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Utah Court of Appeals

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UTAH COURT OF APPEALS

JOHN W. ZUPON, Petitioner, vs. KAISER STEEL CORPORATION, the UNINSURED EMPLOYERS' FUND, the EMPLOYERS' REINSURANCE FUND and the INDUSTRIAL COMMISSION OF UTAH, Respondents.	:	Case No. 920569-CA Priority No. 7

R E P L Y B R I E F O F P E T I T I O N E R

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Section 35-1-67 (1975) is the determinative statute in this case. It is set forth in full in the Addendum hereto as Exhibit A.

SUMMARY OF REPLY

As a result of an industrial injury, Mr. Zupon is no longer able to be employed in any well-known branch of the labor market. Although he undeniably has other medical problems, it was his industrial injury which rendered him unable to work. Due to his advanced age, limited education and other health problems, he is not a suitable candidate for vocational rehabilitation and is a classic "odd-lot" doctrine case. Since this case arises under pre-1988 law, the "odd-lot" doctrine applies and Kaiser Steel Corporation had the burden of finding a line of employment which he could perform. The employer in this case has wholly failed to meet that burden.

The Findings of Fact and Conclusions of Law of the Administrative Law Judge are deficient in that they are not detailed enough to meet legal requirements. The Industrial Commission's Order Denying Motion for Review, which is the Order on appeal, is even more deficient in failing to engage in proper fact finding.

This Court should summarily reverse the Industrial Commission's final agency action, by ruling that Mr. Zupon was entitled to the presumption afforded by the "odd-lot" doctrine, as

it was not rebutted, as a matter of law in this case. Failing such a ruling, this matter should be remanded to the Industrial Commission for more detailed Findings of Fact and Conclusions of Law.

ARGUMENT

I

THE INDUSTRIAL COMMISSION FAILED TO APPLY THE "ODD LOT" DOCTRINE TO PETITIONER'S PERMANENT, TOTAL DISABILITY CLAIM, AND SUCH APPLICATION RESULTS IN A PRESUMPTION OF ENTITLEMENT WHICH HAS NOT BEEN REBUTTED.

A. APPLICATION OF THE BURDEN OF PROOF.

Respondents have completely misconstrued Petitioner's argument in regard to the applicable burden of proof. Petitioner does not dispute that he has the burden of demonstrating medical and legal causation by a preponderance of the evidence. Petitioner's argument on this point, however, is that the Workers' Compensation Act is to be "liberally construed in favor of awarding benefits and any doubts raised from the evidence are to be resolved in favor of the claim." See, e.g., McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Petitioner raises this point not as a "substitute for his burden of proof" as Respondents argue, but rather to show that the Industrial Commission's Order Denying Motion for Review did not evidence the "humane and beneficent purposes" required by the law. Petitioner accepts his burden of proof to demonstrate medical and legal causation; he only argues that in meeting that burden, such

doubt as does exist in the record is to be resolved in his favor. Respondents do not deny this well established principal of construction of workers' compensation law.

The second basis of Petitioner's argument is that under the so-called "odd-lot" doctrine, once Petitioner had proved his disability and inability to be rehabilitated, the burden then shifted to the employer to find regular, steady work which he could perform. In order to fully appreciate the application of the "odd-lot" doctrine it is helpful to understand it's development and the factual context to which it has been applied.

B. HISTORICAL DEVELOPMENT OF THE "ODD-LOT" DOCTRINE.

Perhaps the first case to discuss the concept of the "odd-lot" doctrine was the English case of Cardiff Corporation v. Hall, 1 KB 1009 (1911):

> There are cases in which the burden of shewing suitable work can in fact be obtained does fall up the employer. ... [If]... the capacities for work left to him fit him only for special uses and do not ... make his powers of labour a merchantable article in some well known lines of the labor market....[I]t is incumbent upon the employer to shew that such special employment can in fact be obtained by him....[If] the accident leaves the workman's labour in the position of an "odd-lot" in the labor market, the employer must shew that a customer can be found who will take it .... (Emphasis added).

Judge Cordozo very early in the history of workmen's compensation in the United States, set the policy for odd-lot determination:

> He was an unskilled or common laborer. He coupled his request for employment with notice that labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the 'odd-lot' man, the nondescript in the labor

market. Work, if he gets it, is likely to be casual and intermittent...Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt. Jordan v. Decorative Co., 130 N.E. 635, 636 (N.Y. App. 1921). (Emphasis added).

Professor Larson in his oft cited treatise on workmen's compensation law describes this doctrine, as follows:

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or fiends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. 2 Larson, The Law of Workmen's Compensation, § 57.51 at 10-164.24 (1992). (Footnotes omitted). (Emphasis added).

C. DEVELOPMENT OF THE DOCTRINE IN UTAH.

The "odd-lot" doctrine has been accepted and favorably applied by the Utah Courts. One of the first modern Utah cases applying the doctrine was Brundage v. IML Freight, Inc., 622 P.2d 790 (Utah 1980) where the injured worker had spent thirty years as a truck driver. In August of 1975, he injured his back in a non-industrial accident which led to surgery later that year. In October, 1976, he had recovered sufficiently to return to his job as a truck driver. He subsequently reinjured his back in the course and scope of his employment and in 1977 again underwent surgery on his back. Several months later, however, he re-injured his back in another non-industrial accident and was thereafter unable to return to work.

The Industrial Commission found Mr. Brundage suffered from a

30% permanent partial impairment, half of which was attributable to the industrial injury, and half of which was attributable to nonindustrial causes. Mr. Brundage was awarded permanent partial impairment benefits, but his claim for permanent total disability was denied.

In reversing the Industrial Commission's ruling regarding permanent total disability, the Utah Supreme Court stated:

> In his treatise, The Law of Workmen's Compensation, Professor Arthur Larson states:
>
> > 'total disability' in compensation law is not to be interpreted literally as utter and abject helplessness.... The task is to phrase a rule delimiting the amount and character of work a [person] can be able to do without forfeiting his totally disabled status. 2 Larson, The Law of Workmen's Compensation, § 57.51 at 10-107 (1992).
>
> Consonant with the view expressed by Larson, the Supreme Court has adopted the following definition of total disability:
>
> > This Court has recognized the principle that a workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a [person] of his capabilities may be able to do or to learn to do.... United Park City Mines Co. v. Prescott, 393 P.2d 800, 801-802 (1964). (Emphasis added).

The next important decision was Entwistle v. Wilkins, 626 P.2d 495 (Utah 1981). Mr. Wilkins, who was 55 years old at the time of his industrial injury, sold trailers and other types of recreational vehicles which required him to travel throughout the west contacting dealers. In 1977, he suffered an industrial injury to his back while on a business trip when he slipped and struck his

back on some large rocks while attempting to unhitch a trailer. He was off work for some time while undergoing physical therapy, and although he later return to light duty, he was eventually unable to continue because of pain. In defining the term "total disability," the Court stated as follows:

> ...'total disability' does not mean a state of abject helplessness or that the injured employee must be unable to do any work at all. The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. <u>His temporary disability may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury</u>. <u>Id</u> at 498. (Citations omitted). (Emphasis added).

The "odd-lot" doctrine was next considered in the monumental case of <u>Marshall v. Industrial Commission</u>, 681 P.2d 208 (Utah 1984). The Applicant was employed by Emery Mining Company as a maintenance mechanic in a coal mine. While leaving the mine in the back of a tractor-trailer, he was bounced up and down on the seat causing an injury to his back. After several months of conservative medical treatment, Mr. Marshall underwent surgery. Following surgery he was advised by his doctor that he could not return to work. Mr. Marshall was 67 years of age at the time.

The Industrial Commission awarded Mr. Marshall permanent partial impairment compensation finding he sustained a 10% whole body permanent, partial impairment due to the industrial accident and 15% due to pre-existing conditions. However, the Commission refused his request for permanent total disability stating the primary reason he was unable to return to work was his age.

The Utah Supreme Court reversed the Industrial Commission ruling that Mr. Marshall was entitled to permanent total disability benefits under the "odd-lot" doctrine.

The Court defined permanent total disability as follows:

> [A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do.... 681 P.2d at 211. (Emphasis added).

The Court further stated:

> Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher, for example, as it would in an electrician. Thus, in assessing the loss of earning capacity, a constellation of factors must be considered, only one of which is the physical impairment. Other factors are age, education, training and mental capacity. It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity. Id. at 211. (citations omitted).
>
> Some employees, however, cannot be rehabilitated and even though not in a state of abject helplessness ' can no longer perform the duties ... required in [their] occupation[s].' These employees fall into the so-called 'odd-lot' category... Whether or not an employee falls into the odd-lot category depends on whether there is regular, dependable work available for the employee who does not rely on the sympathy of friends or his own super human efforts. Once the employee has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity and age. ... 'It is much easier for the [employer] to prove the employability of the [employee] for a particular job than for the [employee] to try to prove the universal negative of not being employable at any work.' Id at 212-213. (Citations omitted). (Emphasis added).

Finally, the Court pointed out that the majority of odd-lot

cases are concerned with employees whose work involved physica labor, were 50 years of age and older, and had moderate or littl education, similar to the Petitioner herein. Id. at 212.

In Hardman v. Salt Lake City Fleet Management, 725 P.2d 132 (Utah 1986), the Plaintiff, who was sixty years old with a limite education and even more limited work background, suffered a fractured skull when a steel beam fell and stuck him on the head. A Medical Panel found that he had a 25% whole body permanent, partial impairment, with 15% being related to the industrial injury and 10% being related to pre-existing conditions. He requested permanent, total disability benefits based on his overall physical impairment, as well as his age and lack of education and skills. Despite the request, the Industrial Commission awarded only permanent, partial impairment compensation.

In finding that the Plaintiff had presented a prima facie case of permanent, total disability, the Court stated:

> The Commission's findings failed to acknowledge the odd-lot doctrine accepted in most jurisdictions and which has been repeatedly approved by this Court. That doctrine recognized the substantial difference between physical impairment and disability. For example, a low percentage of physical impairment is not per se less than total permanent disability. Numerous other courts applying the odd-lot doctrine have found permanent total disability despite a deceptively low percentage of physical impairment.... The odd lot doctrine further requires an evaluation of disability in terms of the specific individual who has suffered work-related injury.... Absent proof of employment reasonably available to one in the odd-lot category, the injured employee should be classified as totally disabled. Id. at 1326-1327. (Citations omitted). (Emphasis added).

In Norton v. Industrial Commission, 728 P.2d 1025 (Utah 1986), decided shortly after the Hardman case, the Supreme Court

reiterated it's holding in Hardman as follows:

> As in Hardman,... the Commission again failed in this case to carry out its tasks. It adopted with slight modification the findings of impairment reported by the medical panel but then failed in its administrative responsibility and function to evaluate Norton's permanent disability which should have included such factors as Norton's 'present and future ability to engage in gainful activity' as it is affected by such diverse factors as age, sex, education, economic and social environment, in addition to the definite medical factor-permanent impairment. Id. at 1027.
>
> * * *
>
> Upon remand the Commission is required to address Norton's disability in light of all factors mentioned ante, and the burden will be on the employer to prove the existence of regular, steady work that Norton could perform, taking into account his age, limited education and functional illiteracy as well as his disabling pain. Id. at 1028. (Emphasis added).

In Peck v. Eimco Process Equipment Co., 748 P.2d 572 (Utah 1987), the injured worker was employed as an industrial maintenance mechanic for the defendant. He suffered two industrial injuries which together resulted in a permanent partial impairment of 12% on a whole body basis. Following surgery, he returned to work with light duty restrictions. He retired approximately one year latter at age 65 and at that time requested that he be awarded permanent, total disability compensation. Although the Administrative Law Judge approved permanent total compensation, the Industrial Commission reversed.

The Utah Supreme Court overruled the Industrial Commission's decision and reinstated the Administrative Law Judge's ruling, citing approvingly the Norton, Marshall and Hardman decisions.

Finally, in the recent case of Zimmermann v. Industrial

Commission, 785 P.2d 1127 (Utah App. 1989), the Court stated:

> The Utah Supreme Court has adopted the 'odd lot doctrine' which allows the Commission to find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render the claimant unable to obtain employment. Id. at 1131. (citations omitted).
>
> * * *
>
> Hardman sets forth the following steps for qualification under the 'odd-lot' doctrine: (1) the employee must prove that he or she can no longer perform the duties required in his or her occupation; (2) the employee, having been referred to the Division of Vocational Rehabilitation by the Industrial Commission, must, through cooperation with the Division, establish that he or she cannot be rehabilitated; and (3) the burden then shifts to the employer to prove the existence of steady work the employee can perform, taking into account several factors, including the employee's education, mental capacity, and age. Id. at 1131. (Citations omitted). (Emphasis added).

D. APPLICATION OF FACTS TO THE ELEMENTS OF THE ODD-LOT DOCTRINE.

As initially stated in Hardman and clarified in Zimmermann there are three steps required for the application of the odd-lot doctrine: (1) the employee must prove that he can no longer perform the duties required in his or her occupation; (2) the employee must prove that he cannot be rehabilitated; and (3) the employer then has the burden to prove the existence of regular, steady work the employee can perform. If the employer can not do so, the injured worker is entitled to permanent, total disability compensation as an "odd-lot" injured worker.

A review of each of those elements discloses that the first two are satisfied in this case, but the Employer failed in its burden to find a job that Mr. Zupon could do or learn to do.

1. Inability to perform the duties required in his occupation.

Both the Administrative Law Judge and the Industrial Commission spend a lot of time attempting to prove that it was Mr. Zupon's other medical conditions which prevented his return to work; however, for the purpose of the "odd-lot" doctrine medical causation is irrelevant. The only relevant issue at this stage is whether Mr. Zupon could continue to perform the type of work that he was performing prior to being injured. For this reason, the rational of the Social Security Administration is totally irrelevant to the consideration of the applicability of the "odd-lot" doctrine. None of the parties seriously argue that Mr. Zupon can return to work in the underground coal mines. At the time of the Administrative Law Judge's decision Mr. Zupon was a 67 year old man who had not worked since 1975. (R. at 22, 29).

In addition - and most significantly - Mr. Zupon did in fact attempt to return to work after his industrial injury, and was denied other jobs because he could not pass the required physicals due to his back problems. (R. at 29). That testimony was uncontroverted. The Administrative Law Judge found that he had not worked since 1975, for a total of almost 17 years. (R. at 29). The Medical Panel appointed by the Industrial Commission specifically agreed with Mr. Zupon's treating physician "... that the claimant cannot do mining or mechanic work" and further referenced his inability to work. (R. at 88). Respondents did not present any evidence that following his industrial injury Mr. Zupon was capable

of performing the duties required in his occupation.

He was paid temporary, total disability compensation unti: February 1976, when he began receiving disability pension benefit: from his union. Subsequently, he received Social Securit: disability benefits and a Veteran's disability pension. (R. at 29)

And finally, the Utah Supreme Court in Norton, supra, hel(significantly as follows:

> Provided that worker's disability was also analyzed with the framework of the odd-lot doctrine, case law dealing with the factor of substantial pain has general held that '[a] worker who cannot return to any gainful employment without suffering substantial pain is entitled to compensation benefits for total disability.' (Citations omitted). Id. at 1028.

2. INABILITY TO BE REHABILITATED.

Due to the Industrial Commission's finding that Mr. Zupon hac failed to establish the necessary causation between his impairment and his industrial accident, a rehabilitation evaluation was not ordered by the Industrial Commission. Nevertheless it is difficult to argue that in light of his health, age and limited educatior that Mr. Zupon could be vocationally rehabilitated.

There is no evidence in this case that the Employer dic anything to enhance Mr. Zupon's employment possibilities, and ir fact, the uncontroverted evidence is to the effect that it simpl: declined to permit him to return to work as a coal miner, and took no further actions whatsoever to assist him in locating suitable employment.

The evidence is clear and overwhelming that following his industrial injury Mr. Zupon could not be rehabilitated for

meaningful and sustained employment, and the Employer failed to assist him in any way in doing so.

3. **EXISTENCE OF REGULAR, STEADY WORK THE EMPLOYEE CAN PERFORM.**

Once the injured worker has satisfied elements (1) and (2) above, the burden then shifts to the Employer to prove the existence of regular steady work the employee can perform, taking into account several factors, including the employee's education, mental capacity, and age. Hardman, at 1327. The Respondent Employer has not made even a pretence of making such a showing in this case. This failure undoubtedly resulted from the fact that in this case such a burden simply could not be met. Given Mr. Zupon's advanced age, severe health problems and limited education, there is simply no steady work he can now perform, or that he could be retrained to learn to do, and the Employer does not argue otherwise.

Therefore, Mr. Zupon has established his entitlement to permanent, total disability as an "odd lot" injured worker. The presumption inherent in that doctrine has not been rebutted as a matter of law, and an appropriate award of benefits should be issued.

II

THE INDUSTRIAL COMMISSION FAILED TO PROPERLY REVIEW THIS MATTER AND ITS ORDER DENYING MOTION FOR REVIEW IS LEGALLY DEFICIENT AND MUST BE REVERSED.

The Industrial Commission was required to consider the Motion for Review in this matter pursuant to Utah Code Annotated, Section

63-46b-12(6)(c) (1988), which provides as follows:

> The order on review shall contain:
>
> (i) a designation of the statute or rule permitting or requiring review;
> (ii) a statement of the issues reviewed;
> (iii) findings of fact as to each of the issues reviewed;
> (iv) conclusions of law as to each of the issues reviewed;
> (v) the reasons for the disposition;
> (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
> (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parities; and
> (viii) the time limits applicable to any appeal or review.

A review of the Industrial Commission's Order Denying Motion for Review, a copy of which is attached hereto in the Addendum as Exhibit B, reveals that it is wholly deficient in this regard and does not meet recent legal requirements. No specific Findings are made. Rather, the Industrial Commission merely summarized, with editorial comments, the evidence presented and the Administrative Law Judge's action. Such summary conclusions do not constitute proper fact-finding. In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991), the Court stated as follows:

> While the purported 'Findings of Fact' written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a 'finding of fact,' it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes,

> if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

The Utah Court of Appeals has recently informed the Industrial Commission, further, that:

> In order for us to meaningfully review the findings of the Commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' Action v. Deliran, 737 P.2d 996 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979))...[T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Industrial Commission's Order Denying Motion for Review is specifically deficient in that it fails to make specific and sufficient findings on the issue of medical causation. Although none of the parties, including the Administrative Law Judge, dispute that Petitioner is presently permanently and totally disabled, neither the Administrative Law Judge nor the Industrial Commission specified the degree to which that disability was caused by the 1975 industrial injury. The Industrial Commission (even with reference to the Administrative Law Judge's insufficient Findings) never makes concise findings of its own as to Petitioner's current medical condition and the causes for it. That

failure manifests itself here in inadequate Findings.

The duty to make proper Findings of Fact and Conclusions of Law is that of the Industrial Commission, in addition to, and beyond that, made by the Administrative Law Judge. The Respondents have only made a half-hearted attempt to defend the Administrative Law Judge's Findings and limit their defense of the Industrial Commission's Findings to the single sentence "The Commission's findings, though more brief than those of the ALJ, are clear, consistent and are supported by substantial evidence". (Respondent's Brief at 19). That is indeed faint praise.

Findings are evaluated not as to whether they are "clear and consistent." Rather, "the findings must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Nyrehn v. Industrial Commission, supra at 335. The evidence here was not "capable of only one conclusion" and thus the Industrial Commission's inadequate findings renders its Order Denying Motion for Review "arbitrary and capricious".

The Industrial Commission's, as well as the Administrative Law Judge's, purported Findings of Fact, Conclusions of Law and Order should at a minimum be vacated and remanded with instructions to enter a new Order with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to do so, denies Petitioner the ability to marshall the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App.

1989).

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Based upon the foregoing, it is respectfully submitted that the Industrial Commission erred when it entered it August 3, 1992 Order dismissing Mr. Zupon's claim for permanent, total disability benefits for lack of medical causation. Mr. Zupon is entitled to benefits under the "odd-lot doctrine as a matter of law.

Therefore, it is respectfully requested that this Court remand this case to the Industrial Commission with instructions to award him permanent, total disability benefits based on the uncontroverted facts and medical evidence presented.

DATED this 24th day of May, 1993.

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I hereby certify that true and correct copies of the foregoing Reply Brief of Petitioner were mailed, postage prepaid, on this 24th day of May, 1993 to the following:

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Attorneys for Petitioner

ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-67 (1975).

EXHIBIT B: Findings of Fact, Conclusions of Law and Order (March 18, 1992).

EXHIBIT C: Order Denying Motion for Review (August, 3, 1992).

35-1-67. Permanent total disability—Amount of payments—Vocational rehabilitation—Procedure and payments.—In cases of permanent total disability the employee shall receive 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent wife and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay such weekly compensation payments for more than 312 weeks; and provided further, that a finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to such vocational rehabilitation division, out of that special fund provided for by section 35-1-68 (1), not to exceed $1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah and in writing that such employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, then the commission shall order that there be paid to such employee weekly benefits at the rate of 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent wife and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of that special fund provided for by section 35-1-68 (1), for such period of time beginning with the time that the payments (as in this section provided) to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

EXHIBIT A

Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68 (1) shall be paid compensation benefits at the rate of $60 per week.

Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68 (1) at a rate sufficient to bring their weekly benefit to $60 when combined with employer or insurance carrier compensation payments.

The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

INDUSTRIAL COMMISSION OF UTAH

Case No. 91000568

JOHN ZUPON, Applicant, vs. KAISER STEEL CORPORATION (Self-Insured)/UNINSURED EMPLOYERS FUND and EMPLOYERS REINSURANCE FUND, Defendants.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

* * * * * * * * * * * * * * * * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on February 6, 1992 at 10:00 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was present and was represented by Virginius Dabney Attorney.

The defendants, Kaiser Steel Corporation (Self-Insured) and/or Uninsured Employers Fund were not represented at the hearing.

The Employers Reinsurance Fund was represented by Erie Boorman, Administrator.

This case involves a claim for permanent total disability benefits related to an August 7, 1975 industrial back accident. In a stipulation filed with the Industrial Commission on the day of the hearing, the parties stipulated that if permanent total disability benefits were awarded, the self-insured employer had only a 1/6 proportionate share liability in such an award and that this share had already been paid as between the employer and the Uninsured Employers Fund. As a result of the stipulation, only the Employers Reinsurance Fund had potential liability and thus the only defendant at the February 6, 1992 hearing was the Employers Reinsurance Fund.

Pursuant to the stipulation, the Employers Reinsurance Fund stipulated to a 5/6 proportionate share of liability if permanent total disability benefits are awarded. However, the Employers Reinsurance Fund (ERF) argued at hearing that the applicant is not entitled to an award of permanent total disability benefits. ERF argues that the industrial injury at issue contributed very little to the applicant's overall disability and that the 10% whole man impairment that a prior medical panel awarded to the applicant, as related to the August 7, 1975 industrial accident, is not well founded. Even if there is a 10% whole man impairment related to the August 7, 1975 industrial accident, ERF argues that that small amount, compared with the 50% whole man impairment that was found to be related to pre-existing ankylosing spondylitis, was a minor contribution to

EXHIBIT B

the applicant's significant existing disability. ERF cites two cases which deal with injured employees whose permanent disabilities were found to have been caused by problems unrelated to the relatively minor compensable industrial injury involved. Hodges v. Western Piling & Sheeting Co., 717 P.2d 713 (Utah 1986), Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988). ERF also argues that it was the advancement of the arthritis to the applicant's hands and fingers, which occurred sometime after the industrial accident and was unrelated to the industrial accident, which caused the applicant to become truly disabled. ERF points to the Social Security Disability records as support for this argument.

In a letter to the Employers Reinsurance Fund, dated February 5, 1992, the applicant's attorney summarized the basis for the applicant's claim of permanent total disability related to the August 7, 1975 industrial accident. In referring to the causal connection between the industrial accident and the permanent total disability, that letter indicates that the applicant relies primarily on: 1) the failure to return to work after the August 7, 1975 industrial accident and 2) the award of Social Security Disiability beginning January 1, 1977 with a primary diagnosis of ankylosis of the lumbar spine. The letter states:

> The Decision of the Social Security Administration, Administrative Law Judge confirms that when the lumbar problem extended into Mr. Zupon's extremities causing him to lose hand and finger dexterity, he then became totally disabled. ... Please also note that Mr. Zupon never had any problems with his arms, hands or fingers prior to the industrial accident, and that problems with regard to his extermitites were subsequent to that event.

Based on the explanation above, the ALJ understands that the applicant claims that his hand and finger problmes are somehow related to the lumbar problem.

After the hearing, the ALJ took the matter under advisement so that she could review the medical records submitted at hearing (Exhibit A-1). The matter was considered ready for order as soon as the records were reviewed.

FINDINGS OF FACT:

The applicant is a male who was 51 years old on the date of injury and who is currently 67 years old. The applicant's compensation rate has been set by prior Commission order at $155.00 per week (Exhibit E). At the time of the applicant's industrial injury, on August 7, 1975, the applicant was employed by Kaiser Coal Corporation in Sunnyside, Utah. He was working in mine #3 when he was injured. The applicant's duties at the mine included maintenance and repair of mechanical and electrical equipment and he was also the fireboss. On the date of injury, the applicant was lifting an acetylene tank which he described as being 5 feet long and 18 inches in diameter. The applicant estimated that the tank weighed around 200 pounds. As he started to lift the tank off the ground, the applicant's weight was not under the tank. The tank was off to the side of him and thus he was twisting as he lifted the tank. The applicant stated that he felt a sharp pain in his low back just below the beltline as he attempted to lift the tank. The applicant stated that he could hardly walk after that.

The applicant was seen the same day by Dr. S. Smoot at Carbon Medical Services Association in Dragerton, Utah. Dr. Smoot's medical report for that day indicates that X-rays were taken of the lumbar spine. The X-ray report indicates that the film was read to show extensive degenerative changes and early spur formation. Dr. Smoot decided to treat the applicant conservatively and he had the applicant return approximately a week later (the date on the office note is not legible). Per the office note for this follow-up visit, Dr. Smoot noted that the applicant had aches and pains all over his body at that time. Dr. Smoot noted that this was probably a generalized arthritic reaction. He prescribed some wygesic and butazolidine. On August 27, 1975, Dr. Smoot again saw the applicant and he noted that the applicant was feeling somewhat better, but that his generalized discomforts continued. He continued the applicant on the same medication. The September 3, 1975 office note indicates that the applicant was still complaining of pain in the back and shoulders and "all over." Dr. Smoot changed the applicant's medication and a week later he noted that the applicant was still having some pain inthe mid-thoracic and lumbar area. On September 17, 1975, Dr. Smoot noted that the applicant's complaints remained the same and he gave the applicant instructions for exercises. In follow-up on September 24, 1975, Dr. Smoot noted that the exercises had made the applicant feel worse and that at that time he even had pain in his ears. At the applicant's request, Dr. Smoot provided the applicant with additional pain medication.

On October 1, 1975, Dr. Smoot saw the applicant again and he noted that the pain was worse in the shoulder. He re-X-rayed the lumbar spine and again noted only the degenerative changes. He indicated that the applicant would probably need an orthopedic consultation. This was not scheduled until later in the month and thus Dr. Smoot saw the applicant twice more. On October 7, 1975 Dr. Smoot noted that the applicant had aches in all his joints. Dr. Smoot's office note for that date also indicates that the applicant had been talking to his brother-in-law who worked for Social Security. As a result, the applicant asked Dr. Smoot about being "totaled out." On that same day, the applicant filed his initial application for Social Security Disability benefits. The applicant saw Dr. Smoot one more time on October 15, 1975 and Dr. Smoot's note for that date indicates only that the applicant was feeling worse and that he was to see a Dr. E. Chapman on October 20, 1975 for an orthopedic consultation.

Dr. Chapman's October 20, 1975 office note indicates that the applicant's treatment to that point had been limited to rest and medication. He noted that the applicant was having continued pain in the mid and lower spine with radiation to the hips (left greater than right), with neck pains and right arm pain. Dr. Chapman read X-rays of the dorsal spine, the lumbar spine and the pelvis to show arthritic spurring. His assessment was that the applicant was experiencing the residuals of an acute strain of the lower lumbar spine. He prescribed a book on back care, a Taylor back brace, a cervical pillow and he recommended that the applicant rest frequently and put a board under his mattress. When Dr. Chapman saw him again on October 24, 1975, he noted that the applicant had improved and had "taken to" the Taylor brace. Dr. Chapman's office note states that the applicant still had back pain and was quite certain that he could not return to his regular job at Kaiser. However, Dr. Chapman noted that the applicant was a master electrician and would be able to do other electrical work that was compatible with his limitations. Nonetheless, he did not release the applicant to return to work at that time.

When Dr. Chapman saw the applicant again on November 13, 1975, he noted that the applicant had experienced a recurrence of pain when he tried to be more active. He noted that the applicant's side talent as an electrician would not be helpful to him since it involved activities such as crawling in attics and pulling on conduit. He precribed darvon for the applicant and indicated he did not need to return for another 3 months, at which time he would be rated. He again indicated that the applicant was unable to return to work at that time.

The next medical treatment noted in the medical records was an admit to Castleview Hospital from January 8, 1976 to January 13, 1976 for a hemorrhoidectomy. The applicant saw Dr. Chapman again on February 2, 1976 and Dr. Chapman noted that the applicant was progressively getting worse with pain throughout his lumbar spine and pain in the elbows and shoulders. Dr. Chapman was of the opinion that surgery would not be helpful. He opined that the applicant would not be able to retrun to work as a miner and he determined that the applicant had a 50% loss of body function as a result of the industrial injury. This apparently was some kind of a rough estimate and was not an impairment rating, because in the same office note, Dr. Chapman indicates that he would not assign a disability rating due to the complicated nature of the disability. He recommended that the applicant obtain a rating from an Industrial Commission medical panel. When Dr. Chapman completed his "final bill" for the carrier, on February 19, 1976, he indicated on it that the applicant was still unable to return to work. He noted that the applicant had a severe residual disability and that it was difficult to separate the possible pre-existing problem from the industrial portion. He again noted on this billing that the applicant should be seen by an Industrial Commission medical panel to be rated.

The applicant apparently did file an application for hearing with the Industrial Commission sometime after his February visit with Dr. Chapman. While the application was being processed and the matter was being set for hearing, the applicant again returned to Dr. Chapman on June 22, 1976. On this visit, the applicant complained of pain in the shoulders, elbows and hands. Per Dr. Chapman's office note, this had been present prior to the date of injury for 6 or 7 years, but had gradually become worse and quite severe within the last year. Dr. Chapman did shoulder X-rays and found these to be negative, but elbow and hand X-rays were read to show arthritic narrowing and spurring. After reviewing the X-rays, Dr. Chapman listed the applicant's diagnoses as: 1) progressive arthritis of the spine, shoulders, elbows and hands and 2) possible entrapment of flexor tendon, middle finger, right hand. Dr. Chapman concluded that the applicant was permanently disabled for his regular occupation in the coal mine due to progressive generalized arthritis. This was the applicant's last visit with Dr. Chapman.

On August 23, 1976, the applicant attended a hearing at the Industrial Commission. The ALJ who heard that case referred the matter to a medical panel. Thereafter, the applicant saw Dr. A. MacArthur, presumably an orthopedic physician, on September 28, 1976. Dr. MacArthur's records are found in the medical record exhibit under the tab for Dr. Chapman's records. Dr. Chapman is associated with the Central Utah Orthopedic Clinic in Provo, Utah and it may be that Dr. MacArthur is also associated with that clinic. That information is not in the medical record exhibit. Another possibility is that Dr. MacArthur has a separate practice and Dr. Chapman referred the applicant there for a second opinion. At any rate, Dr. MacArthur's analysis of the applicant's condition is quite differenct from that of Dr. Chapman. Dr. MacArthur noted that the

applicant's chief complaint was back pain subsequent to an acute lumbar strain from which the applicant did not improve. He noted that the applicant was experiencing constant pain and stiffness, but no leg pain. Per Dr. MacArthur's office note, the applicant's symptoms were aggravated by any activity and the applicant felt he was getting worse. Dr. MacArthur's office note indicates that there was no numbness or weakness, no abnormal gait or stance, no spinous process tenderness, no sensory or motor defecits, and no spasm. He noted that the applicant had been under no active treatment program. He concluded that he did not believe that the applicant had back pain significant enough to keep him from working. He recommended return to work unless something could be detected by way of radiological studies. When Dr. MacArthur reviewed films on October 5, 1976, he noted that the X-rays showed only very minimal arthritic changes and nothing he could put together with the applicant's history and physical which would cause the applicant to be unable to return to work or to be restricted in his work.

On November 24, 1976, the Industrial Commission medical panel issued its report (Tab D, Exhibit A-1). The medical panel read the applicant's X-rays to show sacroiliac sclerosis and arthritic changes along the entire lumbar spine consistent with the clinical impression of ankylosing spondylitis. The panel concluded that the applicant was physically capable of doing light work but was unable to do mining or mechanical work. The panel rated the applicant as having a 60% whole person permanent impairment (without taking into consideration his loss of eyesight in the left eye) and the panel attributed 10% of that impairment to the industrial injury because there was "a one-in-six chance that the ankylosing spondylitis was aggravated by the lumbar back strain on the basis of the progression of the X-ray changes, and this man's inability to return to work." The panel concluded that there was no need for future medical care related to the August 7, 1975 industrial accident. On February 10, 1977, the prior ALJ in this matter issued a on order awarding the applicant permanent impairment benefits based on the 10% whole person impairment rated by the panel as being related to the industrial accident.

While the matter was under adjudication at the Industrial Commission, the applicant was going through the process of applying for Social Security Disability benefits (see Tab L, Exhibit A-1 generally). The applicant's initial application was denied and the applicant applied for a hearing that was held on June 15, 1976. After the hearing, the applicant was again denied in a decision issued on November 19, 1976. This decision was affirmed on appeal to the Appeals Council on January 18, 1977, but the matter was reopened in late 1977 as will be noted to follow.

In April of 1977, the applicant was apparently rerated by the VA with respect to his impairment or disability. There is a medical record indicating that the rating was apportioned as follows: 40% anklosing spondylitis, 30% left eye, and 10% right elbow, for a combined rating of 60%. The ALJ is not real sure how these military ratings are determined, but understands that the rating system is not consistent with the system specified in the AMA Guides to the Evaluation of Permanent Impairment.

In December of 1977, the applicant filed unspecified "new evidence" with Social Security that resulted in the U.S. District Court remanding the matter to Social Security for consideration of the new evidence. A supplemental hearing was conducted on May 31, 1978 and the decision to award benefits was issued on

July 11, 1978. That decision (found under Tab L, Exhibit A-1, pp. 157-161) notes that the applicant's arthritis in his hands became much worse starting in January of 1977. In contrast, the applicant actually noted some improvement in his back pain as a result of losing 30 pounds between January and May 1978 (Exhibit A-1, p. 158). The decision goes on to note that the industrial injury most likely had only a minimal effect on the applicant's disability and notes that the applicant was not considered disabled until the arthritis in the hands and fingers became acute in January 1977. The decision states:

> Assuming that the medical panel was correct, his percentage of disability was increased only 10% by the industrial accident. It does not appear the additional impairment resulting from the back strain would be sufficient to preclude claimant from all substantial work. However, the claimant maintains that in addition he has lost hand and finger dexterity. ... The administrative law judge is impressed with the sincerity of the claimant when he testified that beginning in January 1977 he lost the dexterity of in his hands. Until that time the claimant is not deemed to have been disabled but considering the credibility of the claimant's testimony as to the effect of arthritis in his hands and fingers together with his other impairments, it is found that he claimant became disabled January 1, 1977 which disability has been continuing.

(Exhibit A-1, pp. 160-161). The Social Security ALJ noted that prior to the problems with the hands, the vocational expert indicated that the applicant was capable of performing light electrical work.

There are no medical records in the medical record exhibit (Exhibit A-1) indicating any actual treatment for back pain or lumbar problems after 1976. In December of 1981, the applicant was reevaluated by Dr. C. Bench, apparently to determine whether Social Security Disability benefits would continue at that point. Dr. Bench's report is located at Tab L, Exhibit A-1(pp. 164-165). After examination his impression was: 1) history of low back pain and low back injury, rule out ankylosing spondylitis, 2) rule out rheumatoid arthritis, 3) cervical spondylosis with headaches, 4) traumatic injury left eye, rendered blind, 5) chronic sinusitis and 6) obesity. In an addendum report, Dr. Bench noted that the rheumatoid factor tests were negative and he revised his impressions as follows: 1) early cervical spondylosis with early degenerative disk disease of C5-6, 2) low back pain secondary to degenerative disk disease L5-S1 moderate in severity, 3) pain in the right shoulder secondary to some right sub-acromial bursitis and degenerative arthritis of the right AC joint, to a minimal degree. His comment was: "I think this patient's symptoms are way out of proportion to the objective findings which are presented."

From February 10, 1983 through May 25, 1983, the applicant was an inpatient in Castleview Hospital and the University of Utah Hospital with extensive intestinal problems and several surgeries. The applicant had postoperative septicemia and renal failure with gastrointestinal bleeding and it was necessary for him to be monitored in the intensive care unit for several weeks. It is unclear what if any impairment resulted due to this extended intensive treatment and surgery. In May and June of 1988, the applicant apparently underwent cardiac evaluation as noted by the Holter Monitor tests done

at the Salt Lake Clinic. Those records are somewhat unclear with respect to what conclusions were made as a result of the tests.

With respect to pre-existing conditions, the applicant sustained a perforating wound to his left cornea while working in a mine in October of 1954. There are a couple medical records from this incident under Tab H in the medical record exhibit. The applicant testified at hearing that he was hit in the left wrist by a pitched ball when playing baseball in 1941, but there are no medial records from this incident and the applicant indicated that he had had no problems with the wrist subsequent to 1941. He stated that he had no breathing problems resulting from his years of work in the mines.

The applicant completed the 11th grade in highschool. The applicant's work history includes working for the railroad for 2 years, some electrical work and training in the service for 4 years and thereafter in underground mines (from 1946 through 1975). The applicant indicated that while he was employed working in the mines he also did some electrical contracting and furnace installation on the side. The applicant stated that after his back injury in 1975, he tried to get work as a fireboss again but was denied jobs because he could not pass the physical. His wife testified that the applicant did try to find work, but the X-rays of his back always prevented him from passing the physicals.

The applicant was paid 25 weeks of temporary total compensation by the employer from August of 1976 to February of 1976. In February of 1976, he began receiving union disability pension benefits (amount unspecified) and he apparently continues to receive this along with his social security benefits (amount also unspecified). In February of 1977, he began receiving non-service connected VA disability benefits ($200.00 per month).

CONCLUSIONS OF LAW:

The ALJ finds that the applicant has failed to sustain his burden of proof in establishing a medical causal connection between his permanent inability to work and the August 7, 1975 industrial injury. The ALJ finds that there are two main reasons why the evidence does not support the requisite causal connection. First, the evidence shows that it was the arthritic condition in the hands and fingers that truly caused the applicant to be unable to work, not the ankylosing spondylitis in the lumbar spine. Second, even if one were to presume that the ankylosing spondylitis was causing the applicant to be disabled, the industrial injury did not cause the ankylosing spondylitis and only questionably aggravated it.

<u>A. The Cause of the Inability to Work:</u>

The July 11, 1978 Social Security Disability (SSD) decision makes it very clear that Social Security found that the applicant became unable to perform gainful employment when the arthritis in his hands and fingers became severe in January 1977, and not before that. The applicant was denied Social Security Disability benefits in a series of decisions prior to when SSD gave consideration to the onset of arthritis in the extremities. Therefore, Social Security found that the applicant's lumbar problems, even with the aggravation that may have

been caused by the industrial back injury, was not a sufficient disabling condition to cause him to be unable to perform any gainful work. The vocational expert who testified at the May 1978 SSD hearing indicated that there were jobs in the region where the applicant lived that he could have performed in 1978 (after the industrial injury) if he had not lost the dexterity in his hands and fingers. The July 11, 1978 Social Security decision re-emphasizes this in very plain terms. Although this ALJ is not bound in any way by the findings of the Social Security Administration, this ALJ finds the SSD decision very relevant and convincing. It is convincing because other evidence presented to this ALJ, to be discussed below, is consistent with the SSD determination that it was the arthritis in the hands that caused the applicant to be totally disabled, and not the anklosing spondylitis in the lumbar spine, which caused the applicant to be only partially disabled (unable to perform the demanding work in the mines and as a building construction electrician).

The applicant has argued that the arthritis in the hands and fingers is somehow related or was somehow caused by the lumbar condition. The February 5, 1992 letter to the Administrator of the Employers Reinsurance Fund, noted at the beginning of this Order, refers to when the "lumbar problem extended into Mr. Zupon's extremities." Unfortunately, there is no medical evidence at all which even suggests that the lumbar condition and the condition in the hands and fingers is somehow related. The applicant has pointed out that he had no problems in his hands until after the industrial accident, but there needs to be more than just a sequential finding to say that the lumbar back strain on August 7, 1975 caused the progressive degenerative arthritis in the hands and fingers. In addition, the applicant's argument is this regard is not clearly supported by the medical records. Dr. Chapman noted that the applicant had been having problems with his hands and fingers for 6 or 7 years prior to the date of injury and that it became more severe in 1977. It is the applicant's burden to present supportive medical evidence for his theories on the medical causal connection between the work injury and the disabling condition. In arguing that the arthritis in the extremities is related to the back strain, the ALJ finds that the applicant has failed to sustain this burden.

B. The Contribution of the Industrial Injury:

Although the ALJ finds that the analysis under A. above is sufficient to sustain a finding that permanent total disability benefits are not payable, the ALJ feels it is appropriate to also discuss the limited role the industrial injury played in the applicant's overall disability. The applicant has emphasized that he did not return to work after the industrial injury and has pointed out that a prior medical panel found that the industrial injury permanently aggravated his pre-existing ankylosing spondylitis. However, the medical evidence presented for this adjudication leaves the ALJ with some question regarding why the applicant did not return to work after the industrial injury and leaves the ALJ with some real questions regarding the prior medical panel's finding that the applicant sustained a 10% whole person impairment as a result of the industrial injury.

After the industrial back strain on August 7, 1975, the applicant received only conservative care for his back for several months. No acute injury to the spine was ever diagnosed radiologically. Surgery was never recommended or performed. There are no medical records regarding treatment for the back from 1976 forward. The 1976 medical panel concluded that the applicant would need no

future treatment for the back related to the industrial injury. The office notes of the doctors that treated the applicant just after the industrial injury (Dr. Smoot and Dr. Chapman) include regular mention of pain or limited use in many areas of the body besides the lumbar spine. The shoulders, the mid-thoracic spine, the hips, the neck and the elbows are all mentioned. Dr. Smoot noted aches in "all joints" at one point and even mentions ear pain. The medical evidence seems to suggest that the applicant was experiencing symptoms related to what Dr. Chapman diagnosed as "progressive arthritis of the spine, shoulders, elbows and hands." Dr. MacArthur concluded in September 1976 that the applicant's back pain was not so severe as to prevent him from working and Dr. MacArthur went so far as to state that the applicant needed no work restrictions. As late as 1981, when the applicant was re-evaluated for SSD by Dr. Bench, the medical conclusion was that the applicant's symptoms greatly exceeded any objective findings.

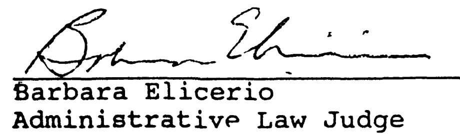
In spite of the above findings, this ALJ would probably have done what the previous Industrial Commission ALJ did and would have given the applicant the benefit of the doubt by awarding the 10% whole person impairment that the medical panel attributed to the industrial injury. However, this would have been giving the applicant the extreme benefit of the doubt. This ALJ has never seen a medical panel finding of impairment that is based on a 1 in 6 chance that there might have been an aggravation. The ALJ recognizes that there is some doubt in any medical conclusion, but the ALJ has always been of the impression that there should be a greater than 50% chance before the medical experts can say something probably caused something else. If it is less than 50%, or a lot less as in this case, then the ALJ would think that the panel would have to say it is NOT more likely than not that the connection exists.

Notwithstanding the highly questionable analysis of the prior panel, even if one concedes that the industrial injury caused 10% whole person impairment, this is still a very minimal portion of the applicant's overall disability or impairment. If not for the causation problems discussed above, the ALJ might find that the 1/6 contribution was sufficient to support a finding that the industrial injury caused the total disability. However, considering all the other evidence, the ALJ must conclude that there is insufficient supportive evidence to find that the industrial injury caused the applicant's total disability. As such, the applicant's claim for permanent total disability benefits related to the August 7, 1975 industrial injury must be dismissed.

ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for permanent total disability benefits related to the August 7, 1975 industrial accident is dismissed for failure to establish a medical causal connection between the industrial accident and the applicant's total disability.

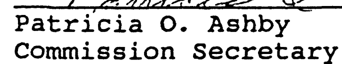
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.



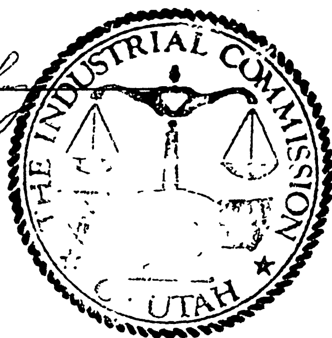
Barbara Elicerio
Administrative Law Judge

Certified by the Industrial Commission of Utah, Salt Lake City, Utah, this 18th day of March, 1992.

ATTEST:



Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on March 18th 1992, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of John Zupon, was mailed to the following persons at the following addresses, postage paid:

John Zupon
292 Welby Street
Helper, UT 84526

Virginius Dabney
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Erie V. Boorman
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Cynthia Anderson
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Uninsured Employers Fund

Pamela Hayes
Uninsured Employers Fund

INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows
Wilma Burrows
Adjudication Division

THE INDUSTRIAL COMMISSION OF UTAH
Case Number 91000568

John Zupon Applicant, vs. Kaiser Steel Corporation, (Self-Insured)/Uninsured Employers Fund, and Employers Reinsurance Fund, Respondents.	* * * * * * * * * * * *	ORDER DENYING MOTION FOR REVIEW

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The Industrial Commission of Utah reviews the Motion for Review of respondent in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant filed a claim for permanent total disability benefits related to an industrial injury on August 7, 1975. A hearing was held on February 6, 1992. In her decision of March 18, 1992, the administrative law judge (ALJ) denied the applicant's claim. The applicant timely filed this motion for review and was granted additional time to submit a memorandum in support of his motion. The applicant submitted a memorandum two months after the time had expired for submission of his memorandum.

1. DID THE ALJ APPLY THE WRONG STANDARD OF PROOF?

The applicant asserts that he was prejudiced by the ALJ's use of a "higher standard of proof than is found in the law." It is unclear what "higher standard" the applicant believes was used here, but examination of the record indicates that the ALJ correctly applied the preponderance of the evidence standard to the issue of medical causation. See Allen v.Industrial Commission, 729 P.2d 15, 23 (Utah 1986). The ALJ found that the applicant failed to establish medical causation by a preponderance of the evidence and denied the applicant's claim for permanent total disability.

The ALJ relied on Large v. Industrial Commission, 758 P.2d 954 (Ct. App. 1988) which held that a showing of medical causation was required under Allen. U.C.A. 35-1-69 was construed to require a showing of medical and legal causation to support an award for permanent total compensation. Id.

EXHIBIT C

2. DID THE ALJ IMPROPERLY ANALYZE THE CLAIM AS ONE BASED ON LUMBAR PROBLEMS IN CONJUNCTION WITH ARTHRITIC DISABILITY IN THE HANDS AND FINGERS?

Utah Code Annotated 35-1-69 provided that:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care . . . shall be awarded."

U.C.A. 35-1-69 (Supp. 1974). The statute contemplates that the compensation and medical care for the preexisting impairment will be paid out of the Second Injury Fund. Chavez. v. Industrial Commission, 709 P,2d 1168, 1170 (Utah 1985); See Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977).

U.C.A. 35-1-69 must be read in light of the other provisions of the statute. In Large v. Industrial Commission, 758 P.2d 954 (Ct. App. 1988) the Utah Court of Appeals agreed with an ALJ of the Industrial Commission who found that the language of 35-1-67 implies that there must be a causal connection between the industrial injury and the permanent total disability. Id. at 956. The Court of Appeals held that proof of a causal connection is required under Allen v. Industrial Commission Id. Therefore, the applicant "for permanent total disability benefits must prove medically that his disability was caused by an industrial accident." Id. It is important to note that Large construes language in the statute that predates the 1988 amendment. Therefore, it appears that Large is controlling in this case and the applicant must show a causal connection between his industrial accident and his permanent total disability in order to receive benefits.

The applicant asserts that Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985) requires the Commission to apply the law as it existed at the time of the applicant's injury. Marshall stands for the proposition that benefits to be awarded in workers' compensation cases are to be determined based on the statute as it existed at the time of injury. Although the applicant was injured in August 1975, he did not file his application for a hearing on permanent total disability until May 24, 1991. The relevant language in 35-1-67 was amended to require a showing of a causal connection in 1988. Thus, all case law construing the statute prior to 1988 should apply in the interpretation of the statute. Under Large, the applicant is required to show a causal connection

between his industrial accident and his permanent disability. The applicant failed to show the requisite causal connection and, therefore, his request for permanent total disability was properly denied by the ALJ.

3. DID THE ALJ IMPROPERLY FIND THAT THE INDUSTRIAL ACCIDENT WAS NOT THE MEDICAL CAUSE OF THE APPLICANT'S DISABILITY?

The applicant attempted to show that the August 7, 1975 industrial accident was the medical cause of his permanent total disability by showing that he never returned to work after the accident and that he was awarded social security disability benefits beginning on January 1, 1977.

The social security decision to award benefits noted that the arthritis in the applicant's hands became much worse beginning in January 1977 and observed that the applicant's industrial injury most likely had minimal effect on the applicant's disability. The Social Security Administration (SSA) did not consider the applicant to be disabled until the arthritis in his hands and fingers became acute in 1977. Prior to that time, the vocational expert who testified at the SSA hearing indicated that there were jobs that the applicant could perform in 1978 had he not lost dexterity in his hands and fingers. Although the SSA hearing is not binding on the commission under the statute in effect at the time of the applicant's injury, it is relevant to determining the extent of the applicant's disability as well as its causal connection to the applicant's industrial injury.

Examination of the applicant's medical records shows that he received no treatment for back pain or lumbar pain after 1976. Office notes of the doctors who treated the applicant immediately following the industrial accident regularly mention pain or limited use in many areas of the body, suggesting that the applicant was experiencing symptoms of progressive arthritis of the spine, shoulders,elbows and hands. Upon examination of the applicant in 1976, Dr. MacArthur concluded that the applicant's back pain was not so severe as to prevent him from working. In 1981, when the applicant was re-evaluated for SSA by Dr. Bench, the doctor concluded that the applicant's symptoms greatly exceeded his objective findings. Thus, the medical records do not establish a medical causal connection between the applicant's August 7, 1975 industrial injury and his permanent total disability.

4. SHOULD THE ALJ HAVE AWARDED THE APPLICANT A FIFTY PERCENT WHOLE PERSON IMPAIRMENT FOR THE PRE-EXISTING IMPAIRMENT IDENTIFIED BY THE 1976 MEDICAL PANEL?

Review of the applicant's Application for Hearing and the record, indicates that the applicant never requested consideration of a claim for permanent partial disability. Under 35-1-66 (Supp. 1974), a claim for permanent partial disability benefits must be filed within 8 years of the date of injury. In the present case, the applicant filed his application for hearing sixteen years after the injury. Therefore, the time for filing an application for permanent partial disability benefits had run when the applicant filed his application for permanent total disability benefits on May 24, 1991.

5. DID THE ALJ FAIL TO DELINEATE ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW?

The applicant asserts that the Order fails to delineate adequate findings of fact and conclusions of law. Review of the ALJ's Order in light of Adams v. Board of Review, 173 Utah Adv. Rep. 18 (1991), indicates that the ALJ made findings sufficient to "disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached." Milne Truck Lines, Inc. v. Public Service Comm'n, 720 P.2d 1336, 1338 (Utah 1979) cited in Adams, at 20. The ALJ's findings of fact and conclusions of law are sufficient to show what issues were decided, legal interpretations and applications made, as well as the subsidiary factual findings which support her decision. See Adams at 21. Therefore, the commission finds that the ALJ's Order contains sufficient findings of fact and conclusions of law to support her decision to deny benefits to the applicant.

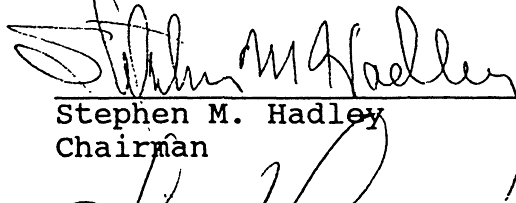
6. WAS THE ALJ'S DECISION ARBITRARY AND CAPRICIOUS?

Review of the record indicates that there is substantial evidence to support the ALJ's findings. The applicant failed to delineate his specific objections in sufficient enough detail to allow the commission to address them. However, review of the entire record indicates that the ALJ's findings are not arbitrary and capricious.

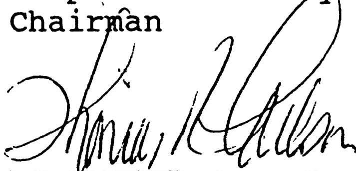
ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 18, 1992 is affirmed.

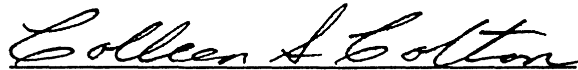
IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.



Stephen M. Hadley
Chairman

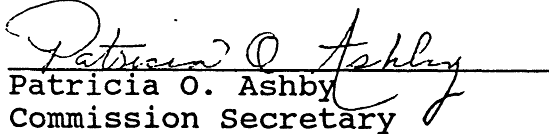


Thomas R. Carlson
Commissioner

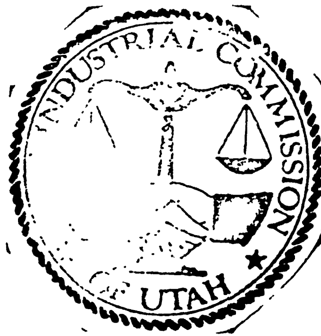


Colleen S. Colton
Commissioner

Certified this 3rd day of August 1992.
ATTEST:



Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on August 3, 1992, a copy of the attached Order Denying Motion for Review in the case of John W. Zupon was mailed to the following persons at the following addresses, postage paid:

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Employers' Reinsurance Fund

Barbara Elicerio
Administrative Law Judge

Edwin C. Barnes
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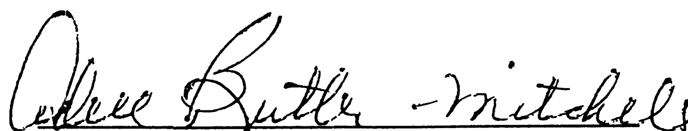
Thomas C. Sturdy
Uninsured Employers Fund



Adell Butler-Mitchell
Legal Assistant