

1994

Hansen v. Industrial Commision of Utah : Brief of Petitioner

Utah Court of Appeals

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UTAH COURT OF APPEALS

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GERALD R. HANSEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,
SALT LAKE CITY CORPORATION and the
EMPLOYER'S REINSURANCE FUND,

Respondents.

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Case No. 940349

Priority No. 7

BRIEF OF PETITIONER

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PETITION FOR REVIEW OF ORDER BY THE INDUSTRIAL COMMISSION OF UTAH
GRANTING RESPONDENT'S MOTION FOR REVIEW OF ORDER OF THE
ADMINISTRATIVE LAW JUDGE

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COURT OF APPEALS

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JURISDICTION OF THE COURT

This case involves a Petition for Review of the Industrial Commission's May 13, 1994 Order granting Respondent Salt Lake City's Motion for Review reversing the prior award of entitlement to workers' compensation benefits caused by an industrial accident. A Petition for Review of that Order was timely filed with this Court on June 10, 1994.

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 ISSUES/STANDARDS OF APPELLATE REVIEW

There are two substantial issues presented for review:

(1) Whether the Industrial Commission erred in failing to uphold the Order of the Administrative Law Judge as required by the provisions of the universally accepted workers compensation precept known as the "Odd Lot" doctrine; and

(2) Whether the Industrial Commission erred in entering cursory, speculative Conclusions of Law not supported by the record or, significantly, by the Findings of Fact of the Administrative Law Judge which the Industrial Commission adopted in their entirety in this case.

Conclusions of Law are reviewed under the "correction of error standard" 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). Both of the identified issues involve questions of law which must be reviewed in accordance with the "correction of error" standard.

DETERMINATIVE STATUTE/RULE

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

STATEMENT OF THE CASE

Nature of the Case

Mr. Hansen seeks review of the Industrial Commission Order granting Respondent Salt Lake City's Motion for Review reversing the prior award of the Administrative Law Judge wherein he alleged entitlement to permanent, total disability compensation occasioned by his 1976 work-ending industrial accident.

Course of Proceedings

Mr. Hansen filed an application for permanent, total disability benefits occasioned by an industrial accident which occurred on May 21, 1976. Respondents alleged that Mr. Hansen failed to prove legal and medical causation and was thus not entitled to permanent, total disability benefits (R. at 36-38). A formal hearing before an Administrative Law Judge was held on April 14, 1992 (R. at 46).

Disposition Below

On March 18, 1993 the Administrative Law Judge held that Mr. Hansen had demonstrated legal and medical causation and that his

symptoms and total disability status were the result of his 1976 industrial injury (R. at 173). A Medical Panel was appointed to examine Mr. Hansen and to review his medical records. The Panel made certain determinations as to the Applicant's impairments and when they arose (R. at 110-126). No objections to the Medical Panel report were filed by any party, and it was not contradicted by any other medical evidence contained in the file (R. at 188). His claim for permanent, total disability benefits was granted in a thorough, 26-page Order of the Administrative Law Judge dated March 18, 1993. A copy of the Order is attached to the Addendum as Exhibit B.

Respondent Salt Lake City filed a Motion for Review with the Industrial Commission on April 29, 1993 (R. at 201-219). On May 13, 1994 the Industrial Commission entered an "Order Denying Motion for Review" although the substance of the Order, in fact, granted the Motion for Review. In doing so the Industrial Commission adopted all of the Findings of Fact of the Administrative Law Judge, but reversed the Administrative Law Judge's Conclusions of Law and Order, denying Mr. Hansen's claim of entitlement to permanent, total disability benefits (R. at 260-263). A copy of that Order is attached to the Addendum as Exhibit C. Mr Hansen challenges that final agency action in this Petition for Review.

Statement of the Facts

This case involves a claim for permanent, total disability benefits related to a May 21, 1976 industrial accident wherein Mr. Hansen sustained injuries to his left knee and right foot. He was employed by Respondent Salt Lake City Corporation on the date of his injury and worked as a maintenance man and glazier at the Salt

Lake City Airport. Part of his responsibilities involved the installation of glass. On May 21, 1976 Mr. Hansen was unloading a crate of glass when the crate tipped over and the glass fell on him injuring his lower extremities (R. at 34).

Mr. Hansen subsequently had surgery performed on his right ankle on May 21, 1976 and later had left knee surgery on September 8, 1976 which were both related to his industrial accident (R. at 173). When he attempted to return to work in mid-January 1977, he had some difficulty doing so, and approximately three weeks later, on February 4, 1977, while at work carrying a bundle of chain link fencing, his left knee and right foot gave way causing him to fall to the ground. He was unable to return to work thereafter (R. at 174).

Mr. Hansen testified that Salt Lake City terminated him because he was unable to perform the duties that were required of him at the Salt Lake Airport (R. at 174). Salt Lake City argued that they had sent him a letter directing him to the personnel office to see if other suitable work was available; however, that letter was sent to an incorrect address and there was no evidence either that he received that letter or that Salt Lake City offered Mr. Hansen any opportunity for re-employment or retraining (R. at 174).

On May 24, 1977 Dr. Edward Hayes, the orthopedic surgeon who performed Mr. Hansen's surgery, wrote a letter to Salt Lake City Corporation indicating that Mr. Hansen could possibly return to light duty work as of April 25, 1977 (R. at 588); however, no light duty work was available or offered to him at the airport by Salt Lake City (R. at 174). Mr. Hansen testified that he was unable to

perform the work he had done all of his life because of his left knee and right ankle injuries (R. at 174). His testimony was not challenged by any opposing or contradictory evidence.

On June 13, 1977 Mr. Hansen applied for Social Security total disability benefits (R. at 869-872) and on June 17, 1977 he also filed an Application for Hearing with the Industrial Commission seeking permanent, partial disability compensation (R. at 1). From June 1977 through May 1978, Mr. Hansen was involved in processing his claims for Social Security disability benefits and additional workers compensation disability benefits.

A hearing on his workers compensation claim was held on September 19, 1977 and on May 10, 1978, Mr. Hansen received a permanent, partial disability award based upon a 16% whole person rating by a Medical Panel (R. at 16).

Social Security initially denied Mr. Hansen's June 13, 1977 application for total disability benefits finding that he was capable of doing light work; however, on October 31, 1977, he filed a Request for Reconsideration indicating that his movements were so restricted that he could not work (R. at 1021). On December 13, 1977, the Social Security Administration confirmed its earlier denial, and on January 27, 1978, Mr. Hansen filed a Request for Hearing which on May 31, 1978 resulted in his being awarded total disability benefits based primarily on the right ankle, with his left knee mentioned as an additional problem. The Social Security Administrative Law Judge relied a great deal on the testimony of a vocational expert who found that Mr. Hansen did not have the residual functional capacity to perform substantial, gainful employment. Total disability benefits were awarded to him

retroactively to May 21, 1976, the date of his industrial accident (R. at 847-852).

On January 11, 1983 Mr. Hansen's Social Security total disability benefits were temporarily discontinued on the basis that it was asserted that he was now capable of gainful activity. On March 7, 1983, he filed a Request for Reconsideration and on October 26, 1983 his benefits were reinstated and back-dated for a continuous award from the May 21, 1976 industrial injury date (R. at 847-852).

Salt Lake City last paid workers compensation weekly benefits to Mr. Hansen in January 1983, although they have continued to pay for his medical treatment, including his prescriptions since then up to and including the present (R. at 84).

Mr. Hansen filed his claim for permanent, total disability compensation on November 16, 1990 (R. at 34). Respondents did not present any evidence at the hearing with respect to Mr. Hansen's ability to work. He is now a 66-year old man with a ninth grade education who has no transferable skills and who has not worked since 1977, a period of almost 18 years. Respondents waived referral for a determination regarding his vocational rehabilitation potential (R. at 149), essentially stipulating to his unemployability. The matter was referred to a Medical Panel which found that Mr. Hansen had a 70% (whole person) permanent, partial impairment of which 16% was exclusively attributable to the industrial accident (R. at 110-126, 129-130).

Following subsequent, substantial input by counsel for the parties, the Administrative Law Judge on March 18, 1993 adopted the findings of the Medical Panel as her own and concluded that the

"preponderance of the evidence shows that Mr. Hansen has been disabled since the date of his industrial injury, May 21, 1976, to the present." She ordered the payment of permanent, total disability compensation benefits to Mr. Hansen (R. at 170-196). The Respondents subsequently filed a Motion for Review with the Industrial Commission (R. at 201-220).

On May 13, 1994, the Industrial Commission entered an Order entitled "Order Denying Motion for Review" although the substance of the Order indicated, in fact, that the Motion for Review of Salt Lake City Corporation had actually been granted. In doing so, the Industrial Commission adopted all of the findings of the Administrative Law Judge, but reversed the Administrative Law Judge's conclusions and denied Mr. Hansen's claim for permanent, total disability compensation (R. at 260-263).

SUMMARY OF ARGUMENT

The Industrial Commission failed to apply the workers compensation act liberally in favor of awarding benefits. In fact, the Industrial Commission engaged in speculation to support a denial of benefits, and without any record support or meaningful reasoning or explanation for its position.

Mr. Hansen is entitled to benefits under the "Odd-Lot" doctrine. This basis for benefits was not even addressed by the Industrial Commission. Respondents conceded that Mr. Hansen sustained an industrial injury, was not a suitable candidate for vocational rehabilitation or retraining and that he was and is now permanently and totally disabled. The burden then shifted to the employer to prove the 'existence of regular steady work which the employers can do taking into account his education, mental capacity

and age.' They have wholly failed to meet that burden.

Finally, the Industrial Commission adopted all of the Findings of Fact of the Administrative Law Judge, but then entered Conclusions of Law which have no support in the Findings. The Findings of Fact as entered by the Administrative Law Judge and as adopted by the Industrial Commission compel the conclusion that Mr. Hansen is permanently and totally disabled by reason of his industrial injury.

ARGUMENT

I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS 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, supra., 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, supra.; 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, 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. Id. at 1021-1022. (Emphasis added)

The Administrative Law Judge in rendering her Findings of Fact and Conclusions of Law applied this vital rule of construction. Her Findings of Fact and Conclusions of Law evidence a "liberal construction" and "resolution of doubt in favor of the claim". Unfortunately, the Industrial Commission on review ignored this

basic principal.

Rather, whenever any doubt or uncertainty appears in the record, the Industrial Commission construed it against the injured employee by selectively referencing Mr. Hansen's medical records, highlighting a subsequent medical condition and virtually ignoring the significant and work-terminating injury to his lower extremities. In fact the Industrial Commission went to the extreme to construe the record against the claim.

Although extensive proceedings were held before the Social Security Administration which subsequently made a finding of total disability, the Industrial Commission dismissed it on the unfounded assertion that "... the Commission does not know the underlying facts upon which the Social Security Administration made its award, whether those facts are supported by the evidence...." (R. at 9).¹

In light of the Industrial Commission's highly selective and prejudicial construction of the medical evidence, the absence of any conflicting lay, medical or disability evidence refuting Mr. Hansen's claim, the denial of permanent, total disability compensation, for the reasons set forth in greater detail below, is simply not supported by the record.

In conclusion, the entire underlying basis of the Order is fundamentally flawed and is nothing more than a speculative,

¹ Interestingly enough, the Industrial Commission acknowledges that under current law the commission would have been required to follow the "sequential decision making process of the Social Security Administration." No reasonable explanation is given why it did not - as the Administrative Law Judge in this case did - follow that same process. In addition, the complete Social Security file consisting of 28 exhibits and totalling almost 200 pages was a part of the record below, but the Industrial Commission Order failed to refer to it at all.

unsupported, inartfully drafted, cursory view of the evidence. The Industrial Commission's Order clearly does not evidence the "humane and beneficent purposes" required by Utah Workers Compensation law. The Order should be reversed due to this obvious conceptual flaw.

II

THE INDUSTRIAL COMMISSION ERRED IN FAILING TO UPHOLD THE ORDER OF THE ADMINISTRATIVE LAW JUDGE AWARDING WORKERS COMPENSATION BENEFITS PURSUANT TO THE PROVISIONS OF THE UNIVERSALLY ACCEPTED "ODD LOT" DOCTRINE.

Petitioner is also entitled to permanent, total disability benefits under the "odd-lot" doctrine. Professor Larson in his monumental treatise on workers' compensation reviewed this doctrine, as follows:

Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. 2 Larson, The Law of Workmen's Compensation, § 57.51 at 10-164.24 (1989). (footnotes omitted).

Pursuant to well-established Utah case-law, an injured worker may be found to be totally disabled if by reason of the disability resulting from the injury, he cannot perform work of the general character that he was performing when injured, or any other work which a person of his capabilities may be able to do or learn to do. Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984). Brundage v. IML Freight, Inc., 622, P.2d 790 (1980). Clark v. Interstate Homes, Inc., 604 P.2d 937, 938 (Utah 1979). United Park

City Mines Co. v. Prescott, 393 P.2d 800, 801-02 (Utah 1964).
Caillet v. Industrial Commission, 58 P.2d 760 (Utah 1936). Mr.
Hansen clearly meets this standard for entitlement.

There is no dispute, and Respondents readily concede, that Mr. Hansen sustained an industrial injury, was and is not a suitable candidate for vocational rehabilitation or retraining, and was and is permanently and totally disabled. Their only basis for dispute is whether Mr. Hansen's 1976 industrial injury was a significant enough "cause" of his unemployability.

On January 27, 1978 the United States Department of Health and Human Services, Social Security Administration, determined that Mr. Hansen was totally disabled as of the date of his industrial injury and that he was not a viable candidate for rehabilitation. The Social Security total disability file confirms that Mr. Hansen's industrial accident was the precipitating and eventual cause of his inability to engage in substantial, gainful employment.

As a result of the July 1, 1988 change in the Workers Compensation Code, the sequential evaluation process which the federal government utilized in reaching its decision concerning Mr. Hansen's permanent, total disability status, has been statutorily adopted as one which the Industrial Commission must similarly apply. Although not technically binding in this case, because Petitioner's industrial accident preceded those changes to Utah Code Annotated, Section 35-1-67 (1988), that finding is still persuasive, legally as well as factually.

In order to fully appreciate the application of the "odd-lot" doctrine it is helpful to understand its development and the facts under which it has been found to apply.

A. HISTORICAL DEVELOPMENT OF THE "ODD-LOT" DOCTRINE.

Perhaps the first case to discuss the concept of the "odd-lot" doctrine was the English case of Cardiff Corporation v. Hall, 1 KB 1009 (1911):

There are cases in which the burden of showing suitable work can in fact be obtained does fall up the employer. ... [If]... the capacities for work left to him fit him only for special uses and do not ... make his powers of labor a merchantable article in some well known lines of the labor market ... it is incumbent upon the employer to shew that such special employment can in fact be obtained by him. .. [I]f the accident leaves the workman's labor in the position of an "odd-lot" in the labor market, the employer must shew that a customer can be found who will take it...

Judge Cordozo very early in the history of workmen's compensation in the United States stated the policy for "Odd-Lot" determination, as follows:

He was an unskilled or common laborer. He coupled his request for employment with notice that labor must be light. The Petitioner imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. he is the 'odd-lot' man, the nondescript in the labor market. Work, if he gets it, is likely to be casual and intermittent...Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt. (Emphasis added). Jordan v. Decorative Co., 130 N.E. 635, 636 (N.Y. App. 1921).

B. DEVELOPMENT OF THE "ODD-LOT" DOCTRINE IN UTAH.

The "odd-lot" doctrine has been accepted and favorably applied by the Utah Courts. One of the first Utah cases applying the doctrine was Brundage v. IML Freight, Inc. et. al., 622 P.2d 790 (Utah 1980). In Brundage, the Plaintiff had spent thirty years as a truck driver. In August 1975 he injured his back in a non-industrial accident which led to surgery later that year. In October 1976 he had recovered sufficiently so he returned to his job as a truck driver. He subsequently re-injured his back at work

and in 1977 again underwent surgery on his back. Months later, however, he re-injured his back again and was unable to return to work thereafter.

The Industrial Commission found Mr. Brundage suffered from an overall permanent, partial impairment of 30% (whole person) - half (15%) of which was attributable to the industrial accident and half (15%) of which was attributable to non-industrial causes. Mr. Brundage was awarded permanent, partial impairment benefits, but his claim for permanent, total disability was denied.

In reversing the Industrial Commission's ruling regarding permanent, total disability, the Utah Supreme Court stated:

In his treatise The Law of Workmen's Compensation, Professor Arthur Larson states:

'total disability' in compensation law is not to be interpreted literally as utter and abject helplessness.... The task is to phrase a rule delimiting the amount and character of work a [person] can be able to do without forfeiting his totally disabled status. 2 Larson, The Law of Workmen's Compensation, § 57.51 at 10-107.

Consonant with the view expressed by Larson, this Court has adopted the following definition of total disability:

This Court has recognized the principle that a workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a [person] of his capabilities may be able to do or to learn to do... United Park City Mines Co., v. Prescott, 393 P.2d 800, 801-802 (1964).

Mr. Hansen testified and the Administrative Law Judge found that he could not continue to perform the work he was doing when

injured, and that a vocational rehabilitation expert had found him unsuitable for rehabilitation (R. at 191).

The next important decision was Entwistle v. Wilkins, 626 P.2d 495 (Utah 1981). Mr. Wilkins, who was 55 years old, sold trailers and other types of recreational vehicles for Entwistle, and he was required to travel throughout the west contacting dealers. In 1977 he suffered an injury to his back when he slipped and struck his back on some large rocks while attempting to unhitch a trailer. He was off work for some time while undergoing physical therapy and later returned to work on a light duty basis, but was unable to continue working. In defining "total disability" the Utah Supreme Court stated that:

... 'total disability' does not mean a state of abject helplessness or that the injured employee must be unable to any work at all. The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. His temporary disability may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury. Id at 498. (citations omitted).

Mr. Hansen also falls within the purview and standard enunciated in Entwistle.

The "odd-lot" doctrine was next considered in the monumental decision of Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984). The injured worker in that case was employed by Emery Mining Company as a maintenance mechanic in a coal mine. On January 25, 1980 while leaving the mine in a tractor-trailer, he was bounced up and down on the seat resulting in an injury to his back. After several months of conservative medical treatment, Mr. Marshall underwent surgery on his back, following which he was advised by his doctor that he could not return to work. Mr.

Marshall was 67 years of age at the time.

The Industrial Commission awarded Mr. Marshall permanent, partial disability compensation finding that he had sustained a 10% (whole person) impairment due to the accident of January 25, 1980, and 15% (whole person) due to pre-existing conditions. However, the Industrial Commission denied his request for permanent, total disability stating the primary reason he was unable to return to work was his age.

The Utah Supreme Court reversed the Industrial Commission ruling that Mr. Marshall was entitled to permanent, total disability benefits under the "odd-lot" doctrine, defining permanent, total disability as follows:

[A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do.... Id. at 211.

* * * *

Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher, for example, as it would in an electrician. Thus, in assessing the loss of earning capacity, a constellation of factors must be considered, only one of which is the physical impairment. Other factors are age, education training and mental capacity. It is the unique configuration of these factors that together will determine the impact of the impairment on the individuals earning capacity. Id. at 211. (citations omitted).

Some employees, however cannot be rehabilitated and even though not in a state of abject helplessness ' can no longer perform the duties ... required in [their] occupation[s].' These employees fall into the so-called 'odd-lot' category... Whether or

not an employee falls into the odd-lot category depends on whether there is regular, dependable work available for the employee who does not rely on the sympathy of friends or his won super human efforts. Once the employee has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity and age. ... 'It is much easier for the [employer] to prove the employability of the [employee] for a particular job than for the [employee] to try to prove the universal negative of not being employable at any work.' Id. at 212-213. (citations omitted). (Emphasis added)

Finally, the Court pointed out that the majority of odd-lot cases are concerned with employees whose work involved physical labor, were 50 years of age and older, and had moderate or little education - which is strikingly similar to Mr. Hansen's case here.

The Respondent's have failed to appreciate this shift in burden and that they had the burden of proving the availability of other work for Mr. Hansen. Their only effort in this regard was a single letter which they sent to the wrong address.

And finally, in Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986), the injured worker, who was sixty years old with a limited education and even more limited work background, suffered a fractured skull when a steel beam fell and stuck him on the head. He had surgery performed on his skull to relieve the pressure on his brain. A Medical Panel found that he had a 25% (whole person) permanent, partial impairment, 15% (whole person) of which was related to the industrial injury. He requested permanent, total disability benefits because of his medical impairment and other disability factors, such as his age and lack

of education or skills. He was awarded only permanent, partial disability compensation.

The Utah Supreme Court reversed holding that once the Petitioner had demonstrated that he was not suitable for rehabilitation, "The burden shifts to the employer to prove the 'existence of regular steady work that the employee can perform' taking into account the Plaintiff's education, mental capacity and age." Id. at 1327. The Court went on to note that "... the record is devoid of concrete evidence that he was offered work of the general nature he had been performing." Id. at 1327.

In conclusion, as a result of his industrial injury, Mr. Hansen no longer performed work of the general character he was performing when injured. A vocational rehabilitation expert in his Social Security disability claim testified that in 1978 he was disabled and incapable of being rehabilitated. Respondents even stipulated that Mr. Hansen was permanently and totally disabled. Mr. Hansen is, therefore, entitled to permanent, total disability benefits under the "Odd-Lot" doctrine.

III

THE INDUSTRIAL COMMISSION ERRED IN ENTERING CONCLUSIONS OF LAW WHICH ARE UNSUPPORTED BY THE RECORD OR THE FINDINGS OF FACT OF THE ADMINISTRATIVE LAW JUDGE WHICH IT ADOPTED IN THEIR ENTIRETY IN ITS ORDER.

Despite the age of this claim, a large quantum of medical evidence in support of the claim, most of it contemporaneous with the injury, was presented totaling over 738 pages (R. at 288-1026). To assist in the resolution of the medical issues, a Medical Panel was appointed which both examined Mr. Hansen and reviewed his medical records. The Medical Panel entered a detailed

report, the conclusions of which were not challenged by Respondents.

On March 18, 1992 the Administrative Law Judge entered detailed Findings of Fact which led to the inescapable conclusion that Mr. Hansen had demonstrated legal and medical causation, and that his totally disabling symptoms resulted from his industrial injury.

The Industrial Commission in its Order Denying Motion for Review adopted, without modification, all of the Findings of Fact of the Administrative Law Judge. Although the Industrial Commission's Order has a section entitled "Discussion and Conclusions of Law", a review of that portion of the Order discloses that there is not a single, true Conclusion of Law contained in it. The Commission merely speculates that there may be another cause of his unemployability, but does not succinctly identify or logically analyze what evidence supports its views.

Although the Administrative Law Judge does not specifically number her Findings of Fact, a careful reading of her decision reveals the following relevant Findings of Fact which were adopted by the Industrial Commission in its Order:

1. Mr. Hansen sustained an industrial injury in the course and scope of his employment with Respondent Salt Lake City on May 21, 1976 (R. at 173).

2. Following his industrial injury, Mr. Hansen had right ankle surgery on May 21, 1976 and left knee surgery on September 8, 1976. He returned to work in mid-January 1977, assuming his normal work duties (R. at 173).

3. On April 4, 1977, Mr. Hansen sustained a second injury when, while carrying a bundle of chain link fencing, his

left knee and right foot gave way causing him to fall to the ground. He was unable to return to work after that injury (R. at 174).

4. As a result of that injury Mr. Hansen sustained a 16% permanent impairment of the whole person (R. at 188).

5. On June 13, 1977, Mr. Hansen applied for Social Security Disability benefits. Although the Social Security Administration initially denied his claim on the basis he was capable of doing light work, a hearing was subsequently held and he was awarded disability benefits based primarily on his right ankle and secondarily on his left knee and back conditions. A vocational expert found he did not have the residual functional capacity to perform substantial gainful employment, and benefits were awarded to begin as of May 21, 1976, the date of his industrial injury (R. at 175-76).

6. From August of 1978 through August of 1979, Mr. Hansen was seen by Dr. Herbertson for treatment of right ankle pain, back pain, left knee pain, right elbow pain and neck pain. Dr. Herbertson treated these conditions primarily with medication (R. at 176).

7. In August 1979 Mr. Hansen began seeing Dr. Jonathan Horne primarily for his left knee and right ankle, the areas of the body injured in the industrial injury. Dr. Horne performed a second knee surgery on November 12, 1979 and a second ankle surgery on March 10, 1980. In September of 1980, Dr. Horne assessed Mr. Hansen's impairments to the left knee and right ankle at 32% of the whole person (R. at 176).

8. Mr. Hansen filed a second Application for Hearing

with the Industrial Commission and the matter was again referred to a Medical Panel which found his impairments to be a total of 14% (whole person), slightly less than the 16% found by the original Panel. Additional impairment benefits were denied in the December 31, 1982 Order, but additional temporary total compensation was awarded related to the two surgeries performed by Dr. Horne (R. at 177).

9. Prior to the May 21, 1976 industrial injury there was no mention in Mr. Hansen's medical record of any prior injury to his right ankle. Subsequent to the industrial injury there are numerous entries reflecting medical treatment, including an impairment rating. Likewise, for the left ankle and left knee (R. at 178-181). Mr. Hansen's back was injured when he was involved in a car accident in 1966, which resulted in five days of hospitalization; however no medical records were presented to the Medical Panel with regard to this injury. The record also reflects that on April 7, 1992 he fell in a grease pit and sustained a sprain of his lumbar sacral spine which resolved after several months of treatment. After May 21, 1976 there are various entries with regard to his back injury (R. at 181-183).

10. A Medical Panel was appointed which concluded that Mr. Hansen's whole person impairments were as follows: 12% for the right ankle (all attributable to the May 21, 1976 accident), 5% for the left knee (all attributable to the May 21, 1976 accident), 10% for the left ankle (all attributable to problems arising after the industrial accident), 10% for the low back (2.5% attributable to problems existing before the industrial accident and 7.5% attributable to problems arising after the industrial accident),

and 1% for macular degeneration (all attributable to problems arising after the industrial accident). Mr. Hansen's additional 40% (whole person) impairment related to his pulmonary condition was wholly attributable to problems arising after the industrial accident (R. at 188).

11. The Administrative Law Judge adopted the Findings of the Medical Panel and noted that "There have been no real objections to the Medical Panel findings and the Panel ratings are not seriously contradicted by any other medical evidence. Therefore, the Administrative Law Judge will use the Panel ratings to assess the Applicant's relative physical impairments and their impact on his permanent disability." (R. at 188).

12. "The Administrative Law Judge presumes that neither of the Defendants (the Employer nor the Employers' Reinsurance Fund) contests that the Applicant is currently unable to return to any of his previous work and that he is currently not susceptible to rehabilitation. The Administrative Law Judge bases this presumption on the fact that no evidence has been presented with respect to the Applicant's ability to work at this time and on the fact that Defendants waived a referral for a determination regarding the Applicant's susceptibility to rehabilitation." (R. at 188).

13. The main issue in this case is whether the Applicant's inability to work was caused by his 1976 industrial injury.

...[I]n analyzing what is the cause of the permanent, total disability, the proper time focus is not necessarily on the Applicant's impairment status at the date of the hearing, but rather his impairment status at the date he discontinued working. Also, physical impairment alone is not the only relevant criteria for

determining what is causing an individual to be unable to work.

* * *

... The Applicant testified that his right ankle and left knee injuries on May 21, 1976 prevented him from doing the fairly heavy work that a glazier is required to perform. Therefore, when he was unable to return as a glazier for Salt Lake City Corporation in February 1977, and because he believed he could no longer perform this occupation, the Applicant proceeded to apply for Social Security Disability benefits at that time. The Administrative Law Judge feels that it is logical that the knee and ankle impairments prevented the heavy lifting, prolong standing and stooping required in glass installation.

* * *

Although logically it appears that return to work was not completely foreclosed as of 1977, it would be speculative to find the Applicant was susceptible to rehabilitation at that time. No concrete evidence has been presented to support this conclusion.

* * *

...there is simply insufficient evidence to show the Applicant was susceptible of rehabilitation in 1977. In 1978, after hearing and testimony from a vocational expert, it was finally determined that the Applicant was disabled and entitled to Social Security disability benefits.

* * *

... the Administrative Law Judge would have to say that the preponderance of the evidence shows that the Applicant has been disabled since the date of his industrial injury, May 21, 1976 to the present. (R. at 190-192).

14. In addition, the Administrative Law Judge made this specific, significant finding:

The Administrative Law Judge finds that the Applicant has been disabled since the industrial injury on May 21, 1976 and that the primary cause of this disability has been the industrial injury to the left knee and right ankle that were sustained on May 21, 1976. The Defendants have waived any referral to the Division of Rehabilitation, the Administrative Law Judge finds it is appropriate to make a final award of permanent, total disability benefits associated with the May 21, 1976

industrial accident (R. at 193).

Although the Administrative Law Judge's specific Findings of Fact are compelling and lead inescapably to the conclusion that the Petitioner is permanently and totally disabled as a result of his 1976 industrial accident, the Industrial Commission while adopting all of these Findings of Fact reaches a totally different conclusion citing the following four bases for reversal:

A.

The Social Security Determination. In response to the compelling nature of the Social Security Determination - and the extensive Social Security file in the record - which was heavily relied upon by the Administrative Law Judge, the Industrial Commission's Order specifically concluded as follows:

In considering the issue of causation, the Commission notes that the Social Security Administration's determination that Mr. Hansen was disabled from work after the 1976 injury. However, the Commission does not know the underlying facts upon which the Social Security Administration made its award, whether those facts are supported by the evidence, or whether legal principles appropriate to workers' compensation were applied by the Social Security Administration in making its determination. For those reasons, the Commission does not place a great deal of reliance on the Social Security determination (R. at 260-261).

There is simply no support in the record for this conclusion. The Industrial Commission did in fact know the underlying facts upon which the Social Security Administration made its award. The proceedings before the Social Security Administration were exhaustively recited by the Administrative Law Judge and were placed in evidence. The Commission had access to the entire Social Security file, totaling almost 200 pages and containing 28 exhibits

(R. at 157-169, 842-1026).

Mr. Hansen was initially denied by the Social Security Administration, but was subsequently reassessed and awarded benefits, particularly after a vocational rehabilitation expert found that he was disabled and incapable of being retrained. There is no basis to believe that those facts are not supported by the evidence, and in fact there is no evidence in the record that at the time of the Social Security determination, there were any other disabling conditions.

The Industrial Commission further does not identify what "legal principles appropriate to workers compensation" may not have been applied by the Social Security Administration in making its determination; however, it does acknowledge that the current version of Utah Code Annotated, Section 35-1-67 (1988) requires the Industrial Commission to follow the sequential decision-making process of the Social Security Administration. Although that provision was not mandatory on the date of Mr. Hansen's injury, it is compelling both factually and legally. The Industrial Commission's decision "not to place a great deal of weight" on the Social Security decision, is without any basis in fact, and is contrary to its adoption of the Administrative Law Judge's Findings of Fact reflecting and accepting the Social Security proceedings and findings.

B.

Permanent, Partial Impairment Rating. The Industrial Commission's Order specifically concluded as follows:

The Commission also notes that Mr. Hansen received a 16% permanent partial impairment rating as a result of the 1976 accident. That impairment rating has never changed since his

industrial injury. It is insufficient to prove that the 1976 accident caused Mr. Hansen to be permanently and totally disabled (R. at 261).

This alleged Conclusion merely begs the question. Mr. Hansen never claimed that his 16% permanent, partial impairment rating, standing alone, was sufficient to prove that he was permanently and totally disabled. Similarly, it is also not necessary for Mr. Hansen's impairment rating to have increased since his last rating in order for him to be found entitled to permanent, total disability. This is not a requirement of Utah Workers Compensation law.

It is, however, significant to note that the Administrative Law Judge specifically found - and the Industrial Commission adopted the finding - that:

Physical impairment alone is not the only relevant criteria for determining what is causing an individual to be unable to work. In determining whether an industrial injury causes permanent, total disability, the Administrative Law Judge finds it is appropriate to look at the time at which the Applicant discontinued working and then to determine what factor or factors (including, but not limited to physical impairment) caused the Applicant to discontinue his/her working status (R. at 191).

This is a reflection of the Marshall, et al., legal standard. The Industrial Commission's isolation of the single factor of impairment is contrary to Utah law. The Industrial Commission's limited observation is simply insufficient to overcome the otherwise extensive and uncontroverted evidence contained in the record.

C.

Failure to Timely Claim Entitlement to Permanent, Total Disability.

The Industrial Commission's Order specifically noted as follows:

Mr. Hansen filed two claims for workers' compensation benefits within a few years of the 1976 accident and thus was before the Commission twice, but neither time did he claim to be permanently and totally disabled (R. at 261).

The Industrial Commission's Order also noted:

The fact that Mr. Hansen waited 14 years to raise his claim does not reduce his burden of proof, or shift that burden of proof to his employer. Had he raised his claim earlier, both parties could have provided better evidence (R. at 261).

Utah Workers Compensation law, for industrial accidents occurring prior to July 1, 1988, did not contain any statute of limitation for filing a workers compensation claim alleging entitlement to permanent, total disability benefits. Utah Code Annotated, Section 35-1-67 (1975). See, e.g., Mecham v. Industrial Commission, 692 P.2d 783 (Utah 1984) and Buxton v. Industrial Commission, 587 P.2d 121 (Utah 1978). Therefore, Mr. Hansen was not obligated to request permanent, total disability benefits immediately following his industrial accident, or any particular time thereafter, because there was no limitation period which required him to do so. The Industrial Commission's implication that his failure to request permanent, total disability benefits either when he filed his earlier two claims, or earlier than 14 years after his industrial accident, somehow detracted from his position that his 1976 industrial accident caused his eventual unemployability is without merit - legally and factually. He was, simply put, not required to file within any particular time frame, and did not waive his eventual claim in any way by not filing until 1990.

The Industrial Commission's additional observation that "had

he raised his claim earlier, both parties could have provided better evidence" is ludicrous (R. at 261) (Emphasis added). This observation is nothing more than pure speculation, the lack of support of which underscores its obvious specious nature.

And finally, it is significant to note that the Industrial Commission does not in any way indicate what this particular Conclusion of Law or gratuitous observation means or how it impacts analysis of the causation question. The subject is simply mentioned and dropped without explanation, and this Court should similarly treat the Industrial Commission's purported or implied basis for denial.

D.

Failure to Return to Work. The Industrial Commission's Order specifically noted as follows:

Finally, the Commission notes that Mr. Hansen did not actually return to work after the 1976 accident. However, his failure to return to work may be attributable to reasons other than his injury and is therefore given little weight (R. at 61).

This Conclusion of Law is also simply not supported by the Findings of Fact in the record. The Industrial Commission never suggests what other reasons the failure to return to work could be attributable to, opining merely that his inability to return to work could be attributable to some other cause. The Industrial Commission does not make a single Finding of Fact which would suggest that there is any other specific basis for Mr. Hansen's inability to return to work other than his industrial accident. Without more, this conclusion must fail.

Although the Industrial Commission notes that Mr. Hansen was released for light duty work during 1977, and that sometime

thereafter he began suffering pulmonary problems, there is no medical evidence to suggest that Mr. Hansen's inability to work following his industrial injury was caused by anything other than his industrial accident:

Shortly after his 1976 accident, Mr. Hansen began suffering pulmonary problems then [sic] other assorted medical problems, which have been appraised by a Medical Panel as much more significant and debilitating than his industrial injury (R. at 261).

Nowhere in the record is there any serious suggestion that Mr. Hansen ceased working because of pulmonary problems that first manifested themselves well after his industrial accident occurred and for which he subsequently sought surgery in the early 1980's. The cause-effect relationship is briefly related in the Industrial Commission Order without any further analysis or reasoning. Similarly, "other assorted medical problems" also referenced in the Industrial Commission Order are not detailed or analyzed. The conclusion that they were "appraised by a Medical Panel as much more significant and debilitating than his industrial injury" is similarly unsupported, unexplained and unreasoned. The simple fact of the matter is, the Conclusions of Law are without merit and are unsupported by the Findings of Fact entered by the Administrative Law Judge and adopted by the Industrial Commission. The Industrial Commission's Conclusions of Law are speculative, and speculation, without more, is simply insufficient to support the Industrial Commission's Order below.

In conclusion, there is simply no evidence which can be marshaled, nor any findings made by the Administrative Law Judge or the Industrial Commission, which would support the conclusion that

Mr. Hansen has not established that his permanent, total disability was caused by his industrial accident. The failure to award him permanent, total disability benefits cannot be and is not supported by the record as a matter of law.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Based upon the foregoing it is respectfully requested that this Court reverse the decision of the Industrial Commission and enter an Order awarding permanent, total disability benefits to Mr. Hansen based upon:

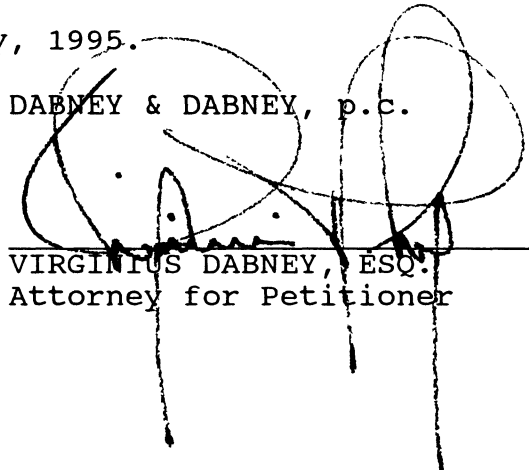
(1) the Findings of Fact entered by the Administrative Law Judge and adopted by the Industrial Commission;

(2) the uncontroverted evidence contained in the record;
and

(3) the lack of any substantive evidence or legal analysis whatsoever referenced in the Industrial Commission's Order allegedly supportive of its final agency action.

DATED this 17th day of January, 1995.

DABNEY & DABNEY, P.C.



VIRGILIUS DABNEY, ESQ.
Attorney for Petitioner

PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were mailed, postage prepaid, on this 17th day of January, 1995 to the following:

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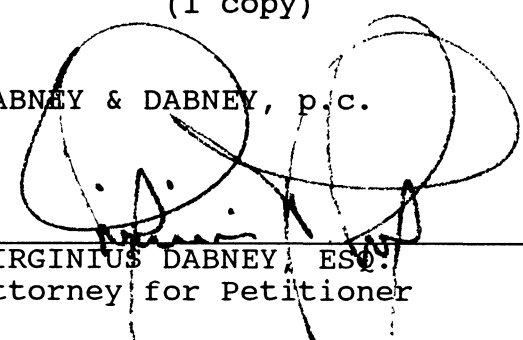
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VIRGINIUS DABNEY, ESQ.
Attorney for Petitioner

ADDENDUM

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

EXHIBIT B: Findings of Fact, Conclusions of Law and Order of
the Administrative Law Judge (March 18, 1993).

EXHIBIT C: Order Denying Motion for Review of the Industrial
Commission of Utah (May 13, 1994).

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.

INDUSTRIAL COMMISSION OF UTAH

Case No. 90001056

GERALD R. HANSEN,	*	
	*	
	*	
Applicant,	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
SALT LAKE CITY CORPORATION	*	AND ORDER
(Self-Insured) and EMPLOYERS	*	
REINSURANCE FUND,	*	
	*	
Defendants.	*	
	*	
* * * * *		

HEARING: Hearing Room 332, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah, on April
14, 1992 at 1:00 o'clock p.m. Said hearing was
pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was present and was represented by
Virginus Dabney, Attorney.

The defendant, Salt Lake City Corporation (Self-
Insured), was represented by Ray Montgomery,
Attorney.

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

This case involves a claim for permanent total disability
benefits related to a May 21, 1976 industrial accident resulting in
injuries to the applicant's right ankle and his left knee. At the
time of the hearing, the self-insured employer and the Employers
Reinsurance Fund argued that the applicant was not entitled to
permanent total disability benefits because the applicant's
disabling condition was his non-industrial pulmonary obstruction
and not the orthopedic problems that resulted from the industrial
accident. The Employers Reinsurance Fund pointed out that the
applicant's orthopedic problems have remained static in the 16
years since the industrial accident (or may have even improved),
while the pulmonary problems have become more symptomatic. The
applicant responded that he never returned to work after his trial
re-employment in 1977 and that he was awarded Social Security

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RE: GERALD HANSEN
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Disability with the onset date being the same date as the industrial accident date. The applicant also pointed out that he was 63 years old, had only a 9th grade education and had no transferable skills. He testified that he has not worked since 1977 because his right ankle and left knee, in combination, prevent him from doing the physical work that he has done for a living all his life.

Just prior to the hearing, the defendant/self-insured employer filed a hearing memorandum in which the employer argued the additional defense that the applicant was barred from pursuing a permanent total disability claim for having failed to file an application for hearing with the Industrial Commission within 3 years of the date of the last payment of compensation (last payment asserted by the employer to have been in January of 1983 with the application for hearing on the permanent total disability claim being filed in November of 1990). Counsel for the employer cited U.C.A. 35-1-99 for this statute of limitations. At hearing, counsel was provided with the citations for Mecham v. Industrial Commission, 692 P.2d 783 (Utah 1984) and Buxton v. Industrial Commission, 587 P.2d 121 (Utah 1978) as precedent for the proposition that there is no separate statute of limitations for permanent total disability claims once the initial filing requirements are met. However, counsel reasserted the U.C.A. 35-1-99 3-year statute of limitations defense post-hearing in a letter to the ALJ dated April 24, 1992, indicating that he had reviewed the cited cases and found they were distinguishable from the instant case. In the same letter, counsel cites the 1990 amendment to U.C.A. 35-1-98, which does specify a 6-year statute of limitations for permanent total disability claims.

Because the applicant has a history of a number of injuries and/or medical problems, after the hearing, the matter was referred to a medical panel to have the applicant's impairments rated and apportioned as to those existing prior to the industrial accident, those caused by the industrial accident and those developing subsequent to the industrial accident. The medical panel report was received on November 12, 1992 and was distributed to the parties on November 13, 1992, with 15 days allowed for objections. On November 30, 1992, counsel for the applicant submitted a letter to the ALJ requesting that the panel clarify when the applicant's pulmonary impairment occurred. The ALJ sent a letter to the panel chairman on December 1, 1992 requesting clarification and the

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chairman responded in a letter received at the Commission on January 4, 1993. This clarification report was distributed to the parties on January 6, 1993, with an additional 15 days allowed for objections.

On January 14, 1993, counsel for the applicant wrote the ALJ requesting a tentative finding of permanent total disability and requesting that the attorneys for the self-insured employer and the Employers Reinsurance Fund waive the statutorily mandated referral to the Utah State Office of Education Division of Rehabilitation. Counsel renewed this request in another letter received at the Commission on January 25, 1993. On February 1, 1993, the ALJ received a letter from counsel for the employer indicating that no waiver was being made, because the employer felt that the industrial injury did not cause the applicant to be permanently totally disabled (primarily because the majority of the applicant's impairment was related to the non-industrial pulmonary condition). On February 22, 1993, the ALJ also received a letter from the Employers Reinsurance Fund which indicates that the Fund agreed with the employer that the permanent total disability was not caused by the industrial injury. Counsel for the applicant responded to the letters of the employer and the Employers Reinsurance Fund in a letter dated February 23, 1993, indicating that even before the development of the pulmonary condition, the Social Security Administration had found the applicant disabled as of the date of the industrial accident.

On March 2, 1993, the ALJ wrote counsel for the employer and the Employers Reinsurance Fund requesting that they waive the statutory referral to the Division of Rehabilitation as logically it did not seem possible that the Division would attempt to offer rehabilitation to the applicant considering his age and long time unemployed status. The ALJ noted that she was not requesting a waiver of any of the defenses either party had asserted up to that point, merely just a waiver of the rehabilitation referral. On March 3, 1993 counsel for the Employers Reinsurance Fund provided the ALJ with a stipulation to waive the referral and on March 8, 1993 counsel for the employer provided the ALJ with a stipulation to waive the referral. On March 11, 1993, counsel for the applicant filed another letter reiterating that the pulmonary problems were never considered by the Social Security Administration in awarding the applicant disability benefits and indicating that the applicant was awarded the benefits based on orthopedic problems that included the right ankle and left knee problems that were caused by the 1976 industrial injury at issue.

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The matter was considered ready for a final order as of March 8, 1993 when the ALJ received the final stipulation to waive the rehabilitation referral from the employer.

FINDINGS OF FACT:

The applicant is a male who was 47 years old on the date of injury, May 21, 1976, and who had a wife and one minor child as of that date. In school, the applicant completed the 9th grade and did attend the 10th grade for a part of a year. The applicant testified that he can read, but stated that his writing was somewhat illegible. The first employment that he can recall was when he drove a pick-up truck for United Supply Delivery. Right after that, the applicant started to work as a glazier and did this for the rest of his employment life. The applicant was employed with Salt Lake City Corporation on the date of injury, having been hired by Salt Lake City on March 2, 1971. The applicant worked as a maintenance man and glazier at the Salt Lake City Airport. The applicant plowed runways in the winter using heavy equipment and mowed lawns during the spring and summer. He operated other heavy equipment as well, including front end loaders, backhoes and graders. The applicant also was an experienced glazier and had worked as a glazier for Granite School District from May 1965 through February 1971. Part of the applicant's responsibilities at the Salt Lake City Airport was installing glass. The applicant was earning \$950.00 per month as of the date of injury, or approximately \$219.40 per week. On May 21, 1976, the applicant was unloading a crate of glass when the crate tipped over and the glass fell on the applicant, primarily effecting his right lower extremity.

The applicant had surgery on his right ankle on May 21, 1976 and later had left knee surgery on September 8, 1976, which was determined to be related to the industrial accident as well. Almost immediately after the surgery on the left knee, the applicant was hospitalized again for a pulmonary embolus. Approximately mid-January 1977, the applicant returned to work for Salt Lake City Corporation, apparently doing his normal work duties. The applicant recalls returning to work in December of 1976, but the majority of the documentary evidence reflects a return to work on approximately January 13, 1977. On approximately February 4, 1977, the applicant was at work carrying a bundle of chain link fencing when his left knee and right foot gave way, causing him to fall to the ground. It is not clear whether or not

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the applicant actually caused any aggravation to his left knee or right foot when this occurred, but he did not return to work after that injury. The applicant stated that the combination of problems with his left knee and right ankle caused him to be unable to walk and stand for any time, caused inability to lift greater than 25 pounds and prevented him from bending and stooping. He testified that Salt Lake City told him that he was terminated because he was unable to perform the duties that were required of him at the Salt Lake City Airport. However, Salt Lake City presented a copy of a May 10, 1977 letter sent to the applicant indicating that he was to go to personnel to see what other jobs might be available to him. At hearing, it was determined that the letter was not sent to the applicant's proper home address and the applicant does not recall receiving the letter.

On May 24, 1977, Dr. E. Heyes, the orthopedic surgeon that performed both the ankle and knee surgery following the industrial accident, wrote a letter to Salt Lake City Corporation indicating that the applicant could return to light duty work operating a motor vehicle as of April 25, 1977. However, the applicant testified that he was unable to operate a clutch vehicle due to his left knee and therefore was only able to drive a vehicle with an automatic transmission. The applicant testified at hearing that he could not really remember the events that transpired in mid-1977 with respect to his failed return to work. He recalls only that he was unable to perform the work that he had performed all his life (presumably glass installation) because of the left knee and right ankle injuries and he recalls that there was no light duty available to him at the airport.

On June 13, 1977, the applicant applied for social security disability and on June 17, 1977, the applicant filed an application for hearing with the Industrial Commission because he felt that the impairment ratings he had been given were insufficient (Dr. Heyes had rated the ankle at 15% and the left knee at 5%, but his ratings were non-specific and thus it is unclear if he was rating the lower extremity or the whole person). From June of 1977 through May of 1978, the applicant was involved in litigating both his claim for social security disability benefits and his claim for additional workers compensation impairment benefits. During this time, the applicant got no treatment for either his left knee or his right ankle. However, he did begin to see Dr. W. Hebertson during this period, in October of 1977, for back pain.

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The Industrial Commission litigation:

A hearing was held on September 19, 1977. The matter was referred to a medical panel for additional input with respect to what impairments resulted due to the industrial accident. The medical panel report was issued on March 21, 1978 and rated the right foot at 12% whole person and the left knee at 5% whole person, for a total industrial impairment of 16% whole person. The panel concluded that the back problems and right elbow problems were not related to the May 21, 1976 industrial accident. The panel report indicates that the panel relied on office notes of Dr. E. Heyes dated prior to the industrial accident for their conclusion that the right elbow problems pre-existed the industrial accident. Those office notes are not included in the medical record exhibit (Exhibit A-1) presently being utilized for the instant litigation. On May 10, 1978, Findings of Fact, Conclusions of Law and Order were entered awarding the applicant temporary total compensation (TTC) from May 22, 1976 through January 12, 1977 and from February 4, 1977 through April 25, 1977 and awarding permanent impairment benefits based on the 16% whole person rated by the panel.

The Social Security Litigation:

Responding to the applicant's June 13, 1977 application for disability benefits, Social Security denied the application on September 29, 1977, stating that the applicant was capable of doing light work. On October 31, 1977, the applicant filed a request for reconsideration, indicating that his movement was so restricted that he could not work. He noted that the doctor had told him that he didn't want the applicant even looking for work and didn't want the applicant going to school until he was recovered. The applicant asserted that he could only walk with a cane and could do no lifting. On December 13, 1977, Social Security again denied benefits, indicating that the applicant could still do

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sedentary work and that his experience as a glazier resulted in him having transferable skills. On January 27, 1978, the applicant filed a request for hearing. On May 31, 1978, the applicant was awarded disability benefits based primarily on the right ankle and secondarily on the low back, with the left knee mentioned as an additional problem. Apparently, the Social Security ALJ relied a great deal on the testimony of a vocational expert who found that the applicant did not have the residual functional capacity to perform substantial gainful employment. The benefits awarded were to begin as of May 21, 1976.

From August of 1978 through August of 1979, the applicant saw Dr. Hebertson almost exclusively. Dr. Hebertson's office notes are brief and illegible and his periodic letters to Salt Lake City Corporation are very brief. Dr. Hebertson just lists the applicant's complaints in his letters and office notes and those include: right ankle pain, back pain, left knee pain, right elbow pain, and neck pain. Apparently, the only treatment provided by Dr. Hebertson was prescription medication. This medication included percodan or percocet (apparently at one point tylox was substituted), either dalmane, seconal, nebutal or halcion, valium, and varying combinations of rela, indocin or fiorinal. The frequency and amount of percodan or percocet was gradually increased during 1979 and 1980. By 1981, the amount prescribed was a regular and consistent 100 per month. This continued along with the other medications through 1988, when the the amount of percodan/percocet was reduced to 60 per month. The prescription refill notes continue in Dr. Hebertson's records through 1990.

In August of 1979, the applicant began alternating his visits with Dr. Hebertson with visits to Dr. Jonathon Horne. The applicant saw Dr. Horne for his left knee and right ankle and per numerous indications in Dr. Horne's notes, the applicant told Dr. Horne that he could not take medication for his knee and ankle due to an ulcer problem. Dr. Horne was thus under the impression that some other form of treatment was necessary. Dr. Horne performed a second knee surgery on November 12, 1979 and a second ankle surgery on March 10, 1980. The applicant saw Dr. Horne regularly, in between visits to Dr. Hebertson, through September of 1980. In September of 1980, Dr. Horne rated the applicant's impairment to the left knee and right ankle at 32% whole person (twice the amount

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rated by the previous medical panel) and this prompted the applicant to file a second application for hearing with the Industrial Commission. The matter was again referred to a medical panel which rated the applicant's impairment at a total of 14% whole person (actually less than the 16% rated by the original panel). Additional impairment benefits were denied in the final order (issued on December 31, 1982) but additional temporary total compensation was awarded, apparently related to the two additional surgeries performed by Dr. Horne.

From October 1980 through March of 1982, the applicant alternated between seeing Dr. Hebertson for his prescriptions and going to the VA Hospital for pulmonary related problems. In October of 1982, the applicant's Social Security disability award came up for review and the applicant represented to Social Security at that time that he needed 2 canes to walk, that he didn't drive, that he needed assistance bathing and that he was unable to do anything physical. In connection with the review, Dr. Horne issued a report in November of 1982 indicating that the applicant would need a right ankle arthrodesis within the next year or two because of increased arthritis in the foot joints. Dr. Horne noted that the applicant's foot was likely to get worse and that the applicant could only walk one block before he experienced severe pain in the foot. Dr. G. Zeluff did an examination and analysis of the applicant's condition in December of 1982, apparently at the request of Social Security. His report states that he felt the applicant's complaints were out of proportion to his examination findings. He noted that there was only minimal degenerative changes in the back, right ankle and left knee. Dr. Hebertson also did a report for Social Security in December of 1982 and just lists the applicant's complaints as: right chest soreness, low back pain, right foot pain, pain and swelling in the left knee, intrascapular pain, arthritic finger pain and headaches. Dr. Hebertson notes that he had done no range of motion testing, had taken no X-rays and had done no inquiry with respect to the applicant's activity restrictions.

On January 11, 1983, the applicant's Social Security benefits were discontinued. The decision to discontinue benefits notes that the applicant was able to do substantial gainful activity as of January of 1983. It was noted that the applicant's breathing capacity was "O.K." and that his loss of range of motion in the ankle, head and back was only moderate, with no loss of range of motion in the left knee. The arthritis in the left knee and right ankle was determined to be moderate and it was decided

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that the applicant could use his hands and arms without restriction. It was noted that the applicant could walk adequately and that he could perform light work. Transferable skills were found to exist. On March 7, 1983, the applicant filed a request for reconsideration and on October 26, 1983, benefits were reinstated. The reinstatement decision indicates that a combination of problems caused the applicant to be disabled. Specifically noted was the applicant's arthritis, secondary to his orthopedic problems. It was determined that the arthritis caused incapacitating pain. The applicant's residual functional capacity was determined to be at the sedentary level, with the applicant having no transferable skills. The applicant's advanced age, and his minimal education were also noted. Benefits were awarded continuous from May 21, 1976.

From March of 1983 through May of 1985, the applicant saw Dr. Hebertson primarily for his prescriptions, with only an occasional visit to Dr. Horne. In August of 1983, a Dr. R. Daynes wrote the applicant after examining him and stated that it was advisable for the applicant to reduce his daily percodan intake as well as his alcohol intake. Beginning in June of 1985, the applicant saw only Dr. Hebertson through August of 1987. The applicant continued to see Dr. Hebertson only through August of 1990, except that he had continuing visits to the VA Hospital for his pulmonary problems.

III. Specific Problems:

In order to make it easier for the medical panel to assess the impairments, the ALJ presented the panel with the following list of specific problems noted in the medical records, with a breakdown based on what problems surfaced prior to the industrial accident and which became apparent only after the industrial accident.

A. RIGHT ANKLE:

1. Prior to May 21, 1976 - no mention made in medical records

2. After May 21, 1976 -

- 5-21-76 SURGERY - by Dr. E. Heyes at St. Mark's Hospital
- Procedure: repair of laceration of posterior
deltoid ligament
- 2-4-77 slip and fall when applicant attempted return to
work - treated by Dr. Heyes
- 9-1-77 continuing problems described by Dr. D. Loken as
pain in the foot and ankle except if the
applicant walked on the lateral border of the
foot, with numbness in the heel, and swelling of
the ankle - rated at 10% (non-specific with
respect to lower extremity or whole man)
- 3-21-78 Industrial Commission medical panel rates the
ankle at 12% whole person
- 9-19-79 Dr. J. Horne attempts treating ankle with a short
leg walking cast - this apparently is helpful
with the applicant supposedly telling Dr. Horne
that he was able to run up or down stairs by
October of 1979
- 12-19-79 Dr. J. Horne tries using a leather brace to treat
the ankle and indicates that the applicant may
someday need a fusion - the ankle brace does not
improve the applicant's symptoms
- 2-11-80 Dr. J. Horne does an X-ray of the ankle and notes
increased bone chips
- 3-10-80 SURGERY - by Dr. J. Horne at Cottonwood Hospital
- Procedure: arthrotomy and excision of bone
spurs of fibula and talus - in follow-up, by 4-80
Dr. Horne notes that the applicant is able to
walk with a flat foot, but aching still is
present
- 6-7-80 CT scan done at Western Neurological Associates
is read to show the only abnormality to be soft
tissue calcifications just below the lateral
malleolus

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- 6-23-80 Dr. J. Horne notes that the ankle still swells and has pain and he rates the ankle at 30% of the lower extremity
- 6-28-82 Dr. J. Horne lists the diagnosis for the ankle as subtalar joint arthritis and mild recurrent spurs in the fibula/talar joint - he tries treating the arthritis with feldene
- 11-17-82 Industrial Commission medical panel rates the ankle at 19% of the lower extremity (8% whole person) and finds that a fusion may be necessary in the distant future
- 11-29-82 Dr. J. Horne tells Social Security that the applicant will need an arthrodesis of the ankle in the next year or two due to increased arthritis in the foot joints

B. LEFT ANKLE

- 1. Prior to May 21, 1976 - no mention made in medical records
- 2. After May 21, 1976 -
 - 11-24-84 the applicant is seen at Cottonwood Hospital for a left ankle sprain - Dr. Horne follows-up with at short leg cast and the injury is apparently resolved by December of 1984 when the cast is removed

C. LEFT KNEE

- 1. Prior to May 21, 1976 - no mention made in medical records

2. After May 21, 1976 -

- 9-8-76 SURGERY by Dr. E. Heyes at St. Mark's Hospital - Procedure: arthrostomy followed by arthrotomy and medical menisectomy
- 9-1-77 Dr. D. Loken describes continuing problems as numbness in the lateral aspect, with the knee giving out when weight is placed on it - it is noted that the applicant needs to hold on to something when he is going upstairs - Dr. Loken rates the knee at 5% of the lower extremity
- 3-21-78 Industrial Commission medical panel rates the knee at 5% whole person
- 11-12-79 SURGERY by Dr. J. Horne at Cottonwood Hospital - Procedure: 1) arthroscopy, 2) debridement of chondromalacia (patella), 3) debridement of chondromalacia (medial femoral condyle) 4) lateral fasciotomy - Post-operative diagnosis: severe chondromalacia of patella medial femoral condyle left knee, scarred superpatellar synovial band left knee
- 6-23-80 Dr. J. Horne notes that the knee still swells and is painful -he rates the knee at 20% of the lower extremity
- 11-17-82 Industrial Commission medical panel rates the left knee at 14% of the lower extremity or 6% whole person - the panel finds that a joint replacement may be necessary in the distant future

D. BACK

1. Prior to May 21, 1976 -

- 1966 per the applicant's testimony, he was involved in a car accident in 1966 which resulted in the need for 5 days of traction in the hospital (Cottonwood Hospita) - medical records for this incident are not included in the current medical record exhibit

4-7-72 Dr. J. Horne notes that the applicant fell in a grease pit and landed on his left hip - this caused the applicant to twist his low back and bruise the left iliac crest - diagnosed as a sprain/strain of the lumbosacral spine, doubted herniated nucleous pulposus - treated with percodan, robaxin and a lumbosacral corset - apparently resolved after several months of seeing Dr. Horne - unclear if this accident is the same one mentioned by the applicant at hearing in which he fell backwards and hit his low back (about 2 inches above the tailbone) on a concrete edge

2. After May 21, 1976 -

4-1-77 Dr. D. Loken notes that the back pain began about February or March of 1977 (around the time that the applicant fell with the chain link fence upon attempting to return to work after the industrial accident of 5-21-76) - Dr. Loken notes no neurological findings and no X-ray findings

9-27-77 Dr. E. Heyes writes Social Security and indicates that the applicant felt that the back pain he was having was due to his limping - D. Heyes notes that this is possible

10-17-77 Dr. Hebertson notes that the applicant may have twisted his back when he was carrying the chain link fence at work around February 4, 1977

1-78 through 5-78

Dr. Hebertson makes repeated notations that the applicant needs to have a myelogram - apparently this is never done

1-17-83 Dr. Horne notes that the applicant has had back pain on and off since the 1966 car accident - he notes no neurological findings and normal reflexes, range of motion, sensation and power - Dr. Horne's diagnosis is: 1) mild degenerative changes, narrowing at L5-S1, 2) mild herniation or possible herniation at L5-S1 and 3) chronic sprain/strain of lumbosacral spine

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5-1-85 the applicant sees Dr. Horne regarding back pain

E. RIGHT ELBOW:

1. Prior to May 21, 1976:

3-21-78 the medical panel report of this date indicates that the panel had office notes of Dr. E. Heyes varifying a right elbow condition treated by Dr. Heyes prior to the industrial accident - these office notes are not included in the present medical record exhibit

2. After May 21, 1976:

6-8-77 SURGERY by Dr. E. Heyes at St. Mark's Hospital - Procedure: exploration and partial division of annular ligament

9-1-77 Dr. D. Loken finds that the right elbow has minimal symptoms at this point

F. LEFT ELBOW:

1. Prior to May 21, 1976:

6-8-70 Dr. J. Horne notes that the applicant had a left elbow contusion while fishing

2. After May 21, 1976:

4-2-86 Dr. J. Horne notes that the applicant fell on his left elbow

G. PULMONARY PROBLEMS:

1. Prior to May 21, 1976:

- 3-14-72 a chest X-ray at St. Mark's Hospital (apparently taken while the applicant was an inpatient for an ulcer) shows some findings
- 5-21-76 while the applicant is hospitalized at St. Mark's Hospital for his right ankle industrial injury, the records note that the applicant had pneumonia in 1974 leaving right lower lobe scars - the records also note that the applicant is being followed by Dr. Abaunza for repeated shortness of breath

2. After May 21, 1976:

- 9-13-76 through 9-21-76 the applicant is hospitalized at St. Mark's Hospital for chest pain and a suspected pulmonary embolus and is treated by Dr. K. Ritchie with anti-coagulants
- 10-14-80 the applicant is seen at the VA Hospital for a 6-week cough - it is noted that the applicant is a 40-50 pack year smoker
- 10-22-80 through 11-13-80 the applicant is hospitalized at the VA Hospital for an abnormal mass seen on a chest X-ray - the applicant undergoes a number of procedures including: 1) a bronchoscopy on 10-24-80, 2) a rigid bronchoscopy and right middle and right lower lobectomy on 10-31-80 - the discharge diagnosis is: endobrachial hamartoma, right lower lobe
- 1-7-81 the applicant is seen at the VA Hospital for an upper respiratory tract infection

- 2-24-81 the applicant is seen at the VA Hospital for post-surgical thoracic pain which is treated with an intercostal block injection and elavil
- 3-22-81 the applicant is seen at the VA Hospital for chest wall pain
- 4-25-81 the applicant is seen at the VA Hospital for pleural effusion
- 5-81 the applicant is seen at the University Hospital Pain Clinic for difficulty managing the post-surgical chest pain
- 5-19-81 the applicant is seen at the VA Hospital for acute bronchitis
- 3-7-92 the applicant is seen at the VA Hospital for chest wall pain
- 11-17-82 the Industrial Commission medical panel finds that the applicant's respiratory problems are due to a tumor which may have been present as early as the date of injury (5-21-76) but is unrelated causally to the industrial accident
- 3-7-85 the applicant is seen at the VA Hospital as a result of upper respiratory tract infections with sharp chest pain in December of 1984 and January of 1985
- 12-22-87, 12-29-87 and 1-9-88 the applicant is seen at the VA Hospital for chronic obstructive pulmonary disease and/or chronic bronchitis
- 9-26-88 pulmonary fucntion tests are done at the VA Hospital and it is determined that the applicant has moderate obstruction
- 11-5-88 the applicnat is seen at the VA Hospital for chest pain - an EKG is read as normal - follow-ups occur on 11-22-88 and 11-28-88
- 1-24-89 the applicant is seen at the VA Hospital for an increase in his chronic shortness of breath

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3-7-89 pulmonary function tests are done at the VA Hospital and it is again determined that the applicant has moderate obstruction

3-29-89 through 4-5-89
the applicant is an in-patient at the VA Hospital due to chronic obstructive pulmonary disease - follow-up occurs on 5-30-89

6-10-89, 7-19-89, 7-21-89
the applicant is seen at the VA Hospital due to acute exacerbations of his chronic obstructive pulmonary disease

H. HEADACHES

1. Prior to May 21, 1976:

1947 the applicant is struck in the head by a hoist cable while unloading a boat while he was in the military - the applicant recalls that he had loss of consciousness, possibly for more than one day, and he develops periodic headaches thereafter

2. After May 21, 1976:

12-80 the applicant is seen at the VA Hospital for syncope, dizzy spells and nausea and an acoustic neuroma is ruled out - extensive testing occurs

8-14-87 the applicant is seen at the VA Hospital for headaches which is noted to be related to a head trauma in the service - it is noted that the headaches have increased over the last few years and that the headaches are associated with photophobia

9-3-87 the applicant is seen at the VA Hospital in follow-up on his headaches and elvavil is prescribed

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I. PSYCHIATRIC

1. Prior to May 21, 1976:

1964 the applicant is voluntarily committed to a hospital in California - the applicant testified that he was there for 2 months and received therapy and medication during his stay - per the applicant's testimony, he was depressed and had put his fist through a wall prior to his admission without provocation

2. After May 21, 1976:

5-81 though 7-81 the applicant is taught relaxation techniques at the VA Hospital to deal with his post-surgical chest pain -the applicant is also given amitriptylline

Briefly mentioned in the medical records or testimony were several things that developed prior to May 21, 1976. The applicant was hospitalized (at St. Mark's Hospital) in March of 1972 for an ulcer problem and Dr. W. Hebertson did a consult during this hospital stay for hand/arm numbness that the applicant was experiencing. The applicant also had some neck problems associated with the back injury that he had in the 1966 car accident. Dr. Hebertson lists neck complaints occasionally in his list of symptoms that he was treating with "drug therapy." The applicant also had some vision impairment prior to the industrial accident which the applicant contends is verified by the 4-6-76 report of Dr. Quinn that is attached to the top of the medical record exhibit. In addition, the applicant states that he feels that his hearing got gradually worse after he got out of the service and thus he feels that he had some hearing loss at the time of the industrial accident, but there are no medical records regarding his hearing dated prior to the industrial accident.

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The medical panel consisted of Dr. M. Thomas, a neurologist, Dr. W. Hess, an orthopedist and Dr. R. Burgoyne, a psychiatrist. The panel concluded that the applicant's whole person impairment was as follows: 12% for the right ankle (all attributable to the 5-21-76 accident), 5% for the left knee (all attributable to the 5-21-76 accident), 2% for the left ankle (all attributable to problems arising AFTER the industrial accident), 10% for the low back (2.5% attributable to problems existing BEFORE the industrial accident and 7.5% attributable to problems arising AFTER the industrial accident) and 1% for the applicant's macular degeneration (all attributable to problems arising AFTER the industrial accident). The panel found that the applicant had 0% permanent impairment related to the following problems noted in the medical records: right elbow status post division of annular ligament, somatoform pain disorder and thinking disorder (in remission), and headaches. Per the clarification report submitted by the panel at the ALJ's request on January 4, 1993, the applicant's 40% whole person impairment related to the pulmonary condition (status post-partial pneumonectomy for hamartoma with COPD, moderate impairment, stable) was wholly attributable to problems arising AFTER the industrial accident.

CONCLUSIONS OF LAW:

Preliminary Conclusions:

The ALJ adopts the findings of the medical panel with respect to the applicant's impairment ratings and the indications as to when the impairments arose. There have been no real objections to the panel findings and the panel ratings are not seriously contradicted by any other medical evidence. Therefore, the ALJ will use the panel ratings to assess the applicant's relative physical impairments and their impact on his permanent disability. The ALJ presumes that neither defendant (the employer nor the Employers Reinsurance Fund) contests a finding that the applicant is currently unable to return to any of his previous work and that he is currently not susceptible to rehabilitation. The ALJ bases this presumption on the fact that no evidence has been presented with respect to the applicant's ability to work at this time and on the fact that the defendants have waived a referral for a determination regarding the applicant's susceptibility to rehabilitation.

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Statute of Limitations:

The ALJ finds that the applicant is not barred from claiming permanent total disability benefits due to the 3-year filing requirement in U.C.A. 35-1-99, as it read on the date of the applicant's industrial injury, or due to the 1990 amendment to U.C.A. 35-1-98, as counsel for the employer has argued. The ALJ finds that the 1990 amendment to U.C.A. 35-1-98 (specifying a 6-year statute of limitations for permanent total disability claims) is not applicable, because that amendment was enacted 14 years after the applicant's date of injury. The employer has provided no explanation regarding why this amended version of U.C.A. 35-1-98 should apply to this case, and thus the ALJ will simply follow the well established principal that the law as of the date of injury is the correct law to apply. Although the ALJ finds that the U.C.A. 35-1-99 provision cited by counsel for the employer was the law at the time of the applicant's injury, the ALJ finds that case law narrowly limits the application of that 3-year filing requirement so that it does not bar the applicant's claim in this case.

The Mecham case cited at the beginning of this order is factually almost identical to this case. In that case, the applicant had a 1961 injury which was litigated at the Industrial Commission from 1964 through 1966. Pursuant to that litigation, the applicant was awarded benefits for a permanent partial impairment only. The last payment of compensation was made in December of 1964. It was not until December of 1982, that the applicant formally filed a claim for permanent total disability benefits with the Commission. The claim was dismissed by the ALJ because the claim was filed more than 3 years after the last payment of compensation. The Supreme Court reversed this ruling, noting that the applicant had met the 3-year filing requirement, because reports were filed just after the date of injury by the employer and the applicant's physicians. The Court found that the filing of these reports created jurisdiction for the Commission and that to determine if there was any further time limits for filing, one had to consult the particular statute dealing with the kind of benefits being claimed (in the case of permanent total disability benefits, the particular statute is U.C.A. 35-1-67). The Court found that U.C.A. 35-1-67 contained no separate time limit for filing a permanent total disability claim and thus the 18 year time lapse between the last payment of compensation and the 1982 filing with the Commission did not act as a bar to the applicant's permanent total disability claim.

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The ALJ does not understand why counsel for the employer feels that the Mecham case is not on point. One need only change the dates and the facts are almost identical. Absent some better explanation from counsel as to why he feels the Mecham case is inapplicable, the ALJ must conclude that the Mecham case is the ruling precedent on the applicability of the U.C.A. 35-1-99 3-year statute of limitations to the instant case. Based on the Court's ruling in Mecham, the applicant in the instant case met the 3-year filing requirement back in 1976 when reports were filed with the Commission and thus he does not need to again meet the requirement after the last payment of compensation in order to file a permanent total disability claim. Based on this ruling, the ALJ will proceed to decide the merits of the applicant's claim for permanent total disability benefits.

The Cause of the Permanent Total Disability:

The main issue in this case is whether the applicant's inability to work has been caused by the 1976 industrial injury. Counsel for the employer has cited the cases Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988) and Hodges v. Western Piling & Sheeting Co., 717 P.2d 713 (Utah 1986) for the proposition that an award of permanent total disability benefits can only be made where it is the industrial injury that causes the disability (as opposed to a situation where an industrial injury occurs, but some other factor or condition causes the disability). The ALJ agrees that these two cases stand for the proposition that there must be some causal link between the industrial injury and the inability to work.

Both the employer and the Employers Reinsurance Fund have argued that, currently, the applicant's most disabling condition is his respiratory condition. Certainly, the 40% whole person rating that the panel has assessed for that condition makes it clear that the respiratory impairment is the most significant impairment that the applicant has currently. However, in analyzing what is the cause of the permanent total disability, the proper time focus is not necessarily on the applicant's impairment status at the date of hearing, but rather his impairment status at the date that he discontinued working. Also, physical impairment alone is not the only relevant criteria for determining what is causing an individual to be unable to work. In determining whether an industrial injury causes permanent total disability, the ALJ finds

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that it is appropriate to look at the time at which the applicant discontinued working and then to determine what factor or factors (including, but not limited to physical impairment) caused the applicant to discontinue his/her working status.

Unfortunately, the absence of a separate statute of limitations for permanent total disability claims allows for significant time delays between the discontinuance of work and the filing of a permanent total disability claim. These time delays in turn cause the employer or carrier to be unable to perform any meaningful discovery with respect to the cause of the discontinuance of work. This certainly has occurred in this case. Because the applicant discontinued working in 1977 and did not file a permanent total disability claim until late 1991, information regarding what was happening in 1977 for the applicant is very sparse. In addition, in this particular case, this lack of information is compounded by the fact that the applicant recalls very little about why he discontinued working and what efforts he made, or could have made, to continue working in 1977. Finally, clearly the statute anticipates that there will be some efforts at rehabilitation once an injured employee determines he is unable to return to his prior employment because of a job injury. However, at this point, the defendants and the Division of Rehabilitation cannot even attempt to offer rehabilitation, because the applicant has developed a post-injury significant respiratory condition, because he is now nearly retirement age, and because he has not worked for the past 16 years.

Based on the foregoing concerns, the ALJ does not feel that she has very accurate information on which to make a determination as to what caused the applicant to discontinue working in 1977. Nevertheless, the ALJ must look at what information there is and make this determination. The applicant testified that his right ankle and left knee injuries on May 21, 1976 prevented him from doing the fairly heavy work that a glazier is required to perform. Therefore, when he was unable to return as a glazier for Salt Lake City Corporation in February 1977, and because he believed he could no longer perform this occupation, the applicant proceeded to apply for Social Security Disability benefits at that time. The ALJ feels that it is logical that the knee and ankle impairments prevented the heavy lifting, prolonged standing and stooping required in glass installation work. However, there is certainly some indication in the medical records that the applicant might have been able to perform some other kind of work, notwithstanding the knee and ankle impairments, in 1977. Dr. Heyes suggested that

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the applicant could be a driver and the applicant's initial applications for Social Security Disability benefits were denied because it was determined that he could still do light work. Whereas rehabilitation currently is certainly untenable, in 1977 the applicant might have been able to return to some kind of work had he sought or been offered some minimal new training.

Although logically it appears that return to work was not completely foreclosed as of 1977, it would be speculative to find that the applicant was susceptible to rehabilitation at that time. No concrete evidence has been presented to support this conclusion. Of course, as noted above, the long wait to file for permanent total disability benefits is the primary cause of the lack of concrete evidence on this point. However, regardless of the reason, there simply is insufficient evidence to show the applicant was susceptible to rehabilitation in 1977. In 1978, after hearing and testimony from a vocational expert, it was finally determined that the applicant was disabled and entitled to Social Security Disability benefits. It is interesting that the applicant was initially denied continued disability benefits in 1983 when the Social Security Administration reassessed the applicant's disability status. Once again, it was asserted that by the Social Security Administration that the applicant was capable of light work, but in the final analysis, the applicant again was determined disabled and his benefits were reinstated so as to be continuous from the date of the industrial injury on. Based on the minimal evidence available (primarily the Social Security Disability records), the ALJ would have to say that the preponderance of the evidence shows that the applicant has been disabled since the date of his industrial injury, May 21, 1976, to the present.

The only remaining question is whether the past 16 years of disability have been caused by the May 21, 1976 industrial accident. Once again, per the most relevant evidence available, the Social Security Disability records reflect that the disability benefits paid during this period were based on the applicant's orthopedic problems, including the right ankle and left knee impairment (solely attributable to the industrial injury per the medical panel) as well as the low back (wholly non-industrial per the panel). There is no way of knowing whether the non-industrial back impairment alone would have been a sufficient basis for awarding the Social Security benefits. Although it is not completely clear why the ankle and knee problems are always listed first on the determination synopsis sheets, it may be that these were found to be the more significant problems. The panel did rate

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the left knee and right ankle combined somewhat higher than the back. In addition, there is very little mention of the back problems in the medical records and very little treatment for the back during the past 16 years. More attention has been paid to the left knee and right ankle, per the medical records. Therefore, based on the scant information available, the ALJ finds that the primary cause of the applicant's disability during the past 16 years has been the left knee and right ankle impairments sustained in the May 21, 1976 industrial accident.

In conclusion, the ALJ finds that the applicant has been disabled since the industrial injury on May 21, 1976 and that the primary cause of this disability has been the industrial injuries to the left knee and right ankle that were sustained on May 21, 1976. As the defendants have waived any referral to the Division of Rehabilitation, the ALJ finds it is appropriate to make a final award of permanent total disability benefits associated with the May 21, 1976 industrial accident.

Benefits Due:

Prior Industrial Commission orders were entered on May 10, 1978, awarding the applicant \$6,737.15 in temporary total compensation and \$5,158.23 in permanent impairment benefits, and on December 31, 1982 awarding the applicant \$1,785.24 in additional temporary total compensation. The compensation rate used in both of those orders was \$148.77/week. The ALJ presumes that the amounts awarded in these orders, a total of \$13,680.61, constitutes the full payment that has been made by Salt Lake City Corporation on the May 21, 1976 industrial accident. Salt Lake City's liability for permanent total disability amounts to 312 weeks at the maximum rate for permanent total disability benefits in May 1976 (\$131.75), or a total of \$41,106.00. Of that amount \$27,425.39 remains to be paid (\$41,106.00 - \$13,680.61). That amount is accrued and due and payable in a lump sum, plus interest and less the attorney fees to be addressed below. The Employers Reinsurance Fund's liability for continuing benefits begins at the conclusion of the initial 312 weeks or on January 30, 1983 (using a start date February 5, 1977, the day following the last date of work). The Employers Reinsurance Fund is to pay benefits at \$131.75 per week, or at the minimum rate for permanent total disability applicable if that is higher.

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Attorney fees are based on the benefits generated by the attorney in the first 312 weeks per Commission rule R568-1-7, or \$27,425.39. Per the rule, the attorney fees are \$3,000.00 (20% of the first \$15,000.00 generated) + \$1,8631.81 (15% of the remainder if it is less than \$15,000.00, as it is in this case, \$12,725.39 x .15) or a total of \$4,863.81.

ORDER:

IT IS THEREFORE ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay the applicant, Gerald Hansen, permanent total disability benefits, at the rate of \$131.75 per week, for 312 weeks, or a total of \$41,106.00, for the permanent total disability resulting from the May 21, 1976 industrial accident. That amount is accrued and due and payable in a lump sum, less the \$13,680.61 paid to date, plus interest at 8% per annum, per U.C.A. 35-1-78, and less the attorney fees to be awarded below.

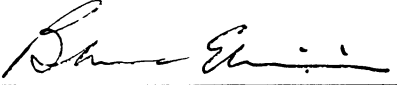
IT IS FURTHER ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay all medical expenses incurred as the result of the May 21, 1976 industrial accident; said expenses to be paid in accordance with the medical and surgical fee schedule of the Industrial Commission of Utah.

IT IS FURTHER ORDERED that the defendant, Salt Lake City Corporation (Self-Insured), pay Virginius Dabney, attorney for the applicant, the sum of \$4,863.81, plus the percentage of interest that is appropriate per R568-1-7, for services rendered in this matter, the same to be deducted from the aforesaid award to the applicant, and to be remitted directly to the office of Virginius Dabney.

IT IS FURTHER ORDERED that the Administrator of the Employers Reinsurance Fund shall prepare the necessary vouchers directing the State Treasurer, as Custodian of the Employers Reinsurance Fund to place the applicant, Gerald Hansen, on the Employers Reinsurance Fund payroll as of January 30, 1983, with payments to be made to him at the rate of \$131.75 per week, or at the minimum applicable rate if that is higher. Said payments to the applicant should continue for the remainder of his life or until further notice from the Commission. Accrued payments are due and payable in a lump sum, plus interest at 8% per annum, per U.C.A. 35-1-78.

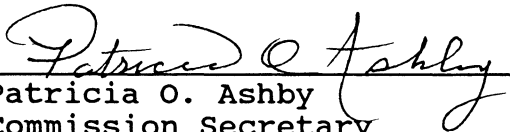
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IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not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

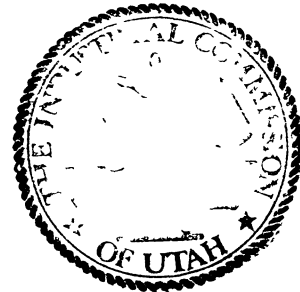


Barbara Elicerio
Administrative Law Judge

Certified by the Industrial Commission
of Utah, Salt Lake City, Utah, this
18th day of March, 1993.
ATTEST:



Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on March 18th, 1993, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Gerald Hansen. was mailed to the following persons at the following addresses, postage paid:

Gerald Hansen
1885 West Bowling Avenue
SLC, UT 84119

Virginus Dabney
Attorney at Law
350 South 400 East
SLC, UT 84111

Ray Montgomery
Attorney at Law
Salt Lake City Corporation
451 South State Street, #505
SLC, UT 84111

Erie V. Boorman
Administrator
Employers' Reinsurance Fund
160 East 300 South
SLC, UT 84114-6612

INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows
Wilma Burrows
Adjudication Division

THE INDUSTRIAL COMMISSION OF UTAH

GERALD R. HANSEN,

Applicant,

vs.

SALT LAKE CITY CORPORATION and
EMPLOYER'S REINSURANCE FUND,

Defendants.

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ORDER DENYING
MOTION FOR REVIEW

Case No. 90-1056

Mr. Hansen alleges that on May 21, 1976, he became totally and permanently disabled because of an industrial injury suffered while employed by Salt Lake City. The ALJ awarded permanent total disability benefits to Mr. Hansen. Salt Lake City then filed this Motion For Review, challenging the ALJ's decision on a number of different grounds. Because the Commission concludes that Mr. Hansen has failed to establish that his industrial accident in 1976 caused his now-claimed permanent total disability, the Commission does not specifically address the other points raised by Salt Lake City.

The Industrial Commission of Utah exercises jurisdiction over this Motion For Review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53 and Utah Admin. Code R568-1-4.M.

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in the ALJ's decision.

DISCUSSION AND CONCLUSIONS OF LAW

Under Utah's Workers Compensation Act, Mr. Hansen is entitled to permanent total disability compensation only if he proves that his 1976 injury caused his now-claimed permanent total disability. See Utah Code Ann. § 35-1-67(1); also Large v. Industrial Commission, 758 P.2d 954, 956 (Utah App. 1988). Other issues regarding Mr. Hansen's claim are not reached unless he first satisfies the threshold causation requirement. Zupon v. Industrial Commission, 860 P.2d 960 (Utah App. 1993).

In considering the issue of causation, the Commission notes the Social Security Administration's determination that Mr. Hansen was disabled from work after the 1976 injury. However, the

Commission does not know the underlying facts upon which the Social Security Administration made its award, whether those facts are supported by the evidence, or whether legal principles appropriate to workers' compensation were applied by the Social Security Administration in making its determination. For those reasons, the Commission does not place a great deal of reliance on the Social Security determination.¹

The Commission also notes that Mr. Hansen received a 16% permanent partial impairment rating as a result of the 1976 accident. That impairment rating has never changed since his industrial injury. It is insufficient to prove that the 1976 accident caused Mr. Hansen to be permanently and totally disabled.

Finally, the Commission notes that Mr. Hansen did not actually return to work after the 1976 accident. However, his failure to return to work may be attributable to reasons other than his injury and is therefore given little weight.

Other facts exist which indicate Mr. Hansen's 1976 accident did not cause permanent total disability. Mr. Hansen's treating physician released him to return to light duty work during 1977. Mr. Hansen filed two claims for workers' compensation benefits within a few years of the 1976 accident and thus was before the Commission twice, but neither time did he claim to be permanently and totally disabled. Shortly after his 1976 accident, Mr. Hansen began suffering pulmonary problems then other assorted medical problems, which have been appraised by a medical panel as much more significant and debilitating than his industrial injury.

As noted above, Mr. Hansen claims that his 1976 industrial injury caused permanent total disability as of 1976. The fact that Mr. Hansen waited 14 years to raise his claim does not reduce his burden of proof, or shift that burden of proof to his employer. Had he raised his claim earlier, both parties could have provided better evidence. Be that as it may, the Commission must make its decision based on the evidence that is available now. In view of the record before it, the Commission concludes that Mr. Hansen has failed to prove his 1976 industrial injury caused his now-claimed permanent total disability.

¹ While the current version of Utah Code Ann. § 35-1-67 specifically refers to the "sequential decision making process of the Social Security Administration", no such provision existed in Utah law at the time of Mr. Hansen's injury.

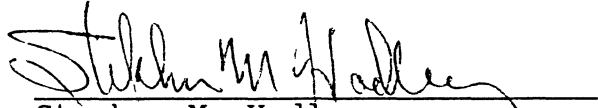
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Order Granting Motion For Review
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ORDER


Based on the foregoing, the Commission denies Mr. Hansen's claim for permanent total disability compensation. It is so ordered.

Dated this 3rd day of May, 1994.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTIFICATION OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a Request for Reconsideration with the Commission within 20 days of the date of this Order. Alternatively, any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

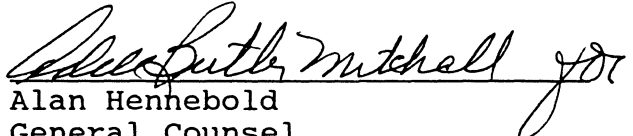
Gerald R. Hansen
Order Granting Motion For Review
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CERTIFICATE OF MAILING

I, Alan Hennebold, certify that I did mail by prepaid first class postage, except as noted below, a copy of the ORDER GRANTING MOTION FOR REVIEW in the case of GERALD R. HANSEN v. SALT LAKE CITY CORPORATION and EMPLOYER'S REINSURANCE FUND, Case Number 90-1056, on the 13th day of May, 1994, to the following:

Virginus Dabney
DABNEY & DABNEY
350 South 400 East
Salt Lake City, Utah 84111

Ray L. Montgomery
Assistant City Attorney
451 South State, Suite 505
Salt Lake City, Utah


Alan Hennebold
General Counsel
Industrial Commission of Utah

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