the denial of benefits.

First, she found that the cause of his inability to work was the arthritic condition in his hands and fingers based upon the "very relevant and convincing" findings of the Social Security Administration entered into evidence by Mr. Zupon. She did not rely solely upon those findings, however, because she correlated them with the other medical records (Record, pp. 27-28). Second, although she had "real questions" about the prior ALJ's adoption of the medical panel's 10% impairment based upon a one-in-six chance of aggravation, she expressed her willingness to give the applicant the "extreme" benefit of the doubt in that regard and still found his proof lacking. In light of the consistent other medical evidence and the apparent lack of any new development with his back after 1976, she found the claimant failed to carry his burden of establishing that the industrial injury caused his total disability (Record, pp. 28-29).⁵

These findings were noted and highlighted by the Commission in its Order Denying Motion for Review (Record, pp. 46-51). The Commission briefly discussed the pertinent medical evidence and, like the ALJ, found that Mr. Zupon failed to carry his burden of establishing medical causation. Accordingly, benefits were denied.

⁵ Mr. Zupon criticizes the ALJ for ignoring the prior 10% impairment award (Brief, pp. 10-11). In fact, she addressed that award several times and made an alternative finding based upon it. Notwithstanding the Commission's continuing jurisdiction to modify such an award under Utah Code Ann. §35-1-78, she did not alter the prior order. Nor did Mr. Zupon demonstrate any significant change or new development since the earlier order that would justify a modification in his favor.

The Commission's findings, though more brief than those of the ALJ, are clear, consistent, and are supported by substantial evidence.

This case is very similar to Hodges v. Western Piling & Sheeting Co., 717 P.2d 718 (Utah 1986). In that case, the petitioner had an accident which resulted in a flair-up of his arthritic condition. A medical panel found the petitioner had a significant impairment due to arthritis and other causes and a 9% to 12% permanent loss of body function due to the industrial injury. The Supreme Court noted that there was substantial evidence to support the Commission's determination that the injury did not result in permanent and total disability. The case was then remanded solely to resolve some mathematical inconsistencies in the medical panel's findings.

In the present case, Mr. Zupon sustained an industrial accident. His injury was rated and paid. He accepted that payment without appeal. Some sixteen years later, with absolutely no medical evidence of any change or deterioration in that condition, he now asks for an award of permanent total disability compensation. The Commission properly found that Mr. Zupon did not prove that his disability was medically caused by his accident and therefore denied his claim. That finding should be affirmed.

III. MR. ZUPON IS NOT ENTITLED TO AN AWARD OF PERMANENT PARTIAL DISABILITY COMPENSATION.

In his memorandum supporting the motion for review with the Industrial Commission, the applicant for the first time asked for an award of additional permanent partial disability compensation (Record, pp. 43-44). That request was denied by the Commission because the applicant had never requested consideration of such a claim and it was therefore barred by the then-applicable eight year statute of limitations. Utah Code Ann. §35-1-66 (Exhibit "A" to this brief).

On appeal, Mr. Zupon again raises this question though he attempts to cloak it under the title of permanent total disability compensation (Brief pp. 13-14). His argument is that he was never compensated for the preexisting component of his industrial accident and that the Commission could not bar his request on the basis of the statute of limitations because that was "an affirmative defense and was never raised by the employer or the uninsured employer's fund at the hearing level" (Brief at 14). Mr. Zupon's argument fails on several obvious bases.

No affirmative defense was raised by Kaiser or the UEF at hearing because those parties had been excused pursuant to Mr. Zupon's stipulation and in accordance with a letter from his attorney (Record, pp. 17-20). Moreover, no party could have raised the statute of limitations applicable to claims for permanent partial disability benefits because Mr. Zupon did not raise that

claim as an issue at hearing (Record, p. 1). It was first raised in his Reply Memorandum to the Commission, and was promptly rejected by the Commission.

Finally, it is clear that the applicable statute of limitations did run. After his accident, Mr. Zupon had eight years within which to file a claim for permanent partial disability compensation. Dean Evans Chrysler Plymouth v. Morse, 692 P.2d 779, 782 (Utah 1984). He did so and received a 10% award. No additional application was filed within the eight-year period and no grounds for modification have been demonstrated.

The Commission properly declined to amend additional permanent partial disability compensation.⁶

CONCLUSION

The orders of the ALJ and the Commission applied proper legal standards and their findings are amply supported by the medical evidence in the record. That evidence demonstrates Mr. Zupon sustained an industrial accident in 1975 for which he was fully compensated. No medical evidence documents that the industrial accident is the cause of total disability. Instead, Mr. Zupon's evidence demonstrates that his disability is due to other causes.

⁶ Even if the current statute of limitations were deemed applicable because of the date of the application for hearing, the claim would be barred because it was not filed within six years from the date of the accident. Utah Code Ann. §35-1-98.

The Commission's Order Denying Motion for Review should be affirmed by this Court.

DATED this 15th day of April, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 1993, four copies of the foregoing JOINT BRIEF OF RESPONDENTS were mailed U.S. first class mail, postage prepaid to the following:

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Tab A

30-1-00. **Partial disability — award of payment.** — Where the injury causes partial disability for work, the employee shall receive, during such disability for not to exceed 312 weeks over a period of not to exceed eight years from the date of the injury, compensation equal to 66 $\frac{2}{3}$ % of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than a maximum of 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week and in addition thereto \$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, but not to exceed 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week.

The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to any employee whose physical condition resulting from such injury is not finally healed and

fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight-year period.

In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 66 $\frac{2}{3}$ % of his average weekly wages at the time of the injury, but not more than a maximum of 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of 18 years; up to a maximum of four such dependent minor children, but not to exceed 66 $\frac{2}{3}$ % of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation hereinbefore provided for temporary total disability, to wit:

For the loss of:	Number of Weeks
(A) Upper extremity	
(1) Arm	
(a) Arm and shoulder (forequarter amputation)	218
(b) Arm at shoulder joint, or above deltoid insertion	187
(c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon	178
(d) Forearm below elbow joint distal to insertion of biceps tendon	168
(2) Hand	
(a) At wrist or midcarpal or midmetacarpal amputation	168
(b) All fingers except thumb at metacarpophalangeal joints	101
(3) Thumb	
(a) At metacarpophalangeal joint or with resection of carpo-metacarpal bone	67
(b) At interphalangeal joint	50
(4) 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
(5) 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
(6) 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
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of meta- carpal bone	8
(b) At proximal interphalangeal joint	6
(c) At distal interphalangeal joint	4
(B) Lower extremity	
(1) 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
(2) Foot	
(a) Foot at ankle	88
(b) Foot partial amputation (Chopart's)	66
(c) Foot midmetatarsal amputation	44
(3) 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
(4) Miscellaneous	
(a) One eye by enucleation	120
(b) Total blindness of one eye	100
(c) Total loss of binaural hearing	100

(C) 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 paragraph, however, shall not apply to the items listed in (B) (4).

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000 and 2000 cycles per second (cps) using pure tone air conduction audiometric instruments (ASA 1951) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 2000 cycles

per second shall not be considered in determining compensable disability.

"Presbycusis" is defined as hearing loss common to persons of advanced age and is considered to be due to general environment rather than industrial conditions.

In measuring hearing loss, a medical panel of medical and paramedical professions appointed by the commission shall measure the loss in each ear at the three frequencies 500, 1000 and 2000 cycles per second which shall be added together and divided by three to determine the average decibel loss. To allow for presbycusis, there shall be deducted from the average decibel loss $\frac{1}{2}$ a decibel for each year of the employee's age over forty at the time of the accident: To determine the percentage of hearing loss in each ear, (after deduction of the loss in decibels for presbycusis) the average decibel loss for each decibel of loss exceeding fifteen decibels shall be multiplied by

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function.

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 $66\frac{2}{3}\%$ 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.