

1994

Gerald R. Hansen v. The Industrial Commision of Utah; Salt Lake City Corporation, Employer's Reinsurance Fund : Brief of Respondent

Utah Court of Appeals

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STATE OF UTAH

Marilyn M. Branch
Clerk of the Court

UTAH COURT OF APPEALS

STATE OF UTAH

GERALD R. HANSEN,)	
)	
Petitioner,)	
)	
vs.)	Case No. 94049-CA
)	
THE INDUSTRIAL COMMISSION OF)	
UTAH; SALT LAKE CITY)	Priority No. 7
CORPORATION; and EMPLOYER'S)	
REINSURANCE FUND,)	
)	
Respondents.)	
)	

BRIEF OF RESPONDENT SALT LAKE CITY CORPORATION

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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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this appeal from a final Order of the Industrial Commission (the "Commission") pursuant to Sections 35-1-82.53, 35-1-86, 63-46b-16 and 78-2a-3 of the Utah Code Ann.

STATEMENT OF THE ISSUE

The following issues are presented for review:

(1) Is there substantial evidence to support the Commission's finding that Petitioner failed to establish, by a preponderance of the evidence, medical causation between his industrial accident on May 21, 1976 and his now claimed permanent total disability?

(2) Did the Commission err in not applying the "odd lot doctrine" to Petitioner's claim because it found no medical causation?

STANDARD OF REVIEW

A. STANDARD OF REVIEW OF FINDING NO MEDICAL CAUSATION.

Because these proceedings commenced after January 1, 1988, the review by this Court is governed by the Utah Administrative Procedures Act (UAPA).¹

The Commission determined that Petitioner Gerald Hansen ("Petitioner") failed to prove, by a preponderance of the evidence, that his May 21, 1976 industrial injury medically

¹Sections 63-46b-1 et seq. of the Utah Code Annotated.

caused his now claimed permanent total disability.² This Court has consistently held that ". . . medical causation is an issue of fact . . .".³ In reviewing a factual finding, this Court will disturb it only if it is not supported by substantial evidence when viewed in light of the whole record before the Court.⁴ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁵

Petitioner necessarily has the burden of marshalling all of the evidence showing that, despite the facts, and in light of the conflicting or contradictory evidence, the Commission's findings are not supported by substantial evidence.⁶

B. STANDARD OF REVIEW OF FINDING THAT THE "ODD LOT DOCTRINE" DOES NOT APPLY.

Since the interpretation of the "odd lot doctrine", and its applicability to Petitioner's claim, is a question of law, this

²R. at 260-263. The decision of the Administrative Law Judge dated March 3, 1993 is attached as Appendix "A". The Commission's decision dated May 13, 1994 is attached as Appendix "B".

³Chase v. Industrial Commission, 872 P.2d 475 (Utah App. 1994).

⁴Commercial Carriers and Old Republic Insurance v. Industrial Commission of Utah, 255 Utah Adv. Rep. 57 (Utah App. 1994); a copy of Commercial Carriers and Old Republic Insurance v. Industrial Commission of Utah, supra, is attached as Appendix "C".

⁵Chase v. Industrial Commission, supra.

⁶King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993).

Court's review is under a correction of error standard, giving no deference to the Commission's decision.⁷

**STATUTES, ORDINANCES, RULES AND REGULATIONS
WHOSE INTERPRETATION IS DETERMINATIVE**

This case does not involve the interpretation of a statute, ordinance, rule or regulation. Rather, the issue presented on appeal pertains to the Commission's factual finding of no medical causation. The following statutes and rules are, however, controlling in this case:

1. Section 35-1-67, Utah Code Ann. (1975).⁸
2. Section 35-1-82.53, Utah Code Ann.⁹
3. Section 63-46b-16, of Utah Code Ann.¹⁰

STATEMENT OF THE CASE

On May 21, 1976, Petitioner, while employed by Salt Lake City Corporation (the "City"), was unloading a crate of glass when the crate tipped over and fell on him injuring his right lower extremity. After undergoing surgery for repair of the lacerations on his right ankle, deltoid ligament and left knee, Petitioner returned to work for the City in mid-January 1977.

On February 4, 1977, Petitioner was at work carrying chainlink fencing when his left knee and right foot gave way causing him to fall to the ground. After February 4, 1977,

⁷King v. Industrial Commission, supra at 1285.

⁸Appendix "D" attached.

⁹Appendix "E" attached.

¹⁰Appendix "F" attached.

Petitioner never returned to work for the City.

Petitioner cannot recall why he discontinued working for the City and what efforts he made or could have made to continue working in 1977. Interestingly, on May 24, 1977, the orthopedic surgeon, who performed Petitioner's ankle and knee surgery, wrote a letter to the City stating that Petitioner could return to light duty work operating a motor vehicle.

On June 17, 1977, Petitioner filed a claim for worker's compensation benefits with the Commission. A hearing was held before an Administrative Law Judge (ALJ) on September 19, 1977. The ALJ referred the matter to a medical panel. The medical panel report issued on March 21, 1978 stated that Petitioner had a total impairment related to his industrial accident of 16% whole person. Petitioner did not, however, at any time during the 1978 proceeding, claim permanent total disability.

In 1982, Petitioner filed a second Application for Hearing with the Commission. The matter was again referred to a medical panel which rated Petitioner's physical impairment related to the 1976 accident at 14% whole person. The Commission denied permanent partial impairment benefits to Petitioner because the 14% rating was less than the 16% rating he received and was compensated for in 1977. The 1982 medical panel also found that Petitioner had pulmonary (respiratory) problems due to a tumor which was unrelated causally to the industrial accident on May 21, 1976. At no time during the 1982 proceeding before the Commission did Petitioner claim permanent total disability.

In late 1991, fifteen years after the 1976 industrial accident, Petitioner filed a claim for permanent total disability with the Commission. The matter was again referred to a medical panel. The medical panel found that Petitioner had a 17% whole person impairment related to his 1976 industrial accident. The medical panel also determined that Petitioner had a 40% whole person impairment related to his pulmonary (respiratory) condition which was not attributable to the industrial accident.

The ALJ, relying primarily upon the Social Security Administration's determination that Petitioner was permanently disabled, ruled that his industrial injury on May 21, 1976 caused his permanent total disability.

On Motion for Review, the Commission incorporated the ALJ's findings of facts, however, it determined that Petitioner failed to demonstrate, by a preponderance of the evidence, that his industrial injury on May 21, 1976 caused his now claimed permanent total disability.

Petitioner filed an appeal with this Court seeking a reversal of the Commission's determination.

STATEMENT OF FACTS

The following is a statement of the facts relevant to the Commission's decision:

1. On May 21, 1976, Petitioner, while employed by the City as a maintenance man and glazier, was unloading a crate of glass when the crate tipped over and fell on him injuring his lower

right extremity.¹¹

2. Petitioner was 47 years old on the date of the industrial accident.¹²

3. Petitioner had surgery on his right ankle on May 21, 1976.¹³

4. On September 8, 1976, Petitioner had left knee surgery which was determined to be related to the 1976 industrial accident.¹⁴

5. In mid-January 1977, Petitioner returned to work with the City performing his normal work duties.¹⁵

6. On or about February 4, 1977, Petitioner, while at work for the City, was carrying a bundle of chainlink fencing when his left knee and right foot gave way causing him to fall to the ground.¹⁶

7. It is not clear whether or not Petitioner actually caused any aggravation to his left knee on February 4, 1977 but he did not return to work after that incident.¹⁷

8. Petitioner did not recall why he discontinued working

¹¹R. at 173.

¹²R. at 173.

¹³R. at 173.

¹⁴R. at 173.

¹⁵R. at 173.

¹⁶R. at 173.

¹⁷R. at 174.

for the City and what efforts he made or could have made to continue working in 1977.¹⁸

9. There is no information as to whether Petitioner was susceptible to rehabilitation in 1977.¹⁹

10. On May 24, 1977, Petitioner's orthopedic surgeon, who performed his ankle and knee surgeries, advised the City and Petitioner, in writing, that Petitioner could return to light duty work as of April 25, 1977.²⁰

11. Petitioner never returned to work after February 4, 1977.²¹

12. On June 13, 1977, Petitioner applied for Social Security disability benefits.²²

13. On June 17, 1977, Petitioner filed an Application for worker's compensation benefits with the Commission.²³

14. From June of 1977 through May of 1978, Petitioner received no treatment for either his left knee or his right ankle. He did, however, receive medical care for back pain.²⁴

15. A hearing was held before an ALJ on September 19,

¹⁸R. at 191.

¹⁹R. at 192.

²⁰R. at 174, 191, 192.

²¹R. at 174.

²²R. at 174.

²³R. at 174, 175.

²⁴R. at 174.

1977.²⁵

16. The matter was referred to a medical panel. The medical panel report, issued on March 21, 1978, recommended an impairment rating for Petitioner's right foot and left knee at 16% whole person.²⁶

17. On May 10, 1978, the ALJ issued Findings of Fact, Conclusions of Law and Order awarding Petitioner temporary total compensation and permanent partial impairment benefits based on the 16% whole person rating. There was no claim or award for permanent total disability.²⁷

18. On September 29, 1977, the Social Security Administration denied Petitioner's claim for disability benefits stating that Petitioner was capable of doing light duty work.²⁸

19. On October 31, 1977, Petitioner filed a request for reconsideration with the Social Security Administration.²⁹

20. On December 13, 1977, the Social Security Administration again denied disability benefits to Petitioner.³⁰

21. On January 27, 1978, Petitioner filed a request for

²⁵R. at 175.

²⁶R. at 175.

²⁷R. at 175.

²⁸R. at 175, 176.

²⁹R. at 175, 176.

³⁰R. at 175, 176.

hearing on the denial of his Social Security benefits.³¹

22. On May 31, 1978, after a hearing, the Social Security Administration awarded permanent disability benefits to Petitioner retroactive to May 21, 1976.³²

23. From August 1978 through August of 1979, Petitioner received treatment for various medical problems including right ankle pain, back pain, left knee pain, right elbow pain and neck pain.³³

24. On November 12, 1979, Petitioner underwent a second knee surgery.

25. On March 10, 1980, Petitioner had surgery on his ankle.

26. In 1982, Petitioner filed another application with the Commission requesting additional worker's compensation benefits.³⁴

27. Petitioner, in his second application, did not claim permanent total disability.³⁵

28. The ALJ again referred the matter to a medical panel which rated Petitioner's impairment related to his 1976 industrial accident at 14% whole person which was less than the

³¹R. at 175, 176.

³²R. at 176.

³³R. at 176.

³⁴R. at 177.

³⁵R. at 177.

16% rating by the medical panel in 1977.³⁶

29. The ALJ ruled that Petitioner was not entitled to any additional benefits, other than temporary total compensation, since his 1982 permanent partial impairment rating due to his 1976 industrial accident was less than the rating given to him in 1977.³⁷

30. The 1982 medical panel also found that Petitioner had pulmonary (respiratory) problems that were due to a tumor which may have been present as early as the date of the 1976 industrial injury but was unrelated causally to the industrial accident.³⁸

31. From October 1980 through March of 1982, Petitioner was seeking care at the VA Hospital for pulmonary related problems.³⁹

32. At the time, Petitioner was a 40-50 pack per year smoker.⁴⁰

33. In November 1982, a medical report was issued indicating that Petitioner had increased arthritis in his foot joints.⁴¹

34. In December 1982, a medical report stated that Petitioner's complaints were out of proportion to the examination

³⁶R. at 177.

³⁷R. at 177.

³⁸R. at 185.

³⁹R. at 184.

⁴⁰R. at 184.

⁴¹R. at 177.

findings.⁴²

35. On January 11, 1983, Petitioner's Social Security benefits were discontinued because it was determined that Petitioner could do other work.⁴³

36. On March 7, 1983, Petitioner filed a Request for Reconsideration with the Social Security Administration and on October 26, 1983, his Social Security benefits were reinstated.⁴⁴

37. From 1981 through the present, Petitioner received continual care from the VA Hospital for chronic obstructive pulmonary disease.⁴⁵

38. In late 1991, Petitioner filed a claim for permanent total disability.⁴⁶

39. After a hearing, the ALJ referred the Petitioner's claim to a medical panel.⁴⁷

40. The medical panel found that Petitioner had the following whole person impairments:

- a. 17% for the right ankle and the left knee which is attributable to the 1976 accident;
- b. 2% for the left ankle, 10% for the low back and 1%

⁴²R. at 177.

⁴³R. at 177.

⁴⁴R. at 178.

⁴⁵R. at 178 and 185, 186.

⁴⁶R. at 191.

⁴⁷R. at 171.

for the macular degeneration all of which are not attributable to the 1976 accident; and

c. 40% for the pulmonary (respiratory) condition which is not attributable to the 1976 accident.⁴⁸

39. On March 18, 1993, the ALJ issued her Findings of Fact, Conclusions of Law and Order stating the following:

a. The 40% whole person rating that the medical panel assessed for Petitioner's (pulmonary) respiratory condition makes it clear that the condition is the most significant impairment that Petitioner has currently.⁴⁹

b. Due to the significant time delay between the Petitioner's discontinuance of work and his filing of the permanent total disability claim, information regarding what was happening in 1977 for the Petitioner is very "sparse".⁵⁰

c. Petitioner recalls very little about why he discontinued working and what efforts he made, or could have made, to continue working in 1977.⁵¹

d. The ALJ does not feel she has very accurate information on which to make a determination as to what caused the Petitioner to discontinue working in 1977.⁵²

⁴⁸R. at 188.

⁴⁹R. at 190.

⁵⁰R. at 191.

⁵¹R. at 191.

⁵²R. at 192.

e. Due to the significant time delay between the Petitioner's discontinuance of work with the City and his filing of a permanent total disability claim, the City and the Division of Rehabilitation need not offer rehabilitation in 1991 because Petitioner has developed a post-injury significant pulmonary (respiratory) condition, is now nearly retirement age and has not worked for the past sixteen years (1977 to 1993).⁵³

f. There is indication in the medical records that the Petitioner might have been able to perform some kind of work in 1977, notwithstanding the knee and ankle impairments.⁵⁴

g. In 1977, the Petitioner might have been able to return to some kind of work had he sought or been offered some minimal new training.⁵⁵

h. There is a lack of evidence, due to the delay in filing the permanent total disability claim, as to whether Petitioner was susceptible to rehabilitation.⁵⁶

i. Based primarily on the Social Security disability records, the ALJ determines that the Petitioner has been disabled since the date of his 1976 industrial injury to the

⁵³R. at 191. The decision of ALJ was issued in 1993.

⁵⁴R. at 191, 192.

⁵⁵R. at 192.

⁵⁶R. at 192.

present.⁵⁷

j. The ALJ finds that the primary cause of the Petitioner's permanent total disability during the past sixteen years has been the left knee and right ankle impairments sustained in the May 21, 1976 industrial accident.⁵⁸

40. On May 13, 1994, the Commission issued an Order denying Petitioner's claim for permanent total disability stating the following:

a. The Commission adopts the Findings of Fact set forth in the ALJ's decision.⁵⁹

b. The Commission does not know: (1) the underlying facts upon which the Social Security Administration made its award; (2) whether those facts are supported by the evidence; and (3) whether it applied the appropriate legal principles required by the Utah Worker's Compensation laws in making its determination. The Commission, therefore, does not place its primary reliance on the Social Security determination.

c. In 1977, Petitioner received a 16% permanent partial impairment rating for his industrial injuries sustained in a 1976 accident. The 16% impairment rating

⁵⁷R. at 192.

⁵⁸R. at 193.

⁵⁹R. at 260.

attributable to his 1976 industrial accident remained virtually unchanged in sixteen years although his physical impairment due to non-industrial conditions, such as his pulmonary (respiratory) problems, increased.⁶⁰

d. Petitioner did not actually return to work with the City after 1977. His failure, however, to return to work may be attributable to reasons other than his injury and is, therefore, given little weight.⁶¹

e. Petitioner's treating physician released him to return to light duty work in 1977.⁶²

f. Petitioner filed two separate claims for worker's compensation benefits within a few years of the 1976 accident, but at no time during the proceedings before the Commission did he claim to be permanently totally disabled.⁶³

g. Shortly after his 1976 accident, Petitioner began suffering pulmonary (respiratory) and other assorted medical problems, which had been appraised by a medical panel as much more significant and debilitating than his industrial injury.⁶⁴

⁶⁰R. at 261.

⁶¹R. at 261.

⁶²R. at 261.

⁶³R. at 261.

⁶⁴R. at 261.

41. In view of the record before it, the Commission ruled that Petitioner had failed to prove, by a preponderance of the evidence, that his 1976 industrial injury medically caused his now claimed permanent total disability.⁶⁵

SUMMARY OF ARGUMENT

The City argues that the Commission correctly determined that Petitioner failed to meet his burden of demonstrating medical causation between an accident on May 21, 1976 and his now claimed permanent total disability. There is substantial evidence in the record to support the Commission's determination, including the following:

1. There is no evidence to indicate why Petitioner discontinued his employment with the City in 1977. A medical report prepared by Petitioner's physician in 1977 stated that he could do light duty work.

2. Petitioner filed claims for worker's compensation benefits in 1977 and 1982. In both proceedings, he at no time, claimed permanent total disability.

3. The permanent partial disability attributable to Petitioner's industrial accident in 1976 remained virtually unchanged for the fifteen years prior to Petitioner's application for permanent total disability.

4. Petitioner's subsequent pulmonary (respiratory) condition, which is not attributable to the industrial accident,

⁶⁵R. at 261.

caused Petitioner's permanent total disability.

5. The ALJ should not have relied primarily on the Social Security Administration determination regarding Petitioner's permanent total disability.

Further, the City argues that the "odd lot doctrine" does not apply because the Commission properly found no medical causation between Petitioner's 1976 industrial injury and his now claimed permanent total disability.

Finally, the City argues that it is the Commission, not the ALJ, who is the ultimate fact finder. The Commission's findings are of sufficient detail that this Court can discern its logical process in finding no medical causation.

ARGUMENT

POINT I

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT PETITIONER FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, MEDICAL CAUSATION BETWEEN HIS INDUSTRIAL ACCIDENT ON MAY 21, 1976 AND HIS 1991 CLAIMED PERMANENT TOTAL DISABILITY.

A. MEDICAL CAUSATION IS A FACTUAL MATTER.

Petitioner argues that the Commission erred in finding that he failed to meet his burden of demonstrating medical causation between an accident on May 21, 1976 and his now claimed permanent total disability.

This Court has consistently held that "medical causation is a 'factual matter'".⁶⁶ Petitioner has the burden to prove

⁶⁶Chase v. Industrial Commission, supra at 479.

medical causation by a preponderance of the evidence.⁶⁷ This Court reviews the Commission's factual findings under the substantial evidence standard.⁶⁸

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁶⁹

B. THE COMMISSION'S FINDING OF NO MEDICAL CAUSATION IS SUPPORTED BY RELEVANT EVIDENCE AS A REASONABLE MIND MIGHT ACCEPT AS ADEQUATE TO SUPPORT THE CONCLUSION.

In reviewing the whole record, there is substantial evidence to support the Commission's finding that Petitioner failed to prove, by a preponderance of the evidence, that his 1976 industrial accident was the medical cause of his now claimed total permanent disability.

The industrial accident which Petitioner claims caused his permanent disability occurred on May 21, 1976. The injuries he sustained from the May 21, 1976 industrial accident were to his right ankle and left knee.⁷⁰

Petitioner left the employment of the City in 1977. There is no evidence, however, which indicates why Petitioner discontinued his employment with the City.⁷¹ The Petitioner did

⁶⁷Large v. Industrial Commission, 758 P.2d 954, 956 (Utah App. 1988).

⁶⁸Chase v. Industrial Commission, supra at 479.

⁶⁹Id.

⁷⁰Fact ¶¶1, 3, 4.

⁷¹Fact ¶8.

not recall why he left and what efforts he made, or could have made to continue working in 1977. Petitioner's treating physician, however, stated in 1977, that Petitioner could still do light duty work.⁷²

The ALJ attributes the lack of evidence to the fifteen year time delay between the industrial accident and Petitioner's filing of his claim for permanent total disability. This Court, however, stated in Zupon v. Industrial Commission,⁷³ that in order for a claimant to receive benefits, he or she must first ". . . prove that he or she can no longer perform the duties required in his or her occupation. . . ." and that he or she cannot be rehabilitated. After the employee has shown that rehabilitation is not possible, the employer has the opportunity to prove the existence of steady work the employee can perform.

The time delay of fifteen years does not change Petitioner's burden as stated in Zupon,⁷⁴ to prove he could no longer work in 1977 and he could not be rehabilitated. The lack of evidence supports the Commission's finding.

In 1977, the Petitioner filed a claim for worker's compensation benefits.⁷⁵ The 1977 claim was referred to a

⁷²Fact ¶10.

⁷³Zupon v. Industrial Commission, 860 P.2d 960, 963 (Utah App. 1993). A copy of Zupon v. Industrial Commission, supra is attached as Appendix "C".

⁷⁴Zupon v. Industrial Commission, supra.

⁷⁵Fact ¶13.

medical panel which found that Petitioner had a permanent partial impairment of 16% attributable to his industrial injury.⁷⁶ There was no mention by the medical panel or the Petitioner that he was permanently totally disabled.⁷⁷ In 1982, Petitioner filed another claim for benefits with the Commission.⁷⁸ The 1982 matter was also referred to a medical panel. The 1982 medical panel found that Petitioner's impairment related to his industrial injury was 14% which was less than the finding of the medical panel in 1977. Accordingly, Petitioner was not awarded any benefits in 1982 for permanent partial impairment.⁷⁹ Again, Petitioner never asserted that he was permanently totally disabled and the 1982 medical panel made no mention of such condition. The 1982 medical panel did, however, find that Petitioner had pulmonary (respiratory) problems unrelated to his 1976 industrial accident.

In 1991, fifteen years after the industrial accident, Petitioner, for the first time, asserts that he is permanently totally disabled. The 1991 claim was referred to a medical panel. The 1991 medical panel found that Petitioner had total physical impairment of 70% of the whole person. The medical panel, however, determined that only 17% of the total physical

⁷⁶Fact ¶16.

⁷⁷Fact ¶17.

⁷⁸Fact ¶26.

⁷⁹Facts ¶29.

impairment was related to the 1976 industrial accident. The medical panel attributed 40% of the Petitioner's disability to his pulmonary (respiratory) problems which were unrelated to his 1976 industrial accident.⁸⁰

Accordingly, Petitioner's impairment related to his 1976 industrial accident remained essentially unchanged throughout the sixteen years prior to his claim for permanent total disability. He received a 16% permanent partial rating in 1977, a 14% rating in 1982 and a 17% rating in 1992. Consequently, even though Petitioner's total physical impairment increased from 16% in 1977 to 70% in 1992, the impairment attributable to the 1976 industrial accident remained virtually unchanged.⁸¹ The most significant impairment that Petitioner had in 1991 was his pulmonary (respiratory) problems.⁸²

Petitioner had opportunities during the sixteen years, in two different proceedings before the Commission, to claim permanent total disability and that he was unable to work after 1977. He never mentioned permanent total disability until 1991.

Petitioner's most disabling condition and the cause of his permanent total disability is his pulmonary (respiratory) impairment. The 1992 medical panel determined that of his 70% whole person disability, 40% is related to his pulmonary

⁸⁰Facts ¶40.

⁸¹Id.

⁸²Id.

(respiratory) condition. The history regarding Petitioner's pulmonary (respiratory) condition began in 1976 when Petitioner was hospitalized for chest pain and a suspected pulmonary embolus.⁸³ In 1980, Petitioner was seen at the VA Hospital for a six week cough. The VA Hospital records indicate that Petitioner was a 40 to 50 pack a year smoker.⁸⁴ From October 1980 through November 1980, Petitioner was hospitalized at the VA Hospital for an abnormal mass seen on a chest x-ray.⁸⁵ In 1981, Petitioner was seen at the VA Hospital for an upper respiratory tract infection.⁸⁶ In 1981, Petitioner was provided care at the VA Hospital for post-surgical thoracic pain, chest wall pain and acute bronchitis. In the 1982 proceeding before the Commission, the medical panel found that Petitioner's pulmonary (respiratory) problems were due to a tumor which may have been present as early as 1976 but was unrelated causally to the 1976 industrial accident. In 1985, Petitioner was seen at the VA Hospital for upper respiratory tract infections with sharp pain. From December 1987 to January 1988, Petitioner received medical care at the VA Hospital for chronic obstructive pulmonary disease and chronic bronchitis.⁸⁷ In 1988, pulmonary function tests were

⁸³Fact ¶31.

⁸⁴Fact ¶32.

⁸⁵R. at 185.

⁸⁶R. at 185.

⁸⁷Facts ¶31.

done at the VA Hospital and it was determined that the Petitioner had moderate pulmonary obstruction.⁸⁸ In 1989, Petitioner was seen at the VA Hospital for an increase in his chronic shortness of breath.⁸⁹ In 1989, pulmonary function tests were done at the VA Hospital and it was again determined that Petitioner had moderate obstruction. From March 1989 through April 1989, Petitioner was inpatient at the VA Hospital due to chronic obstructive pulmonary disease.⁹⁰ In June 1989, Petitioner was seen at the VA Hospital due to acute exacerbations of his chronic obstructive pulmonary disease. There is substantial evidence in the record showing that the cause of Petitioner's permanent total disability is his pulmonary (respiratory) problems and not the 1976 industrial injury.

Interestingly, the ALJ recognized that the pulmonary (respiratory) condition was the most significant impairment that the Petitioner has.⁹¹ The ALJ stated that rehabilitation was not a possibility because Petitioner had developed a significant post-injury respiratory condition.⁹²

The ALJ relied primarily on the Social Security Administration decision to support her conclusion that Petitioner

⁸⁸R. at 185.

⁸⁹Id.

⁹⁰Id.

⁹¹Fact ¶39.

⁹²Id.

was permanently totally disabled as a result of the 1976 industrial injury.⁹³ The Social Security Administration, however, was not concerned about finding a causal connection between the 1976 industrial injury and permanent total disability or other legal standards applicable to worker's compensation benefits. The Social Security Administration decides only whether a person is permanently totally disabled. Further, the City was not a party to the Social Security Administration proceeding. To rely primarily on the Social Security Administration ruling deprives the City of its right to present its evidence, cross examine witnesses and otherwise contest the matter. There must be evidence other than the Social Security Administration decision to support a determination that the 1976 industrial injury caused Petitioner's permanent total disability.

The Commission, based upon the Findings of Fact of the ALJ, was obligated to correct the ALJ's misplacement of the burden of proof. The Commission, in applying the proper burden of proof, determined that Petitioner failed to demonstrate a causal connection between the 1976 industrial accident and his permanent total disability. There is substantial evidence to support the Commission's conclusion that Petitioner failed to show medical causation.

⁹³Fact ¶39.

POINT II

THE "ODD LOT" DOCTRINE DOES NOT APPLY BECAUSE THE COMMISSION PROPERLY FOUND NO MEDICAL CAUSATION BETWEEN PETITIONER'S 1976 INDUSTRIAL INJURY AND HIS NOW CLAIMED PERMANENT TOTAL DISABILITY.

Petitioner argues that he is entitled to permanent total disability benefits based on the "odd lot" doctrine. The "odd lot" doctrine allows the Commission to find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render a claimant unable to obtain employment.

This Court, however, has consistently held that for the odd lot doctrine to apply, there must first be medical causation between the claimant's industrial accident and the claimed permanent total disability.⁹⁴ That is different from, and not controlled in any way by, a determination that the industrial accident caused a permanent partial disability.⁹⁵ The standard of proof for medical causation is by a preponderance of the evidence.⁹⁶

The Commission found that Petitioner failed to prove, by a preponderance of the evidence, that his 1976 industrial injury

⁹⁴Zupon v. Industrial Commission, supra.

⁹⁵Id. at 963.

⁹⁶Large v. Industrial Commission of Utah, 758 P.2d 954 (Utah App. 1988).

medically caused his now claimed permanent total disability.⁹⁷ Therefore, the odd lot doctrine does not apply and need not be addressed by this Court.⁹⁸

In Zupon, this Court reviewed issues, and underlying facts, similar to those presented by Petitioner. Claimant Zupon sustained industrial injuries in 1976. In 1977, claimant Zupon received workers' compensation benefits for permanent partial impairment of 10%. In 1978, claimant Zupon was awarded disability benefits by the Social Security Administration. Subsequently, claimant Zupon had increased problems with his arthritic condition.

The Commission concluded that claimant Zupon had failed to establish the necessary medical causation between his 1975 industrial accident and his permanent total disability stating that his arthritic condition caused his permanent total disability. On appeal, claimant Zupon argued that he was entitled to permanent total disability benefits under the "odd lot doctrine".

This Court, in Zupon, held that for the "odd lot doctrine" to apply, the claimant must first show that there is medical causation between his 1975 industrial accident and his now claimed permanent total disability.

⁹⁷Fact ¶42.

⁹⁸Zupon v. Industrial Commission, supra.

This Court affirmed the Commission's determination stating that substantial evidence supports the conclusion that claimant Zupon did not establish, by a preponderance of the evidence, medical causation between his 1975 industrial accident and his now claimed total permanent disability.

Petitioner, like the claimant in Zupon, received partial impairment ratings attributable to the 1976 industrial accident years before a claim for permanent total disability was filed.⁹⁹ Shortly after the industrial accident and thereafter, Petitioner, like claimant Zupon, had a significant impairment unrelated to the industrial accident. In 1992, the medical panel for the Commission found that 40% of Petitioner's disability was related to his pulmonary (respiratory) condition. Petitioner, like the claimant in Zupon, did receive Social Security benefits prior to his filing of an application for permanent total disability. The claimant in Zupon waited sixteen years to file his application for permanent total disability. Petitioner waited fifteen years to file his claim for permanent total disability.

In Large v. Industrial Commission of Utah,¹⁰⁰ this Court held that:

Under the medical cause test, the claimant must prove the disability is medically the result of an exertion or an injury that occurred during a work related activity. The standard of proof for causation is by a preponderance of the evidence.

⁹⁹Facts ¶¶17, 28.

¹⁰⁰Large v. Industrial Commission of Utah, supra.

This Court, in Large, found that the industrial injury, for which the claimant received a 5% permanent partial impairment rating, was not the medical cause of claimant's permanent total disability and that the claimant's age, obesity, lack of transferable skills and prior back surgery resulted in his disability.

This Court concluded in Large that there was an inadequate causal link between the permanent total disability and the industrial injury.

Accordingly, Petitioner's argument, based on the "odd lot doctrine," is not applicable and need not be addressed because the Commission found that Petitioner's industrial injury did not medically cause his permanent total disability.

POINT III

THE COMMISSION IS THE ULTIMATE FACT FINDER.

The Petitioner criticizes the Commission for reversing the ALJ. Petitioner argues that the ALJ prepared extensive Findings of Fact and Conclusions while the Commission incorporated the ALJ's Findings of Fact and articulated its reasons in a less exhaustive manner.

In Commercial Carriers and Old Republic Insurance v. Industrial Commission of Utah,¹⁰¹ this Court reviewed a decision by the Commission to reverse the ALJ. It was argued in

¹⁰¹Commercial Carriers v. Industrial Commission, 255 Utah Adv. Rep. 57 (Utah App.). (A copy of Commercial Carriers v. Industrial Commission, supra is attached as Appendix "C".

Commercial Carriers that the Commission could not reverse the ALJ's Findings of Fact without stating specifically and in detail the reasons for doing so.

This Court held in Commercial Carriers that, while it is the ALJ who initially hears the evidence, the Commission is the ultimate fact finder.¹⁰² The decisions of the Commission, not the ALJ, are deemed conclusive.

This Court further stated that the Commission's findings are of sufficient detail if this Court can discern the Commission's logical process, i.e. subsidiary fact findings logically to lead to ultimate fact findings. This Court concluded that:

It is the province of the Board, not the appellate courts, to resolve conflicting evidence and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.¹⁰³

Although the Commission incorporated the Findings of Fact of the ALJ, it was obligated to apply the appropriate burden on the Petitioner to establish a causal relationship between the 1976 industrial accident and permanent total disability particularly since the evidence shows that there is no medical causation. The Commission was obligated to place the burden on Petitioner to show why he could no longer perform his duties with the City in 1977.

The Commission is the ultimate fact finder. The Commission

¹⁰²Id. citing Chase v. Industrial Commission, 872 P.2d 475, 479 (Utah App. 1994).

¹⁰³Id. at 59.

gave specific reasons for its decision which are supported by the Findings of Fact. The Commission is not required to accept the ALJ's decision. On the contrary, if the ALJ has not applied the facts properly, the Commission must correct the error.

CONCLUSION

The Commission, as the ultimate fact finder, properly found, based upon the Findings of Fact, that Petitioner failed to show, by a preponderance of the evidence, that the industrial accident on May 21, 1976 was the medical cause of Petitioner's permanent and total disability. There is substantial evidence to support the Commission's decision. The "odd lot doctrine", therefore, does not apply to this case.

DATED this 1st day of March, 1995.



FRANK M. NAKAMURA
Assistant City Attorney
Attorney for Respondents
Salt Lake City Corporation

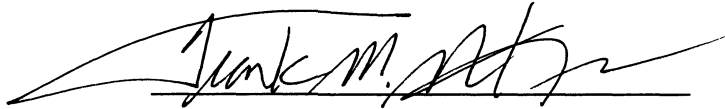
CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing
Brief by depositing the same in the U.S. mail, postage prepaid,
this 15th day of March, 1995, to the following:

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A handwritten signature in black ink, appearing to read "Frank M. Stutz", is written over a horizontal line.

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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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

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 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
 malleous

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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 pulpous - 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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RE: GERALD HANSEN
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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

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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

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RE: GERALD HANSEN
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- 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

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.

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) + \$1,863.81 (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.

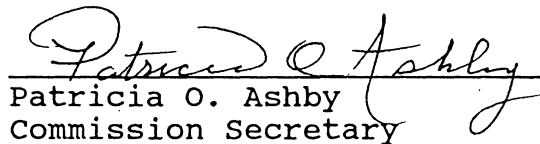
ORDER
RE: GERALD HANSEN
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IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order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

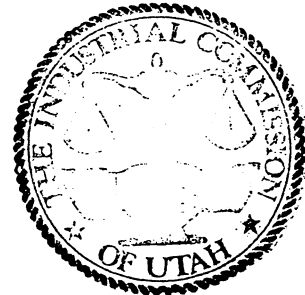


Barbara Elicerio
Administrative Law Judge

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 is 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.

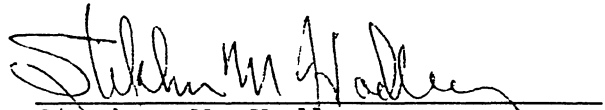
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ORDER


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.

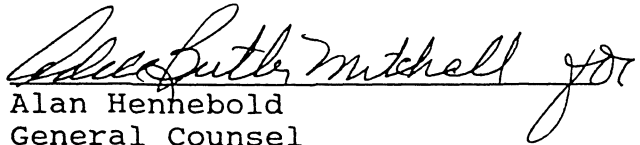
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CERTIFICATE OF MAILING

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

ah\90-1056o

use automatic stay applies to actions brought by creditor; *Martin-Trigona v. Lav. & Loan Ass'n*, 892 F.2d 575, 989 (defendant able to initiate a complaint brought by bankrupt standing automatic stay, because stay actions brought by debtor); *Carley Fireman's Fund Ins. Co.*, 889 F.2d Cir. 1989 (per curiam) (automatic to actions brought by debtor that bankruptcy estate); *Rhett White Motor v. Fargo Bank*, 99 B.R. 12, 15 (1989) ("[S]tay provisions are not actions which have been commenced by the estate").

Under 11 U.S.C. § 541(c)(2), a trustee is appointed "for the interests of creditors," 11 U.S.C. § 541(c)(2). Otherwise, the debtor continues in possession of the estate. There was no reason to appoint a trustee in this case. Hartford was a debtor in possession, with limited exceptions to all the powers with which it was endowed. See 11 U.S.C. § 1107(a) (1988). The attention that Speciale appeared to devote as counsel for Hartford is not her reasons. Negotiations over the building between Speciale and the estate, as suggested by the State, were not, as suggested by the State, the primary asset of the estate and there was no reason to assume that Hartford was conducting anything but bankruptcy proceedings of the estate. Additionally, it would be an abuse of the attorney to purport to enter an appearance without making some effort to do so.

The court notes that the effect of the State's request for notice to appoint counsel would be to deprive the trial court of its jurisdiction. The court lacks actual jurisdiction by virtue of its notice only in limited cases, e.g., *Garcia v. Garcia*, 712 P.2d 852, 854 n.3 (Utah 1979) (per curiam) (court lacks jurisdiction if service of process requirements are not met). See Utah Rules of Civil Procedure not in effect until 1992 (compliance with notice requirements). Code Ann. § 63-30-12 (1993) (subject matter jurisdiction over the estate). In contrast, failure to comply with notice requirements does not affect jurisdiction. See, e.g., *Sovereign v. P.2d 852, 854 n.3* (Utah 1979) (quit in an unlawful detainer action does not state a claim, but not lack of jurisdiction); *In re Clinton*, 762 P.2d 1010 (1988) (failure to comply with notice for appointment of counsel in proceedings does not affect personal jurisdiction). A court properly acquires jurisdiction not lost through subsequent events. See *Secrest v. Simonet*, 708 P.2d 803, 804 (Utah 1985) (state ex rel. *Owens v. Hodge*, 641 P.2d 1010 (1982)). In the instant case, the court, the defendants served, and the court had both subject matter and personal jurisdiction. The State's failure to send notice under Rule 4-506 does not destroy jurisdiction—it merely precludes the State from asserting jurisdiction in the case until the requirement

is met. Hartford would have had a notice to appoint counsel, Hartford would obviously have had an opportunity to reactivate its claim before the elapse of the 20-day period prescribed by Rule 4-506(3), rendering any intended motion to dismiss for failure to prosecute of academic interest only. Cf. *Johnson v. Firebrand, Inc.*, 571 P.2d 1368, 1369-70 (Utah 1977) (finding court had abused its discretion in dismissing case for failure to prosecute when party's motion to dismiss filed concurrently with its answer). 9. Nothing prevents the trial court from receiving additional memoranda if it wishes to do so. We merely hold that Hartford was not entitled to submit the additional memorandum as a matter of right. Hartford may have been more successful in gaining acceptance of its supplemental memorandum if it had first sought leave of court. Counsel could have filed a motion, stating the reasons the information was not included in the original memorandum, and requested permission to submit an additional memorandum. Cf. Utah R. Civ. P. 15(d) (motion to allow supplemental pleadings, at discretion of court); Utah R. Civ. P. 60(b)(1), (2) (motion for relief from judgment for excusable neglect or newly discovered evidence); Utah Code Jud. Admin. R. 4-501(1)(a) (over-length memorandum may be submitted with prior leave of court on ex parte application).

Cite as
255 Utah Adv. Rep. 57

IN THE UTAH COURT OF APPEALS

COMMERCIAL CARRIERS and Old
Republic Insurance,
Petitioners,

v.
The INDUSTRIAL COMMISSION of
Utah, and Ronny Lyn Judd,
Respondents.

No. 940208-CA
FILED: December 30, 1994

Original Proceeding in this Court

ATTORNEYS:

Anne Swensen and Julianne P. Blanch, Salt
Lake City, for Petitioners
Eugene C. Miller, Jr., Salt Lake City, for
Respondents

Before Judges Davis, Greenwood, and Jackson.

This opinion is subject to revision before
publication in the Pacific Reporter.

GREENWOOD, Judge:

Petitioners Commercial Carriers (Commercial) and its insurer, Old Republic Insurance, seek reversal of a decision by the Board of Review of the Utah Industrial Commission (the Board) granting worker's compensation benefits to

(Judd), a truck driver who was injured in a fight at a truck stop motel. We affirm.

BACKGROUND

On May 21, 1992, Commercial assigned Judd and fellow trucker, Jim Coyle (Coyle), to transport a truck load of automobiles from Wentzville, Missouri, to Burlingame, California. The two men stopped for the night at a motel in Fort Kearney, Nebraska. They spent several hours drinking in the motel bar. After the bar closed, Judd and Coyle encountered two men in the parking lot near their trucks. Judd and Coyle told the men to stay away from their trucks, and the two men fled into a field. Judd and Coyle pursued the two men into the field, where Judd was severely beaten by one of the men.

When Commercial refused Judd's request for worker's compensation benefits, Judd petitioned the Utah Industrial Commission for a hearing on his claim. After a hearing, the administrative law judge (ALJ) found that Judd and Coyle met two women who joined them at the bar to escape the "harassment" of two younger men, who had asked the women to dance. The ALJ ultimately found that the fight that caused Judd's injuries resulted from personal animosity between Judd and the two younger men "who were competing for the attention" of the two women. Accordingly, the ALJ dismissed Judd's claim with prejudice.

Judd appealed to the Board. Although the Board adopted most of the ALJ's findings of fact, it drew different "inferences" from those facts. The Board found that Judd and Coyle met the women at the bar and walked them to their car when the bar closed. After the women drove away, the two young men who had been in the bar suggested to Judd and Coyle that the four of them buy more beer and drink it in their motel room. The truckers declined, stating they had to leave early in the morning.

The Board found that, during the conversation, the young men also asked if they could take one of the cars Judd and Coyle were transporting out for a drive. Judd told the young men such use was prohibited and warned them that all of the cars had alarms.

The Board further found that Judd and Coyle then left the young men and walked to the parking lot to check their trucks. Afterward, they walked to a nearby convenience store, but the store was closed. As they were walking back to the motel, they observed the two young men in the parking lot, walking around the parked cars and trucks. Judd and Coyle walked toward their trucks and watched the young men from the shadows.

The young men then approached Judd's and Coyle's trucks, and one said, "[T]hese must be the vehicles with the alarms." At that point, Judd and Coyle confronted the young men and told them to stay away from their trucks and all other trucks in the parking lot.

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The two young men fled into the field, and Judd and Coyle walked after them. About thirty yards into the field, the young men stopped. One of them beat Judd, who suffered serious injuries.

Based on those findings, the Board reversed the ALJ's decision and awarded worker's compensation benefits to Judd. The Board concluded that although the women at the bar joined Judd and Coyle in part to "avoid the attentions of the two younger men," there was "no objective evidence" to support the "hypothesis" that the fight stemmed from antagonism concerning the two women. Thus, the Board concluded that the fight and Judd's injuries "arose out of and in the course of" Judd's employment.

ISSUES ON APPEAL

Commercial raises two issues on appeal:

(1) Did the Board correctly determine that Judd's injuries arose out of and in the course of his employment under Utah Code Ann. §35-1-45 (1988)?

(2) Did the Board err in allowing Judd an extension of time to appeal the ALJ's denial of benefits without a showing of good cause?

STANDARD OF REVIEW

We review the Board's findings of fact under section 63-46b-16(4)(g) of the Utah Code, which provides that a factual finding may be disturbed only if it "is not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. §63-46b-16(4)(g) (1989); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App. 1993). We review an agency's interpretation and application of statutes for correctness, unless the statute in question grants the agency discretion. *Morton Int'l, Inc. v. Auditing Div. of State Tax Comm'n*, 814 P.2d 581, 588-89 (Utah 1991). Because section 35-1-45 of the Utah Code, which states that compensable injuries must "arise out of and in the course of employment," grants no discretion, we review the Board's decisions for correctness. *Walls v. Industrial Comm'n*, 857 P.2d 964, 966-67 (Utah App. 1993) ("[S]ection 35-1-45 (1988) does not expressly or impliedly grant the Commission discretion to interpret or apply the language of that section.").

ANALYSIS

Commercial makes three main arguments on appeal. First, Commercial argues that the Board's findings are not supported by substantial evidence and, thus, should be reversed. Second, Commercial claims that the Board erred in concluding Judd's injuries were work-related. Finally, Commercial argues that it was substantially prejudiced by the Board's decision to grant Judd an extension of time to appeal the ALJ's order. We consider each of these arguments in turn.

Commercial claims the Board's findings of fact are not supported by "substantial evidence," as required by Utah Code Ann. §63-46b-16(4)(g) (1989).¹ Commercial argues that the Board cannot reverse the ALJ's findings of fact without stating specifically and in detail the reasons for doing so. We disagree.

"While it is the ALJ who initially hears the evidence, the Commission is the ultimate fact finder." *Chase v. Industrial Comm'n*, 872 P.2d 475, 479 (Utah App. 1994) (citing *Virgin v. Board of Review of Indus. Comm'n*, 803 P.2d 1284, 1287 (Utah App. 1990)); see also *U.S. Steel Corp. v. Industrial Comm'n*, 607 P.2d 807, 810-11 (Utah 1980) (holding that Industrial Commission is ultimate fact finder). Moreover, Professor Arthur Larson, in his treatise on worker's compensation, notes that the decisions of the Board, not the ALJ, are deemed conclusive in the majority of states.² 3 Arthur Larson, *Workmen's Compensation Law* §80.12(b) (1994).

We therefore review the record before us to determine if substantial evidence supports the Board's factual findings. Substantial evidence is more than a "scintilla" of evidence," though "less than the weight of the evidence." *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989) (citation omitted), *superseded on other grounds*, 819 P.2d 361 (1991). Substantial evidence is that quantum and quality of relevant evidence that will convince a reasonable mind to support a conclusion. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990). To determine whether a finding is supported by substantial evidence, we examine the record as a whole, weighing evidence that both supports and detracts from the finding. *Grace Drilling*, 776 P.2d at 68.

Commercial argues that the Board must explain its reasons for making different findings than the ALJ. Commercial claims that this court's decision in *Adams v. Board of Review of the Indus. Comm'n*, 821 P.2d 1 (Utah App. 1991), requires the Board to adequately detail the logic behind a factual finding so that it may be challenged on appeal. *Id.* at 5 (the Board's findings "'should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached.'") (quoting *Milne Truck Lines, Inc. v. Public Serv. Comm'n*, 720 P.2d 1373, 1378 (Utah 1986)).

However, Commercial's reliance on *Adams* is misplaced. In *Adams*, a worker at a telemarketing firm claimed a variety of injuries stemming from her work, which required constant use of the telephone without a headset or automatic dialing equipment. *Id.* at 3. The ALJ reviewed conflicting medical testimony from doctors and mental health professionals, some of whom thought her injuries were work-related, while others did not. *Id.* at 3-4. The ALJ ultimately denied benefits after

claims the Board's findings of support by "substantial evidence," as required by Utah Code Ann. § 63-46b-16(4)(h)(iv) (1989).¹ Commercial argues that the ALJ's findings cannot be reversed and in detail stating specifically and in detail why we disagree.

The ALJ who initially hears the case is the ultimate fact finder. *Industrial Comm'n*, 872 P.2d 1019 (Utah App. 1994) (citing *Virgin v. Industrial Comm'n*, 803 P.2d 1019 (Utah App. 1990)); see also *U.S. v. Industrial Comm'n*, 607 P.2d 1019 (Utah 1980) (holding that Industrial Commission is the ultimate fact finder). Moreover, as noted by Larson, in his treatise on compensation, notes that the decisions, not the ALJ, are deemed to be the majority of states.² 3 *Arthur's Compensation Law* 4).

In reviewing the record before us, the substantial evidence supports the findings. Substantial evidence is "scintilla" of evidence," though the weight of the evidence." *Grace Drilling, 776 P.2d 63, 68* (9) (citation omitted), *superseded*, 819 P.2d 361 (1991). The evidence is that quantum and quality of evidence that will convince a trier of fact to support a conclusion. *First County Bd. of Equalization*, 799 P.2d 55 (Utah 1990). To determine if a finding is supported by substantial evidence, the record as a whole, and not just the both supports and the finding. *Grace Drilling*, 776

argues that the Board must make findings for making different findings. Commercial claims that this is not the case in *Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1 (Utah App. 1993). The Board to adequately detail the facts of a factual finding so that it may be reversed on appeal. *Id.* at 5 (the Board's findings must be sufficiently detailed to show by which the ultimate factual findings by which the ultimate factual findings are reached. (quoting *Milne Truck Lines, Inc. v. Industrial Comm'n*, 720 P.2d 1373, 1374)).

Commercial's reliance on *Adams v. Board of Review of Indus. Comm'n*, a worker at a mine claimed a variety of injuries while working, which required the use of a telephone without a headset and the use of mining equipment. *Id.* at 3. The Board's conflicting medical testimony and the mental health professionals, who thought her injuries were more severe than others did not. *Id.* at 3-4. Commercially denied benefits after

The Industrial Commission affirmed the decision with a single "finding," stating simply that the injury was not work-related. *Id.* at 5. This court vacated the Commission's order, holding that the finding was "arbitrary" because it was so inadequate that it defied meaningful review. *Id.* at 7; see Utah Code Ann. § 63-46b-16(4)(h)(iv) (1990). Thus, the question addressed by the *Adams* court was not whether the findings were supported by substantial evidence, but rather whether the findings sufficiently disclosed the logical process employed to permit meaningful review.

By contrast, the findings in the instant case are sufficiently detailed to meet the *Adams* test. The Board's findings consist of thirteen paragraphs carefully detailing the events leading to Judd's injuries.³ The Board's findings are sufficiently detailed that we can discern the Board's logical process; i.e., subsidiary fact findings logically lead to ultimate fact findings.

Moreover, our review of the record indicates there was substantial evidence to support the Board's findings. The Board found that Judd and Coyle spent several hours in the motel lounge, during which time they encountered two women, one of whom was an acquaintance of Judd's. Further, the Board found that, "to some degree," the women joined Judd and Coyle to avoid the two younger men. Nonetheless, the Board found that the young men later suggested that Judd and Coyle join them for more beer after the bar closed. The young men also asked if they could drive one of the cars Judd and Coyle were transporting, but Judd told them it was not allowed. After leaving the bar, Judd and Coyle walked to the parking lot to check their trucks. A short time later, Judd and Coyle observed the two young men approach their trucks and overheard one of the young men say, "[T]hese must be the vehicles with the alarms." Judd and Coyle confronted the two men, who fled into the field. The two truckers pursued the young men about thirty yards into the field, and Judd was severely injured.

"It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." *Grace Drilling*, 776 P.2d at 68. Thus, the inference that Judd's injuries were job-related is clearly within the Board's fact-finding authority.

II. Work-related Injuries

Having ruled on the adequacy and substantiality of the factual findings, we turn next to the question of whether these facts establish that Judd's injuries "arose out of and in the course of his employment."⁴

The Board found Judd's injuries "arose out of" his employment. We agree. Injuries are deemed to arise out of employment when there is a "causal relationship" between the injury and the employment. *M & K Corp. v. Industrial*

(1948). As Professor Larson notes, "the concept of employment is not synonymous with 'caused by' employment; rather, the cause of the injury 'is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion.'" 1 Larson, *supra*, § 6.60, at 3-9 (emphasis in original). Moreover, "[t]he controlling test should be 'if the circumstances of the employment can be fairly said to have elicited conduct by the employee which results in his injury.'" *Id.* § 11.11(c), at 3-205 (citation omitted). Accordingly, when the injuries result from a fight, the injuries may still be causally related to the employment "[i]f the fight is spontaneous and closely entangled with the work itself." *Id.* § 11.15(a), at 3-243. Because Judd was injured while attempting to protect his cargo, we conclude that the fight was "closely entangled" with his job as a truck driver for Commercial. Thus, we concur with the Board's conclusion that Judd's injury arose out of his employment by Commercial.⁵

We also agree with the Board's conclusion that Judd's injuries arose "in the course of" his employment. An accident arises in the course of employment when "it occurs while the employee is rendering service to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service." *M & K Corp.*, 189 P.2d at 134. Additionally, an injury arises in the course of employment if it occurs within the "time, place and circumstances" of the employment. *Walls v. Industrial Comm'n*, 857 P.2d 964, 967 (Utah App. 1993); see 1 Larson, *supra*, § 14.00.

Commercial argues that Judd's injuries are not compensable because they were suffered during a personal deviation from work. Commercial relies upon *Walls*, in which this court held that a bartender who was injured while helping move a beer keg several hours after her scheduled shift was not entitled to compensation. *Walls*, 857 P.2d at 966.

However, *Walls* is distinguishable because it involves an employee who was injured following a clear break from her employment responsibilities. Here, Judd, in his capacity as a truck driver for Commercial, had general working hours in that he could drive for ten hours or 540 miles a day. After stopping in Fort Kearney for the evening, Judd and Coyle decided to relax and drink beer for several hours in the motel lounge. Nonetheless, when the bar closed, the two checked their trucks in order to ensure the cargo was safe. When they discovered the two young men milling around the trucks, Judd and Coyle chased them away. Judd's injuries were a direct result of his attempt to protect his cargo, not a personal deviation from work.

Moreover, it is reasonable that an employee should feel some responsibility to protect his o

her employer's property. See *Martinez v. Workers' Comp. App. Bd.*, 544 P.2d 1350, 1352 (Cal. 1976) (church worker who was injured while attempting to prevent theft of beer from his employer is entitled to worker's compensation). In this case, it was reasonable that Judd would attempt to preempt potential vandals rather than simply notifying police after the vandalism had occurred. Judd's concerns about the intentions of the two young men were especially understandable in light of the interest the young men had expressed in taking one of the cars for a "joy ride."

Accordingly, we conclude that the Board did not err in determining Judd's injuries "arose out of and in the course of his employment." Also, Judd was responsible for delivering his cargo safely to its ultimate destination. That job was necessarily punctuated by rest stops, but those stops did not terminate his duty to protect the cargo from harm.

III. Judd's Motion for Review

Commercial argues that the Board erred in granting Judd a thirty-day extension of time to appeal the ALJ's ruling without requiring Judd to show good cause for the extension. See Utah Code Ann. §63-46b-1(9) (1989) ("Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter"). Moreover, Commercial argues that this court should reverse under Utah Code Ann. §63-46b-16(4)(h)(iii) (1989), which requires reversal if a party has been substantially prejudiced by an action that is contrary to the agency's prior practice. Commercial cites *Maverik Country Stores v. Industrial Commission*, 860 P.2d 944 (Utah App. 1993), as support for this argument.

We find Commercial's argument unpersuasive. First, *Maverik* is distinguishable because the request for an extension was filed after the deadline. *Id.* at 946. Conversely, Judd filed his request for a continuance one day before the cut-off. Second, Commercial did not claim in its motion opposing the extension that it would be substantially prejudiced by an extension. Utah Code Ann. §63-46b-16(4)(h)(iii). Without a showing of substantial prejudice, Commercial's motion was without merit. Moreover, a claim of substantial prejudice would be unavailing to Commercial because the test for substantial prejudice is not, as Commercial claims, the fact that it received an unfavorable result; rather, the test is whether Commercial was given full and fair consideration of the issues. See *Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987). There is nothing to indicate the Board failed to fully and fairly consider Commercial's position. Thus, there was no prejudicial error.

CONCLUSION

We conclude that the Board's factual findings concerning the circumstances of Judd's injuries were supported by substantial evidence.

Although some of the Board's findings were at odds with those of the ALJ, the Board is the ultimate fact finder, and it was within its authority in adopting different findings. Further, we find the Board was correct in concluding that Judd's injuries "arose out of and in the course of" his employment for Commercial. His injuries were, as the Board ruled, "closely entangled" with his work responsibilities. We also find it reasonable that Judd acted to protect his employer's property. Finally, we conclude that Commercial's claim that the Board committed prejudicial error by granting a thirty-day extension to Judd for challenging the ALJ's ruling is without merit.

Accordingly, we affirm.

Pamela T. Greenwood, Judge

WE CONCUR:

James Z. Davis, Judge

Norman H. Jackson, Judge

1. In challenging the Board's factual findings, a party is required to marshal all of the evidence in support of the Board's findings, then demonstrate that the findings are not supported by substantial evidence. See *Johnson v. Board of Review*, 842 P.2d 910, 912 (Utah App. 1992). In the instant case, Commercial's effort at marshalling the evidence falls short of the requirement. In effect, Commercial selectively presented those findings that support its position and omitted findings that support Judd's position. For example, Commercial did not mention that the two young men suggested that Judd and Coyle join them for more beer drinking after the lounge closed. Commercial also failed to state that Judd and Coyle had checked their trucks after leaving the bar. This evidence is important because it tends to support the Board's findings that the fight and Judd's injury resulted not from personal antipathy, but from Judd's attempt to safeguard his cargo.

2. Only seven states--Florida, Pennsylvania, Oklahoma, Arizona, Michigan, Colorado, and Kentucky--and the Longshoreman's Act attach a presumption of conclusiveness to the ALJ's referee's findings. 3 Arthur Larson, *Workmen's Compensation Law* §80.12(c)(1)-(8) (1994).

3. Although it is not incumbent on the Board, as the ultimate fact finder, to explain its reasons for reversing the ALJ, we note that the Board nonetheless states that it simply finds no "objective evidence support" the hypothesis that Judd's beating resulted from a fight over women rather than a fight over truck and cars.

4. As Professor Larson notes, the "arising out of" and the "in the course of" provisions are usually regarded as separate legal tests, each of which must be satisfied before compensation can be awarded. 1 Larson *supra*, §6 10, at 3-3. This would appear to be the case in Utah, which at one time was, according to Larson, the only state in which a worker was awarded compensation for an injury "arising out of or in the course of employment." *Id.* at 3-2 (citing Utah Code Ann. §35-1-45 (1953)) (emphasis added). The statute has since been amended to state that compensable injuries are those "arising out of and in the course of his employment." Utah Code Ann. §35-1-45 (1994) (emphasis added).

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Judge
ion, Judge

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factual findings underlying the Board's conclusion on this point, it does not attack the legal conclusion itself. Thus, we need not consider it further. 6. Commercial argues that by confronting the two men and chasing them into the field, Judd violated company rules, which require a trucker to immediately report vandalism to the police. However, this contention was directly contradicted by testimony of Commercial's terminal manager, who told the ALJ that "I don't believe that we have ever instructed" truckers what to do when someone is only attempting to vandalize their trucks.

Cite as
255 Utah Adv. Rep. 61

IN THE UTAH COURT OF APPEALS

Alicia LARSON,
Plaintiff and Appellant,
v.
Marc LARSON,
Defendant and Appellee.

No. 930550-CA
FILED: December 30, 1994

Third District, Summit County
The Honorable David S. Young

ATTORNEYS:
John D. Sheaffer, Jr., Salt Lake City, for
Appellant
Ellen Maycock, Salt Lake City, for Appellee
Kathryn D. Kendell, Salt Lake City, for
amicus curiae American Civil Liberties
Union

Before Judges Billings, Orme, and Wilkins.

This opinion is subject to revision before
publication in the Pacific Reporter.

ORME, Associate Presiding Judge:

Alicia Larson appeals the trial court's order modifying the child custody and visitation provisions of a divorce decree. She also challenges the trial court's decision not to award her costs and attorney fees incurred in contesting the modification of the divorce decree initiated by her ex-husband. We reverse the trial court's ruling modifying the divorce decree, but affirm its decision not to award costs and attorney fees.

FACTS

After nine years of marriage, Alicia and Marc Larson were divorced on April 29, 1992. The marriage produced three children, the oldest of whom was eight and the youngest of whom was five at the time the court modified the divorce decree. Prior to her marriage, Alicia

During the marriage and at the time of the divorce, Alicia was a homemaker, not otherwise employed outside the home, and Marc owned and operated a physical therapy clinic in Park City, Utah.

The decree of divorce incorporated the parties' stipulation and property settlement agreement and provided, in part, that Marc and Alicia maintain joint legal custody of the children, with physical custody to be with Alicia. Marc was awarded extensive rights of visitation, including two-and-one-half weekends per month, extended summer visits, and an equal share of time with the children during the holidays.

The parties were ordered to cooperate in fostering and maintaining each other's relationship with their children and to inform one another of important issues in the children's lives to facilitate joint decision-making. Consistent with this general mandate was the specific requirement that each party was to give the other a minimum of thirty days written notice prior to relocating from the Park City area.

The parties and their children have lived in Park City since 1989. Alicia and the children continued to reside together in Park City following the divorce, as did Marc in a separate home. In the summer of 1992, Alicia attended a workshop in Oregon to receive instruction in glass fusion, an advanced form of stained-glass art. During this workshop, Alicia met Doug Pomeroy, a glass fusion artist and an instructor at the workshop. Subsequently, Alicia and Doug made plans to marry and thereafter live together with the Larson children in Doug's home in Corvallis, Oregon. In October 1992, Alicia notified Marc, by letter, that she intended to marry Doug Pomeroy and move to Corvallis with the children.

On November 6, 1992, Marc filed a petition to modify the custody provisions of the divorce decree. Marc filed the petition because he was concerned that the move to Oregon would not be in the children's best interest, as it would inhibit his ability to maintain a parental relationship with his children, disrupt their religious training, and remove them from their friends and relatives. After an evidentiary hearing, the trial court granted Marc's petition to modify the divorce decree. The court found that it was in the best interests of the children to remain in the Park City area and ordered that if Alicia moved from Summit County, Utah, physical custody of the children would thereupon be transferred to Marc, and Alicia would then have reasonable and liberal rights of visitation. The trial court also determined that the parties had the ability to pay their own costs and attorney fees.

Alicia Larson appeals, raising the following issues: (1) Was there sufficient evidence to support the trial court's findings? (2) Did the trial court abuse its discretion in granting Marc's petition to modify? (3) Did the trial court abuse its discretion in failing to award costs and

question of whether the officers acted in an objectively reasonable manner in reliance on the search warrant. At the very least, the trial court should be invited to determine factually if the officer knew that information he supplied in the affidavit was false, or whether he "would have known [it] was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421.

After we have decided the narrow issue presented in an interlocutory appeal, we should allow the case to proceed in the trial court. "To the extent an appellate court supersedes the trial court in the decision of factual issues and the application of law to fact, it undermines the authority of the tribunals through which the legal system speaks directly to those who invoke the legal process for resolution of their controversies." Section 3.11, American Bar Association, *Standards Relating to Appellate Courts*, 1977 Edition. We must be very careful not to usurp the authority and responsibility of our trial courts.

Due to the intermediate and limited nature of this appeal, I would reverse the suppression order and remand the case for further proceedings in the trial court.



John W. ZUPON, Petitioner,

v.

INDUSTRIAL COMMISSION OF UTAH,
Employers' Reinsurance Fund; Uninsured Employers' Fund; and Kaiser Steel Corporation, Respondents.

No. 920569-CA.

Court of Appeals of Utah.

Sept. 14, 1993.

Workers' compensation claimant sought review of Industrial Commission's

decision denying his claim for permanent total disability benefits. The Court of Appeals, Billings, P.J., held that Commission's decision was supported by substantial evidence.

Affirmed.

1. Workers' Compensation ⇄1856

Failure of workers' compensation claimant to raise claim that he was entitled to compensation for an additional 50% permanent partial disability at original hearing precluded any review of such claim on appeal.

2. Workers' Compensation ⇄1937

Industrial Commission's comment, that administrative law judge's findings were supported by substantial evidence, represented at most harmless error since substantial evidence standard was simply recited in response to an unclear nonspecific challenge and the substantive, factual discussion of the case applied the necessary preponderance of the evidence standard.

3. Workers' Compensation ⇄847

"Odd lot doctrine" allows Industrial Commission to find permanent total disability when relatively small percentage of impairment caused by industrial accident is combined with other factors to render claimant unable to obtain employment.

See publication Words and Phrases for other judicial constructions and definitions.

4. Workers' Compensation ⇄847

To qualify as recipient of benefits under odd lot doctrine, employee must prove that she can no longer perform duties required in her occupation and must establish, through cooperation with Division of Vocational Rehabilitation, that she cannot be rehabilitated.

5. Workers' Compensation ⇄847

After employee seeking benefits under odd lot doctrine has shown that rehabilitation is not possible, employer has opportunity to prove existence of steady work that employee can perform; the work the employer establishes is available must take

to consideration all relevant factors, including employee's education, mental capacity and age, as well as physical limitations.

Workers' Compensation ⇨1421

Before workers' compensation claimant can acquire benefits under the odd lot doctrine, claimant must establish compensable industrial injury by preponderance of the evidence.

Workers' Compensation ⇨1492

Proving medical causation between industrial accident and disability for which workers' compensation claimant seeks compensation is necessary component for recovery.

Workers' Compensation ⇨1716, 1939-11(5)

Medical causation is issue of fact and Court of Appeals reviews this determination of Industrial Commission under substantial evidence standard. U.C.A.1953, 68-46b-16(4)(g).

Workers' Compensation ⇨847

For odd lot doctrine to apply, Industrial Commission had to determine that there was medical causation between claimant's industrial accident and his claimed permanent "total" disability and this issue was not controlled by administrative law judge's (ALJ) determination approximately 15 years earlier that claimant's industrial accident caused permanent "partial" disability and ALJ's determination that there was medical causation did not prevent Commission from reaching different conclusion 15 years later based on new medical evidence. U.C.A.1953, 35-1-78(1).

Workers' Compensation ⇨1636

Substantial evidence supported Industrial Commission's determination that workers' compensation claimant did not establish that his industrial accident was medical cause of his claimed total permanent disability.

Virginus Dabney, Dabney & Dabney, P.C., Robert Bentley (Argued), Salt Lake City, for petitioner.

Edwin C. Barnes (Argued), Clyde, Pratt & Snow, P.C., Salt Lake City, for Uninsured Employers' and Kaiser Steel.

Benjamin A. Sims, Gen. Counsel, Salt Lake City, for respondent Industrial Commission of Utah.

Erie V. Boorman, Salt Lake City, for respondent Employers' Reinsurance Fund.

Before BENCH, BILLINGS and ORME, JJ.

BILLINGS, Presiding Judge:

John W. Zupon filed this Petition for Review from an order of the Industrial Commission denying his claim for permanent total disability benefits. We affirm.

BACKGROUND

In 1975, petitioner was employed by Kaiser Steel as an electrician. On August 7 of that year, he felt a pain in his back while lifting an acetylene tank at work. In February of 1977, an administrative law judge found petitioner had a ten percent permanent physical impairment and was entitled to twenty-six weeks of temporary total compensation and thirty-one weeks of permanent partial compensation. The ALJ based his ruling on the opinion of a medical panel which found petitioner had total physical impairment of sixty percent. The panel, however, found only ten percent of the total physical impairment attributable to the industrial accident. It attributed the balance of petitioner's impairment to a preexisting condition known as ankylosing-spondylitis, a degenerative disease of the spine. The panel concluded the ten percent impairment was attributable to the industrial accident because there was "a one-in-six chance that the ankylosingspondylitis was aggravated by the lumbar back strain on the basis of the progression of the x-ray changes."

In June of 1976, petitioner applied for social security disability benefits. His initial application, application for a rehearing,

and application on appeal were all denied. Following a court order obtained to acquire review of unspecified new evidence, petitioner had a new hearing in May of 1978. In June of 1978, the Social Security Administration's ALJ granted petitioner benefits. The ALJ ruled petitioner's total disability was not a result of his back problems but rather a result of arthritis in his hands that became more severe starting in January of 1977. A doctor who assessed petitioner in 1981 to determine whether his Social Security benefits should continue noted: "I think this patient's symptoms are way out of proportion to the objective findings which are presented."

On May 24, 1991, petitioner filed an application for permanent total disability based on his 1975 accident. A hearing was held and the ALJ concluded petitioner had failed to establish the necessary medical causation between his 1975 industrial accident and his permanent total disability. The ALJ based her conclusion on two rationales: First, the medical evidence demon-

strated it was petitioner's arthritic condition, which was unrelated to the industrial injury, that caused petitioner's inability to work; Second, even if ankylosing spondylitis contributed to petitioner's inability to work, the industrial accident did not cause the disease and "only questionably aggravated it."

On August 3, 1992, the Industrial Commission issued an order affirming the ALJ's order and denying petitioner's motion for review. Petitioner brings a petition for review to this court from the Commission's order.¹

[1,2] On appeal, petitioner argues the Commission erred by failing to apply the "odd lot" doctrine to his situation and award him permanent total disability benefits.² Petitioner further claims the Commission's determination of no medical causation was contrary to its prior determination of ten percent causation and therefore in error.³ The Commission responds that

1. In his reply brief, petitioner challenges, under Utah Code Ann. § 63-46b-12(6)(c) (1989), the sufficiency of the Industrial Commission's findings of fact in its order denying review. We note the facts in this case are undisputed and in such a case the failure to disclose a specific subsidiary finding is not fatal to the agency's decision. See *Adams v. Board of Review*, 821 P.2d 1, 5 (Utah App.1991). Although we do not remand here because of the nature of the record, we strongly encourage the Industrial Commission to clearly articulate its factual findings in *all* cases to enhance our ability "to conduct a meaningful review." *Id.* at 4.

2. Petitioner also argues the Commission erred when it rejected his claim, made for the first time in his Motion for Review, that he deserved compensation for an additional fifty percent permanent partial disability. The application for a hearing does not specify such a claim. The ALJ, in a response letter, indicates that such a claim was not presented at the hearing. Although the Commission rejected the claim based on the eight year statute of limitations which had expired more than seven years before petitioner raised this claim in his motion for review, we do not consider Mr. Zupon's claim because his failure to raise the claim at the original hearing precludes any review on appeal. See *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 268-69 (Utah App.1993).

3. Petitioner also claims we should remand the case for factual findings because the Commis-

sion applied the substantial evidence test rather than a preponderance of the evidence standard. See *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah App.1993). In *Ashcroft*, the Industrial Commission held petitioner had failed to meet his burden of proof under the substantial evidence standard. Furthermore, the only evaluation of the evidence the Commission did was under the substantial evidence standard. We noted substantial evidence review is not the role of the Commission, a trier of fact. *Id.*

The case at hand is significantly different. Here, the Commission ruled the ALJ's findings were supported by substantial evidence. The order found the respondents had established no medical causation by "substantial evidence." This is the exact opposite of *Ashcroft*. A substantial evidence standard represents a higher burden of proof and thus the comment represents at most a harmless error.

Furthermore, in the order denying review, the Commission systematically responded directly to the challenges the petitioner asserted to the ALJ's findings. In response to the petitioner's challenge that the ALJ improperly found no medical causation, the Commission recited the evidence supporting medical causation and concluded "the medical records do not establish a medical causal connection between applicant's August 7, 1975 industrial injury and his permanent total disability." As opposed to *Ashcroft*, where substantial evidence was the only comment on the evidence by the Commission, in this case the substantial evidence standard is

Cite as 860 P.2d 960 (Utah App. 1993)

the odd lot doctrine is inapplicable because medical causation must be established prior to the doctrine's application and the Commission properly found petitioner's industrial injury did not cause his permanent total disability.

ODD LOT DOCTRINE

[3-5] The odd lot doctrine "allows the Commission to find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render the claimant unable to obtain employment." *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127, 1131 (Utah App. 1989). See also *Marshall v. Industrial Comm'n*, 681 P.2d 208, 212-13 (Utah 1984) (discussing odd lot doctrine). To qualify as a recipient of benefits under the odd lot doctrine, an employee must first "prove that he or she can no longer perform the duties required in his or her occupation." *Zimmerman*, 785 P.2d at 1131. Next, the employee, through cooperation with the Division of Vocational Rehabilitation, must "establish that he or she cannot be rehabilitated." *Id.* After the employee has shown that rehabilitation is not possible, the employer has the opportunity "to prove the existence of steady work the employee can perform." *Id.* The work the employer establishes is available must take into consideration all relevant factors "including the employee's education, mental capacity, and age" as well as physical limitations. *Id.*⁴

[6,7] Before a claimant can acquire benefits under the odd lot doctrine, however, the claimant must establish a compensable industrial injury. *Zimmerman*, 785 P.2d at 1132. "[U]nless the claimant has suffered a compensable industrial injury, the [odd lot] doctrine is inapplicable no matter how compelling the other factors." *Id.* (quoting *Ortiz v. Industrial Comm'n*,

simply recited in response to an unclear nonspecific challenge. The substantive, factual discussion of the case applies the necessary preponderance of the evidence standard.

4. Although petitioner argues that application of the odd lot analysis indicates he is entitled to benefits, it is clear from the record there was, at

766 P.2d 1092, 1094 (Utah App.1989)) (modifications in original). The claimant must prove the compensability of an injury by a preponderance of the evidence. *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah App.1993). Proving medical causation between the industrial accident and the disability for which the claimant seeks compensation is a necessary component for recovery. *Allen v. Industrial Comm'n*, 729 P.2d 15, 27 (Utah 1986).

MEDICAL CAUSATION

[8] Medical causation is an issue of fact and we review the determination of the Industrial Commission under the substantial evidence standard. See *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App.1993); Utah Code Ann. § 63-46b-16(4)(g) (1989). "Medical causation demands that petitioner 'prove [his] disability is medically the result of an exertion or injury that occurred during a work-related activity.'" *Willardson v. Industrial Comm'n*, 856 P.2d 371, 375 (Utah App. 1993) (quoting *Allen v. Industrial Comm'n*, 729 P.2d 15, 27 (Utah 1986)) (footnote omitted).

Petitioner claims the Commission committed error in ignoring its prior decision that ten percent of petitioner's permanent partial impairment was attributable to the industrial accident. This argument misapprehends the impact of the Commission's earlier decision.

[9] For the odd-lot doctrine to apply, the Commission must first determine there is medical causation between the petitioner's 1975 industrial accident and his now claimed permanent total disability. That is a different question from, and not controlled in any way by, the determination that his industrial accident caused a permanent partial disability. Furthermore, the determination that there was medical cau-

the very least, never any rehabilitation evaluation ordered. See *Hardman v. Salt Lake City Fleet Management*, 725 P.2d 1323, 1328 (Utah 1986) (remanding for rehabilitation determination). See also *Norton v. Industrial Comm'n*, 728 P.2d 1025, 1028 (Utah 1986) (per curiam) (remanding to assess disability and provide employer opportunity to prove existence of work).

sation in the 1977 hearing did not prevent the Commission from reaching a different conclusion based on new medical evidence at the 1992 hearing. *See* Utah Code Ann. § 35-1-78(1) (Supp.1993). While the 1977 decision was some evidence supporting medical causation for the new permanent total claim brought sixteen years after the industrial accident, the ALJ and the Commission properly reassessed *all* the medical evidence in the record.

[10] Based primarily on the Social Security Administration's determination that petitioner's total disability was a result of the arthritis in the petitioner's hands, the Commission found there was no medical causation between the 1975 industrial injury and his permanent total disability claim.⁵ Thus, the Commission's determination petitioner did not establish by a preponderance of the evidence that the 1975 industrial accident was a medical cause of his now claimed total permanent disability is supported by substantial, undisputed evidence in the record. We therefore affirm.

CONCLUSION

The Industrial Commission's determination that petitioner failed to establish his 1977 industrial injury was a medical cause of his now claimed permanent total disability is supported by substantial evidence. We therefore affirm the denial of permanent total disability benefits.

ORME and BENCH, JJ., concur.



5. The ALJ and the Commission discussed an alternative basis for the rejection of petitioner's claim. Based on the medical panel's assessment that there was only a one-in-six chance petitioner's back injury aggravated his spine disease, the ALJ questioned the validity of the earlier ALJ's finding of medical causation. The ALJ noted a one-in-six, or 16 and 66 one-hundredths percent, chance is significantly less than the 50 percent required under the preponderance of the evidence standard. Furthermore, the ALJ explicitly and completely reviewed the substantial, undisputed medical evidence in the case. The Commission also affirmed the ALJ's finding of no medical causation on this basis and recited

The PROMARK GROUP, INC., a Colorado corporation formerly known as Component Sales, Inc., and Utah Component Sales, Inc., a Utah corporation, Plaintiffs and Appellants,

v.

HARRIS CORPORATION, Defendant and Appellee.

No. 920173-CA.

Court of Appeals of Utah.

Sept. 17, 1993.

Sales representative sued corporation seeking to recover damages for lost commissions and lost value of exclusive sales territory due to improper termination of agreement by corporation. The District Court, Third District, Salt Lake County, Michael R. Murphy, J., granted corporation's motion for summary judgment. Sales representative appealed. The Court of Appeals, Jackson, J., held that: (1) corporation's improper attempt to make termination of agreement retroactive in violation of agreement did not invalidate termination itself but only affected timing of effective date of actual termination, and (2) sales representative was not entitled to receive from corporation any commissions in view of its settlement with subrepresentative for breach of subrepresentation agreement which expressly premised dollar amount of settlement on compensation under subre-

undisputed facts in the record to support its conclusion. The commission noted: (1) The medical records show no treatment for back pain after 1976; (2) The doctors who treated petitioner immediately after the accident noted he complained of pain and limited use of much of his body, "suggesting that the applicant was experiencing symptoms of progressive arthritis of the spine, shoulders, elbows, and hands;" (3) A doctor in 1976 concluded petitioner could return to work; and (4) A doctor evaluating petitioner for Social Security Benefits in 1981 concluded petitioner's symptoms were out of proportion with the doctor's objective analysis.

APPENDIX "D"

35-1-67. Permanent total disability—Amount of payments—Vocational rehabilitation—Procedure and payments.—In cases of permanent total disability the employee shall receive $66\frac{2}{3}\%$ 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 $66\frac{2}{3}\%$ 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.

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

ment of any artificial means or appliance for the reason of breakage, wear and tear, deterioration, or obsolescence

(5) The commission may, in unusual cases, order the payment of additional sums for burial expenses or to provide for artificial means or appliances as the commission considers just and proper 1964

35-1-82, 35-1-82.51. Repealed. 1965, 1987

35-1-82.52. Appointment of law judges — Power and authority.

(1) The commission shall appoint one or more administrative law judges

(2) The commission or any administrative law judge may call, preside at, and conduct hearings and adjudicative proceedings

(3) (a) The commission and any administrative law judge may issue subpoenas

(b) Failure to respond to a properly issued subpoena may result in a contempt citation and offenders may be punished as provided in Section 78-32-15 1987

35-1-82.53. Review of administrative order — Finality of commission's order.

(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge may seek review of that order with the commission by complying with the commission's rules governing that review

(2) The order of the commission on review is final, unless set aside by the Court of Appeals 1988

35-1-82.54, 35-1-82.55. Repealed. 1988

35-1-82.56. Notice to parties of order or award.

All parties in interest shall be given due notice of the entry of any administrative law judge's order or any order or award of the commission. The mailing of the copy of said order or award to the last known address shown in the files of the commission of any party in interest and to the attorneys or agents of record in the case, if any, shall be deemed to be notice of such order 1975

35-1-83 to 35-1-85. Repealed. 1987

35-1-85.1. Depositions of witnesses authorized.

The commission or any party to a proceeding under this act may cause depositions of witnesses to be taken as in civil actions 1965

35-1-86. Court of Appeals may review commission's actions.

The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order 1988

35-1-87. Attorneys' fees.

In all cases coming before the Industrial Commission in which attorneys have been employed, the commission is vested with full power to regulate and fix the fees of such attorneys 1953

35-1-88. Rules of evidence and procedure before commission and hearing examiner — Admissible evidence.

Neither the commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in such man-

ner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following

(a) Depositions and sworn testimony presented in open hearings

(b) Reports of attending or examining physicians, or of pathologists.

(c) Reports of investigators appointed by the commission

(d) Reports of employers, including copies of time sheets, book accounts or other records

(e) Hospital records in the case of an injured or diseased employee 1965

35-1-89. Injuries to minors.

A minor shall be deemed sui juris for the purposes of this title, and no other person shall have any cause of action or right to compensation for an injury to such minor workman, but in the event of the award of a lump sum of compensation to a minor employee, such sum shall be paid only to his legally appointed guardian 1953

35-1-90. Void agreements between employers and employees.

No agreement by an employee to waive his rights to compensation under this title shall be valid. No agreement by an employee to pay any portion of the premium paid by his employer shall be valid. Any employer who deducts any portion of such premium from the wages or salary of any employee entitled to the benefits of this title is guilty of a misdemeanor, and shall be fined not more than \$100 for each such offense 1953

35-1-91. Physical examinations.

Any employee claiming the right to receive compensation under this title may be required by the commission, or its medical examiner, to submit himself for medical examination at any time, and from time to time, at a place reasonably convenient for such employee, and such as may be provided by the rules of the commission. If such employee refuses to submit to any such examination, or obstructs the same, his right to have his claim for compensation considered, if his claim is pending before the commission, or to receive any payments for compensation theretofore granted, shall be suspended during the period of such refusal or obstruction 1953

35-1-92. Autopsy in death cases — Authority of commission — Certified pathologist — Public record — Attending physicians — Penalty for refusal to permit — Liability.

On the filing of a claim for compensation for death within the provisions of this act where, in the opinion of the commission it is necessary to accurately and scientifically ascertain the cause of death, an autopsy may be ordered by a majority of the commission and shall be made by a person designated by the commission. The commission shall determine who shall pay the charge of the certified pathologist making the autopsy. Any person interested may designate a duly licensed physician to attend such autopsy, and the findings of the certified pathologist performing the autopsy shall be filed with the commission and shall be a public record. All proceedings for compensation shall be suspended upon refusal of a claimant or

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sealable order. Sloan v.
P.2d 463 (Utah Ct. App.

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mission order.
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- (3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.
(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25; 1990, ch. 132, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added the exception at the end of Subsection (1)(a).

NOTES TO DECISIONS

ANALYSIS

Final agency action.
Function of district court.
Right to judicial proceeding.
Cited.

Final agency action.
Industrial Commission's determination of wrongful discharge was not final, and so not reviewable under this section, because the commission and the parties had not resolved the issue of reimbursement for lost wages and benefits as required by § 34-28-19(2). *Parkdale Care Ctr. v. Frandsen*, 837 P.2d 989 (Utah Ct. App. 1992).

Function of district court.
Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursu-

ant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988), cert. denied, 773 P.2d 45 (Utah 1989).

The only appellate jurisdiction statutorily delegated to the district court is to review informal agency adjudicative proceedings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990).

Right to judicial proceeding.
District court erred in declining a de novo review of a dentist's claim to licensure by reciprocity, where there had been no proceeding on his application that was sufficiently judicial in nature, and he had not yet had the licensing agency's action reviewed in a "trial-type hearing." *Kirk v. Division of Occupational & Professional Licensing*, 815 P.2d 242 (Utah Ct. App. 1991).

Cited in Southern Utah Wilderness Alliance v. Board of State Lands & Forestry, 830 P.2d 233 (Utah 1992); *Bonneville Int'l Corp. v. Utah State Tax Comm'n*, 219 Utah Adv. Rep. 52 (Ct. App. 1993).

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

- (i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or
 - (ii) according to any other provision of law.
- (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
 - (b) the agency has acted beyond the jurisdiction conferred by any statute;
 - (c) the agency has not decided all of the issues requiring resolution;
 - (d) the agency has erroneously interpreted or applied the law;
 - (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
 - (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
 - (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
 - (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute,
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Cross-References. — Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610

NOTES TO DECISIONS

ANALYSIS

Agency action
 Applicability of section.
 Arbitrary action.
 Conflicting evidence.
 Factual findings.
 Final order.
 Function of district court.
 Jurisdictional hearing by board.
 Prior practice.
 Review.
 Standard of review.
 — Interpretation of statutory term.
 — Questions of law.
 Substantial evidence test.
 Substantial prejudice.
 Whole record test.
 Cited.

Agency action.

Whether the Industrial Commission acted contrary to its own rule is governed by Subsection (4)(h)(ii) of this section. *Ashcroft v. Indus-*

trial Comm'n, 855 P.2d 267 (Utah Ct App 1993).

Applicability of section.

Subsection (4) deals with judicial relief, not judicial review. It does not affect the degree of deference an appellate court grants to an agency's decision. Rather, it ensures that relief should not be granted when, although the agency committed error, the error was harmless. *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991).

Arbitrary action.

Industrial commission's denial of occupational disease disability benefits based upon a solitary finding regarding the ultimate issue of causation failed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, were reached, and therefore rendered the action arbitrary. *Adams v. Board of Review*, 821 P.2d 1 (Utah Ct App 1991).

Conflicting evidence.

In undertaking a review, the court will not substitute its judgment for the agency's. Reasonably conflicting evidence that the court might have come to a different conclusion than the agency did is the province of the courts, to resolve conflicts, to resolve inconsistent inferences from the same evidence. *Board of Review*, 776 P.2d 158 (Utah Ct App 1989).

Appellate court refers to the Board of Review of the Commission on Conflicts, Inc. v. Department of Social Services, 775 P.2d 158 (Utah Ct App 1989).

Factual findings.

Under Subsection (4) the court will not disturb the board's factual findings to the extent that the board's findings exceed the bounds of rationality. *Pro-Bu Board of Review*, 775 P.2d 158 (Utah Ct App 1989).

Final order.

Administrative law judge's order to dismiss petitions of occupational and professional licensees is not a final order for purposes of the Administrative Procedure Act. *Barney v. Division of Occupational Licensing*, 828 P.2d 158 (Utah Ct App 1991).

Function of district court.

Subsection (1) provides that decisions through formal review will be reviewed by the district court or Court of Appeals. The appellate court will no longer review the agency's decision. *Board of Review*, 776 P.2d 158 (Utah Ct App 1989).

Judicial hearing by the Court of Appeals is not a review of the hearing officer's decision. *Service Review Board v. Industrial Commission*, 821 P.2d 1 (Utah Ct App 1991).