

1995

Hoskings v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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James R. Black; Attorney for Warren Hoskings.

Frank M. Nakamura; Assistant City Attorney; Attorney for Salt Lake City Corporation; Alan L. Hennebold; General Counsel; Industrial Commission of Utah; Erie V. Boorman; Attorney Administrator; Attorney for Employer\'s Reinsurance Fund.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

WARREN HOSKINGS,)	
)	
Applicant/Petitioner,)	
)	Court of Appeals
vs.)	Case No. 950236-CA
)	
INDUSTRIAL COMMISSION OF)	Industrial Commission
UTAH and SALT LAKE CITY)	Case No. 90-0401
CORPORATION,)	
)	Priority 7
Defendant/Respondent.)	

BRIEF OF RESPONDENT
SALT LAKE CITY CORPORATION

Petition for Review of an Order of the
Industrial Commission of Utah

JAMES R. BLACK
Attorney at Law
900 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7304
Attorney for Warren Hoskings

FRANK M. NAKAMURA, #2362
Assistant City Attorney
451 South State, Suite 505
Salt Lake City, Utah 84111
Telephone: (801) 535-7788
Attorney for Salt Lake City
Corporation

Alan L. Hennebold
General Counsel
Industrial Commission of Utah
Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84114

ERIE V. BOORMAN
Attorney, Administrator
P.O. Box 146611
Salt Lake City, Utah 84114
Attorney for Employer's
Reinsurance Fund

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Attorney at Law
900 Kennecott Building
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Attorney for Warren Hoskings

FRANK M. NAKAMURA, #2362
Assistant City Attorney
451 South State, Suite 505
Salt Lake City, Utah 84111
Telephone: (801) 535-7788
Attorney for Salt Lake City
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Alan L. Hennebold
General Counsel
Industrial Commission of Utah
Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84114

ERIE V. BOORMAN
Attorney, Administrator
P.O. Box 146611
Salt Lake City, Utah 84114
Attorney for Employer's
Reinsurance Fund

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STANDARD OF REVIEW.....	2
STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATIONS ARE DETERMINATIVE.....	3
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	6
SUMMARY OF ARGUMENT.....	15
ARGUMENT.....	17
POINT I.	
THE COMMISSION'S FINDING THAT PETITIONER HOSKINGS IS NOT PERMANENTLY TOTALLY DISABLED IS SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE WHOLE RECORD BEFORE THE COURT	17
A. PETITIONER HOSKINGS DID NOT MISS ANY WORK AS A RESULT OF THE INDUSTRIAL ACCIDENT AND HE PERFORMED THE FULL DUTIES OF HIS JOB UNTIL HE RETIRED.....	19
B. PETITIONER HOSKINGS VOLUNTARILY RETIRED FROM HIS JOB WITH THE CITY ON SEPTEMBER 1, 1988 AND WAS PAID, IN ADDITION TO HIS NORMAL MONTHLY PENSION, A RETIREMENT INCENTIVE FROM THE CITY.....	20

C.	AFTER HIS RETIREMENT IN 1988, PETITIONER HOSKINGS WORKED A FULL-TIME JOB AS A FIRE MARSHAL IN WEST YELLOWSTONE, WYOMING IN 1990 AND 1991.....	23
D.	ACCORDING TO AN EVALUATION BY INTRACORP, PETITIONER HOSKINGS CAN BE REHABILITATED.....	25
E.	THE MEDICAL OPINIONS IN THE RECORD SUPPORT THE COMMISSION'S FINDINGS.....	26
F.	THERE IS STEADY WORK PETITIONER HOSKINGS CAN PERFORM TAKING INTO CONSIDERATION HIS EDUCATION, MENTAL CAPACITY AND AGE AS WELL AS PHYSICAL LIMITATIONS.....	26
1.	Unlike most odd-lot cases, Petitioner Hoskings has transferable skills.....	26
2.	Petitioner Hoskings can be trained for challenging and higher paying jobs.....	30
3.	There is work available to Petitioner Hoskings.....	30
4.	There is no requirement that the City become an employment agency and find a specific job for Petitioner Hoskings.....	32
POINT II.		
	THE ISSUE OF PERMANENT PARTIAL DISABILITY BENEFITS WAS NOT PROPERLY BEFORE THE COMMISSION.....	35
CONCLUSION.....		36

TABLE OF AUTHORITIES

CASES

<u>Hodges v. Western Piling and Sheeting Company,</u> 717 P.2d 718 (Utah 1986).....	2, 19
<u>Marshall v. Industrial Commission,</u> 681 P.2d 208 (Utah 1984).....	22, 27, 29, 32
<u>New Orleans (Gulfwide) Stevedores v. Turner,</u> 661 F.2d 1031 (Fourth Cir. 1981).....	33
<u>Peck v. Eimco Process Equipment Company,</u> 748 P.2d 572 (Utah 1987).....	20, 21, 24, 27, 29
<u>Van Leeuwen v. Industrial Commission,</u> 270 Utah Adv. Rep. 13 (Utah App. 1995).....	2, 31
<u>Zupon v. Industrial Commission,</u> 860 P.2d 960 (Utah App. 1993).....	18

STATUTES

35-1-67, <u>Utah Code Ann.</u> (1974 Repl. Vol. 4B 1986 Cum. Supp.).....	3, 5
35-1-82.53, <u>Utah Code Ann.</u>	1
35-1-86, <u>Utah Code Ann.</u>	1
49-6a-28 (1968), <u>Utah Code Ann.</u>	23
63-46b-16, <u>Utah Code Ann.</u>	1
63-46b-16(4)(g), <u>Utah Code Ann.</u>	3
78-2a-3, <u>Utah Code Ann.</u>	1
Title 49 <u>Utah Code Ann.</u>	8, 21, 22

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over 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 ISSUES

The following issue is presented for review:

Is there substantial evidence to support the Commission's finding that Petitioner Hoskings is not permanently totally disabled because:

1. He failed to establish that he could not be rehabilitated?

2. Based on his capabilities, regular work is available to him if he is genuinely seeking work?¹

STANDARD OF REVIEW

The Commission ruled that Petitioner Hoskings is not permanently totally disabled under the Utah Workers' Compensation laws.² It found that Petitioner Hoskings can be rehabilitated and that other work is available to him, after considering his capabilities and limitations.³

The determination whether an individual is permanently totally disabled is a factual question to be resolved by the Commission.⁴ On review of the Commission's findings of fact, this Court will uphold the findings if they are supported by substantial evidence when viewed in light of the whole record before the Court.⁵

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁶

¹ The issue of Petitioner Hoskings' permanent partial disability, if any, was not before the Commission and is not an issue presented for review.

² R. at 211 through 214. The Commission's Order dated March 3, 1995 is attached as Appendix "A".

³ R. at 213.

⁴ Hodges v. Western Piling and Sheeting Company, 717 P.2d 718 (Utah 1986).

⁵ Van Leeuwen v. Industrial Commission, 270 Utah Adv. Rep. 13, 14 (Utah App. 1995).

⁶ Id.

**STATUTES, ORDINANCES, RULES AND REGULATIONS
WHOSE INTERPRETATIONS ARE DETERMINATIVE**

This case does not involve the interpretation of a statute, ordinance, rule or regulation. Rather, the issue presented for review is the Commission's factual determination that Petitioner Hoskings is not permanently totally disabled under the Utah Workers' Compensation laws. The following statutes and rules are, however, applicable :

1. Section 35-1-67 of the Utah Code Ann. (1974 Repl. Vol. 4B 1986 Cum. Supp.).⁷
2. Section 63-46b-16(4)(g) of the Utah Code Ann.⁸

STATEMENT OF THE CASE

On April 6, 1986, Petitioner Hoskings, while employed by the City, suffered an acute left ankle sprain when he inadvertently stepped down from a truck onto a fire hose filled with water.

On September 1, 1988, Petitioner Hoskings voluntarily retired from the City Fire Department and started receiving his monthly pension under Title 49 of the Utah Code Ann. Because Petitioner Hoskings had twenty or more years of City

⁷ A copy of Section 35-1-67 of the Utah Code Ann., (Supp. 1986) is attached as Appendix "B".

⁸ A copy of Section 63-46b-16(4)(g) of the Utah Code Ann. is attached as Appendix "C".

service, he also received a retirement incentive in the amount of \$35,187.92 from the City.

On April 16, 1990, Petitioner Hoskings filed an Application for Hearing with the Commission seeking workers' compensation benefits for the injury he sustained in the industrial accident on April 6, 1986. Following a hearing on January 8, 1992, the Administrative Law Judge (ALJ) referred the matter to a medical panel.

The medical panel issued a report on May 13, 1992 stating that Petitioner Hoskings is 11% whole person impaired. The medical panel made no reference to permanent total disability.

On August 3, 1992, the ALJ made a tentative finding that Petitioner Hoskings is permanently totally disabled as a result of a April 6, 1986 industrial accident.

On August 3, 1992, the ALJ referred the matter to the Utah Division of Rehabilitation Services (DRS). The DRS concluded that Petitioner Hoskings did not demonstrate the physical stamina and endurance to perform sedentary work activities and that his limitations are permanent.

In December 1993, Petitioner Hoskings was evaluated by Dr. S. Knorpp. Dr. S. Knorpp stated that Petitioner

Hoskings was not "by definition disabled or unable to perform or engage in any gainful occupation".

In December 1993, Intracorp performed a vocational evaluation on Petitioner Hoskings. In a report dated December 24, 1993, Intracorp identified specific jobs Petitioner Hoskings can perform. Intracorp further determined that Petitioner Hoskings demonstrated the capacity to learn and progress within a career field and would be successful in formal education training which would prepare him for more challenging and higher paying jobs.

On June 30, 1994, the ALJ issued Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits to Petitioner Hoskings in the amount of \$85,800.

On July 26, 1994, the City filed a Motion for Review of the ALJ's order. On March 3, 1995, the Commission issued an Order finding that Petitioner Hoskings is not permanently totally disabled under Section 35-1-67 of the Utah Code Ann. (Supp. 1986) because:

1. Petitioner Hoskings failed to show that he cannot be rehabilitated.

2. There is regular work available to Petitioner Hoskings if he is genuinely seeking work.

On April 3, 1995, Petitioner Hoskings filed, with this Court, a Petition for Review of the final order issued by the Commission on March 3, 1995.

STATEMENT OF FACTS

The following is a statement of the relevant facts relied on by the Commission:

1. Petitioner Hoskings was born on December 6, 1935.⁹
2. He graduated from high school in 1954.¹⁰
3. He attended technical college from 1958 through 1960 and received a degree in electronics.¹¹
4. From 1960 through 1965, he worked as a test technician for Sperry Corporation.¹²
5. In 1965, he worked for Litton Industries as a gyrotechnician.
6. On January 3, 1966, he started his employment with the City as a firefighter.¹³

⁹ R. at 232.

¹⁰ R. at 234.

¹¹ R. at 150.

¹² R. at 150.

¹³ R. at 150.

7. He worked for the City from 1966 to September 1, 1988.

8. During his career with the City Fire Department, he was promoted from a firefighter to a lieutenant and eventually to a captain.¹⁴

9. As a fire captain for the City, he supervised and coordinated activities of firefighters; inspected the buildings and grounds facilities; examined fire trucks and equipment for operational safety and efficiency; responded to fire alarms; assisted in firefighting; investigated and determined the extent of fire location and water sources; managed crews in the fire operation; trained subordinates in the use of firefighting equipment and techniques; inspected commercial establishments for fire code compliance and reported safety violations; compiled other reports; recommended corrective measures for fire hazards; supervised and coordinated activities of fire companies fighting multiple alarm fires; wrote and submitted proposals for the purchase of new equipment; and prepared recommendations to the City's emergency plans.¹⁵

¹⁴ R. at 150.

¹⁵ R. at 236.

10. On April 6, 1986, while working for the City, Petitioner Hoskings stepped down from a fire truck onto a 2.5 inch diameter hose filled with water.¹⁶

11. He injured his left ankle as a result of stepping on the hose.¹⁷

12. On April 7, 1986, his ankle was examined and it was determined that he had an acute ankle sprain.¹⁸

13. He did not miss any work time with the City as a result of the April 6, 1986 accident.¹⁹

14. After the April 6, 1986 accident, he continued to perform his regular duties and responsibilities as a captain in the City Fire Department.²⁰

15. On September 1, 1988, Petitioner Hoskings retired from the City and commenced receiving his monthly pension as provided under Title 49 of the Utah Code Ann.²¹

16. Petitioner Hoskings did not pursue a disability retirement under Title 49 of the Utah Code Ann.

17. Petitioner Hoskings accepted an early retirement incentive from the City in the amount of \$35,187.92.²²

¹⁶ R. at 152.

¹⁷ R. at 152.

¹⁸ R. at 152.

¹⁹ R. at 159.

²⁰ R. at 159.

²¹ R. at 154.

²² R. at 179.

18. At the time of his retirement, Petitioner Hoskings did not inform the City that his decision to retire was related to his ankle injury.²³

20. After his retirement in September 1988, Petitioner Hoskings developed lung problems and was treated for pneumonia and pleural effusion.²⁴

21. He received follow-up care for his lung problems at LDS Hospital in December 1988.²⁵

22. Dr. M. Collins, a pulmonologist at LDS Hospital, stated that the lung injury was not related to any on-the-job event.²⁶

23. From April 22, 1990 through September 23, 1990, Petitioner Hoskings worked at a full-time job with Hamilton Stores in West Yellowstone, Wyoming as a fire marshal.²⁷

24. As a fire marshal in West Yellowstone, Wyoming, he taught fire safety and did fire protection education at several stores operated within Yellowstone National Park.²⁸

25. On April 16, 1990, Petitioner Hoskings filed an Application for Hearing with the Commission alleging that he

²³ R. at 211.

²⁴ R. at 394.

²⁵ R. at 394.

²⁶ R. at 396.

²⁷ R. at 156.

²⁸ R. at 156.

was entitled to workers' compensation benefits as a result of his accident on April 6, 1986.²⁹

26. In his Application for Hearing, Petitioner Hoskings claimed that he was entitled to medical expenses, permanent partial disability and permanent total disability.³⁰

27. In 1991, Petitioner Hoskings had planned to do seasonal work again with Hamilton Stores in West Yellowstone, Wyoming, but Hamilton Stores wanted to hire someone to work year-round which Petitioner Hoskings would not do.³¹

28. Petitioner Hoskings worked for Hamilton Stores from May 6, 1991 through June 14, 1991 to train the person who was to take the year-round position.³²

29. A hearing was held on Petitioner Hoskings' claim for workers' compensation benefits before an ALJ on January 8, 1992.³³

30. After the hearing, the ALJ referred the matter to a medical panel in March of 1992.³⁴

²⁹ R. at 1. The Application for Hearing originally referred to an accident on June 4, 1986. It was determined that the June 4, 1986 date was in error and that the correct date was April 6, 1986.

³⁰ R. at 1.

³¹ R. at 156.

³² R. at 156.

³³ R. at 149.

31. On May 13, 1992, the medical panel submitted its report to the ALJ.³⁵

32. The medical panel found that Petitioner Hoskings' foremost orthopedic problem was his calcaneal cuboid arthritis in the left ankle. It determined that the origin of this condition was industrial with progression of the condition having occurred over the years since the 1986 industrial accident. It concluded that the appropriate permanent partial impairment rating would be 11% whole person. The medical panel did not mention permanent total disability.³⁶

33. On or about August 1992, the ALJ made a tentative finding that Petitioner Hoskings was permanently totally disabled as a result of the April 6, 1986 industrial accident.

34. On August 3, 1992, the ALJ referred the case to the Division of Rehabilitation Services (DRS) for an evaluation.³⁷

35. The DRS performed a one week work evaluation of Petitioner Hoskings in November 1992.³⁸

³⁴ R. at 149.

³⁵ R. at 149.

³⁶ R. at 157.

³⁷ R. at 158.

36. The DRS concluded that Petitioner Hoskings lacked the physical stamina to perform part-time sedentary work.³⁹

37. The DRS concluded that, based upon the periodic self-reports, Petitioner Hoskings' limitations were permanent.⁴⁰

38. In December 1993, Petitioner Hoskings underwent a vocational evaluation performed by Intracorp.⁴¹

39. Based on the evaluation, Intracorp concluded the following:⁴²

(a) Based on his work experience, education, intelligence, age and limitations, there are specific jobs Petitioner Hoskings can perform with some training.

(b) Petitioner Hoskings has demonstrated the capacity to learn and would be successful in formal training in preparation for more challenging and higher paying jobs.

³⁸ R. at 159.

³⁹ R. at 159.

⁴⁰ R. at 159.

⁴¹ R. at 160.

⁴² R. at 236, 237, 238.

(c) There is no medical opinion which prohibits Petitioner Hoskings from returning to a full-time work schedule under appropriate job demand requirements.

(d) Petitioner Hoskings is viewed as being able to benefit from professional services and vocational rehabilitation.⁴³

40. In December, 1993, Dr. S. Knorpp performed a medical examination of Petitioner Hoskings and found that he was "not by definition disabled or unable to perform or engage in gainful occupation".⁴⁴

41. On June 30, 1994, the ALJ entered her Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits to Petitioner Hoskings in the amount of \$85,800.00.⁴⁵

42. The ALJ specified, in her Findings of Fact, Conclusions of Law and Order, that the issue before her was a claim for permanent total disability.⁴⁶

43. On July 26, 1994, the City filed a Motion for Review with the Commission.⁴⁷

⁴³ R. at 236, 237, 238.

⁴⁴ R. at 226 through 231.

⁴⁵ R. at 148-49.

⁴⁶ R. at 148.

⁴⁷ R. at 191.

44. On March 3, 1995, the Commission granted the City's Motion for Review and ruled that Petitioner Hoskings is not entitled to permanent total disability compensation within the meaning of Section 35-1-67 of the Utah Workers' Compensation Act because:⁴⁸

(a) He can be rehabilitated. The report prepared by the DRS made no distinction between sedentary work and more strenuous employment. It did not address the fact that his employment at Hamilton Stores demonstrated an ability to work. It made no reference to his intelligence, education, adaptability or wide range of prior work experience. In contrast to the DRS, the Intracorp report identifies his training, experience and abilities. It specifically addresses the effects of his ankle injury and other medical conditions. It analyzes the foregoing factors and concludes that he can be rehabilitated. Intracorp's conclusion is corroborated by the fact that he found other work at Hamilton Stores and successfully performed his employment duties there. The Commission

⁴⁸ R. at 250, 251.

was persuaded by Intracorp's' objective data and subjective analysis.

(b) There is other work available to Petitioner Hoskings. The Intracorp report contains a list and discussion of employment opportunities within his abilities.

45. Petitioner Hoskings appealed the Commission's decision to this Court on April 3, 1995.

SUMMARY OF ARGUMENT

The City will argue that the following is substantial evidence supporting the Commission's finding that Petitioner Hoskings is not permanently totally disabled.

A. Petitioner Hoskings missed no work as a result of his industrial accident on April 6, 1986. For two years after his industrial accident, Petitioner Hoskings continued to perform his regular duties and responsibilities as a fire captain.

B. Petitioner Hoskings voluntarily retired from the City on September 1, 1988 and accepted an early retirement incentive in the amount of \$35,187.92. At the time of his retirement, he did not specify, as a reason for retiring, his problems with his left ankle. Since his retirement was

not substantially motivated by the industrial injury, but primarily due to personal and other reasons, the denial of permanent total disability was appropriate.

C. After he retired in 1988, Petitioner Hoskings worked as a seasonal fire marshal in West Yellowstone, Wyoming without limitations. The fact that he did other work after his retirement is relevant evidence that he is capable of working.

D. It was reasonable for the Commission to rely upon the report prepared by Intracorp. Intracorp found that Petitioner Hoskings can be rehabilitated and that "he could be successful in long term formal training in preparation for more challenging and higher paying jobs."

E. Although the medical opinions in the record indicate that Petitioner Hoskings may be permanently partially disabled, the same medical evidence, including the review by the medical panel appointed by the Commission, supports a conclusion that Petitioner Hoskings is not permanently totally disabled.

F. There is regular work available to Petitioner Hoskings based upon his intelligence, education, adaptability, and wide range of prior work experience. A

vocational evaluation performed by Intracorp specifies employment opportunities within Petitioner Hoskings' capabilities. Unlike most odd-lot doctrine cases, Petitioner Hoskings has transferable skills which make him employable despite his physical limitations.

In regards to Petitioner Hoskings' issue on permanent partial disability, the City argues that although Petitioner Hoskings initially raised, in his Application for Hearing, that he was seeking permanent partial disability benefits, further pleadings and proceedings before the ALJ and Commission narrowed Petitioner Hoskings' claim to the sole issue of permanent total disability benefits. There has been no hearing on the issue as to whether Petitioner Hoskings is entitled to permanent partial disability benefits and, if he is, what those benefits would be.

ARGUMENT

POINT I.

THE COMMISSION'S FINDING THAT PETITIONER HOSKINGS IS NOT PERMANENTLY TOTALLY DISABLED IS SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE WHOLE RECORD BEFORE THE COURT.

Petitioner Hoskings claims that he is permanently totally disabled as the result of an industrial accident on April 6, 1986. On April 6, 1986, Petitioner Hoskings

sustained an acute left ankle sprain when he stepped down from a truck onto a fire hose filled with water.

He asserts 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.⁴⁹ 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 . . . and must establish 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."⁵⁰ 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.⁵¹

⁴⁹ Zupon v. Industrial Commission, 860 P.2d 960, 963 (Utah App. 1993).

⁵⁰ Id. (emphasis added).

⁵¹ Id.

The Commission ruled that Petitioner Hoskings failed to prove that he cannot be rehabilitated. Further, even if Petitioner Hoskings could be rehabilitated, the Commission determined that other work is available that Petitioner Hoskings can perform.

A determination whether an individual is permanently . . . totally disabled is a factual question to be resolved by the Commission and will not be set aside by this Court unless there is no substantial evidence in the record to support it.⁵²

The Commission's finding that Petitioner Hoskings is not permanently totally disabled is supported by the following substantial evidence.

A. PETITIONER HOSKINGS DID NOT MISS ANY WORK AS A RESULT OF THE INDUSTRIAL ACCIDENT AND HE PERFORMED THE FULL DUTIES OF HIS JOB UNTIL HE RETIRED.

Petitioner Hoskings did not miss any work as a result of the acute left ankle sprain sustained in his industrial accident on April 6, 1986. From April 6, 1986, to the date of his retirement on September 1, 1988, Petitioner Hoskings performed the full duties and responsibilities of his job as a captain in the City Fire Department without limitations or

⁵² Hodges v. Western Piling and Sheeting Company, 717 P.2d 718 (Utah 1986).

accommodations. At no time did he express to the City that he was a risk to himself, co-workers or the public as he performed the normal duties of his position.

The fact that Petitioner Hoskings returned to his normal duties following his industrial accident, without missing any work time, is relevant evidence in determining his ability to perform the duties of his occupation. Not only is it relevant evidence, the Utah Supreme Court, in Peck v. Eimco Process Equipment Company,⁵³ stated that:

. . . [T]he fact that an employee returns to work after an industrial injury creates a "rebuttable presumption that the claimant has not sustained permanent and total disability".⁵⁴

Petitioner Hoskings presented no evidence which would rebut the presumption that he has not sustained permanent total disability.

B. PETITIONER HOSKINGS VOLUNTARILY RETIRED FROM HIS JOB WITH THE CITY ON SEPTEMBER 1, 1988 AND WAS PAID, IN ADDITION TO HIS NORMAL MONTHLY PENSION, A RETIREMENT INCENTIVE FROM THE CITY.

On September 1, 1988, Petitioner Hoskings voluntarily retired from the City Fire Department. At the time of his

⁵³ Peck v. Eimco Process Equipment Company, 748 P.2d 572 (Utah 1987).

⁵⁴ Id.

retirement, Petitioner Hoskings never gave, as a reason for his retirement, problems with his left ankle which he sprained in an industrial accident on April 6, 1986. Since he did not miss any work after the industrial accident and performed the duties and responsibilities of his position as a fire captain, the City treated Petitioner Hoskings' retirement as voluntary.

Commencing September 1, 1988, Petitioner Hoskings received his normal monthly pension under Title 49 of the Utah Code Ann. Interestingly, he did not apply for a disability pension under Title 49 of the Utah Code Ann. In addition to the normal pension, the City paid him a retirement incentive in the amount of \$35,187.82.

The Utah Supreme Court stated in Peck v. Eimco Process Equipment Company that when "a finding is made and supported by evidence that the employee's retirement is not substantially motivated by his industrial injury, but is due primarily to personal or other reasons, . . . a denial of disability benefits [will] be upheld on a basis of voluntary retirement."⁵⁵

⁵⁵ Id. at 578.

It is reasonable for the Commission to conclude that Petitioner Hoskings' retirement was not substantially motivated by his industrial injury. At the time he retired, Petitioner Hoskings made no mention of his left ankle injury as a reason for his retirement. He retired and began receiving his monthly pension under Title 49 of the Utah Code Ann. He took advantage of the City's early retirement incentive and was paid \$35,187.92. The primary reason for his retirement was personal and economic.

The purpose of the workers' compensation law is to "secure [employees] . . . against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment."⁵⁶ This compensation is not in the form of damages for injury, but in the form of payments to compensate for the loss of employability resulting from the injury.⁵⁷

Accordingly, workers' compensation laws should not be used to force the public treasury to pay, as an afterthought, \$85,800.00, for a left ankle injury, years after the employee has retired, in addition to a substantial

⁵⁶ Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984).

⁵⁷ Id.

monthly retirement pension⁵⁸ and a retirement incentive in the amount of \$35,187.00. Petitioner Hoskings is not employed because he retired, not because he is unemployable by virtue of an industrial injury.

The Commission correctly ruled that Petitioner Hoskings should not be paid from the public treasury \$85,800.00 for permanent total disability in addition to his monthly retirement pension and the \$35,187.00 incentive. He retired.

C. AFTER HIS RETIREMENT IN 1988, PETITIONER HOSKINGS WORKED A FULL-TIME JOB AS A FIRE MARSHAL IN WEST YELLOWSTONE, WYOMING IN 1990 AND 1991.

Petitioner Hoskings worked as a fire marshal for Hamilton Stores from April 22, 1990 to September 23, 1990 and from May 6, 1991 through June 14, 1991. As part of his duties as a fire marshal, he taught safety and fire protection at several stores operated within Yellowstone National Park. In 1991, Hamilton Stores wanted to make the job a year-round position. Petitioner Hoskings did not want to work year-round and, therefore, did not work for Hamilton

⁵⁸ Under Section 49-6a-28 (1986) of the Utah Code Ann., Petitioner Hoskings receives, as a monthly retirement pension, 54% of his final average monthly salary.

Stores thereafter. While employed by Hamilton Stores, he fully performed the duties and responsibilities of the job. There is no evidence that he would not have been able to do the job if he had been willing to work year-round.⁵⁹ There is no evidence that in order for him to perform the job, he needed to exhibit "superhuman efforts" or rely on the sympathy of friends.

The fact that Petitioner Hoskings worked, without limitation, in another job after his retirement, is relevant evidence the Commission reasonably relied on to support its decision that he is capable of working and that there is dependable work he can do if he wants to work. Since Petitioner Hoskings retired, he did not need to work in a year-round position. Because he worked after his industrial accident, there is a "rebuttable presumption" that he has not sustained a permanent total disability.⁶⁰ He has presented no evidence to rebut the presumption.

Therefore, the fact that Petitioner Hoskings worked after he retired supports the Commission's decision that he is not permanently totally disabled.

⁵⁹ Facts paragraphs 23, 24, 27 and 28.

⁶⁰ Peck v. Eimco Process Equipment Company, *supra*.

D. ACCORDING TO AN EVALUATION BY INTRACORP,
PETITIONER HOSKINGS CAN BE REHABILITATED.

Petitioner Hoskings was referred to Intracorp for a vocational evaluation. Based upon his work experience, intelligence, age, education and limitations, there are jobs Petitioner Hoskings can perform. Further, Intracorp determined that Petitioner Hoskings would be successful in long-term formal training in preparation for more challenging and higher paying jobs. Intracorp concluded that there is no medical opinion which prohibits Petitioner Hoskings from returning to a full-time work schedule under appropriate job demand requirements.⁶¹

It is reasonable for the Commission to accept the expert opinion of Intracorp that Petitioner Hoskings can be rehabilitated particularly in light of the whole record discussed herein. If Petitioner Hoskings wanted to undergo training, he could do regular work. Since he can be rehabilitated, he is not permanently totally disabled.

⁶¹ Facts paragraph 39.

E. THE MEDICAL OPINIONS IN THE RECORD SUPPORT THE COMMISSION'S FINDINGS.

Petitioner Hoskings has been treated and evaluated by several physicians and specialists. A medical panel, appointed by the ALJ, reviewed Petitioner Hoskings' claim. There is no medical opinion which states that Petitioner Hoskings is prohibited from returning to a full-time work schedule or that he cannot be rehabilitated. On the contrary, Dr. S. Knorpp concluded that Petitioner Hoskings was not permanently totally disabled.⁶² The medical evidence in the record supports the Commission's determination that Petitioner Hoskings is not permanently totally disabled.

F. THERE IS STEADY WORK PETITIONER HOSKINGS CAN PERFORM TAKING INTO CONSIDERATION HIS EDUCATION, MENTAL CAPACITY AND AGE AS WELL AS PHYSICAL LIMITATIONS.

The Commission's finding, that there is work available to Petitioner Hoskings, is supported by the following substantial evidence.

1. Unlike most odd-lot cases, Petitioner Hoskings has transferable skills. The Commission found that there was

⁶² Facts paragraph 40.

general work available to Petitioner Hoskings that he could perform given his age, experience, education and limitations.

Disability is evaluated, not in the abstract, but in terms of the specific individual who has suffered a work related injury. Odd lot cases generally involve claimants whose adaptability to the new situation created by their physical injury is limited by the lack of mental capacity or education. A person whose sole stock in trade has been the capacity to perform physical movements, and, whose ability to make those movements has been impaired by injury, is under severe disadvantage in acquiring a dependable new means of livelihood.⁶³

Accordingly, the odd lot cases most often involve employees whose work required physical labor. Many of those employees were 50 years old or older with moderate or little education.⁶⁴ In Marshall v. Industrial Commission, a case relied upon by Petitioner Hoskings to support his claim, the worker who was awarded permanent total disability, was a coal miner with less than a high school education and had a 40 year history of heavy labor in the mines. In Peck v.

⁶³ Marshall v. Industrial Commission, *supra*.

⁶⁴ Id.

Eimco Process Equipment Company, another case relied on by Petitioner Hoskings, the worker was 63 years old, had no formal education beyond high school and worked his entire life in heavy manual labor.⁶⁵

Petitioner Hoskings, however, is a high school graduate. He completed a one year program in electronics at Salt Lake City Technical College. He attended Brigham Young University for two years majoring in engineering and completed approximately two years of general education credits while being employed with Sperry Corporation. He worked at Sperry Corporation as a test technician. He worked for Litton Industries as a gyrotechnician.

As an employee with the City Fire Department, Petitioner Hoskings was promoted from the rank of firefighter to lieutenant to captain. His duties and responsibilities with the City included supervising and coordinating the activities of firefighters assigned to his station; performing fire inspections of buildings and facilities; examining fire trucks and equipment for operational safety and efficiency; responding to fire alarms; determining the extent of fire location and water

⁶⁵ Peck v. Eimco Process Equipment Company, *supra* at 575.

sources; directing crews in the fire operation; training subordinates in the use of firefighting equipment and techniques; inspecting commercial establishments for compliance with fire codes; reporting safety violations; compiling reports; recommending measures for fire hazards; supervising and coordinating activities of fire companies fighting multiple alarm fires; writing and submitting proposals for new equipment; and preparing written recommendations to the City's emergency plans.⁶⁶ Unlike the claimants in Peck and Marshall, Petitioner Hoskings has transferable skills to other occupations.⁶⁷

Further, after he retired, Petitioner Hoskings did in fact work as a fire marshal for Hamilton Stores in West Yellowstone, Wyoming.

⁶⁶ Facts paragraphs 1-9.

⁶⁷ Petitioner Hoskings' evaluations reflect that he is intelligent and very capable of learning new tasks. In the DRS report of December 1, 1992, the vocational evaluator reported test results in the areas of academic development, intellectual capacities and aptitudes. Petitioner Hoskings scored at the Post-High School level in vocabulary, reading comprehension, problem solving and mathematics; in the 78 percentile on the ability to quickly think and learn when presented with nonverbal intellectual tasks, and in the 95+ percentile in abstract ability and the capacity for observation and clear thinking. R.490-491. The evaluator felt that Petitioner Hoskings possessed "many personal characteristics which resulted in a competent, well-liked supervisor. It appeared that he would experience very little, if any, difficulty in a work setting, whether in a supervisory or subordinate role." Moreover, he demonstrated "the ability to follow verbal instructions, written instructions, diagrams, demonstrations and models" as well as "the ability to effectively plan and organize his work." Accordingly, unlike most odd lot claimants, Petitioner Hoskings can learn to do other jobs if he is genuinely pursuing other work. (R. at 493-494.)

It is reasonable for the Commission to conclude that Petitioner Hoskings can perform other general work with or without training.

2. Petitioner Hoskings can be trained for challenging and higher paying jobs. Based upon a vocational evaluation of Petitioner Hoskings, Intracorp determined that he had the capacity to learn and progress within his career field and would be successful in long-term formal training in preparation for more challenging and higher paying jobs. He manifested a suitable appearance and demeanor to pursue a professional job search and his stable employment history could be considered complimentary by prospective employers. Petitioner Hoskings had no familial, legal or other personal encumbrances affecting employability and he had adequate transportation to acquire and maintain employment.⁶⁸ With respect to physical limitations, no specific medical opinion was on file to prohibit Petitioner Hoskings from returning to a full-time work schedule under appropriate job demand requirements.⁶⁹

3. There is work available to Petitioner Hoskings. Intracorp identified general work that Petitioner Hoskings

⁶⁸ R. at 238.

⁶⁹ Facts paragraph 39.

could perform with limited training based upon his intelligence, education, work experience and physical limitations. Intracorp never conditioned the general work available to him on the sympathy of friends or superhuman efforts.

Admittedly, DRS determined that Petitioner Hoskings was permanently disabled. Petitioner Hoskings argues that the report prepared by the DRS is a better evaluation than Intracorp and asks this Court to re-weigh the DRS evaluation against the report prepared by Intracorp. This Court, however, does not re-weigh the evidence.⁷⁰ Rather, this Court will uphold the finding of the Commission if it is supported by substantial evidence when viewed in the light of the whole record before the Court. It is reasonable for the Commission to give more weight to the Intracorp evaluation.

The Intracorp report, viewed in light of Petitioner Hoskings' voluntary retirement, his work history before retirement, his seasonal work after retirement and the medical opinions in the record, supports the Commission's conclusions that there is regular work available to

⁷⁰ Van Leeuwen v. Industrial Commission, *supra*.

Petitioner Hoskings and, therefore, he is not permanently totally disabled.

4. There is no requirement that the City become an employment agency and find a specific job for Petitioner Hoskings. Petitioner Hoskings argues that the City must not only prove that there is work of a general character which he can perform or a person of his capabilities may be able to learn to do; it must also lead him to a specific job opportunity. Although the Intracorp report identified work that Petitioner Hoskings can, with his capabilities, perform, he criticizes the evaluation because it did not find him a specific job.

The Utah Supreme Court stated in Marshall v. Industrial Commission,⁷¹ that workers may be found totally disabled if they can no longer perform work of the general nature they were performing when injured or any other work which persons of their capabilities may be able to do or learn to do or for which they might be trained. There is no requirement that the City must become an employment agency and find a specific job for Petitioner Hoskings. The City's burden is only to show that there is general work which Petitioner

⁷¹ Marshall v. Industrial Commission, *supra*.

Hoskings can perform with or without training based upon his physical and educational ability, age and experience. If Petitioner Hoskings was correct, a finding of permanent total disability would result by simply proving that one cannot return to his former job, thereby encouraging injured employees, rather than seeking rehabilitation, to avoid any active effort to secure alternate employment. This is counter to all the innumerable projects, governmental, state and federal and private, which look towards restoring to the injured the opportunity to become useful, meaningful citizens and human beings.⁷²

Job availability should incorporate the answer to two questions: (1) Considering the claimants' age, background, employment history and experience, what can claimants physically and mentally do following their injury; that is, what types of jobs are they capable of performing or capable of being trained to do? (2) Within the category of jobs that claimants are reasonably capable of performing, are there jobs reasonably available in the community for which claimants are able to compete and which they could realistically and likely procure?

⁷² See, New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (Fifth Cir. 1981).

The second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimants' age, education and vocational background, that they would be hired if they diligently sought the job. If alternate jobs exist which the claimants could reasonably perform and secure had they diligently tried, the employer, after demonstrating the existence of such jobs, has met its burden.⁷³

Job availability should depend on whether there is a reasonable opportunity for claimants to compete in a manner normally pursued by persons genuinely seeking work with their determined capabilities. If it is established that there are jobs which the claimants can realistically perform and secure, there may not be a finding of total permanent disability.⁷⁴ The employer's burden of demonstrating that claimants are able to secure employment simply cannot amount to a requirement that the employer either hire the claimants or find them a guaranteed job. "The employer does not have to lead the claimant to water, only establish that water is nearby which the claimant may drink if he reaches for it."⁷⁵

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

Intracorp found there are jobs which Petitioner Hoskings could do if he genuinely sought work with his capabilities. It was not unreasonable for the Commission to rely on the Intracorp report combined with the other facts surrounding Petitioner Hoskings' retirement and work history and the medical evidence to conclude that there was regular work available to him. Since there is work available to Petitioner Hoskings, the Commission is correct in finding that he is not permanently totally disabled.

POINT II.

THE ISSUE OF PERMANENT PARTIAL DISABILITY BENEFITS WAS NOT PROPERLY BEFORE THE COMMISSION.

Petitioner Hoskings argues that, in the alternative, the Commission should have awarded him permanent partial disability benefits. Based upon the pleadings and the hearings, the issue was narrowed to whether Petitioner Hoskings was entitled to permanent total disability.⁷⁶ Neither the Commission nor the ALJ reviewed evidence regarding permanent partial impairment. There is conflicting medical information regarding permanent partial impairment which will require further hearings before the ALJ, a medical panel and ultimately the Commission.

⁷⁶ R. at 254.

CONCLUSION

For the reasons stated herein, the Commission's decision should be affirmed because there is substantial evidence to support its finding that Petitioner Hoskings is not permanently totally disabled. Since the issue of permanent partial impairment was not before the Commission and the ALJ, a separate action must be commenced by Petitioner Hoskings. Regardless, the issue of permanent partial disability is not before this Court.

DATED this 15th day of September, 1995.



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

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing by depositing the same in the U.S. mail, postage prepaid, this 15 day of September, 1998, to the following:

James R. Black
CALLISTER, NEBEKER & McCULLOUGH
800 Kennecott Building
Salt Lake City, Utah 84133

Alan L. Hennebold, General Counsel
Industrial Commission of Utah
Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84114-6600

Erie V. Boorman
Employers' Reinsurance Fund
Heber M. Wells Building
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114

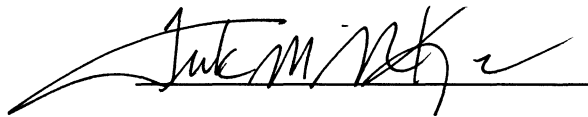


EXHIBIT A

3-6-95

Dated 3/3/45

THE INDUSTRIAL COMMISSION OF UTAH

WARREN HOSKINGS,

Applicant,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

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ORDER GRANTING
MOTION FOR REVIEW

Case No. 90-0401

Salt Lake City Corporation asks The Industrial Commission of Utah to review an Administrative Law Judge's decision awarding permanent total disability compensation to Warren Hoskings under the Utah Workers' Compensation Act.

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

Beginning in 1966, Mr. Hoskings worked for Salt Lake City as a fireman. He was promoted to lieutenant in 1974, then captain in the early 1980's.

While fighting a fire in 1980, Mr. Hoskings injured his left ankle. He underwent surgery, but continued to experience pain. On April 6, 1986, in the course of his employment, he reinjured his left ankle. He received medical attention the next day and was diagnosed with an acute ankle sprain and "calcaneus/cuboid joint problem," later additionally diagnosed as "traumatic osteoarthritis".

Mr. Hoskings did not miss any work as a result of the April 1986 injury. However, he experienced chronic pain and difficulty walking. He was examined by a number of different physicians who attempted various conservative remedies without producing any significant improvement.

On September 1, 1988, Mr. Hoskings accepted early retirement from Salt Lake City. There is no indication that Mr. Hoskings' work performance was unsatisfactory prior to his retirement, nor is there any evidence Mr. Hoskings informed Salt Lake City that his decision to retire was related to his ankle injury. However, Mr. Hoskings now claims that his decision to retire was motivated by his ankle injury.

Mr. Hoskings' impairment from his ankle injury has been rated by several doctors in a range from 8% to 17% of the whole person. The doctors also agree the injury causes Mr. Hoskings significant pain and limits the mobility of the ankle.

After retiring, Mr. Hoskings worked as fire marshall for Hamilton Stores in Yellowstone Park during the summers of 1990 and 1991. Mr. Hoskings spent a substantial amount of his work day driving from one store to another. He had no difficulty performing the duties of the job. However, he chose to resign when the job was changed to a year-around position because he believed the cold winter temperatures in Yellowstone might aggravate his ankle injury as well as a nonindustrial pulmonary condition.

At the time of his injury, Mr. Hoskings was 50 years old. He is of above average intelligence and performs well on vocational aptitude tests. He has completed a one-year technical program in electronics and two years of university education. He has work experience in electronics, as well as eight years experience with the National Guard in transportation and supply services.

Two vocational rehabilitation studies have been performed on Mr. Hoskings. The first was conducted by the Division of Rehabilitation Services ("DRS") and concludes that Mr. Hoskings cannot be rehabilitated. The second was conducted at Salt Lake City's request by Intracorp and concludes that Mr. Hoskings is a suitable candidate for rehabilitation. The Intracorp study also identifies work available throughout Utah which Mr. Hoskings can perform. For reasons set forth below, the Industrial Commission finds the Intracorp report to be persuasive on the issues of Mr. Hoskings' suitability for rehabilitation and the availability of alternative work.

DISCUSSION AND CONCLUSIONS OF LAW

The ALJ has applied the correct framework in considering Mr. Hoskings' claim for permanent total disability compensation. First, the ALJ concluded that Mr. Hoskings' industrial accident caused the ankle injury which is now claimed to render him disabled. The ALJ then applied the "odd-lot" doctrine to determine whether Mr. Hoskings was permanently and totally disabled.

The odd lot doctrine is a three part test. Mr. Hoskings must first prove that his ankle injury prevents him from returning to his former occupation. Then he must demonstrate that he cannot be rehabilitated. If Mr. Hoskings is successful in establishing these two factors, the burden shifts to Salt Lake City to prove that other work is available to Mr. Hoskings despite his injury.

ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE THREE

While the Industrial Commission agrees with the analytical framework applied by the ALJ to Mr. Hoskings' claim, the Industrial Commission does not agree with the ALJ's conclusions on two points: First, the Industrial Commission finds that Mr. Hoskings can be rehabilitated. Second, the Industrial Commission finds that other work is available that Mr. Hoskings can perform, despite his ankle injury.

On the issue of Mr. Hoskings' ability to be rehabilitated, the Industrial Commission has carefully reviewed the DRS report, which concludes that Mr. Hoskings was "unable to demonstrate the stamina and endurance needed to work in full-time employment." However, the report makes no distinction between sedentary work and more strenuous employment. It does not address the fact that Mr. Hoskings' employment at Hamilton Stores demonstrated some ability to work. It makes no reference to Mr. Hoskings' intelligence, education, adaptability, or wide range of prior work experience. The Industrial Commission has also reviewed the deposition of Mr. Miera, a rehabilitation counselor with DRS, but Mr. Miera's testimony adds little to support the DRS report.

In contrast to the DRS report, the Intracorp report identifies Mr. Hoskings' training, experience and abilities. It specifically addresses the effects of Mr. Hoskings' ankle injury and other medical conditions. The Intracorp report then analyzes the foregoing factors and concludes that Mr. Hoskings can be rehabilitated. Intracorp's conclusion is corroborated by the fact that Mr. Hoskings found other work at Hamilton Stores and successfully performed his employment duties there. The Industrial Commission is persuaded by Intracorp's objective data and subjective analysis.

Although Mr. Hoskings can be rehabilitated and therefore fails to meet the second element of the odd lot doctrine, the Industrial Commission will consider the third element of the odd lot doctrine. This third element requires Salt Lake City to show that other work is available to Mr. Hoskings.

The Intracorp report contains a detailed list and discussion of employment opportunities within Mr. Hoskings' abilities. Such employment opportunities exist primarily in the Salt Lake metropolitan area, but also are present throughout Utah. The record contains no significant evidence contradicting the Intracorp report on this point. Consequently, the Industrial Commission finds that regular, dependable employment is available within Mr. Hoskings' abilities.

ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE FOUR

In summary, the Industrial Commission agrees with the ALJ that Mr. Hoskings' industrial accident caused his ankle injury and that he cannot return to work as a fire fighter. However, contrary to the ALJ's decision, the Industrial Commission finds that Mr. Hoskings can be rehabilitated and that regular, dependable work is available to him in other branches of the labor market. The Industrial Commission therefore concludes that Mr. Hoskings is not entitled to permanent total disability compensation within the meaning of §35-1-67 of the Utah Workers' Compensation Act.

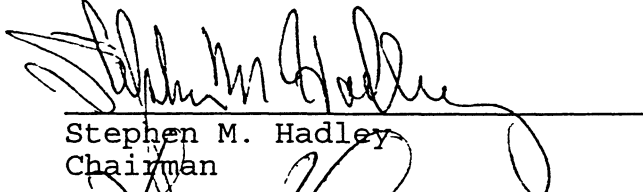
In light of the Industrial Commission's determination that Mr. Hoskings is not entitled to permanent total disability compensation, it is unnecessary to address Mr. Hoskings' argument regarding the date on which compensation should begin.


ORDER

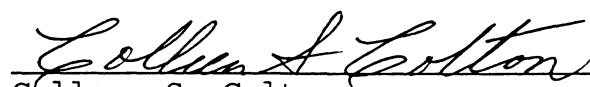
The Industrial Commission reverses the ALJ's decision in this matter and hereby denies Mr. Hoskings claim for permanent total disability compensation. It is so ordered.

Dated this 3rd day of March, 1995.




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.

ORDER GRANTING MOTION FOR REVIEW
WARREN HOSKINGS
PAGE FIVE

CERTIFICATION OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review in the matter of Warren Hoskings v. Salt Lake City Corporation, Case No. 90-0401, was mailed, first class postage prepaid, this 32nd day of March, 1995, to the following:

WARREN HOSKINGS
45 EAST 200 NORTH
IVIN, UTAH 84123

JAMES BLACK
ATTORNEY AT LAW
800 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84111

FRANK NAKAMURA
ATTORNEY AT LAW
451 SOUTH STATE STREET
SUITE 505
SALT LAKE CITY, UTAH 84111

ERIE V. BOORMAN
ADMINISTRATOR
EMPLOYERS' REINSURANCE FUND
P. O. BOX 146611
SALT LAKE CITY, UTAH 84114-6611

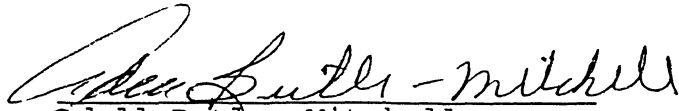

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

EXHIBIT B

**UTAH CODE
ANNOTATED**

1986 Cumulative Supplement

REPLACEMENT VOLUME 4B

1974 EDITION

Place in Pocket Part of Corresponding Bound Volume.

Including legislation through the 1986 General Session and the 1986
Second Special Session and annotations through 711
P.2d 1155. See Preface in Volume 1A.

Edited by
The Publisher's Editorial Staff

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35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments.

In cases of permanent total disability the employee shall receive 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four 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 weekly compensation payments for more than 312 weeks. 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: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the 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 the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68 (1), not to exceed \$1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under § 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated 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, the commission shall order that there be paid to the employee weekly benefits at the rate of 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four 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 the second injury fund provided for by Subsection 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 shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than \$120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. 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, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases 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 §§ 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.

History: L. 1917, ch. 100, § 78; C.L. 1917, § 3139; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-63; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-63; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 5; 1971, ch. 76, § 6; 1973, ch. 67, § 4; 1974, ch. 13, § 1; 1975, ch. 101, § 5; 1977, ch. 150, § 1; 1977, ch. 151, § 3; 1977, ch. 156, § 6; 1979, ch. 138, § 2; 1981, ch. 286, § 1; 1983, ch. 356, § 1; 1985, ch. 160, § 1.

Compiler's Notes. — The 1975 amendment substituted "85% of the state average weekly wage" for "66⅔% of the state average weekly wage" four times in the first paragraph and once in the last paragraph; increased the minimum benefit per week from \$35 to \$45 in the first paragraph; inserted "not to exceed the average weekly wage of the employee at the time of the injury" twice in the first paragraph; increased the benefit per week from \$50 to \$60 at the end of the third paragraph (deleted by the 1977 amend-

ment) and near the end of the fourth paragraph (deleted by the 1977 amendment); and substituted "July 1, 1975" for "July 1, 1974" in the fourth paragraph (deleted by the 1977 amendment).

The 1977 amendment by chapter 151 substituted "spouse" for "wife" in the first paragraph.

The 1977 amendment by chapter 156 made the same changes as the 1977 amendment by chapter 151; combined the first two paragraphs into one paragraph; inserted the second paragraph; and deleted the former third and fourth paragraphs which read: "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 re-

- (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 pursuant 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).

Right to judicial proceeding.

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 proceedings 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).