

1994

Hansen v. Industrial Commision of Utah : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GERALD R. HANSEN,

Petitioner,

vs.

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

Respondents.

APPELLATE CASE NO: 940349-CA

PRIORITY NO. 7

BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH

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FILED

Utah Court of Appeals

FEB 21 1995

Marilyn M. Branch
Clerk of the Court

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GERALD R. HANSEN,

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THE INDUSTRIAL COMMISSION OF
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TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF AUTHORITIES | ii |
| JURISDICTION OF THE COURT | 1 |
| ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW | 1 |
| DETERMINATIVE STATUTE | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENTS | 6 |
| ARGUMENT: | |
| POINT 1: HANSEN FAILED TO MARSHALL THE EVIDENCE ON MEDICAL CAUSATION | 7 |
| POINT 2: HANSEN FAILED TO PROVE MEDICAL CAUSATION. | 9 |
| POINT 3: BECAUSE HANSEN FAILED TO PROVE MEDICAL CAUSATION, IT WAS UNNECESSARY FOR THE INDUSTRIAL COMMISSION TO CONSIDER THE "ODD LOT" DOCTRINE | 13 |
| CONCLUSION | 14 |
| ADDENDUM | 15 |

TABLE OF AUTHORITIES

STATUTES

| | |
|--|-------|
| Utah Code Ann. §35-1-67 (1975) | 1, 2 |
| Utah Code Ann. §63-46b-16(1) (1993) | 1 |
| Utah Code Ann. §63-46b-16(4)(d) (1993) | 1 |
| Utah Code Ann. §63-46b-16(4)(g) (1993) | 1, 14 |
| Utah Code Ann. §78-2a-3(2)(a) (1992) | 1 |

CASES

| | |
|---|--------------|
| <u>Commercial Carriers v Industrial Commission,</u> 255 Utah Adv. Rep. 57 (Utah App. 1995) | 10, 12 |
| <u>Intermountain Health Care v. Industrial Commission,</u> 839 P.2d 841 (Utah App. 1992) | 7 |
| <u>Large v. Industrial Commission,</u> 758 P.2d 954 (Utah App. 1988) | 13 |
| <u>West Valley City v. Majestic Inv.,</u> 818 P.2d 1311 (Utah App. 1991) | 7 |
| <u>Willardson v. Industrial Commission,</u> 856 P.2d 371 (Utah App. 1993) | 7, 10 |
| <u>Zupon v. Industrial Commission,</u> 860 P.2d 960 (Utah App. 1993) | 1, 7, 10, 13 |

JURISDICTION

The Utah Court of Appeals has jurisdiction over Gerald R. Hansen's Petition For Review pursuant to Utah Code Ann. §78-2a-3(2)(a) (1992) and Utah Code Ann. §63-46b-16(1) (1993).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Does substantial evidence support the Industrial Commission's finding that Hansen failed to prove medical causation.

Standard of Review: Medical causation is a question of fact. Zupon v. Industrial Commission, 860 P.2d 960, 963 (Utah App. 1993). The Industrial Commission's findings of fact will not be disturbed if supported by substantial evidence in light of the whole record. Utah Code Ann. §63-46b-16(4)(g) (1993); King v. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993.)

2. In light of the Industrial Commission's finding that Hansen had not proved medical causation, did the Industrial Commission err in not applying the "odd-lot" doctrine to Hansen's claim.

Standard of Review: The application of the odd-lot doctrine is governed by §35-1-67 of the Utah Workers' Compensation Act ("the Act"). The Industrial Commission's determination on this point is a question of law, subject to correction of error by the Court of Appeals. Utah Code Ann. §63-56b-16(4)(d); King, 850 P.2d at 1286.

DETERMINATIVE STATUTORY PROVISIONS

Hansen's claim for permanent total disability compensation is governed by §35-1-67 of the Act, as effective on May 21, 1976, the date of Hansen's industrial accident. (See Exhibit A.)

STATEMENT OF THE CASE

Nature of the Case: Hansen asks the court to review the Industrial Commission's denial of his claim for permanent total disability compensation.

Proceedings Below: Hansen injured his ankle in 1976, while employed by Salt Lake City. Fourteen years later, on November 16, 1990, Hansen filed a claim for permanent total disability compensation. The ALJ ruled in Hansen's favor. (See Exhibit B.) Salt Lake City appealed to the Industrial Commission.

The Industrial Commission adopted the ALJ's findings of fact,¹ but denied Hansen's claim because he failed to prove his 1976 industrial injury was the cause of his current disability. (See Exhibit C.)

¹ The Industrial Commission adopted the ALJ's "findings of fact" set forth in the initial part of the ALJ's decision. (R. 173-188) The Industrial Commission did not adopt the ALJ's conclusions based on those facts. Instead, the Industrial Commission specifically substituted its own determination on the issue of causation. (R. 260-263)

Statement of facts: On May 21, 1976, while working as a glazier for Salt Lake City, Hansen injured his right ankle and left knee. (R. 173) That same day, he received medical attention to repair the lacerated right ankle. (R. 173; R.5) On September 8, 1976, he underwent surgery on his left knee. (R. 173; R.9)

Hansen returned to work during January 1977. (R. 173) On February 4, 1977, his right ankle and left foot "gave way," resulting in an additional period of disability. (R. 173) On April 25, 1977, his orthopedic surgeon released him to return to light duty work. (R. 174; R. 588) On May 19, 1977, Salt Lake City sent Hansen a letter asking him to come to the city's personnel office to determine what light duty work was available. (R. 174) Hansen did not receive the city's letter, which was incorrectly addressed. (R. 174) Hansen made no attempt on his own to contact the city or to return to work. (R. 174)

On June 17, 1977, with the assistance of an attorney, Hansen filed a claim with the Industrial Commission. He did not allege he was entitled to permanent total disability compensation. (R. 174; R. 1) The ALJ referred the medical aspects of the claim to a medical panel, which concluded that Hansen's ankle and knee injuries were due to his industrial accident and had resulted in a 16% whole person impairment. (R. 175; R. 9-12) On May 10, 1978, the ALJ awarded Hansen temporary disability compensation for the

period of his recovery and permanent partial disability compensation based on the 16% impairment rating. (R. 175; R. 13-15)

During November 12, 1979, Hansen again underwent surgery on his left knee, followed by surgery on his right ankle during March 1980. (R. 176) On September 22, 1980, he filed a second claim with the Industrial Commission, again with assistance of an attorney, asking for an increase to his previous award of permanent partial disability compensation. (R. 177; R. 2) Hansen did not allege he was permanently and totally disabled. (R. 177)

Once again, the medical aspects of Hansen's claim were referred to a medical panel. (R. 177; R. 18-24) The panel concluded that Hansen suffered a 14% whole person impairment as a result of his industrial injury. (R. 177; R. 20) On December 31, 1982, the ALJ awarded Hansen additional temporary disability compensation for the period of his recovery from the surgeries of November 1979 and March 1980. (R. 177; R. 25-29) The ALJ did not increase Hansen's permanent partial disability compensation. (R. 177; R. 28) Hansen's permanent partial disability compensation payments ended in 1983. (R. 28)

During June 1977, Hansen applied for social security disability benefits. (R. 174) He was initially denied, but later received benefits following a series of administrative appeals. (R. 175) During January 1983, his social security benefits were

again denied. (R. 177) After another series of administrative appeals, benefits were reinstated based on the finding that a combination of all Hansen's injuries and illnesses, both industrial and nonindustrial, prevented him from working. (R. 178; R. 851)

Hansen received periodic medical attention for the industrial injuries to his right ankle and left knee. He also received medical attention for nonindustrial headaches, chest soreness, back pain and pulmonary problems. (R. 178-187) Dr. Zeluff, one of the physicians who has examined Hansen, concluded that Hansen's complaints were "out of proportion" with the results of the doctor's examination. (R. 177; R. 891)

On November 16, 1990, Hansen filed a third claim with the Industrial Commission, alleging permanent total disability compensation dating back to 1977. (R. 34) For the third time, the medical aspects of Hansen's claim were referred to a medical panel. (R. 188; R. 93-94) The panel concluded that Hansen's industrial injury had remained stable, resulting in a 17% whole person impairment. (R. 188; R. 111-119) However, the panel found that Hansen suffered an additional 53% whole person impairment due to nonindustrial causes. Hansen's pulmonary problems resulted in a 40% whole person impairment. His back problems were rated as a 10% whole person impairment. Various other ailments contributed an additional 3% whole person impairment. (R. 188; R. 117)

On review, the Industrial Commission accepted the ALJ's statement of objective fact but substituted its own finding on the issue of medical causation. (R. 260-262; Appendix C) Specifically, the Industrial Commission found Hansen had not proved his industrial injury of 1976 was the cause of his now claimed permanent total disability. (R. 261; Appendix C) Because of its finding on the issue of medical causation, the Industrial Commission did not address the secondary issue of the odd-lot doctrine. (R. 260; Appendix C)

SUMMARY OF ARGUMENT

The issue of medical causation is the threshold issue in Hansen's claim for permanent total disability compensation. The Industrial Commission denied Hansen's claim because he failed to prove medical causation.

In challenging the Industrial Commission's decision, Hansen has failed to marshall all the evidence relating to medical causation. When the Court of Appeals examines the full record, it will find substantial evidence supporting the Commission's decision.

Finally, because Hansen did not prove medical causation, it was unnecessary for the Industrial Commission to consider the secondary issue of the "odd lot" doctrine.

ARGUMENT

POINT ONE

HANSEN FAILED TO MARSHALL THE EVIDENCE ON MEDICAL CAUSATION.

The Industrial Commission denied Hansen's claim for permanent total disability compensation because he failed to prove his now claimed permanent total disability "is medically the result of an exertion or injury that occurred during work-related activity." Willardson v. Industrial Commission, 856 P.2d 371, 375 (Utah App. 1993); cited with approval in Zupon, 860 P.2d at 963. The foregoing requirement is referred to as "medical causation."

Medical causation is an issue of fact, Zupon, *ibid*. Consequently, in challenging the Industrial Commission's determination, Hansen is obliged to marshall all the evidence on the issue. Intermountain Health Care, Inc. v. Board of Review, 839 P.2d 841 (Utah App. 1992). Hansen must then show that the evidence is inadequate to support the Industrial Commission's conclusion:

In order to properly discharge the duty of marshalling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.

West Valley v. Majestic Inv., 818 P.2d 1311, 1315 (Utah App. 1991).

In his brief, Hansen emphasizes evidence supporting his claim, but does not refer to the contrary evidence. The Industrial Commission therefore summarizes such evidence, as follows:

Following his industrial injury during May 1976, Hansen's own surgeon released him to light duty work on April 25, 1977. (R. 174; R. 588) Despite this release, Hansen did not contact his employer or make any effort to return to work. (R. 174) Later, in 1977 (R. 174; R. 1) and again in 1980 (R. 176; R. 2), Hansen filed claims for workers' compensation benefits with the Industrial Commission. Hansen was assisted by counsel in both instances, but in neither instance did he pursue a claim for permanent total disability compensation. (R. 174; R. 177)

Hansen has been awarded social security disability benefits, but on the basis of the combined effects of all his ailments, industrial and nonindustrial. (R. 178; R. 177)

In 1983, Dr. Zeluff concluded that Hansen's complaints were "out of proportion" with the results of Dr. Zeluff's examination. (R. 177; 891)

From 1980 until 1990, Hansen made no claim under the workers' compensation system that his work injury had caused him to be permanently and totally disabled. During the decade between 1980 and 1990, Hansen developed substantial nonindustrial health problems. (R. 188; R. 117) In particular, two lobes of his right

lung were removed (R. 121) He developed chronic obstructive pulmonary disease. (R. 120) Consequently, his nonindustrial pulmonary condition alone has been rated as a 40% impairment of the whole person. He also suffered back problems, rated as a 10% impairment, along with other ailments and injuries. When all these nonindustrial illnesses are added together, they constitute a 53%, compared to his industrial impairment of 17%. (R. 117) There is no independent verification of Hansen's claim that it is his industrial injury which causes his now claimed disability.

The foregoing facts support the Industrial Commission's conclusion that the 1976 industrial accident did not cause Hansen's now claimed disability. In omitting these facts from his brief, Hansen failed to discharge his duty to marshal all the evidence.

POINT TWO

HANSEN FAILED TO PROVE MEDICAL CAUSATION.

There is no question that Hansen was injured while working for Salt Lake City during May 1976, nor is there any question that he suffered a permanent partial impairment as a result of that industrial accident. He has already received the permanent partial disability compensation allowed by the Act for his injury.

While Hansen's industrial injury and partial impairment are admitted, he must nevertheless prove that his now claimed permanent

total disability "is medically the result of an exertion or injury that occurred during work-related activity." Willardson, 856 P.2d at 375; cited with approval in Zupon, 860 P.2d at 963. After reviewing the record, the Industrial Commission has determined that a preponderance of the evidence does not support Hansen's claim.

The Industrial Commission's determination on this issue of fact must be affirmed if supported by substantial evidence when viewed in light of the whole record. Utah Code Ann. §63-46b-16(4)(g). In Commercial Carriers v. Industrial Commission, 255 Utah Adv. Rep. 57, 59 (Utah App. 1995), the court defined "substantial evidence as follows:

Substantial evidence is more than a 'scintilla' of evidence, though less than the weight of the evidence. Substantial evidence is that quantum and quality of relevant evidence that will convince a reasonable mind to support a conclusion. (Citations omitted.)

The following facts constitute substantial evidence in support the Industrial Commission's decision.

Although Hansen claims he has been totally and permanently disabled since 1977, his conduct over the past 18 years indicates otherwise. In 1977 and again in 1980, he came before the Industrial Commission with claims related to his 1976 accident. He was represented by counsel in each instance, but he made no claim that he was permanently and totally disabled.

Until 1988, the Act did not impose time limits on claims of permanent total disability. Consequently, Hansen's permanent total disability claim allegedly arising from his 1976 accident is not time barred. Nevertheless, the fact that Hansen failed to allege permanent total disability in 1977 and 1980, when he was before the Industrial Commission with other claims, is evidence that he was not permanently and totally disabled at that time.

The fact that Hansen's own physician released him to light duty work in 1978 is further evidence that Hansen was not totally and permanently disabled. Hansen simply made no effort to return to work. Dr. Zeluff, evaluating Hansen in 1983, found his complaints to be out of proportion with any objective medical findings.

Hansen's impairment from his industrial injury has been remarkably stable since 1978. However, he suffers other health problems having nothing to do with his industrial injury. Part of a lung has been removed, he suffers from chronic obstructive pulmonary disease, has a bad lower back, deteriorating eyesight and left ankle problems. These nonindustrial conditions amount to a 53% whole person impairment.

The Social Security Administration has awarded disability benefits to Hansen. However, the award was based on all Hansen's ailments, industrial and nonindustrial. Consequently, the social

security award is not helpful in determining whether the test of medical causation has been met for purposes of awarding workers' compensation benefits.

Finally, there is no independent evidence, medical or otherwise, that Hansen's industrial accident is the cause of his now claimed disability. Hansen's own testimony is the only evidence in support of his claim. As pointed out above, Hansen's current testimony is inconsistent with his past conduct.

Based on the record, the Industrial Commission concluded that Hansen failed to prove that his 1976 industrial injury was the medical cause of his now claimed disability. In reaching its conclusion, the Industrial Commission reversed the ALJ's decision. It is the Industrial Commission which is the ultimate fact finder in workers' compensation claims. Commercial Carriers v. Industrial Commission, 255 Utah Adv. Rep. 57, 59 (Utah App. 1995).

In summary, Hansen bears the burden of proving medical causation. After viewing the record as a whole, the Industrial Commission determined that Hansen failed to discharge his burden of proof. The Industrial Commission's determination is supported by substantial evidence in the record.

POINT 3

**BECAUSE HANSEN FAILED TO PROVE MEDICAL CAUSATION,
IT IS UNNECESSARY TO CONSIDER THE APPLICATION OF
THE "ODD LOT" DOCTRINE TO HIS CLAIM.**

The "odd-lot" doctrine is an accepted landmark of Utah workers' compensation law. It serves the important purpose of providing compensation to workers who may not be totally incapacitated as a result of their industrial injuries, but who are unlikely to find work in a competitive labor market.

While the odd-lot doctrine is a well established part of workers' compensation law, the analysis of claims for permanent total disability compensation does not begin there. First, an applicant for permanent total disability compensation must prove medical causation:

For the odd-lot doctrine to apply, the Commission must first determine there is medical causation between the petitioner's . . . industrial accident and his now claimed *permanent total* disability.

Zupon, 860 P.2d at 963.

In this case, the Industrial Commission found that Hansen did not establish medical causation. Consequently, the Industrial Commission did not reach the secondary issue of the "odd-lot" doctrine. The Industrial Commission's decision in this regard is consistent with the analysis applied by the Court of Appeals in various appellate decisions. Zupon, 860 P.2d 960; Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988).

CONCLUSION

The Industrial Commission denied Hansen's application for permanent total disability compensation because he did not prove his industrial accident was the medical cause of his disability. In reaching its decision, the Industrial Commission discharged its obligation as the ultimate finder of fact and properly allocated the burden of proof on the issue of medical causation to Hansen.

Under Utah Code Ann. §63-46b-16(4)(g), the Industrial Commission's finding of no medical causation will be affirmed if supported by substantial evidence. Although Hansen failed to marshall the evidence, the Industrial Commission has set forth in this brief the substantial evidence which supports its decision.

Finally, because Hansen failed to prove the threshold issue of medical causation, it is unnecessary to consider secondary issues such as the "odd-lot" doctrine.

The Industrial Commission's decision in this matter is supported by the evidence and is a proper application of the Utah Workers' Compensation Act. The decision should be affirmed.

Dated this 21st day of February, 1995.

By _____
Alan Hennebold, General Counsel
The Industrial Commission of Utah

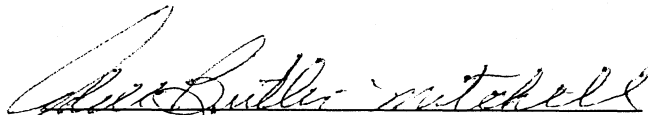
CERTIFICATE OF MAILING

I certify that two copies of the BRIEF OF RESPONDENT in the matter of GERALD R. HANSEN, Case No. 940349-CA, was mailed, first class, postage prepaid this 21st day of February, 1995, to the following:

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Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

ADDENDUM

EXHIBIT A

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.

EXHIBIT B

INDUSTRIAL COMMISSION OF UTAH

Case No. 90001056

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|------------------------------|---|--------------------|
| 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

ORDER
RE: GERALD HANSEN
PAGE 2

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

00171

6-277

ORDER
RE: GERALD HANSEN
PAGE 3

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.

00172

ORDER
RE: GERALD HANSEN
PAGE 4

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

00173

ORDER
RE: GERALD HANSEN
PAGE 5

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.

00474

ORDER
RE: GERALD HANSEN
PAGE 6

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

00125
00125

ORDER
RE: GERALD HANSEN
PAGE 7

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 dalmene, 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 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

11/00176

ORDER
RE: GERALD HANSEN
PAGE 8

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

00177

ORDER
RE: GERALD HANSEN
PAGE 9

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

00178

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
malleous

ORDER
RE: GERALD HANSEN
PAGE 11

- 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: arthroostomy 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 nucleus 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

ORDER
RE: GERALD HANSEN
PAGE 14

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

ORDER
RE: GERALD HANSEN
PAGE 17

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

00142
00186

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.

ORDER
RE: GERALD HANSEN
PAGE 19

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.

00144⁰⁰¹⁸⁸

ORDER
RE: GERALD HANSEN
PAGE 20

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.

0044
00189

ORDER
RE: GERALD HANSEN
PAGE 21

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

00145

ORDER
RE: GERALD HANSEN
PAGE 22

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

ORDER
RE: GERALD HANSEN
PAGE 23

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

00132

ORDER
RE: GERALD HANSEN
PAGE 24

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.

00493

ORDER
RE: GERALD HANSEN
PAGE 25

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 Virginus 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 Virginus 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.

0019150

ORDER
RE: GERALD HANSEN
PAGE 26

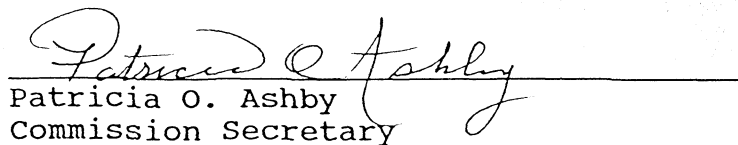
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.



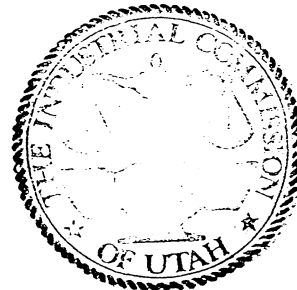
Barbara Elicerio
Administrative Law Judge

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

ATTEST:



Patricia O. Ashby
Commission Secretary



001951

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

Virginius 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/nny
Wilma Burrows
Adjudication Division

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00196

EXHIBIT C

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.

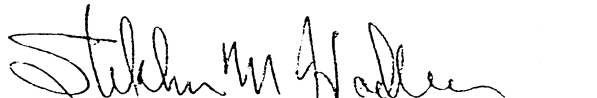
Gerald R. Hansen
Order Granting Motion For Review
Page Three


ORDER

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

Dated this 13th 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.

00260

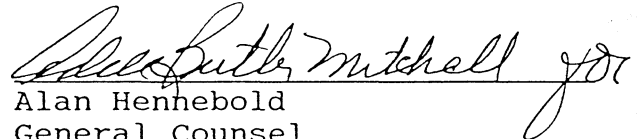
Gerald R. Hansen
Order Granting Motion For Review
Page Four

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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