

1995

# Hoskings v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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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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950236-CA

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**UTAH COURT OF APPEALS**

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WARREN HOSKINGS, :

Petitioner, : Case No. 950236-CA

vs. :

INDUSTRIAL COMMISSION OF : Priority No. 7

UTAH and SALT LAKE CITY

CORPORATION, :

Respondents. :

---

***ON PETITION FOR REVIEW OF THE ORDER OF  
THE INDUSTRIAL COMMISSION OF UTAH***

---

**BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH**

---

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**FILED**

OCT 02 1995

**COURT OF APPEALS**

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UTAH COURT OF APPEALS

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WARREN HOSKINGS, :  
 :  
 Petitioner, : Case No. 950236-CA  
 :  
 vs. :  
 :  
 INDUSTRIAL COMMISSION OF : Priority No. 7  
 UTAH and SALT LAKE CITY :  
 CORPORATION, :  
 :  
 Respondents. :

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*ON PETITION FOR REVIEW OF THE ORDER OF  
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BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH

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## **INTRODUCTION**

The Industrial Commission of Utah hereby responds to Petitioner Warren Hosking's petition for review of the Industrial Commission's order denying Mr. Hoskings' claim for permanent total disability compensation under the Utah Workers' Compensation Act (Utah Code Ann. §35-1-1 et seq; "the Act" hereafter).

The Industrial Commission generally agrees with the arguments set forth in the brief filed by respondent Salt Lake City Corporation. The Industrial Commission will therefore limit its argument to one issue: Is there substantial evidence in support of the Industrial Commission's finding that other work is available to Mr. Hoskings that is within his capabilities.

## **JURISDICTION**

Pursuant to Utah Code Ann. §78-2a-3(2)(a) (Supp. 1995), the Utah Court of Appeals has appellate jurisdiction over petitions for review of the Industrial Commission's final orders.

## **STATEMENT OF ISSUES ON APPEAL AND STANDARDS OF REVIEW**

The ultimate issue in this case is whether Mr. Hoskings is entitled to permanent total disability compensation pursuant to §35-1-67 of the Act, as a result of his 1986 industrial accident. The subsidiary issue which the Industrial

Commission believes to be dispositive of Mr. Hoskings' claim is as follows: Is other work available to Mr. Hoskings that is within his capabilities. This is a question of fact. Pursuant to Utah Code Ann. §63-46b-16(4)(g) (1993 Repl. volume), the Court shall grant relief to Hoskings if the Industrial Commission's decision "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. "Substantial evidence" is that quantum and quality of relevant evidence that will convince a reasonable mind to support a conclusion. Commercial Carriers v. Industrial Commission, 888 P.2d 707, 711 (Utah App. 1994).

#### **DETERMINATIVE STATUTE**

Because Mr. Hoskings' industrial injury occurred during September, 1986, his claim for permanent total disability compensation is governed by Utah Code Ann. §35-1-67, Replacement Volume 4B, 1974; 1987 Cumulative Supp.), set forth in Appendix 1, attached hereto.

#### **STATEMENT OF THE CASE**

The Industrial Commission agrees with the description of the nature of this case, course of proceedings and disposition below found in the briefs of Mr. Hoskings and Salt Lake City. With respect to the facts of this case, the Industrial

Commission adopts the statement of facts set forth in Salt Lake City's brief.

#### **SUMMARY OF ARGUMENT**

The Industrial Commission recognizes that Mr. Hoskings suffered an injury in the line of duty that has left him with a permanent impairment. Without minimizing Mr. Hoskings' injury, the Industrial Commission has concluded that the injury has not left Mr. Hoskings permanently and totally disabled within the meaning of §67 of the Act because other work is available for Mr. Hoskings.

When viewed in light of the record as a whole, substantial evidence supports the Industrial Commission's finding of "other available work".

After Mr. Hoskings' claim for permanent total disability claim is resolved in this proceeding, he can renew his claim for permanent partial disability compensation.

#### **ARGUMENT**

**POINT ONE: UNDER THE UTAH WORKERS' COMPENSATION ACT AS INTERPRETED BY UTAH'S APPELLATE COURTS, THE INDUSTRIAL COMMISSION MUST DENY MR. HOSKINGS' CLAIM FOR PERMANENT TOTAL DISABILITY COMPENSATION IF OTHER WORK IS AVAILABLE TO HIM.**

The Utah Supreme has described the principles underlying permanent total disability compensation as authorized by the Utah Workers' Compensation Act:



At the outset, we note that the purpose of the worker's compensation acts is "to secure workmen . . . against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment . . . ." (Citation omitted) This compensation is not in the form of damages for injury, as in a tort action, but in the form of payments to compensate for the *loss of employability* resulting from the injury. (Citation omitted.) Marshall v. Industrial Commission, 681 P.2d 208, 210 (Utah 1984).

Also in Marshall, *ibid.*, the Utah Supreme Court identified a step-by-step analysis for determining whether an injured worker is entitled to permanent total disability compensation. The final step requires a determination of whether work is available to the injured worker that is within his capabilities:

. . . Once the employee has demonstrated his impairment and presented evidence that he is no longer capable of performing his former work and that he cannot be rehabilitated, the burden shifts to the employer to show that regular work is available. Marshall, 681 P.2d at 212.

In judging whether regular work is available, the Industrial Commission must "take into account the plaintiff's education, mental capacity and age." Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323, 1327 (Utah 1986), citing Marshall, 681 P.2d at 212.

**POINT II:      SUBSTANTIAL      EVIDENCE      SUPPORTS      THE  
INDUSTRIAL COMMISSION'S FINDING THAT OTHER WORK IS  
AVAILABLE FOR MR. HOSKINGS.**

As noted above and as reflected in the Industrial Commission's decision, set forth as Appendix 2, the burden of proof is on Salt Lake City to show that regular work is available to Mr. Hoskings, taking into account his personal characteristics and limitations.

The record shows Mr. Hoskings to be an intelligent man with a substantial educational background, both of a technical and academic nature. Mr. Hoskings has an abundance of work related skills, derived from his employment in the electronics industry, his employment as a firefighter, and his service in the National Guard. He has demonstrated personal qualities as an employee that caused him to advance through the ranks of the Salt Lake City Fire Department to the position of captain. As a trained, intelligent, and versatile employee, Mr. Hoskings can reasonably expect favorable consideration in the labor market.

The record also shows that from the time of injury until his retirement, Mr. Hoskings did not miss any time from work because of his injury. That Mr. Hoskings continued to work is not controlling on the issue of his permanent total disability. Norton v. Industrial Commission, 728 P.2d 1025 (Utah 1986). It is, however, some evidence of his capacity for work.

Similarly, the fact that Mr. Hoskings retired from his employment with Salt Lake City does not prevent him from qualifying for workers' compensation benefits. Peck v. Eimco, 748 P.2d 572 (Utah 1987). However, it is some evidence of Mr. Hoskings' ability to work that he did not apply for a disability retirement. Instead, he continued to work until early retirement incentives were made available as part of Salt Lake City's regular retirement program.

Additional evidence of Mr. Hoskings' ability to find work is the fact that he was employed by Hamilton Stores. He worked on a full time basis during the summer months without any difficulties. However, when Hamilton Stores offered year around employment to Mr. Hoskings, he resigned. Again, Mr. Hoskings' work at Hamilton Stores is evidence that work is available for him.

Finally, the record contains the report of Intracorp, a professional vocational consulting group. The report contains an accurate account of Mr. Hoskings' personal characteristics, education and work experience. It evaluates the Utah job market for persons with Mr. Hoskings' qualifications and limitations and identifies several job classifications with current openings that Mr. Hoskings could perform. Additionally, it identified other employment Mr. Hoskings could be trained to perform.

The foregoing evidence, when taken together, constitutes substantial evidence that despite Mr. Hoskings' disability, there is available work he can do, "without the expectation that he will rely on the sympathy of friends or his own 'superhuman efforts.'" Marshall, 681 P.2d. at 212.

**POINT III: MR. HOSKINGS STILL CAN CLAIM PERMANENT PARTIAL DISABILITY COMPENSATION.**

In his initial application for hearing, Mr. Hoskings claimed permanent partial disability compensation and permanent total disability compensation. Such claims are necessarily made in the alternative. As Mr. Hoskings' claim proceeded through the Industrial Commission, it was the claim for permanent total disability compensation that was adjudicated and which is the subject of this petition for review.

In the event that the Court affirms the Industrial Commission's determination that Mr. Hoskings is not entitled to permanent total disability compensation, Mr. Hoskings is entitled to reinstate his claim for permanent partial disability compensation.

### CONCLUSION

In the view of the Industrial Commission, the evidence in this proceeding establishes that despite his disabilities, Mr. Hoskings has experience, skills and abilities for which employment is available. Consequently, under the standards set forth by the Utah Supreme Court in Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984) and other appellate decisions, Mr. Hoskings is not permanently and totally disabled within the meaning of §67 of the Act.

Dated this 29th day of September, 1995.



---


Alan Hennebold  
General Counsel  
Industrial Commission of Utah

# **CERTIFICATE OF MAILING**

I certify that two true and correct copies of the foregoing Brief of The Industrial Commission of Utah, Respondent, were mailed, postage prepaid, on this 29th day of September, 1995, to the following:

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Appendix One

Utah Code Ann. §35-1-67

Replacement Vol. 4B, 1974, Cumulative Supp. 1987.Two

**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 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  $66\frac{2}{3}\%$  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 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 amendment) 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 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 1977 amendment by chapter 150, in the two paragraphs deleted by the 1977 amendment by chapter 156 (quoted above) substituted "1977" for "1971" and "1975" and substituted "\$75" for "\$60."

The 1979 amendment increased the minimum benefit in the second paragraph from \$75 to \$85.

The 1981 amendment substituted "second injury fund" for "special fund" throughout the section; and increased the amount in the second paragraph from \$85 to \$100.

The 1983 amendment substituted "under this section" at the end of the first paragraph for "as set forth herein"; increased the minimum amount in the first sentence of the second paragraph from \$100 to \$110; and made minor changes in phraseology, punctuation and style.

The 1985 amendment substituted "\$120" for "\$110" in the first sentence of the second paragraph.

**Effective Date.** — Section 2 of Laws 1985, ch. 160 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case of a veto, the date of veto override." Approved March 18, 1985.

APPENDIX TWO

Decision of The Industrial Commission of Utah

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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

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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.

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ORDER GRANTING MOTION FOR REVIEW  
WARREN HOSKINGS  
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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  
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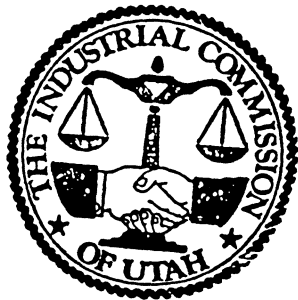
In summary, the Industrial Commission agrees with the ALJ that Mr. Hoskings' industrial accident caused his ankle injury and that he cannot return to work as a fire fighter. However, contrary to the ALJ's decision, the Industrial Commission finds that Mr. Hoskings can be rehabilitated and that regular, 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.

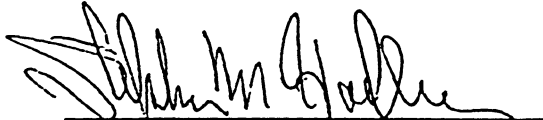
In light of the Industrial Commission's determination that Mr. Hoskings is not entitled to permanent total disability compensation, it is unnecessary to address Mr. Hoskings' argument regarding the date on which compensation should begin.

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.

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ORDER GRANTING MOTION FOR REVIEW  
WARREN HOSKINGS  
PAGE FIVE

CERTIFICATION OF MAILING

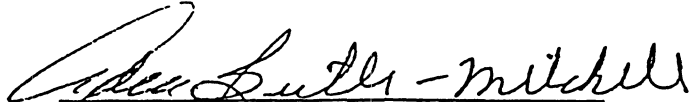
I certify that a copy of the foregoing Order Granting Motion For Review in the matter of Warren Hoskings v. Salt Lake City Corporation, Case No. 90-0401, was mailed, first class postage prepaid, this 32<sup>nd</sup> day of March, 1995, to the following:

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