

1995

Warren Hoskings v. Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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.

Recommended Citation

Reply Brief, *Hoskings v. Industrial Commission of Utah*, No. 950236 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6573

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U
50
.A10
DOCKET NO. 950236-CA

IN THE UTAH COURT OF APPEALS

WARREN HOSKINGS,	)	REPLY BRIEF OF PETITIONER
	)	WARREN HOSKINGS
Applicant/Petitioner,)	
	)	Court of Appeals
vs.	)	Case Number: 950236-CA
)	
INDUSTRIAL COMMISSION OF	)	Industrial Commission Case
UTAH and SALT LAKE CITY	)	Number: 90-0401
CORPORATION,)	
	)	Priority 7
Defendant/ Respondent.)	

PETITION FOR REVIEW OF AN ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH

FRANK NAKAMURA
Attorney at Law
451 South State Street
Suite 505
Salt Lake City
Utah 84111
Attorney for
Salt Lake City Corporation
(801) 535-7788

JAMES R. BLACK #0347
Attorney at Law
349 South 200 East, Suite 310
Salt Lake City
Utah 84111
Attorney for
Warren Hoskings
(801) 531-6737

FILED
Utah Court of Appeals

NOV 03 1995

Marilyn W. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WARREN HOSKINGS,	)	REPLY BRIEF OF PETITIONER
	)	WARREN HOSKINGS
Applicant/Petitioner,)	
	)	Court of Appeals
vs.	)	Case Number: 950236-CA
)	
INDUSTRIAL COMMISSION OF	)	Industrial Commission Case
UTAH and SALT LAKE CITY	)	Number: 90-0401
CORPORATION,)	
	)	Priority 7
Defendant/ Respondent.)	

PETITION FOR REVIEW OF AN ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH

FRANK NAKAMURA
Attorney at Law
451 South State Street
Suite 505
Salt Lake City
Utah 84111
Attorney for
Salt Lake City Corporation
(801) 535-7788

JAMES R. BLACK #0347
Attorney at Law
349 South 200 East, Suite 310
Salt Lake City
Utah 84111
Attorney for
Warren Hoskings
(801) 531-6737

Erie V. Boorman
Attorney, Administrator
P.O. Box 146611
Salt Lake City, Utah 84114-6611
Attorney for Employer's
Reinsurance Fund
(801) 530-6820

Alan L. Hennebold
INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
P.O. Box 146600
Salt Lake City, Utah 84114-6600
Attorney for
Industrial Commission of Utah
(801) 530-6937

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED	1
STANDARDS OF REVIEW	2
DETERMINATIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. Course of Proceedings at the Industrial Commission	2,3
3. Disposition at Industrial Commission	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	5
ARGUMENT	5
THE INDUSTRIAL COMMISSION AND SALT LAKE CITY BASE THEIR CONCLUSIONS AS TO JOB AVAILABILITY FOR WARREN HOSKINGS ON THE INCOMPETENT HEARSAY EVIDENCE OF AN INTRACORP. REPORT FOR WHICH THERE IS NO RESIDUUM OF OTHER SUBSTANTIVE COMPETENT EVIDENCE AS REQUIRED TO SUPPORT A FINDING OF FACT.	
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Garfield Smelting Company v. Industrial Commission, 53 Utah 133, 178
P. 57 (1918) 5

Industrial Power Contractors v. Industrial Commission of Utah, 832 P 2d. 477 (U.C.A.
1992) 5

Marshall v. Industrial Commission of Utah,
681 P.2d 208 (Utah 1984) 6

STATUTORY PROVISIONS

§35-1-88 U.C.A.

§35-1-67 U.C.A., 1987 Cum. Supp., Repl. Vol. 4(B),
1974 Ed 2

STATEMENT OF JURISDICTION

See Warren Hoskings original brief at page 1.

ISSUES PRESENTED

The issues presented in Warren Hoskings' original brief remain the same and are repeated here for the convenience of the Court.

A. Did the Industrial Commission misinterpret the "Odd lot" doctrine and thereby fail to apply the correct burdens of proof to the evidence introduced by the parties?

B. Did Mr. Hoskings make a prima facie showing that he could no longer perform the duties required in his occupation as a fire fighter as a result of his industrial injury and that he could not be rehabilitated to perform some other meaningful employment?

C. Did Salt Lake City present substantive evidence that Mr. Hoskings' ankle injury did not prevent him from performing the duties of a fire fighter?

D. Did Salt Lake City Corporation meet its burden to prove by a preponderance of the evidence the existence of a specific, regular, available, dependable job that Mr. Hoskings can reasonably perform in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or his superhuman efforts; taking into account his education, work experience, mental capacity and age?

E. Should permanent total disability compensation begin at the time of Mr. Hoskings retirement from Salt Lake City Corporation or at some later date?

F. In the alternative, did the Industrial Commission err by failing to award permanent partial disability compensation as well as medical benefits?

STANDARDS OF REVIEW

Warren Hoskings is satisfied with the standards of review presented at pages 2 and 3 of his original brief.

DETERMINATIVE STATUTES AND RULES

Because of its importance to a determination of the issues in this matter, petitioner restates the relevant parts of § 35-1-67 U.C.A. regarding permanent total disability. The remaining statutes are at pages 3-4 in the original brief.

1. Permanent total disability--Amount of payments--Vocational rehabilitation--Procedure and Payments, §35-1-67 U.C.A., Replacement Volume 4B 1974 Edition, 1987 Cumulative Supplement.

. . . 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 [that has since been changed in name to the Division of Rehabilitation Services] . . . for rehabilitation training . . . if the Division of Vocational Rehabilitation . . . certifies to the Industrial Commission of Utah in writing that the employee has fully cooperated with the Division of Rehabilitation 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 . . .

(See statute in its entirety in Appendix 2 to original brief.)

STATEMENT OF THE CASE

1. Nature of the Case.

Warren Hoskings is satisfied with his statement of the nature of the case as contained at page 5 of his original brief.

2. Course of Proceedings at Industrial Commission.

Warren Hoskings is satisfied with his statement of the course of proceedings as contained at pages 5 and 6 of his original brief.

3. Disposition at Industrial Commission.

Warren Hoskings is satisfied with his statement of the disposition of the case at the Industrial Commission as stated at pages 6 and 7 of his original brief.

STATEMENT OF FACTS

Petitioner Warren Hoskings is satisfied that he accurately presented the facts in his original brief at pages 7 through 25 of his original brief. However, in light of the claims of both the Industrial Commission and Salt Lake City in their respective briefs, it is important to emphasize several points about which the evidence is undisputed:

1. At no point since Warren Hoskings retired has any evidence or witness suggested that he could return to employment as a fire fighter. In fact the opposite is true. (See the report of Dr. Robert P. Hansen dated July 20, 1989, R. 397).

2. The ankle injury has become progressively worse through the years. (See the Medical Panel Report, R. 76-81).

3. The only physician to venture an opinion regarding Warren Hoskings' employability was one of the many examiners Salt Lake City retained. There is nothing in the record to provide foundation for his opinion regarding employability. Salt Lake failed to provide the Court with a complete quote regarding the doctor's opinion in its brief at page

13. The doctor reported without presenting his qualifications to so opine:

I concur that a fusion of the involved left calcaneocuboid joint might reduce this patient's pain complaints...[I]t will certainly also bring along a concomitant degree of reduction of the patient's motion. As such, while he may experience some

benefit...he will be left with a degree of altered gait which may in an of itself lead to the concomitant development of further knee, hip and low back pain.

From a purely musculoskeletal capacity, this patient is not by definition disabled or unable to perform or engage in any gainful occupation. Certainly, he would not do well in an employment situation requiring him to perform prolonged standing or walking, particularly on hard or concrete surfaces...

(R. 230) The doctor did not suggest anywhere in his report that he had considered the universe of employability factors in arriving at his conclusions. He considered only one.

4. Salt Lake City bases its contention that there are jobs available to Mr. Hoskings on a report from an organization known as Intracorp. As will be argued hereinafter, the report is incompetent evidence upon which to base a finding. The report was accepted into evidence with no foundation laid for its admission and no opportunity for cross examination to test its credibility. The report does not suggest that Mr. Hoskings could return to his position as a fire fighter. No performance or aptitude testing was done. There is no indication of what records Salt Lake City provided the examiner. The examiner's credentials for expressing the opinions reported are not provided. The examiner did nothing to check the real world of job availability such as contacting employers in the suggested job fields to see if they would hire an individual with Mr. Hoskings' limitations. (Please see a more complete analysis of the Intracorp. report at pages 20 through 25 of the Hoskings original brief. The report in its entirety is attached as Appendix 5 to the Hoskings original brief.)

5. There is no evidence that the temporary fire marshal's position with Hamilton Stores in Yellowstone Park was anything but a limited specialty job not generally available in the competitive job market.

6. There is no evidence that Mr. Hoskings 30 year state technical training in electronics is compatible with any current technical job.

SUMMARY OF ARGUMENT

Because of the brevity of the Argument in this Reply Brief , the Court is referred to the Argument itself at page 5.

ARGUMENT

I. THE INDUSTRIAL COMMISSION AND SALT LAKE CITY BASE THEIR CONCLUSIONS AS TO JOB AVAILABILITY FOR WARREN HOSKINGS ON THE INCOMPETENT HEARSAY EVIDENCE OF AN INTRACORP. REPORT FOR WHICH THERE IS NO RESIDUUM OF OTHER SUBSTANTIVE COMPETENT EVIDENCE AS REQUIRED TO SUPPORT A FINDING OF FACT.

As argued in Hoskings original brief, the Intracorp. report is foundationally flawed and therefore constitutes unsubstantiated hearsay on the issue of job availability. Though hearsay, it may be introduced and made a part of the record. (See Section 35-1-88 U.C.A.) However, that does not make it competent substantive evidence. It was established at the very nascence of the workers compensation system in Utah that every finding of fact must be based on some substantive and legally competent evidence. Such findings by the Commission cannot be established by hearsay or other incompetent evidence alone. Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 P. 57 (1918). See also Industrial Power Contractors v. Industrial Commission of Utah, 832 P.2d 477 (UCA 1992) in which

the Court discusses the long established concept that the Commission's findings of fact cannot be based exclusively on hearsay. There must be a residuum of evidence, legal and competent in a court of law, to support an award. There is no evidence other than the incompetent hearsay evidence of Intracorp. to support Salt Lake City's burden to show that there "...is regular, dependable work available for [Warren Hoskings] ...not...[relying] on sympathy of friends or his own super-human efforts." Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984).

CONCLUSION

An overview of the facts shows that Salt Lake City referred Mr. Hoskings to multiple independent medical examiners. Each examiner found that he suffered a very significant injury to his left ankle in the April 6, 1986, accident. Each made note of the progressively worsening condition of his left leg and ankle injuries through the years. There is not one scintilla of evidence that Mr. Hoskings could at this time return to his fire fighting employment for Salt Lake City, or any other fire department. His inability to perform the physical functions of a fire fighter due to this left ankle injury has not been challenged in any way.

Salt Lake City's evidence of employability does not use to the level of competence upon which a finding of fact can be based. It is hearsay without foundation with no residuum of substantive evidence in support

Salt Lake City produced no evidence showing specific job availability in light of Warren Hoskings' "odd-lot" limitations as was its burden. It is not sufficient to say there is

a telephone solicitation or like job available in the abstract. It is Salt Lake City's burden to show the availability of a regular job for which he would truly be competitive in the work market. The administrative law judge properly placed that burden on Salt Lake City after the finding by the Division of Rehabilitative Services that Mr. Hoskings could not be rehabilitated for a reasonable job that fits the standards proclaimed by the appellate court decisions cited above.

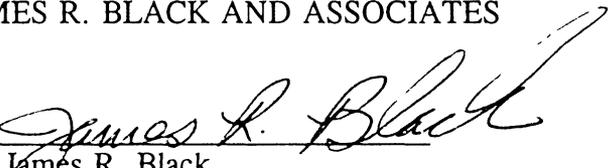
At the very minimum, the Commission committed reversible error in not ruling that Mr. Hoskings is entitled to permanent partial disability benefits. The Order is silent on that matter, even though the evidence is uncontested that Warren Hoskings has compensable preexisting and industrially related impairments for which Salt Lake City has failed to pay the statutory compensation.

Paraphrasing the Supreme Court's language, Mr. Hoskings has demonstrated without substantive rebuttal "[t]he presence of substantial pain [which]...directly affects the probable dependability with which [he]...can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, *temporary luck*, or [his] super human efforts to rise above his crippling handicaps. (citations omitted) . . .But [Warren Hoskings] with a stiffened [ankle]...will...have a harder time doing his work well in meeting the competition of young and healthy men. When a man stands before the Worker's Compensation court with proven permanent physical injuries, for which the exclusive remedy has abolished all possibility of common-law damages, it is not justifiable to tell him he has undergone no impairment..." Norton v. Industrial Commission, *supra*.

The Court of Appeals should reverse the Commission's granting of the Motion for Review and reinstate the well thought out Findings of Fact, Conclusions of Law and Order in which the administrative law judge properly interpreted the relative burdens of the parties in light of the facts. Mr. Hoskings is entitled to permanent total disability benefits.

DATED this 31 day of October, 1995.

JAMES R. BLACK AND ASSOCIATES

By: 
James R. Black
Attorneys for Warren Hoskings

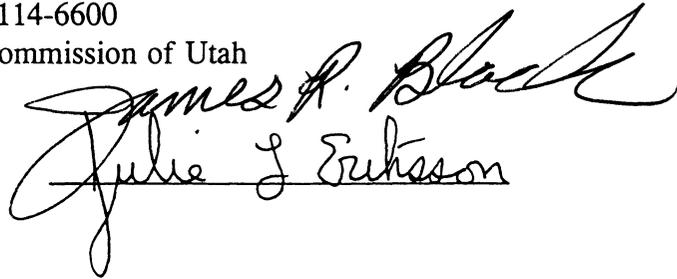
CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF WARREN HOSKINGS, APPELLANT were mailed, postage prepaid, on this 31 day of October, 1995 to the following:

FRANK M NAKAMURA
Assistant City Attorney
Attorney for Salt Lake City Corp.
451 South State, Suite 505
Salt Lake City, Utah 84111

Erie V. Boorman
Attorney, Administrator
P.O. Box 146611
Salt Lake City, Utah 84114-6611

Alan L. Hennebold
INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
P.O. Box 146600
Salt Lake City, Utah 84114-6600
Attorney for Industrial Commission of Utah



James P. Black
Julie J. Eriksson

A:\HOSKINGS.REP