

2007

LPI Services v. Michael McGee, and the Utah Labor Commission : Brief of Respondent

Utah Court of Appeals

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LPI SERVICES,
and/or TRAVELERS INDEMNITY CO.
OF CONNECTICUT

VS.

Respondents.

FILED
UTAH APPELLATE COURT
JUL 02 2007

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INTRODUCTION

Section 413(1) of the Utah Workers' Compensation Act establishes several factors to be considered in determining whether an injured worker is entitled to a preliminary determination of permanent total disability. One of those factors—found in subsection 413(1)(c)(iv)—requires the Labor Commission to determine whether the injured worker cannot perform other work “reasonably” available, taking into consideration the injured worker’s age, education, past work experience, medical capacity and functional capacity.

The Commission has promulgated Rule R612-1-10.D.1 to identify the subsidiary considerations that are necessary to determine whether other work is “reasonably” available to an injured worker. These considerations include the location, stability and wage rate of the work.

LPI Services and Travelers Indemnity Co. (“LPI” hereafter) argue that Rule R612-1-10.D.1 is inconsistent with the statutory provisions of § 413(1)(c)(iv). Respondents Michael McGee and the Utah Labor Commission respectfully disagree. Respondents believe that Rule R612-1-10.D.1 is an appropriate exercise of the Commission’s discretion to interpret and apply § 413(1)(c)(iv)’s “reasonableness” requirement.

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to § 78-2a-3(2)(a) and § 34A-2-801(8), Utah Code Annotated.

ISSUE AND STANDARD OF REVIEW

Is Rule R612-1-10.D.1.c consistent with § 34A-2-413(1)(c)(iv) of the Utah Workers' Compensation Act?

Preservation of issue for review: LPI raised this issue in proceedings before the Commission, thereby preserving the issue for appellate review. (Record, vol. 1, pages 154-166.)

Standard of review: LPI argues this Court should apply a “correction of error” standard in determining whether Rule R612-1-10.D.1.c is consistent with § 413(1)(c)(iv). Under this standard of review, the Court simply would substitute its judgment for that of the Commission in determining what “reasonable” means in § 413(1)(c)(iv). However, Utah’s appellate courts have rejected this kind of mechanical approach. As the Utah Supreme Court stated in *Morton International*, 814 P. 2d 581, 586 (Utah 1991):

... it is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review. Rather, what has developed as the dispositive factor is whether the agency, by virtue of its experience or expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.

Whether Rule R612-1-10.D.1.e is contrary to § 413(1)(c)(iv) depends on the meaning of “reasonable” as the word is used in § 413(1)(c)(iv). As discussed in Point One of this brief, the Commission has discretion to answer that question. This Court should review the Commission’s judgment for “abuse of discretion” pursuant to § 63-46b-16(4)(h)(i) of the Utah Administrative Procedures Act

(“UAPA”; Title 63, Chapter 46b, Utah Code Annotated), and uphold the Commission’s rule if it is within the bounds of reasonableness. *King v. Industrial Commission*, 850 P.2d 1281 (Utah App. 1993.)

DETERMINATIVE STATUTES

The following statutes and rules are determinative in this proceeding. They are set out in full in **Appendix A** of this brief.

- Section 34A-2-413 of the Utah Workers’ Compensation Act (Title 34A, Chapter 2, Utah Code Annotated, 1997).
- Rule R612-1-10, “Workers’ Compensation Rules—Procedures,” Utah Administrative Code.

STATEMENT OF THE CASE

Nature of the Case: LPI seeks judicial review of a decision by the Appeals Board of the Utah Labor Commission concluding that Michael McGee was entitled to a preliminary determination of permanent total disability pursuant to § 34A-2-413(1) of the Utah Workers’ Compensation Act.

Course of Proceedings: On August 8, 2003, Mr. McGee filed an amended application for hearing with the Labor Commission, seeking permanent total disability compensation for injuries suffered while working for LPI Services. (Record at 25.) Administrative Law Judge La Jeunesse held an evidentiary hearing on Mr. McGee’s claim on October 31, 2003. (R. at 31.) In a decision issued on April 12, 2004, Judge La Jeunesse concluded that Mr. McGee was entitled to a preliminary finding of permanent total disability, subject to LPI’s

statutory right to submit a plan to reemploy Mr. McGee. (R. at 33-47; Judge La Jeunesse's decision is attached to this brief as **Exhibit B**.) On May 11, 2004, LPI submitted a reemployment plan for Mr. McGee. (R. at 53-72.) Judge La Jeunesse approved the plan on February 15, 2005. (R. at 143-146.)

On April 15, 2005, LPI filed a motion asking the Labor Commission's Appeals Board to review Judge La Jeunesse's preliminary determination of permanent total disability. (R. at 154-167.)¹ The Appeals Board issued its decision on December 28, 2006, denying LPI's motion for review and affirming Judge La Jeunesse's determination. (R. 200-203; the Appeals Board decision is attached to this brief as **Exhibit C**.) LPI then petitioned for appellate judicial review of the Appeals Board's decision.

Statement of Facts: LPI does not dispute the underlying facts set forth in Judge La Jeunesse's decision (Appendix B) and adopted by the Appeals Board. (Appendix C.) Although LPI has interspersed argument with the statement of fact contained in its brief, respondents do not believe it is necessary to restate the facts here.

SUMMARY OF ARGUMENT

Whether an administrative rule is consistent with its underlying statute depends on the meaning of the statute itself. Thus, LPI's argument that the

¹ LPI's motion for review was deemed timely pursuant to Administrative Law Judge Hann's order of March 3, 2005, which extended the filing period until April 17, 2005. (R. at 150-151.)

Commission’s Rule R612-1-10.D.1.c is inconsistent with § 413(1)(c)(iv) of the Utah Workers’ Compensation Act necessarily raises the more fundamental question: What does § 413(1)(c)(iv) mean?

Section 413(1)(c)(iv) requires the Commission to determine whether other work is “reasonably” available for an injured worker. The Commission has both explicit and implicit discretion in making that determination.

- Section 34A-1-301 of the Utah Labor Commission Act (Title 34A, Chapter 2, Utah Code Annotated) **explicitly** grants the Commission “full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.”
- By using the word “reasonably”—a word that is subjective and undefined—in § 413(1)(c)(iv), the Legislature **implicitly** authorized the Commission to interpret and apply the word in the context of the statute.

Whether Commission’s discretion is viewed as explicit or implicit, the Commission has the duty to determine whether work is “reasonably” available for purposes of § 413(1)(c)(iv). The Commission is well-suited to this responsibility because of its expertise in modern employment relationships and its understanding of the workers’ compensation system. The Commission’s judgment, reflected in Rule R612-1-10.D.1.c, should be upheld so long as it is not unreasonable.

The Commission’s Rule R612-1-10.D.1.c identifies the subsidiary factors that the Commission considers important in determining whether other work is reasonably available. These factors are: 1) the stability and regularity of the work;

2) the work's location; and 3) the wage attached to the work. By considering the factors as part of the determination of "reasonableness," the rule screens out work that is not reasonable because it is too uncertain or undependable, too distant, or not economically viable.²

The standards for "reasonableness" contained in Rule R612-1-10.D.1.c are consistent with the purpose of § 413(1)(c)(iv) and other provisions of the Utah Workers' Compensation Act. More importantly, the rule is consistent with the Commission's obligation to liberally construe and apply the Act to provide coverage and resolve any doubt respecting the right to compensation in favor of an injured employee." *Salt Lake City Corp. v. Labor Commission*, 569 Utah Adv. Reports 17, 19 (Utah 2007).

In summary, the Commission has discretion to determine what "reasonable" means in the context of § 413(1)(c)(iv). The Commission's judgment on that issue, as set forth in Rule R612-1-10.D.1.c and as applied to Mr. McGee's claim for permanent total disability compensation, should be upheld by this Court.

² Respondents acknowledge the textual difficulties presented by § 34A-2-413(1)(c)(iv). The statute identifies two primary considerations: 1) whether work is reasonably available, and 2) whether the injured worker can actually do that work. The statute then enumerates particular factors (age, education, past work experience, and medical/functional capacity) but does not specifically state whether the enumerated factors apply to the determination of whether other work is "reasonably" available, or to the determination of whether the injured worker can actually perform such work. This is largely a semantic difference; under either formulation, the considerations identified in Rule R612-1-10.D.1.c are a reasonable exercise of the Commission's discretion under the statute.

ARGUMENT

POINT ONE: THE COMMISSION IS ENTITLED TO EXERCISE DISCRETION IN INTERPRETING “REASONABLENESS” UNDER §413(1)(c)(iv).

LPI challenges the Commission’s interpretation and application of § 413(1)(c)(iv). “Appellate courts defer to an agency’s statutory interpretation only when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. (Citations and internal punctuation omitted.)” “*Utah Standards of Appellate Review—Revised*,” Judge Norman H. Jackson, Utah Bar Journal, Vol. 12, No. 8, October 1999.

This Court has explained the analytical model that determines whether an agency’s interpretation or application of statute is entitled to deference.

First, we determine whether the legislature explicitly granted deference to the agency to interpret or apply statutory language at issue. . . . If we find such a grant, we review under section 63-46b-16(4)(h)(i) for abuse of discretion. That is we afford the agency some deference and assess whether its action is within the bounds of reasonableness.

Second, if we do not find an explicit grant of discretion, we examine the language of the statute and the statutory framework for an implicit grant of discretion. If the statutory language is broad and expansive or subject to numerous interpretations we will assume the legislature has chosen to defer to the policy making expertise of the agency and we will find an implicit grant of discretion and review the action under section 63-46b-16(4)(h)(i) for abuse of discretion.

King v. Industrial Commission, 850 P. 2d 1287.

Applying this analysis to § 413(1)(c)(iv), both explicit and implicit grants of discretion to the Commission can be found.

Explicit discretion. Section 34A-1-301 of the Utah Labor Commission Act grants the Commission “the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.” This authority extends to § 413(1)(c)(iv) of the Utah Workers’ Compensation Act and constitutes an explicit legislative grant of discretion to the Commission to use its informed judgment to establish when other work is “reasonably” available to an injured worker.

Implicit discretion. In *Morton International*, 814 P.2d at 590, the Utah Supreme Court observed that:

. . . courts have also recognized that grants of discretion may be implied from the statutory language. For example, we have held that when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency. We have also granted an agency’s statutory interpretation deference when the statutory language suggested that the legislature had left the specific question at issue unresolved.

With respect to § 413(1)(c)(iv), the statute requires the Commission to determine whether other work is “reasonably” available for an injured worker. The Legislature has not defined what “reasonable” means in the context of this statute. Furthermore, “reasonableness” is a subjective concept; its meaning depends on the context in which it is applied. The Legislature’s use of

“reasonably” in § 413(1)(c)(iv) therefore “bespeak[s] a legislative intent to delegate [its] interpretation to the responsible agency.” *Morton*, Ibid.

In a case such as this, where the Commission’s interpretation and application of § 413(1)(c)(iv) is entitled to deference, this Court will review the Commission’s action pursuant to § 63-46b-16(4)(h)(i) of UAPA, “afford[ing] the [Commission] some deference and assess whether its action is within the bounds of reasonableness.” *King v Industrial Commission*, 850 P.2d at 1286.

For its part, LPI argues that this Court should not grant any deference to the Commission’s interpretation of § 413(1)(c)(iv). Instead, LPI argues that the determination of whether an administrative rule is consistent with controlling statute is a question of law, reviewed for correction of error with no deference to the agency determination. In other words, LPI asks this Court to substitute its judgment for that of the Commission in determining whether other work is “reasonably” available.

In arguing for a non-deferential standard of review, LPI relies on three appellate decisions that applied the correction of error standard in judging whether administrative rules were consistent with statutory provisions. Each of these decisions is distinguishable from the circumstances of this case.

- In *Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm’n*, 846 P.2d 1304 (Utah 1993), the statute in question specifically defined “manufacturer” by reference to the Standard Industrial Classification code. The Tax Commission’s rule imposed additional

definitional elements. In the absence of any grant of discretion to the Tax Commission to define “manufacturer,” the Supreme Court struck down the Tax Commission’s restrictive definition.

- In *Draughton v. Dep’t of Financial Institutions*, 975 P.2d 935 (Utah App. 1999), this Court invalidated a DHRM rule that had the effect of limiting protections against demotion that were otherwise available by statute. Although not specifically discussed in the Court’s opinion, it appears that DHRM lacked any explicit or implicit discretion to interpret the statutory provisions in question. The Court therefore applied a correction of error standard in determining whether DHRM’s rule was consistent with the underlying statute.

- This Court’s decision in *Crowther v. Nationwide Mut. Ins. Co.*, 762 P.2d 1119 (Utah App. 1988), was issued prior to the “standard of review” jurisprudence subsequently articulated in *Morton International v. Tax Commission*, 814 P. 2d 581 (Utah 1991), *State v. Pena*, 869 P. 2d 932 (Utah 1994), *King v. Industrial Commission*, 850 P.2d 1281 (Utah App. 1993), and other appellate decisions. Consequently, the opinion in *Crowther* does not address the issue of agency discretion and assumes that a “correction of error” standard is applicable.

The common thread that distinguishes the foregoing cases from the matter at hand is that none of the cases deal with a situation in which the administrative agency was granted discretion to interpret or apply the underlying statute. In the

absence of such agency discretion, the courts properly applied a “correction of error” standard of review. But in this case, the Labor Commission has been granted discretion to determine what “reasonable” means in the context of § 413(1)(c)(iv). Consequently, the Commission’s judgment is subject to the more deferential “abuse of discretion” standard of review, and the Commission’s judgment should be upheld if it is within the bounds of reasonableness.

POINT TWO: THE COMMISSION’S RULE R612-1-10.D.1.c IS CONSISTENT WITH § 413(1)(c)(iv).

Rule R612-1-10.D.1.c is consistent with the Utah Workers’ Compensation Act in general, and with § 413(1)(c)(iv) in particular.

In *Larson’s Workers’ Compensation Law*, “Nature of Workers’ Compensation,”: Vol. 1, §1.03[2], Professor Larson describes the fundamental social purpose that is common to workers’ compensation systems throughout the United States:

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries. . . .

Chief Justice Cardozo, then of the New York Court of Appeals, eloquently expressed the same point in a decision issued during the formative years of the workers’ compensation systems:

. . . . The Workmen’s Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage. (Citations omitted.) He was to have enough to sustain

him in a fashion measurably consistent with his former habits of life during the trying day of readjustment.

Surace v. Danna, 161 N.E. 315 (N.Y. 1923).

Utah's workers' compensation system shares this objective. In *Reteuna v. Industrial Commission*, 185 P. at 537, decided only two years after the Legislature enacted Utah's workers' compensation system, our Supreme Court observed:

The beneficent purposes of the (workers' compensation) act, and of similar acts, have been repeatedly stated by the courts of this and other states. It has not only for its object to secure compensation to an injured employee or to those dependent upon one killed by accident while so employed, but to relieve society of the care and support of the unfortunate victims of the industrial accident. (Emphasis added.)

Thus, the Utah Workers' Compensation Act is intended to protect injured workers by replacing, to some extent, wages that have been lost as a result of work accidents. This allows injured workers to support themselves and their dependents without private charity or government welfare. And consistent with this general policy, § 34A-2-409(1) of the Act specifically provides that: [e]xcept as otherwise provided . . . the average weekly wage of the injured employee at the time of the injury is the basis upon which to compute the weekly compensation rate. . . .”

By tying compensation to pre-injury earnings in at least an approximate fashion, the Act allows an injured worker to, in the words of Chief Justice Cardozo, “have enough to sustain him in a fashion measurably consistent with his former habits of life.” *Surace v. Danna*, 161 N.E. at 315. The Commission's rule R612-1-10.D.1.c is consistent with this objective.

POINT THREE: LPI'S SPECIFIC OBJECTIONS TO RULE R612-1-10.D.1.c ARE WITHOUT MERIT.

LPI has raised a number of specific objections to Rule R612-1-10.D.1.c. Some of these arguments overlap; others are not fully explained. Below, respondents catalogue and respond to LPI's objections.

Consideration of factors not specifically mentioned in statute. LPI argues that in determining whether other work is "reasonably available" the Commission has no discretion to consider any factor not specifically identified in the statute. This brief has already responded to the main thrust of that argument. However, it is necessary to discuss the untenable consequences that LPI's argument would have on injured workers.

Rule R612-1-10.D.1.c requires evaluation of whether other work is "reasonably" available to an injured worker in light of the other work's 1) stability, 2) location, and 3) wage. Although LPI focuses its attack on the rule's wage requirement, the logic of LPI's argument would also invalidate the rule's other factors of stability and location. Consequently, if LPI's argument is accepted, it would be improper for the Commission to consider whether "other work" is regular, steady and readily available. Likewise, it would be improper to consider the location of "other work," even if the work involved an excessive commute or required the injured worker to move to an entirely new location. LPI's argument cannot be squared with § 413(1)(c)(iv)'s requirement that other

work be “reasonably” available, nor can it be reconciled with Workers’ Compensation Act’s general purpose of protecting injured workers.

The same can be said for LPI’s argument that any work paying at least minimum wage is “reasonably” available. The facts of Mr. McGee’s case are illustrative. Prior to his work accident, Mr. McGee worked 40 hours a week and earned \$17.50 per hour as a building engineer. His dependents consisted of a wife and child. Pursuant to § 413(2), Mr. McGee would be entitled to receive \$477 per week in total disability compensation. However, LPI’s interpretation of § 413(1)(c)(iv) would preclude Mr. McGee from qualifying for this compensation if he was capable of performing any minimum wage job. At current minimum wage rates, Mr. McGee’s gross income would be more than cut in half, to \$206 per week. The impact would be even greater if taxes, travel expense, and other expenses of working are considered.³

In summary, LPI’s interpretation of § 413(1)(c)(iv) would deny some injured workers and their dependents the protection of the Utah Workers’ Compensation Act, thereby violating the purpose of the Act to “secure compensation to an injured employee” and “to relieve society of the care and

³ Respondents acknowledge that the “other work” identified in this case—“lens stylist” and “car rental reservationist”—would pay approximately \$10 per hour. But even at this higher wage, Mr. McGee’s actual income would be substantially reduced. Assuming a modest 20% factor to cover taxes and expenses, Mr. McGee, his wife and child would receive disposable earnings of only \$320 per week, one-third less than the amount provided by disability compensation.

support of the unfortunate victims of the industrial accident.” *Reteuna v. Industrial Commission*, 185 P. at 537.

Consistency with the rehabilitation/reemployment process. As previously noted, § 413 establishes a two-step process for adjudicating claims of permanent total disability. (See *Thomas v. Color Country Management*, 84 P.3d 1201, 1207 (Utah 2004).) The first step requires the Commission to make a preliminary determination of whether the injured worker is permanently and totally disabled. The second step allows the employer or insurance carrier to propose a plan to reemploy or rehabilitate the injured worker. LPI argues it is inconsistent for the Commission to apply the wage requirement of rule R612-1-10.D.1.c to the first step of this process, but not to the second step.

LPI’s argument fails to note an important difference between “first step” and “second step” proceedings. The “first step” proceeding requires the injured worker to make a *prima facie* showing of permanent total disability. Unless the injured worker can meet this burden, he or she receives no permanent total disability compensation. Without such disability compensation, the injured worker must look to whatever employment is available in the labor market for his or her support. In this context, it is appropriate to consider the level of wages available in the labor market for the types of work the injured worker is capable of performing.

In contrast, “second step” proceeding occurs after an injured worker has already established a *prima facie* right to permanent total disability compensation.

Having established that *prima facie* right, the injured worker is entitled to payment of subsistence benefits from the employer or insurance carrier. (See § 413(6)(b)(i).) And while the purpose of the second step proceeding is to determine whether the employer or insurance carrier can develop a feasible plan to rehabilitate or reemploy the injured worker, § 413(6)(d)(ii) mandates that any such plan “shall include payment of reasonable disability compensation to provide for the employee’s subsistence during the rehabilitation plan.”

Thus, the second step process has its own method to provide for the injured worker’s subsistence as he or she is reintroduced to the workforce. Because the second step proceeding on Mr. McGee’s claim is not at issue before this Court, it is inappropriate to consider the rules that might apply to that proceeding.

Failure to address statutory factors. LPI argues that the ALJ’s decision is inadequate because it did not explicitly list all the factors identified for consideration by § 413(1)(c) “and then include an explanation of how each criterion applied.” (LPI’s brief at page 17-18.) LPI’s then extends its criticism to the Appeals Board for failing to correct the ALJ’s purported error.

However, LPI did not present this issue to the Appeals Board as part of its motion for review. (Record, vol. 1, pages 154-167.) LPI’s motion for review raised three specific issues: 1) whether Rule R612-1-10.D.1.c was contrary to § 413(1)(c)(iv); 2) whether the rule was contrary to the Utah Injured Worker Reemployment Act; and 3) whether the rule could be applied to Mr. McGee’s

claim. LPI did not argue that the ALJ's decision was inadequate in its discussion of other aspects of § 413(1)(c).

Section 63-46b-14(2) of the Utah Administrative Procedures Act requires that issues be presented to the Commission or its Appeals Board before they can be raised on appeal:

(1) A party aggrieved may obtain judicial review **of final agency action**, except in actions where judicial review is expressly prohibited by statute. (Emphasis added.)

By failing to raise its argument regarding the sufficiency of the ALJ's decision as part of the review proceedings before the Appeals Board, LPI waived the issue. It cannot now be considered on appeal.

Allegation that other portions of Rule R612-1-10 have been invalidated.

At page 24 of its brief, LPI states that “[t]his case would not be the first time that a portion of Administrative Rule R612-1-10 had to be declared invalid by this Court.” LPI then cites this Court's decision in *Target Trucking v. Labor Commission*, 108 P.3d 128 (Utah App. 2005). LPI's assertion is both misleading and irrelevant.

LPI's assertion is misleading because this Court has withdrawn support from the *Target* decision. See *Ameritemps v. Labor Commission et al.*, 128 P. 3d 31 (Utah App. 2005); *aff'd* 569 Utah Adv. Rep. 24 (SC, 1/19/07).

LPI's assertion is irrelevant because, in *Target*, this Court addressed an entirely different section of the rule, specifically, Rule R612-1-10.C.1.c, which explained the parties' rights to judicial review, as follows: “A preliminary

determination of permanent total disability by the Labor Commissioner or Appeals Board is a final agency action for purposes of appellate judicial review.” Admittedly, whether a party has a right to judicial review is a question of general law. The Commission has no discretion to interpret such matters, which must ultimately be decided by the appellate courts. The Commission promulgated Rule R612-1-10.C.1.c as guidance to litigants, and, in fact, the substance of the rule has now been ratified by this Court in *Ameritemps*, *ibid*. Thus, the important distinction between Rule R612-1-10.C.1.c and Rule R612-1-10.D.1.c is that the first is subject to a “correction of error” standard of review, while the second is subject review for abuse of discretion.

CONCLUSION

The Commission and Mr. McGee concede it would be within the power of the Legislature to create a permanent total disability compensation system that incorporates the standards envisioned by LPI. But the Legislature has not done that. Instead, it has granted discretion to the Commission to use its expertise and judgment to determine when other work is “reasonably available.” The Commission’s Rule R612-1-10.d.1.c establishes a test that is consistent with § 413 itself, with the Workers’ Compensation Act in general, and with the fundamental objective of the Act to provide a reasonable means of support to injured workers. As such, the rule is well within the bounds of reasonableness and should be upheld by this Court.

The Commission and Mr. McGee respectfully urge this Court to affirm the Appeals Board's determination that Mr. McGee is entitled to a preliminary determination of permanent total disability pursuant to § 413(1) of the Utah Workers' Compensation Act.

Dated this 2nd day of July, 2007.

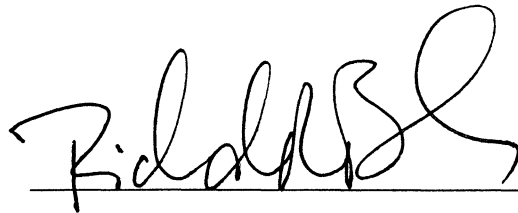
AL Heuer

Rickal R. S.

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of July 2007, two copies of the forgoing brief were placed in the mail to:

MARK R. SUMSION
MICHAEL K. WOOLLEY
RICHARDS BRANDT MILLER & NELSON
P O BOX 2465
SALT LAKE CITY UT 84110-2465

A handwritten signature in black ink, appearing to read "Richard Brandt Miller & Nelson", is written over a horizontal line.

Appendix A

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation lump-sum compensation payment, 26
 § 302. A L.R.5th 127.
 A.L.R. — Workers' compensation reopening

34A-2-413. Permanent total disability — Amount of payments — Rehabilitation.

(1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

- (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
- (ii) the employee is permanently totally disabled; and
- (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

- (i) the employee is not gainfully employed;
- (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
- (iii) the industrial or occupationally caused impairment or combination of 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 or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) of exceeding the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 34A-2-703.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation ben-

The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, time work in a job earning at least minimum wage provided that

employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

(i) the review of medical records;

- (ii) employee submission to reasonable medical evaluations;
- (iii) employee submission to reasonable rehabilitation evaluations and retraining efforts;
- (iv) employee disclosure of Federal Income Tax Returns;
- (v) employee certification of compliance with Section 34A-2-110; and
- (vi) employee completion of sworn affidavits or questionnaires approved by the division.

(d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

(e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

(g) In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

(h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Insurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

If any provision of this section, or the application of any provision to any circumstance, is held invalid, the remainder of this section shall be set without the invalid provision or application.

Appendix B

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

MICHAEL MCGEE, Petitioner, vs. LPI SERVICES, Respondent,	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Case No. 05-0114 Judge Richard M. La Jeunesse
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SUBMISSION OF CASE: The parties waived an evidentiary hearing in this matter and submitted the issues to be considered by way of “Stipulation for Direct Referral to a Medical panel” (Stipulation).

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Michael McGee, was represented by his attorney Richard Burke Esq.

The respondent, LPI Services, was represented by attorney Mark Sumsion Esq.

I. STATEMENT OF THE CASE.

This case arose as an outgrowth of Case No. 20021225 between the same parties. In the present case the parties agreed to submit the narrow issues concerning the cause of Mr. McGee’s headaches to a medical panel for resolution.

II. ISSUES.

1. Did Michael McGee’s industrial accident on July 4, 2001 cause his headache condition at issue in this case?
2. If Michael McGee’s industrial accident on July 4, 2001 caused his headache condition at issue in this case, what medical treatment is reasonable and necessary to address the condition?

III. COURSE OF PROCEEDINGS.

On December 28, 2004 the parties filed their Stipulation. I sent the Stipulation to the Medical panel appointed in this case. The Medical Panel filed a report on June 13, 2005. I sent the Medical panel Report to the parties on June 13, 2005 and gave them 15 days to file objections to the admissibility of the report. Neither party filed any objections to the Medical Panel Report. Accordingly, I accepted the Medical Panel Report into evidence and considered the matter ready for order.

IV. FINDINGS OF FACT

A. Stipulated Facts.

The parties submitted the following stipulated facts:

1. On July 4, 2001, Michael McGee, petitioner, was involved in an industrial accident while in the course and scope of his employment with LPI Services. The petitioner was assisting four men move a 600 pound plus motor when he injured his low back and shoulder.
2. The applicant subsequently developed headaches, which he claims are related to his industrial injury. The headache condition is the only medical condition at issue.
3. On July 20, 2001, Dr. Larcom took x-rays of the applicant's shoulder, which demonstrated a hypertrophic AC joint that appeared to be of long standing duration. (MRE at 48).
4. An EMG of the petitioner's shoulder was performed by Dr. Ryser on August 8, 2001, which revealed an axonal neuropathy. (MRE at 54-61).
5. On August 31, 2001, Dr. Larcom indicated the EMG showed a palsy of the Infraspinatus branch of the suprascapular nerve at the level of the notch. (MRE at 50).
6. On October 29, 2001, the petitioner reported to Dr. Larcom that his shoulder pain had resolved. (MRE at 51).
7. On February 25, 2002, Dr. Bowen performed a fusion at L4-5. (MRE at 224-226).
8. The petitioner received physical therapy for his low back from April 15, 2002 to May 8, 2002. (MRE at 66-78).

9. On April 29, 2002, the petitioner was seen at Pioneer Valley Hospital for severe headaches. A spinal tap was performed and a diluting hemorrhage was noted. A CT of the head was also taken, which showed minor vascular abnormality. (MRE at 236-43).
10. That same day, an MRI of the petitioner's head was taken at University of Utah, which revealed non-specific white matter changes. An MRA was also taken, which was normal. (MRE at 194).
11. On May 29, 2002, Dr. Savia noted the petitioner had two migraine headaches during his life prior to his back problems. He further indicated that the petitioner's headaches were indirectly related to his back problems. He further indicated the petitioner's headaches were indirectly related to the industrial accident because they started after physical therapy for the low back. (MRE at 86-89).
12. On July 29, 2002, the petitioner was seen by Drs. Knoebel and Moress, who stated the headache condition was not related to the industrial accident. (MRE at 94-104).
13. On September 5, 2002, Dr. Brown indicated the headache condition was directly related to the industrial accident. (MRE at 43-44)
14. The parties stipulate that the petitioner has a 15% whole person impairment rating related to his low back, with 10% attributable to preexisting conditions and 5% attributable to the industrial accident.

B. The Medical Cause of Michael McGee's Headache Condition.

On June 13, 2005 the Medical Panel appointed in this case filed a report. The Medical Panel consisted of the chair Dr. Madison Thomas M.D., a neurologist, panel member Dr. Glen Momberger M.D., an orthopedic surgeon, and Dr. Robert H. Burgoyne M.D., a psychiatrist. The Medical Panel examined Mr. McGee, reviewed the stipulation and medical records provided by the parties, and reviewed the radiology films made available to them. [Medical Panel Report at 1].

The Medical Panel concluded that: "The migraine-like headaches do not appear to have been a result of the reported injury of 4 July 2001." [id. p. 4 ¶ 1]. I found the Medical Panel Report thorough and well reasoned. Therefore, the preponderance of the evidence in this case established that Mr. McGee's July 4, 2001 industrial accident did not medically cause his headache problems at issue in this case. Consequently, Mr. McGee's claim for workers' compensation benefits related to his headache problems must be dismissed.

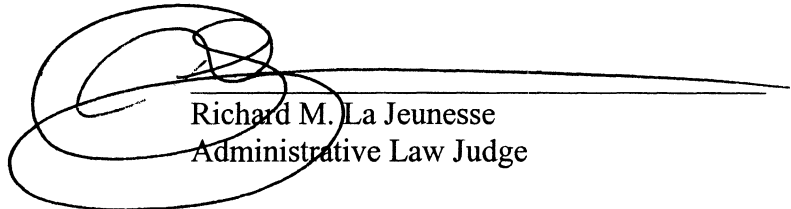
V. CONCLUSIONS OF LAW

Mr. McGee's July 4, 2001 industrial accident did not medically cause his headache problems at issue in this case. Consequently, Mr. McGee's claim for workers' compensation benefits related to his headache problems must be dismissed.

VI. ORDER

IT IS THEREFORE ORDERED that Michael McGee's claim against LPI Services for workers' compensation benefits based on headaches is hereby dismissed with prejudice.

DATED September 9, 2005.



Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

Appendix C

**APPEALS BOARD
UTAH LABOR COMMISSION**

MICHAEL MCGEE,

Petitioner,

vs.

**LPI SERVICES and TRAVELERS
INSURANCE COMPANY,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 02-1225

LPI Services and its insurance carrier, Travelers Insurance Company (referred to jointly as "LPI" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's preliminary determination that Michael McGee is permanently and totally disabled for purposes of the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. McGee claims permanent total disability compensation for a low back injury he suffered on July 4, 2001, while working for LPI. After holding an evidentiary hearing on the claim, Judge La Jeunesse concluded that Mr. McGee had satisfied the criteria of §413(1) of the Act and was, therefore, entitled to a preliminary determination of permanent total disability.

Among the criteria for permanent total disability contained in §413(1)(c)(iv) is the requirement that the injured worker "cannot perform other work reasonably available, taking into account the employee's: (A) age; (B) education; (C) past work experience; (D) medical capacity; and (E) residual functional capacity." In applying this standard to Mr. McGee's claim, Judge La Jeunesse relied on the Commission's Rule 612-1-10.D.1.c. to conclude that no work was reasonably available to Mr. McGee.

In seeking review of Judge La Jeunesse's decision, LPI argues that the requirements of Rule 612-1-10.D.1.c are contrary to the statutory provisions of § 413(1)(c)(iv). Alternatively, LPI argues that, even if Rule 612-1-10.D.1.c is valid, it cannot be applied retroactively to Mr. McGee's claim.

FINDINGS OF FACT

LPI does not contest Judge La Jeunesse's findings of fact. The Appeals Board therefore adopts those findings.

DISCUSSION AND CONCLUSIONS OF LAW

Compatibility of Rule 612-1-10.D.1.c with § 413(1)(c)(iv). In considering LPI's arguments, the Appeals Board acknowledges the fundamental principle that administrative rules must comply with statutory directives. In *Sanders Brine Shrimp v. Audit Division*, 846 P.2d 1304, 1306 (Utah 1993), the Utah Supreme Court stated:

It is a long-standing principle of administrative law that an agency's rules must be consistent with its governing statutes. Thus, a rule that is out of harmony with a governing statute is invalid. (Internal citations omitted.)

In this case, § 34A-2-413(1)(c)(iv) is the governing statute. It provides as follows (emphasis added):

(c) To find an employee permanently totally disabled, the commission shall conclude that:

. . . .

(iv) the employee cannot perform other work **reasonably** available, taking into consideration the employee's:

- (A) age;
- (B) education;
- (C) **past work experience;**
- (D) medical capacity;
- (E) residual functional capacity.

The foregoing statute was enacted in 1995. Thereafter, stakeholders in the workers' compensation system asked the Commission to promulgate standards for determining whether other work was "reasonably" available within the meaning of § 413(1)(c)(iv). The Commission convened an ad hoc committee with representatives from the applicants' bar, insurance carriers and employers. The committee proposed what is now Rule 612-1-10.D.1.c. The rule was discussed and approved by the Workers' Compensation Advisory Council established by § 34A-2-107 of the Act, then discussed at public hearings. The Commission promulgated the rule in January 2001 and it has remained in effect since then. Rule 612-1-10.D.1 provides as follows:

1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:

- a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;
- b. The work is regular, steady, and readily available; and

ORDER AFFIRMING ALJ'S DECISION
MICHAEL MCGEE
PAGE 3

c. The work provides a gross income at least equivalent to:

- (1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
- (2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

LPI now contends that subsection (c) of Rule 612-1-10.D.1 is invalid because it exceeds the scope of § 413(1)(c)(iv). Section § 413(1)(c)(iv) requires the Commission to determine whether other work is “reasonably available,” taking into consideration, among other factors, the injured worker’s “past work experience.” In effect, LPI argues that “past work experience” refers **only** to the injured worker’s duties at work, and not to any of the other terms and conditions of the work environment. Thus, under LPI’s interpretation, aspects of the injured worker’s past employment such as location, wage, or hours cannot be considered.

On the other hand, the Commission’s Rule 612-1-10.D.1 takes a broader view of the statutory term “past work experience.” Under the rule, “past work experience” includes an injured worker’s job duties, but also includes other aspects of the employment contract. The rule therefore takes into account the location of the injured worker’s residence and past employment, previous wage levels, and the availability and regularity of alternative work. The Appeals Board finds the rule to be reasonable, consistent with the structure and purposes of the workers’ compensation system, and within the Commission’s authority.

The Appeals Board notes LPI’s argument that provisions of the Utah Injured Worker Reemployment Act (“Reemployment Act”; Title 34A, Chapter 8, Utah Code Annotated) must be considered in interpreting § 34A-2-413(1)(c)(iv)’s test of “other work reasonably available.” While it is true that § 34A-2-413 of the Utah Workers’ Compensation Act makes passing reference to the Reemployment Act, the Appeals Board finds no basis to conclude that the Legislature intended to incorporate the various definitions of the Reemployment Act into § 413. But even if such an incorporation were intended, § 34A-8-104(3) of the Reemployment Act itself defines “gainful employment” in terms of work that is “reasonably feasible” and “reasonably attainable” in consideration of the injured worker’s past “experience.” Thus, the Reemployment Act’s statutory formulation is only slightly different from that of § 34A-2-413(1)(c)(iv) and, for the reasons already stated above, is not violated by the Commission’s Rule 612-1-10.D.1.

Finally, LPI argues that Rule 612-1-10.D.1 cannot be applied to claims based on injuries that occurred before the rule was promulgated. However, it is § 413(1)(c)(iv), rather than Rule 612-1-10.D.1, which gives rise to Mr. McGee’s right to benefits. The rule does nothing more than explain how the Commission will exercise the discretion conferred by § 413(1)(c)(iv), to determine whether

ORDER AFFIRMING ALJ'S DECISION
MICHAEL MCGEE
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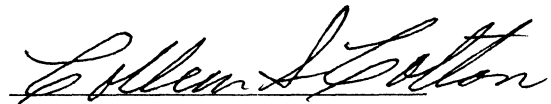
other work is "reasonably" available to Mr. McGee. In light of the provisions of the underlying statute and the function of the Commission's rule, the Appeals Board finds no reason why the rule cannot be applied to Mr. McGee's claim.


In summary, the Appeals Board concludes that Rule 612-1-10.D.1 is consistent with the provisions of § 34A-2-413(1)(c)(iv). The Appeals Board further concludes that Judge La Jeunesse properly applied the rule to Mr. McGee's claim.

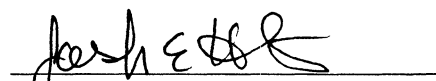
ORDER

The Appeals Board affirms Judge La Jeunesse's decision. It is so ordered.

Dated this 28th day of December, 2006.


Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board 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.