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Nolan W. Marshall v. The Industrial Commission of The State of Utah, Emery Mining Corporation [Employer], The State Insurance Fund [Insurance Carrier For The Employer] and the Second Injury Fund of The State of Utah : Brief of Defendants-Respondents

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IN THE SUPREME COURT

OF THE STATE OF UTAH

NOLAN W. MARSHALL,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 19153
vs.	:	
	:	
INDUSTRIAL COMMISSION OF UTAH, EMERY MINING COMPANY, STATE INSURANCE FUND, and SECOND INJURY FUND,	:	
	:	
Defendants-Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

On Writ of Review from the Industrial Commission of the State Of Utah

James R. Black
BLACK & MOORE
500 Ten Broadway Building
Salt Lake City, Utah 84101
363-2727
Attorney for Defendants

Virginius Dabney
DABNEY & DABNEY
136 South Main St. Suite 412
Salt Lake City, Utah 84101

Gilbert A. Martinez
Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111

Frank V. Nelson
Assistant Atty General
236 State Capitol Building
Salt Lake City, Utah 84114

FILED

IN THE SUPREME COURT

OF THE STATE OF UTAH

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	:	
Plaintiff-Appellant,	:	
	:	Case No. 19153
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	:	
Defendants-Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

On Writ of Review from the Industrial Commission of the State Of Utah

[illegible]
[illegible] Broadway Building
Salt Lake City, Utah 841[illegible]
[illegible]
Attorney for Plaintiff [illegible]

Virginius Dabney
DABNEY & DABNEY
136 South Main St. Suite 412
Salt Lake City, Utah 84101

Gilbert A. Martinez
Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111

Frank V. Nelson
Assistant Atty General
236 State Capitol Building
Salt Lake City, Utah 84114

STATUTES CITED

SECONDARY AUTHORITIES

IN THE SUPREME COURT

OF THE STATE OF UTAH

[illegible],	:	
	:	
[illegible],	:	
	:	
	:	Case No. 19153
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
EMERY MINING COMPANY,	:	
STATE INSURANCE FUND, and	:	
UTAH STATE INJURY FUND,	:	
	:	
Defendants-Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

This is a Workmen's Compensation Act case dealing with a claim filed by Plaintiff on Appeal against his employer, Emery Mining Company and its insurer, the State Insurance Fund, for an injury he suffered in an accident in the course of his employment on January 25, 1980.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Following applicant's objection (R. 143-144), Amended objection (R. 145-146), and Second Amended objection to medical [illegible], the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order granting an award for temporary total disability, an award for a 26% permanent impairment, and an award of medical expenses

incurred as a result of the injury [illegible]

a Motion for Review [illegible]

award (R. 159-161), the Industrial Commission [illegible]

of the Administrative Law Judge [illegible]

(R. 169). Plaintiff thereafter filed a Petition for Writ of Review

(R. 171) and a Writ of Review (R. 172) issued, bringing this matter

before the Supreme Court.

RELIEF SOUGHT ON APPEAL

Defendants on Appeal respectfully ask that the Decision of the Industrial Commission of Utah be affirmed.

STATEMENT OF FACTS

Plaintiff herein, a 67-year-old coal miner at the time (R. 21), was injured when the mantrip he was riding in hit a lump of coal and bounced him into the air. Plaintiff injured his back when he again made contact with the mantrip seat (R. 23). As time progressed, plaintiff noticed increased pain in his back. Finally on March 8, 1980, plaintiff was admitted to the hospital, and later underwent surgery for lumbar laminectomy (R. 67, 131).

After a hearing before the Industrial Commission of Utah on July 12, 1982 (R. 19), plaintiff was sent to a medical panel for examination (R. 51-52). The medical panel found that he suffered from a permanent partial impairment attributable to his accident of spondylosis and spondylolisthesis, with a prior loss of hearing and loss of parts of two fingers (R. 138-141). Based [illegible] the Administrative Law Judge determined that plaintiff had a permanent partial impairment of 20% of the whole man, and awarded benefits accordingly (R. 155-156).

[illegible] disagree with plaintiff's allegation [illegible] that the record "does not contain any [illegible] indicate that the employee(plaintiff) [illegible] of meaningful employment" following his [illegible] accident (Plaintiff's Brief at 4). On the contrary, the evidence indicates the plaintiff's condition improved after the March 1980, operation (R. 42) and that plaintiff's doctor considered him ready for work by November 15, 1980 (R. 44). All of the plaintiff's shoulder, neck and spine pains associated with prior injuries had completely vanished by the Fall of 1980 (R. 42-43), and he had no continuing problems as a result of earlier hernia operations (R. 47). In fact, both the medical panel and plaintiff's physicians agree that his condition had stabilized by mid-September or November of 1980 (R. 87, 91, 141). Plaintiff now does yard work and housekeeping at home (R. 47-48).

Even Dr. Lamb, on whose statements plaintiff relies as support for his apparent permanent total disability, qualified his opinions that plaintiff not return to work "in the mine" (R. 81 86), explaining that a coal miner's work is much more rigorous that most types of employment. The only instance in which Dr. Lamb did state that plaintiff was unable to go back to work was in a letter to the State Insurance Fund, dated September 9, 1981, (R. 93). In that letter Dr. Lamb specifically qualified his opinion, suggesting the [illegible] "would have a [illegible] permanent partial disability at this [illegible]".

Only plaintiff's letter from the Division of Rehabilitation [illegible] the West State Board of Education evidences a possibility [illegible] (R. 97). But this letter,

introduced at the [illegible] objected to by [illegible] because the [illegible] the hearing, [illegible] and no basis was given for the term letter's conclusory summary plaintiff's ability to rehabilitate himself (R. 88).

ARGUMENT

The sole issue on appeal is whether the Industrial Comm erred denying permanent total disability benefits to a 69-year-ol retired coal miner with a 26% permanent partial impairment rating. Respondents agree with plaintiff that age is relevent to a determ of permanent total disability benefits. When age becomes the principal factor in such a determination, however, public policy and statutory intent demand denial of permanent total disability benefits.

I. PLAINTIFF IS NOT PERMANENTLY AND TOTALLY DISABLED.

A. EVIDENCE SHOULD BE EXAMINED IN LIGHT MOST FAVORABLE TO THE COMMISSION'S FINDINGS.

The Administrative Law Judge found as follows:

> Regarding the issue of permanent total disability . . . . the applicant is not entitled to a tentative finding, since it appears . . . that his prime reason for being unemployed at the present time is age rather than physical impairment. (R. 156)

These findings were affirmed by the Commission, and are entitled to careful consideration on appeal. The Utah Supreme Court has held that only on very rare occasions [illegible] findings be overruled. In Harris v. Industrial Commission, P.2d 510, 511 (Utah 1978), this Court stated that it is "for the Industrial Commission to weigh the [illegible]

[illegible] Harrison." The Harrison court added: "Our statute [illegible] findings of fact by the Commission [illegible] be subject to review." Id. at 512. More [illegible] is found in Kaiser Steel Corporation v. Monfredi, [illegible] 898, 900 (Utah 1981), as follows:

> (T)he reviewing court's inquiry is whether the Commission's findings are "arbitary and capricious" or "wholly without cause" or contrary to the "one (inevitable) conclusion from the evidence" or without "any sustantial evidence to support them." Only then should the Commission's findings be displaced. (Bracketed language in original).

It should also be kept in mind that ". . . the burden (rests) upon plaintiff to prove the extent of his disability by evidence which persuades the Commission in accordance with his contention." Shipley v. C & W Contracting Company, 528 P.2d 153, [illegible] 155 (Utah 1974).

No substantial evidence refutes the Commission's findings in this case. Plaintiff simply failed to carry his burden of persuasion.

B. PLAINTIFF, A 69 YEAR OLD RETIRED COAL MINER WITH A 26% PERMANENT PARTIAL IMPAIRMENT RATING, FAILS THE TEST FOR PERMANENT TOTAL DISABILITY BENEFITS.

The test to be used in a determination of the permanent total disability of Utah Code Ann. § 35-1-67, was first enunciated in Silver King Coalition Mines Co. v. Industrial Commission of Utah, [illegible] U. 511, 69 P.2d 608 (1937). In that case, an employee of the Silver King Coalition Mines Company, in the course of his employment, [illegible] between a retainer and an ore chute resulting in a crushing [illegible] , the applicant therein was not [illegible] permanent total disability. In analyzing and [illegible] permanent total and permanent partial disability the Court [illegible] it was:

> The compensation [illegible] disability is measured [illegible] or in proportion [illegible] the loss [illegible] applicant [illegible] the issue is as [illegible] permanently disabled industrially [illegible]. There is a twilight zone where [illegible] other. That is, the loss of bodily function may be so great as to leave one totally and permanently disabled industrially. Thus a person with a 90 percent loss of bodily function might be able to prove himself totally and permanently disabled. If so, he would take himself out of the class of applicants limited to recover under permanent partial disability, and put himself in the class of applicants limited to recover under permanent partial disability, and put himself in the class where his compensation should be determined by his total lack of industrial or economical ability. But until that point is reached, the permanent partial disability is seemingly compensated for on loss of bodily function alone. A workman may stop in the zone of permanent partial not quite going over into the zone of permanent total, whereas, a trifle more disability would bring him into what the commission might find as a fact to be an industrial or economic permanent total . . . The applicant had a loss of bodily function of 79 percent."

Id. 69 P.2d at 613-614.

A sampling of other cases establishes a pattern of percentage of loss of bodily function which will support a decree of total and permanent disability. Where an applicant had his right hand amputated, lost 10-20% use of his right knee, and 60% loss of the use of his left hand, he was granted a decree of permanent and total disability. Caillet v. Industrial Commission, 90 U. [illegible], [illegible] 760 (1936).

In another case, testimony of a medical [illegible] injured employee's permanent loss of bodily [illegible] Industrial Commission's finding of permanent total disability when supported by rehabilitation expert testimony that [illegible] I.Q., the applicant couldn't be [illegible]

... Industrial Commission, 19 U.2d 390, 424

... recommended a finding of 90% ... because of a severed leg at the knee joint, ... of the right scapula, dislocation of the right ... joint, severe internal injuries to the right ... and lung, and injuries to the scrotum on the perineum, the ... was determined to be totally and permanently disabled. ... Park City Mines Co. v. Prescott, 15 U.2d 410, 393 P.2d 800 ...).

There is little doubt that the injury suffered by plaintiff in the case at bar doesn't reach the magnitude of severity of those ... But, of greater significance, is the fact that his injury ... any more serious and much less of a bodily impairment than in ... where the application for permanent and total disability ... denied by the Industrial Commission and upheld by the Supreme ... of Utah. For example:

> (1) 25% loss of the use of one leg by a miner. Broderick v. Industrial Commission, 63 U. 210, 224 P.2d 856 (1924).
>
> (2) Partial paralysis of both legs causing only 75% loss of bodily function because he could still use his body from the waist up and could get about with canes was not sufficient by itself for a finding of permanent and total disability. Spring Canyon Coal Co. v. Industrial Commission, 74 U. 103 277 P. 2d 1029). (emphasis added)
>
> ... the ... and ankle bone, necessitating ... a shortening of the leg and ... in the use of crutches for ... insufficient to reverse a decision ... Industrial Commission that there was not total and permanent disability. Mijat v. Industrial Commission, ... U. 371, 44 P.2d 705 (1935).

(4) A 75% disability of the [illegible] a 25% impairment of the left [illegible] a construction worker [illegible] permanent and total disability. [illegible] Commission, [illegible], [illegible]

(5) A total disability [illegible] a back injury resulting in a [illegible] function was not granted recovery for permanent and total disability. [illegible] Industrial Commission, 104 U. 333, 140 P.2d 801 (1943).

Not only should a 26% permanent partial impairment in this case be insufficient for a determination of permanent total disability, the evidence previously stated demonstrates that plaintiff's January 1980 accident had very little effect, if any, plaintiff's employability. After following plaintiff's condition closely for over six months, Dr. Lamb logged the following observation on August 27, 1980:

> "He (plaintiff) did heavy work in the mine and he probably shouldn't return to this for a couple to three months yet." (R. 57).

At a December 10, 1980 examination, plaintiff told Dr. Lamb he was "in the process of retiring" (R. 57).

Plaintiff's decision to retire was voluntary, and his disability was the natural result of his age as well as some pre-existing (pre-January 1980) causes, according to Dr. Lamb's letter to plaintiff's attorney dated January 28, 1980 (R. 14, 13[illegible]). Plaintiff admitted that normally miners retire between the ages of 60 and 70 years old (R. 45), and further, testified that he is now on social security retirement benefits and also receives a pension from his labor union (R. 44-45; 47).

In light of this evidence, the Industrial Commission

plaintiff's condition, commenting: "Upper [illegible]." (R. 138).

[illegible] the case of Beverly R. Buxton v. [illegible], 567 P.2d 121 (Utah 1978). Plaintiff [illegible], however, that the primary issue there was the [illegible] whether or not the general statute of limitations [illegible] to all workmen's compensation cases applied to Section [illegible] of the Utah Code Annotated in a case for increased benefits. The court found that there was no statute that applied to that [illegible] when the continuing jurisdiction of the Industrial Commission [illegible] was invoked by a filing of a claim for compensation. Secondarily, the Supreme Court found that the evidence taken at the time of the hearing for the increase of benefits that the loss of [illegible] function had increased from the 40% plus 15% pre-existing [illegible] by the medical panel of the prior hearing to a 100% based [illegible] the only medical evidence presented at the time of the second hearing from Dr. Wayne Hebertson. The court ruled that there was [illegible] competent medical evidence in the file to rebut Dr. Hebertson's [illegible] of Mrs. Buxton's 100% disability at the second hearing [illegible], therefore, reversed the Commission's denial for additional benefits.

That simply is not the case presently before the court. The substantive facts in support of the Commission's order show [illegible] plaintiff has suffered a loss of no more than 26% disability [illegible] in the yard and in his home.

[illegible] other than Buxton, supra, is that [illegible] Printing Company, 528 P.2d 153 (Utah 1974).

Therein, [illegible]

[illegible]

been his [illegible]

found that [illegible]

of Employment Security [illegible]

witnesses testified that [illegible] condition, his age

52 years, his education [illegible] only the [illegible] grade, limited work

skills, he was unemployable in any occupation. The treating

physician didn't disagree with the medical panel's assessment [illegible]

impairment but based on his last examination of the applicant his

opinion was that the applicant was unemployable. The applicant [illegible]

also receiving social security benefits for total disability. T[illegible]

defendant offered no evidence that the applicant was employable.

The <u>Shipley</u> Court sustained the Commission's denial of [illegible]

permanent total award. We quote at length from the court's opin[illegible]

applies so directly to the case at bar:

> Plaintiff's argument that it is mandatory upon the Commission to grant him a permanent disability rating of 100 per cent is grounded on the proposition that the testimony of the witnesses just referred to, that because of <u>his condition which resulted from the industrial accident he is unemployable, is uncontradicted.</u>
>
> Concerning this contention several observations are to be made. The first is that our statutes confer upon the Industrial Commission both the [illegible] and the prerogative of making the determination [illegible] to disability; and this includes [illegible] any "loss of bodily function [illegible] provided for herein, . . . [illegible] Commission shall [illegible] proportion as near [illegible] tion for specific [illegible] schedule . . . ."

* * * *

[illegible] with the [illegible] the Labor Act [illegible] the extent of [illegible] which permits [illegible] in accordance with his contention. [illegible] to be had in mind [illegible] only the evidence upon which the plaintiff relies concerning his unemployability, but also the evidence, which he seems [illegible], of the medical panel which rated his disability at 50 per cent, which the Commission elected to believe and adopt as its findings. It is not open to question that if the Commission had chosen to make its findings in accordance with the plaintiff's evidence, that award would be sustained. But upon this review it is our duty to survey the total evidence in the light most favorable to the Commission's determination; and to assume that it believed those aspects of the evidence which support its award; and we cannot properly reverse when there is a reasonable basis therein to support the findings and award as made.

[illegible] P.2d at 155 (Citations omitted)

In Archuleta v. Industrial Commission, No. 16433 (Utah [illegible] April 3, 1989), an applicant with 26% permanent partial disability sought an award for a permanent total disability. Therein, [illegible] court concluded:

> The answer to plaintiff's contentions is that it is the prerogative of the Commission to find the facts; and that there appears to be a reasonable basis in the evidence to support the finding that the extent of the disability she has suffered is not more than 26%.

[illegible], slip op. at 3.

Plaintiff also states that because Utah Code Ann. § 35-1-67 [illegible] does not require that impairment be the primary [illegible], he was wrongly denied permanent total [illegible] Commission implied that impairment [illegible] determining whether such benefits will be

carriers.

Even if [illegible] determining permanent total disability, it would [illegible] injustice to the employee. [illegible] with their extended work-lives. Plaintiff [illegible] of Workmen's Compensation, 577.01 [illegible] finding plaintiff to fit the odd-lot [illegible] 12). But unlike those who take relief in the [illegible], is not subject to crippling handicaps and is merely [illegible] ordinary aging process we all face with or without [illegible] employability test does not fit here, where plaintiff [illegible] 70 years old. If plaintiff were [illegible] just prior to the accident in question, it is likely [illegible] have success in finding a [illegible] the [illegible].

Finally, plaintiff asks [illegible] IML Freight Inc., 622 P.2d 760 [illegible] total disability benefits. The [illegible] facts:

1. [illegible] claim of permanent total disability [illegible] industrial accident. Here, the [illegible] treating physician would have [illegible] restrictions by the [illegible].

... the Brundage case that nonphysical ... his disability. It was ... primarily not his age alone. ... plaintiff here, certainly the age ..., was the "prime reason for (his) being unemployed" ... to any award of permanent total disability benefits. ... Moreover, the Commission's decision is based upon ... substantial evidence, and has fairly awarded benefits. ... supported by the medical practitioners who have ... treated the plaintiff for several years as well as the ... Commission. There is a factual basis to find plaintiff a ... totally disabled person.

CONCLUSION

... plaintiff's main contention of error in these proceedings ... permanent disability award by the Industrial Commission is ... evidence which allegedly shows that he is permanently ... disabled. However, plaintiff fails to recognize that it ... is the duty of the Industrial Commission. He ... must remember that on appeal the Supreme Court must look ... at the evidence in the light most favorable to the decisions of the ... Commission. If the Commission has arbitrarily and capriciously ... disregarded competent, substantive, uncontradicted and credible ... evidence, we will reverse a factual determination of the ...

... by the Court decisions ... in a case where an injured ... a finding of permanent ... total disability when the

evidence so overwhelmingly [illegible] any physical impairment [illegible] because of his [illegible].

The plaintiff's appeal [illegible] respectfully submitted that the [illegible] should be affirmed in all its particulars.

DATED THIS 6TH Day of September, 1983.

BLACK & MOORE

BY _____
JAMES R. BLACK
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this ___ day of September, 1983, to the following:

Virginius Dabney,
DABNEY & DABNEY
136 South Main Street, Suite 412
Salt Lake City, Utah 84101

Frank V. Nelson
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Gilbert A. Martinez
Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111