
UTAH LABOR COMMISSION

KEVIN PECK,

Petitioner,

vs.

**GRANITE CONSTRUCTION and
VALLEY FORGE INSURANCE CO.,
SALT LAKE CITY CORPORATION, and
EMPLOYERS' REINSURANCE FUND,**

Respondents.

**ORDER MODIFYING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 04-0791

Salt Lake City Corporation (“SLC” hereafter) and the Employers’ Reinsurance Fund¹ (“ERF”) ask the Utah Labor Commissioner to review Administrative Law Judge La Jeunesse's determination that SLC and ERF, rather than Granite Construction and Valley Forge Insurance Co., (referred to jointly as “Granite”) are liable for Kevin Peck’s permanent total disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commissioner exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers’ Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Peck filed two applications for hearing with the Commission’s Adjudication Division, raising alternative claims for permanent total disability compensation against Granite and SLC. The first application alleged that Mr. Peck was permanently and totally disabled from a right-elbow injury caused by a work accident at Granite on August 20, 2002. The second application alleged that Mr. Peck’s permanent total disability stemmed from left-foot, low back and other injuries suffered in a work accident at SLC on October 13, 1988.

Judge La Jeunesse held an evidentiary hearing and then ruled that Mr. Peck’s 1988 accident at SLC was the cause of his disability. Judge La Jeunesse therefore ordered SLC and ERF to pay permanent total disability compensation to Mr. Peck.

¹ Under the law in effect at the time of Mr. Peck’s accident at SLC in 1988, the ERF is liable for a portion of the benefits paid to individuals who are permanently and totally disabled as a result of work-related injuries. See § 34A-2-413(3) of the Utah Workers’ Compensation Act.

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SLC and ERF now ask the Labor Commission to review Judge La Jeunesse's decision. Specifically, SLC and ERF contend that Mr. Peck's 2002 accident at Granite caused his permanent total disability and that Granite should be held liable for Mr. Peck's permanent total disability compensation.

FINDINGS OF FACT

The Commission finds the following facts material to the issue raised SLC and ERF's motions for review. The Commission also adopts Judge La Jeunesse's findings of fact to the extent they are consistent with the findings of this decision.

On October 13, 1988, Mr. Peck was employed by SLC on a road repair crew. A 500-pound asphalt block fell on his left foot, crushing the foot and causing him to fall backward onto some pipes and injure his low back. These injuries necessitated ongoing medical care over the next several years, including surgeries to sever nerves ("left lumbar sympathectomy"), implant a dorsal column stimulator, and then remove the dorsal column stimulator.

The 1988 accident at SLC left Mr. Peck with a permanent 16.5% whole person impairment for injuries to his left foot and lower back and chronic pain associated with those injuries. He was unable to return to work for SLC, and a functional capacity evaluation performed in August 1990 concluded the he could not do any work due to his "uncontrolled symptoms."

Nevertheless, Mr. Peck did return to work. In 1991 he began work driving concrete trucks for various employers, and in approximately 1994 he began working in that capacity for Granite. His duties included steering and operating other controls of heavy-duty concrete trucks. He also unloaded, manipulated and reloaded the metal channels, known as "chutes," used to move concrete from the truck to the delivery point. Thus, Mr. Peck's work as a concrete truck driver required him to use his arms to operate steering wheels, control knobs and levers, and to manipulate and clean the chutes.

After returning to work, Mr. Peck was able to perform all the duties of a concrete truck driver even though he continued to suffer impairments and pain from the 1988 accident at SLC. In 1995 he suffered a new work injury while working for Granite as a driver. Specifically, his right arm became caught in his truck's steering wheel, causing right cubital tunnel syndrome. Mr. Peck underwent surgery for this condition and suffered a permanent 2% whole person impairment. Nevertheless, after Mr. Peck reached medical stability from the injury, he returned to his regular duties as a driver and continued in that capacity for seven more years, until he suffered another work injury at Granite on August 20, 2002.

The injury of August 2002 occurred as Mr. Peck was preparing to offload concrete at a work site. After exiting his truck, he attempted to unload a chute from its storage location on the truck. Another driver had previously used the chute and had failed to clean it properly. As a result,

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concrete had dried in the chute and the chute was unusually heavy. When Mr. Peck attempted to lift the chute, he felt a popping sensation and pain in his right elbow. He subsequently required right-elbow surgery consisting of a very complicated lateral epicondylectomy, debridement of the extensor brevis tendon, and repair of the extensor wad.

After the foregoing surgery, Mr. Peck experienced increasing pain in his right elbow. This pain increases with simple day-to-day activities. Mr. Peck describes the pain as preventing him from performing simple day-to-day activities and from performing the various functions required to drive and operate a truck. Dr. Randle, the last physician to treat Mr. Peck, believes that Mr. Peck cannot do any type of manual labor. Dr. Randle concluded that Mr. Peck reached medical stability by November 7, 2003, and was left with a permanent 2% whole person impairment for "extremity painful organic syndromes."

Mr. Peck left school after the 10th grade. He has no specialized training or computer skills. His work experience throughout his life has involved heavy manual labor, and he has a felony criminal record. Mr. Peck has not worked since early 2003 and has been unable to identify any work that is actually available to him and that is also within his capabilities. Likewise, for the reasons expressed in Judge La Jeunesse's decision, Granite's own professional vocational assessment of Mr. Peck does not identify any suitable, available work. The Commission also notes that the Social Security Administration has concluded that Mr. Peck is totally disabled.

DISCUSSION AND CONCLUSION OF LAW

I. CAUSE OF MR. PECK'S INABILITY TO WORK.

None of the parties contest Judge La Jeunesse's determination that Mr. Peck is now unable to work. Instead, SLC and ERF on one hand, and Granite on the other, dispute which of Mr. Peck's two work accidents is the cause of his disability. The Commission has therefore carefully considered the medical and testimonial evidence regarding the nature of Mr. Peck's injuries and impairments, together with his work history and current limitations.

Without doubt, Mr. Peck suffered significant impairments and chronic pain as a result of his 1988 accident at SLC. But those impairments and pain did not prevent him from returning to work. Mr. Peck was able to find a niche as a concrete truck driver. He was able to fully perform the duties of the work for approximately eleven years, until he was involved in the August 2002 accident at Granite. It was this latter accident that limited his use of his right arm to the point that he could no longer operate a concrete truck, or perform any other work reasonably available to him.

Under these circumstances, the Commission concludes that Mr. Peck's inability to work is the result of his August 2002 accident at Granite. Consequently, Mr. Peck's claim for permanent total disability compensation under Utah's workers' compensation system must be evaluated according to the standards established by § 34A-2-413 of the Utah Workers' Compensation Act in

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effect on the date of that accident.

II. APPLICATION OF § 413 TO MR. PECK'S CLAIM.

Section § 413(1)(b) requires that Mr. Peck to prove three elements in order to qualify for permanent total disability compensation: 1) he has suffered significant impairment as a result of his work accident; 2) he is permanently and totally disabled, as defined by subsection 413(1)(c); and 3) his work accident is the direct cause of his permanent total disability. These requirements are discussed below.

1) Significant impairment from work accident. Subsection 413(1)(b)(i) requires that Mr. Peck prove he sustained a significant impairment “as a result of” his work accident at Granite. Mr. Peck’s testimony regarding the new functional limitations to the use of his right arm, as well as Dr. Randle’s assessment of a permanent 2% whole person impairment, are sufficient to establish the existence of a significant impairment from the subject accident.

2) Permanent total disability. Subsection 413(1)(b)(ii) requires that Mr. Peck prove he is permanently totally disabled according to the four-part definition set out in subsection 413(1)(c)(i) through (iv). Each of the four components of 413(1)(c) are summarized and discussed below.

a) The employee is not gainfully employed. Subsection 413(1)(c)(i) requires a finding that “the employee is not gainfully employed.” The evidentiary record establishes that Mr. Peck is not gainfully employed.

b) Impairments limiting basic work activities. Subsection 413(1)(c)(ii) requires that the Commission conclude “the employee has an impairment or combination of impairments that limit the employee’s ability to do basic work activities.” This factor takes into account **all** Mr. Peck’s impairments, regardless of cause. Furthermore, this factor only requires that the impairments “limit” his ability to do basic work activities. The Commission views the term “basic work activities” as referring to common activities shared in a wide variety of occupational settings, rather than the unique requirements of any particular job. In this sense, the term includes the abilities to report for work with reasonable regularity, some degree of physical flexibility, strength and endurance, sufficient mental capacity, the ability to communicate, and other basic abilities. The impairments Mr. Peck has incurred from injuries to his left foot, low back and right elbow clearly limit his ability to perform basic work activities.

c) Inability to perform essential functions of past work. Subsection 413(1)(c)(iii) requires that “the industrial . . . impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident . . .” Here, the focus is limited to work-related impairments and their effect on Mr. Peck’s ability to perform the essential functions of his pre-injury work. For eleven years prior to the accident at Granite in August 2002, Mr. Peck’s only significant work was as a concrete truck driver. Mr. Peck’s

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unchallenged testimony and the uncontroverted medical record establishes that his right-elbow injury prevents him from performing the essential tasks of that work. Mr. Peck's work-related impairments are therefore sufficient to satisfy this part of subsection 413(1)(c)'s definition of permanent total disability.

d) Ability to do other work. This final part of subsection 413(2)(c) requires the Commission to consider whether Mr. Peck can do other work that is reasonably available to him, taking into account his age, education, past work experience, medical capacity and residual functional capacity.

Mr. Peck is 55 years old. He suffers from significant physical limitations that preclude manual labor, and he has no training, experience or apparent aptitude for any other type of work. He also is burdened by a criminal felony record that further restricts what types of work he might obtain. The Social Security Administration has already determined that Mr. Peck is unable to engage in any gainful employment, and neither Mr. Peck nor Granite has identified any work within Mr. Peck's capabilities. The Commission therefore concludes that no other work is reasonably available to Mr. Peck.

In summary, the Commission concludes that Mr. Peck's circumstances meet each of the four prongs of subsection 413(1)(c)'s definition of permanent total disability.

3. Work accident as "direct cause" of disability. The final element Mr. Peck must prove is that his work injuries are the direct cause of his permanent total disability. Mr. Peck had no difficulty performing his duties as a concrete truck driver for the 11 years preceding August 20, 2002. Then, as a result of his work-related accident on that date, he suffered right-arm injuries that prevent him from returning to work as a driver. The Commission therefore concludes that the accident of August 20, 2002, is the direct cause of his permanent total disability.

III. SUBSISTENCE BENEFITS.

Because Mr. Peck has satisfied all of § 413(1)'s requirements for a preliminary determination of permanent total disability, he is entitled to payment of subsistence benefits pursuant to § 413(6)(b)(I). The Commission concludes that Granite is liable for Mr. Peck's subsistence benefits at the rate of \$368 per week beginning on November 7, 2003, when Mr. Peck reached medical stability from the injuries related to his August 2002 accident, and continuing until further order of the Commission.

IV. REEMPLOYMENT PLAN.

Pursuant to § 413(6), a finding of permanent total disability is not final until the employer is given an opportunity to submit a reemployment plan for the injured worker. The Commission will therefore remand this matter to Judge La Jeunesse to allow Granite an appropriate opportunity to

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submit such a plan, and to take any additional action as is appropriate under the circumstances.

ORDER

The Commission sets aside the previous order entered by Judge La Jeunesse in this matter and remands Mr. Peck's claim to Judge La Jeunesse to: 1) set the amount of lump sum and continuing subsistence benefits Mr. Peck is entitled to receive from Granite; 2) provide for submission of a reemployment plan by Granite; 3) assess interest and determine attorneys' fees; and 4) take such other action as necessary and consistent with this decision.

It is so ordered.

Dated this 31st day of March, 2009.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.