

2007

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

Utah Court of Appeals

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APR 30 2007

IN THE UTAH COURT OF APPEALS

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

Petitioners / Defendants

vs.

MICHAEL MCGEE, and the
UTAH LABOR COMMISSION,

Respondents.

**BRIEF OF PETITIONERS
LPI SERVICES AND
TRAVELERS INDEMNITY**

Case No. 20070077-CA

(Oral Argument Requested)

PETITION FOR REVIEW FROM THE LABOR COMMISSION OF UTAH

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Section 78-2a-3(2)(a) (2006); see also Utah Code Ann. § 63-46(b)-16(1) (2006) (providing for judicial review of formal adjudicative proceedings).

ISSUE

Did the Utah Labor Commission improperly promulgate and apply Utah Administrative Rule 612-1-10.D.1.c., a Rule that conflicts with Utah Code Section 34A-2-413(1)(c)(iv) because it improperly modifies the statutory definition of “other work reasonably available.”

Standard of Review: Questions of statutory construction are matters of law, and the court gives no deference to an administrative agency’s interpretation of a statute, relying on a “correction of error” standard. Chris & Dick’s Lumber v. Tax Com’n, 791 P.2d 511 (Utah 1990). In some cases, the court gives some deference to the administrative agency, when the agency’s expertise is applicable. However, such deference is not warranted here because the determination of whether an administrative rule conflicts with legislation is a pure question of law for which no deference is given to the agency.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following statutes and administrative rules are determinative. Because of the length of some, citations are provided below and the full text of each is set forth in addenda to the brief.

1. Utah Code Section 34A-2-413(c)(iv) (1997)

(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 age, education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis added).¹

¹ While there is no substantive difference between the current statute and the 1997 version in effect at the time of the accident, the 1997 version is provided and applied herein. The differences are stylistic, with formatting subsections (a) through (e) having been added to the language to permit easier reading. The 2007 statute reads:

(c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence 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; and**
- (E) residual functional capacity.**

2. Utah Code Section 34A-8-102 (1997)

This chapter is intended to promote and monitor the state's and the employer's capacity **to assist the injured worker in returning to the work force as quickly as possible**

Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis added) (setting forth the "Intent Statement" for the Utah Injured Worker Reemployment Act).

3. Utah code Section 34A-8-104 (1997)

(3)(b) Factors to be considered in determining gainful employment include the injured worker's:

- (i) education;
- (ii) experience; and
- (iii) physical and mental impairment and condition.

4. Utah Code Section 34A-8-108 (1997)

(1) The division shall administer this chapter with the objective of assisting in returning the disabled injured worker to gainful employment

Utah Code Ann. § 34A-8-108 (1997) (setting forth priorities for assisting workers to return to gainful employment).

5. Utah Administrative Code R612-1-10

A. This rule applies to claims for permanent total disability compensation under the Utah Workers' Compensation Act.

. . .

D. For purposes of this rule, the following standards and definitions apply:

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

- 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.**

Utah Admin. Code R612-1-10.D.1.c (2007) (emphasis added).

6. Utah Administrative Code R612-8-9

A Reemployment plan (Form 209) shall be provided for injured workers who are identified on the initial assessment as needing reemployment assistance, due to an industrial accident or illness which creates a significant barrier preventing a return to the work force. Significant barriers include, but are not limited to: 1) impairment(s) resulting from the industrial accident(s) or illness which prevent the employee from performing the essential functions of the work activity for which the employee has been qualified until the time of the industrial accident; 2) lack of transferable skills; 3) education/training; and 4) age. The plan shall not be provided for those injured workers who have previously been screened out through Form 206. The report should contain a return-to-work plan outlining employee demographics, functional limitations, type of plan, specific job target or employment category, specific tasks, time frames for completion and costs. Parties responsible for carrying out each task shall be identified (i.e., employee, employer, qualified rehabilitation provider, and insurance carrier). The plan shall be completed by a qualified rehabilitation provider (as defined by Section 34A-8-109) and filed within 30 days of the Initial Assessment.

Utah Admin. Code R612-8-9 (2007).

STATEMENT OF THE CASE

The instant petition presents an issue of first impression, specifically, whether Utah Administrative Rule 612-1-10.D.1.c. is in conflict with Utah Code Section 34A-2-413(1)(c)(iv).

Mr. Michael McGee filed a workers' compensation claim for permanent total disability benefits. Instead of applying the statutory standard found in Utah Code Section

34A-2-413(c)(iv) which sets forth what must be proven to establish that an employee is permanently disabled and thereby entitled to these benefits, the Labor Commission applied Utah Administrative Rule R612-1-10.D.1.c. This Administrative Rule conflicts with the statutory standard and goes beyond the statutory mandate by promulgating a test that considers factors not permitted by the statutory standard.

Taking into consideration the statutory factors of McGee's age, education, past work experience, medical capacity and residual functional capacity, evidence was presented showing McGee could work – there was other work reasonably available to him that would allow him to return to the workforce. Notwithstanding the availability of this employment, the Labor Commission concluded that McGee was entitled to permanent total disability benefits because the wages for this gainful employment were not up to an acceptable standard – they just didn't pay enough. Applying a test promulgated by the Commission as set forth in Administrative Rule R612-1-10.D.1.c., the Labor Commission concluded that even though McGee was capable of working, and even though work was available, because the wages were not enough, according to the administrative rule, it was preferable to award permanent total disability benefits.

STATEMENT OF FACTS

In November 2002, McGee filed an Application for Hearing seeking Workers' Compensation benefits asserting claims for medical expenses, recommended medical care, temporary total disability compensation, permanent partial disability compensation,

and interest related to an alleged July 4, 2001 industrial injury with LPI Services.

(R.0002.)

In August 2003, McGee filed an Amended Application seeking permanent total disability compensation. (R. 00025.)

In October 2003 an administrative hearing was held. (R. 0033-0047.) Jobs were identified for the ALJ that constituted gainful employment for Mr. McGee, but the available jobs paid a wage lower than the State average weekly wage. (R. 0033-0048.) During the administrative hearing, it was established that McGee earned \$17.50 per hour at the time of the alleged injury. (R. 0034, 0040-41.) The average weekly wage for the State of Utah as of July 4, 2001, equaled \$13.85 per hour. (R. 0040-41) As a result, the ALJ determined that Mr. McGee's wage exceeded the current State average weekly wage for the date of injury.

During the administrative hearing, the defendants' vocational expert, Dirk Evertsen, testified that Mr. McGee was capable of working as a lens stylist at Lens Crafters with a starting wage of \$7.00 per hour, plus commissions of \$2.50 per hour or more and income potential of between \$12.00 to \$13.00 per hour. Mr. Evertsen also testified that McGee could perform a car rental reservationist job with a starting wage of \$7.29 per hour, plus commissions of \$2.50 per hour or more and income potential of between \$12.00 to \$13.00 per hour. (R. 0040.)

In April 2004, the administrative law judge issued his Findings of Fact, Conclusions of Law, and Order. (R. 0033-48.) The ALJ entered a tentative finding of

permanent total disability on the basis that even though Mr. Evertsen established that other work was reasonably available through at least two specific jobs, both gainful employment, those jobs did not qualify as other work reasonably available pursuant to the new Utah Administrative Rule 612-1-10.D.1, which went into effect in January 2003. (R. 0045.) The decision was contrary to State statute, applying an administrative rule that conflicts with Legislative statutory mandate. Utah Code Section 34A-2-413(1)(c)(iv) states that in order to be permanently disabled, an employee must prove that, inter alia, he or she cannot perform “other work reasonably available, taking into consideration the employee’s age, education, past work experience, medical capacity, and residual functional capacity.” The administrative rule purports to define what constitutes “other work reasonably available” by taking into consideration gross income, available wage rates, and the current state average weekly wage, and by imposing a minimum wage rate that must be satisfied before available gainful employment can constitute “other work reasonably available.”

The ALJ applied this improper administrative standard, stating that “[t]he two jobs located by Mr. Evertsen as lens stylist and car rental reservationist at most paid \$13.00 per hour, or less than the average weekly wage for the State of Utah as of July 4, 2001.” (R. 0045.) Accordingly, even though McGee could work and was able to work, because the wage was less than the current State average weekly wage, the ALJ determined that “no evidence existed that any employment remained reasonably available to Mr. McGee as of the date of the hearing pursuant to the requirements of Utah Code § 34A-2-

413(a)(c)(iv) and Utah Administrative Code R. 612-1-10.D.1.c.” (R.0045.) The ALJ identified no problems with the jobs identified by Dirk Evertsen other than the fact that the jobs paid less than the current State average weekly wage. (R.0045.)

In April 2004, the defendants filed a notice of intent to file a reemployment plan, which was filed in May 2004. (R.0049-50; R. 0053-72.) In September 2004, an evidentiary hearing was held with respect to the reemployment plan. (R.0143.) In February 2005, the ALJ issued Findings of Fact, Conclusions of Law, and an Order, wherein the defendants’ reemployment plan was determined to be reasonably designed to return McGee to gainful employment. (R.0143-147.)

In March 2005, an Order was signed allowing the parties to file any Motions for Review on or before April 15, 2005, to allow for administrative review of the ALJ’s decision by the Appeals Board of the Labor Commission. (R. 0150-51.) Defendants filed a timely Motion for Review contesting the ALJ’s finding that McGee is permanently and totally disabled. (R. 0154-67.) The primary argument asserted that Rule 612-1-10.D.1 was improperly promulgated as contrary to State statute, and that McGee could not be found permanently and totally disabled when gainful employment was available which constitutes, applying the statutory standard, “other work reasonably available, taking into consideration the employee’s age, education, past work experience, medical capacity, and residual functional capacity.” (R. 0157-66.) McGee opposed the Motion for Review, claiming that the consideration of gross income, available wage rates, and the current state average weekly wage rate “did not ‘abridge, enlarge, extend, or modify’” the

statutory standard and its five criteria. (R. 0170.) McGee also claimed that the statutory criteria were simply a starting point, or “minimum considerations”; and other criteria beyond the legislative factors could be considered by the Labor Commission. (R. 0172-73.)

On December 28, 2006, the Commission issued its Order affirming the ALJ’s decision. (R. 0193-97.) The Order suggested that Administrative Rule 612-1-10.D.1 was proper because, the Labor Commission claimed, the consideration of gross income, available wage rates, and the current state average weekly wage rate were all necessary to the consideration of “past work experience,” one of the permitted criteria in Utah Code Section 34A-2-413(1)(c)(iv). (R. 0193-204.) The Labor Commission acknowledged it took a “broader view of the statutory term ‘past work experience’” than defendants. (R. 202.) Unsurprisingly, the Labor Commission was not persuaded that its “broad” administrative rule conflicted with state legislation. (R. 0201-203, claiming that the consideration of gross income, available wage rates, and the current state average weekly wage pursuant to Administrative Rule R612-1-10.D.1.c., and the consideration of commuting distance and steadiness of the work, pursuant to Administrative Rule R612-1-10.D.1a. & b., was compatible with the five statutory criteria of “age, education, past work experience, medical capacity, and residual functional capacity.”)

A timely Petition for Review was filed with the Utah Court of Appeals on January 24, 2007, thereby vesting this court with appellate jurisdiction.

SUMMARY OF ARGUMENTS

The Award of Permanent Total Disability benefits to McGee must be overturned because the Administrative Rule applied by the Labor Commission is invalid because it conflicts with state legislation. The ALJ held that available, gainful employment jobs identified by the defendants as “other work reasonably available” for McGee were unacceptable solely because the jobs did not pay enough money – they did not provide a wage at or above the current State average weekly wage that Rule 612-1-10.D.1 purports to require. The statute, however, which establishes what constitutes “other work reasonably available,” sets forth five specific criteria for consideration, and it does not provide for consideration of gross income, available wage rates, or the current State average weekly wage. Defendants contend that the Rule improperly expands the statutory definition of “other work reasonably available,” which permits consideration of only age, education, past work experience, medical capacity, and residual functional capacity.

As indicated by the ALJ, the jobs identified were appropriate given McGee’s work injury and his transferrable skills. The only deficiency identified by the ALJ was the lower wage provided by these jobs. Because the Commission lacks authority to enact and rely on a Rule that expands the statute to include consideration of non-statutory factors, the award of permanent total disability benefits must be overturned.

ARGUMENT

I. The Utah Labor Commission Exceeded Its Rule-Making Authority by Creating an Administrative Rule which Enlarged and Substantively Amended the Workers' Compensation Act.

In enacting Utah Code Section 34A-2-413(1)(c), the Utah Legislature set forth five criteria that may be considered by the Labor Commission in determining whether or not an applicant is permanently totally disabled. The Labor Commission promulgated an administrative rule that purports to permit the consideration of additional factors. Because the administrative rule expands the statute, it is in conflict with statutory law, and is therefore invalid.

A. Longstanding Utah law provides that administrative rules may not conflict with state statutes

When an administrative rule conflicts with a statute, “[t]he rule must . . . yield to the statute.” The Utah Supreme Court has stated that “[i]t is a long-standing principle of administrative law that an agency’s rules must be consistent with its governing statutes.” Sanders Brine Shrimp v. Audit Div. of the Utah State tax Comm’n, 846 P.2d 1304, 1306 (Utah 1993). An administrative rule that is out of harmony with a statute is invalid. Id.; see also Draughon v. Dep’t of Financial Institutions, State of Utah, 975 P.2d 935, 937 (Utah Ct. App. 1999) (explaining that unharmonious rules conflict with state statute and thereby “in effect amend that statute.” In Draughon, the court further clarified the limitations on administrative rule-making: “When an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of

administrative authority granted. Agency regulations may not abridge, enlarge, extend or modify a statute.” 975 P.2d at 937; see also Crowther v. Nationwide Mut. Ins. Co., 762 P.2d 1119, 1122 (Utah Ct. App. 1988) (holding that administrative rule was invalid as having exceeded its authority where legislature had “not clearly declared its policy”).

B. The Administrative Rule purporting to permit consideration of factors not permitted by the statute must be declared invalid

Utah Administrative Rule 612-1-10.D.1 conflicts with Section 34A-2-413(1)(c)(iv) of the Workers’ Compensation Act. The statute does not permit the consideration of gross income, current available wage rates, or the current state average weekly wage. By permitting the consideration of non-statutory factors, the administrative rule impermissibly expands the statute. First, the plain language of the text provides no permission to consider the wage factors set forth by the administrative rule. Second, the Labor Commission’s application of the rule, specifically its failure to set forth or apply the statutory criteria, impermissibly expanded the statute. Third, other cases, including Utah cases, have held that administrative rules which purport to define statutory terms have impermissibly modified the statute requiring invalidation of the administrative rules; and applying these cases to the instant case, the administrative rule must be invalidated. Fourth, this court has already identified problems with other portions of this same administrative rule.

1. Straightforward analysis of the plain language of the text demonstrates that the administrative rule impermissibly expands the statute

The Utah Labor Commission has no inherent authority. All powers, rights, duties, and responsibilities of the Utah Labor Commission are granted by the Utah Legislature. Utah Code. Ann. 34A-1-103 (1997). Utah Code Section 34A-2-413(1)(c)(iv) states what may be considered by the Labor Commission in determining whether an employee is permanently totally disabled. The Labor Commission is statutorily mandated to evaluate whether “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.**” (Emphasis added.) The statute contains no wage consideration. The statute makes no mention of the consideration of gross income, wage rates, or the state average weekly wage. The administrative rule that purports to permit consideration of these factors impermissibly expands the statute and is therefore void and must be declared invalid.

Comparing the plain language of the statutory text against the text of the administrative rule, the administrative rule sets forth additional considerations beyond the five statutory criteria for what constitutes other work reasonably available and thereby improperly expands the statute. The version of Utah Code Section 34A-2-413 in effect at the time of the accident reads, in relevant part:

(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 age, education, past work experience, medical capacity, and residual functional capacity.

Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis added).² Utah Administrative Code R612-1-10.D reads as follows:

D. For purposes of this rule, the following standards and definitions apply:

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

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.

Utah Admin. Code R612-1-10.D.1.c (2007).

The Labor Commission's Order claims that the statutory criterion of "past work experience" necessarily permits consideration of gross income, current wage rates, and the current state average weekly wage. The Labor Commission's argument must be rejected as a matter of straightforward textual analysis. First, the consideration of **past** work experience does not permit consideration of **current** wages. When interpreting

² See footnote 1, *supra*, explaining that while there is no substantive difference between the current statute and the 1997 version in effect at the time of the accident, the 1997 version is provided and applied herein.

statutes, Utah courts “presume that the legislature used each term advisedly,” and thereby must construe statutes to give effect to each term. See, e.g., State v. Tooele County, 2002 UT 8, ¶ 10, 44 P.3d 680. The Legislature used the term “**past** work experience.” The term “past” does not permit consideration of current available wages, nor does it permit consideration of the “current state average weekly wage.” Utah Admin. Code. R R612-1-10.D.1.c. (2007). Second, the consideration of **work experience** does not necessarily permit consideration of **wages**. Experience is defined as “practical knowledge, skill, or practice derived from direct observation of or participation in events or in a particular activity [;] the length of such participation <has 10 years [experience] in the job>.” (See “Experience,” Merriam Webster’s Collegiate Dictionary (10th ed. 1993). In other words, “[w]ork experience is the experience that a person has working, or working in a specific field or occupation,” irrespective of any type of wages. See Wikipedia, <http://en.wikipedia.org/wiki/Work_experience>. Experience does not necessarily imply wages or compensation. If the Legislature had wanted to permit consideration of wages or compensation in conjunction with consideration of experience, it would have said so. It did not. Accordingly, from a straightforward textual analysis, the administrative rule improperly expands the statute.

The Labor Commission itself also previously defined the term “experience” in a manner inconsistent with the statute and its new rule. Utah Code Section 34A-2-413(6)(a)(i) requires reemployment plans for those initially found permanently and totally disabled to comply with the Reemployment Act. The Reemployment Act, as with the

Workers' Compensation Act, requires consideration of "experience". Utah Code Ann. § 34A-8-104(3)(b)(i) (1997). The Commission, in promulgating a rule governing reemployment plans indicated that the plans consider "1) impairment(s) resulting from the industrial accident(s) or illness which prevent the employee from performing the essential functions of the work activity for which the employee has been qualified until the time of the industrial accident; 2) lack of transferable skills; 3) education/training; and 4) age." Administrative Rule R612-8-9. Comparing that Rule to Section 34A-2-413(6)(a)(i), "transferable skills" is equivalent to "past work experience." The Commission, however, has now impermissibly expanded the statutory language and criteria by adopting and applying a new administrative rule definition of "past work experience" to include consideration of the wage the injured worker made at his or her last job and consideration of the current state average weekly wage.

The legislature set forth a specific list of statutory criteria for a determining whether other work is reasonably available. There is no requirement in the statute that permits consideration of a gross income at least equivalent to the current state average weekly wage. Instead, the statute requires that other work reasonably available must consider age, education, past work experience, medical capacity and residual functional capacity.

2. The Labor Commission's application of the statute in this case impermissibly expanded the statute

The Labor Commission's application of the administrative rule in this case improperly expanded the statute. Specifically, the Labor Commission failed to even set forth, much less apply, the statutory criteria.

The Labor Commission must set forth and apply the statutorily mandated factors the Legislature directed that the employee must prove. The Legislature has mandated that in order to find that an employee is permanently totally disabled the Labor Commission must conclude that “(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.” Utah Code Ann. § 34A-2-413(c)(iv) (1997). Of necessity, these factors must be set forth and applied by the Labor Commission.

The Labor Commission failed to set forth and apply the statutory factors. In considering whether there was “other work reasonably available” to McGee, the ALJ's Order never even mentions the five statutory criteria. Instead, the ALJ's Findings of Fact section sets forth summaries of the testimony of competing experts (R. 0039-40), and then explains McGee's wages history and compares the wages of the current available jobs proposed by defendants' expert to the state average weekly wage. (R. 0040.) There is no analysis of McGee's age, education, or past work experience. (R.0039-40.) An order that would have properly followed and applied the statutory criteria would have listed the

criteria and then included an explanation of how each criterion applied. Instead of following the statute, the Labor Commission favored its own rule that purports to permit the consideration of factors other than those set forth in the statute. The ALJ's Conclusions of Law further cements the fact that the ALJ simply bypassed the statutory criteria in favor of the administrative rule. (R. 0044-46.) The Conclusions of Law section contains more than two pages of nothing more than the application of the rule. (R. 0044-46.) There is no mention of McGee's education, let alone any analysis of how his age, education, or past work experience, i.e. transferrable skills, would aid, or hinder, him from obtaining other work reasonably available. (R. 0044-46.) Instead, the ALJ defended his improper exclusive use of the administrative rule instead of applying the statutory criteria. (R. 0044-46.)

The Labor Commission Appeals Board's Order affirming the ALJ's decision also fails to set forth and apply the statutory criteria. (R. 0200-204.) The Appeals Board's "Discussion and Conclusions of Law" states that Section 34A-4-413(1)(c)(iv) is the governing statute, but instead of applying the criteria, the Appeals Board goes on to defend their decision to adopt an administrative rule that adds additional criteria. (R. 0201.) Specifically, in quoting and defending the administrative rule, the Appeals Board notes that the administrative rule's additional criteria include (1) commuting distance, (R. 201, R612-1-10.D.1.1.a), (2) the steadiness of available work (R.0201, R612-1-10.D.1.1.b), (3) potential gross income of current available work, taking into consideration (4) the current state average weekly wage, and (5) the wage the claimant

was earning at the time of the accident. (R. 0201-02, R612-1-10.D.1.1.c.(1) & (2).) In defending the administrative rule, the Appeals Board went on to acknowledge it took a “broader view of the statutory term ‘past work experience’” than defendants, pointing out that the administrative rule purported to permit consideration of “the injured worker’s residence [and] previous wage levels.” (R.0202.) As noted above, these additional criteria are not statutory criteria, nor do they necessarily have anything to do with “past work experience.” In the end, instead of applying the statutory criteria, the Appeals Board argued in favor of its rule, a rule that expands the statutory criteria, and then applied the rule. In so doing, the Appeals Board failed to set forth the statutory criteria, and failed to apply the statutory criteria in any way.

This analysis and result is supported by Norton v. Industrial Comm’n, 728 P.2d 1025 (Utah 1986). In Norton, the Industrial Commission’s ruling was invalidated because the Commission failed to set forth and apply the proper criteria. Id. at 1026, 28. At issue in Norton was the Industrial Commission’s determination of whether a worker was permanently, totally disabled. Id. at 1026. At the time, the Commission was required to consider the worker’s age, sex, education, economic and social environment, and medical impairment. Id. at 1027. The Commission “failed . . . to carry out its task” because it failed to apply the required criteria. Id. In other words, the Utah Supreme Court criticized the Commission in Norton for doing the same thing that the Labor Commission did in the instant case: failing to set forth and apply the proper factors. Id. The Labor Commission never applied the statutory criteria. As the court stated in Norton,

“[n]o mention was made of [the] factors.” Id. As a result, the Labor Commission’s Order must be vacated.

In short, the statute sets forth specific criteria for the Labor Commission to consider and apply. The Labor Commission should have set forth each statutory criterion and explained how each applied. The Labor Commission failed to do so in this case. As a result, the Labor Commission’s application of the rule impermissibly expanded the statute in this case, and therefore the Labor Commission’s order must be overturned.

3. Case law holds that administrative rules, which purport to define statutory terms, impermissibly modify the statute requiring invalidation of the administrative rules

The Labor Commission claims that the administrative rule is simply an attempt to define what constitutes “other work reasonably available.” (R. 0201, stating that the administrative rule was promulgated “for determining whether other work was ‘reasonably’ available within the meaning of [the statute].”) However, other cases have held that administrative rules which purport to define statutory terms have impermissibly modified the statute requiring invalidation of the administrative rules. These cases, applied to the instant case, require invalidation of this administrative rule.

In Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm’n, the Utah Supreme Court invalidated an administrative rule that improperly defined what constituted a manufacturer entitled to a statutory tax exemption. Instead of setting forth and applying the statutory criteria, the “Commission relied upon an administrative rule that impermissibly narrowed the availability of the exemptions.” Id. at 1304. The statute

at issue in Sanders provided tax exemptions for manufacturers, and the petitioner was a company that harvested and processed brine shrimp cysts. Id. at 1304-05. The Tax Commission refused to permit the exemption, concluding that the company “did not satisfy [the administrative rule’s] requirement that a manufacturer produce a new, reconditioned, or remanufactured product . . . from raw, semi-finished, or used material.” Id. at 1305 (internal quotes and brackets omitted). In other words, the Tax Commission purported to define what constituted a manufacturer – the statutory term. The Utah Supreme Court held that the purported definition improperly restricted the statutory term. Id. at 1305. The statute set forth some terms for defining a manufacturer. Id. at 1306. The administrative rule, however, went on to attempt to even further define a manufacturer, by adding administrative definitions for which there were “no statutory counterparts.” Id. This attempt to further define a statutory term resulted in improperly restricting the sales tax exemption. Id. This administrative definition impermissibly modified the statute which required reversal of the administrative agency’s decision. Id.

In Draughon v. Dep’t of Financial Institutions, 1999 UT App 42, 975 P.2d 935, this Court invalidated yet another administrative agency’s attempt to re-characterize a statutory criterion with an administrative rule definition. In Draughon a civil service worker was “involuntarily reassigned” (the administrative rule’s terminology), pursuant to an administrative rule permitting “involuntary reassignments” that could better utilize workers’ skills – the employer’s stated reason for the reassignment. Id. at ¶1. The worker was given the same pay initially, but subjected to less overall pay over time, and less

retirement benefits. Id. at ¶¶ 2, 10. The worker claimed that this “involuntary reassignment” violated the statutory prohibition against “demotions.” Demotion of a civil service worker was prohibited by statute – unless good cause was shown. Id. at ¶5. This Court explained that “[a]n administrative agency’s authority to promulgate regulations is limited to those regulations which are consonant with the statutory framework and neither contrary to the statute nor beyond its scope.” Id. The Court then explained that the Legislature “plainly set forth two situations in which a career service employee can be demoted or dismissed [(good cause or to advance the good of the public service)].” Id. at ¶ 8. The administrative rule, however, enlarged the statute by purporting to create new administrative criteria for transferring a worker: an “involuntary reassignment.” The Court held that the rule was invalid because it contravened the Legislature.

Applying Sanders and Draughon to the instant case, the Labor Commission’s rule impermissibly modifies the statutory criteria for determining what constitutes other work reasonably available. In the instant case, the statute was modified similar to how the Tax Commission improperly restricted a statutory term by attempting to define it in Sanders or how the Department of Human Resources management attempted to redefine the statutory term in Draughon; the Labor Commission improperly enlarged the statutory term by attempting to further define it. The statutory term that must be considered is what constitutes “other work reasonably available,” and the permitted criteria for considering this term include “age, education, past work experience, medical capacity, and residual functional capacity. The administrative rule expands the statutory criteria by purporting

to permit the consideration of gross income, current available wage rates, or the current state average weekly wage in considering what constitutes “other work reasonably available.” This administrative rule enlarges the criteria and thereby improperly modifies the statute. Clearly the administrative rule and the statute are not congruent. As a result, the Commission’s ruling must be reversed.

Other jurisdictions support this reasoning. In Ney v. State Workmen’s Compensation Commissioner, 297 S.E.2d 212 (W. Va. 1982), an administrative rule was invalidated because it modified statutory criteria. In Ney, the worker’s compensation statute provided that injured workers were entitled to reimbursement of transportation expenses necessarily incurred in obtaining medical treatment. Id. at 214-16. The administrative rule attempted to more narrowly define the scope of travel, purporting to permit reimbursement of travel expenses only if the travel exceeded twenty-five miles. Id. at 214-15. The administrative rule was invalidated as being “out of harmony” with the statute by limiting the criteria for travel expense reimbursement. Id. at 214; see also, e.g., Holt Service Co. v. Modlin, 293 S.E.2d 741 (Ga. Ct. App. 1982) (holding that administrative rule that purported to shift the burden of proof in workers’ compensation proceedings was an impermissible extension of authority and contrary to the statutory powers of the agency).

The administrative rule at issue in the instant case similarly purports to modify the statutory criteria. Administrative Rule R612-1-10.D.1.1.c.(1) & (2) purports to expand the criteria for consideration by the Labor Commission to include gross income, current

wage rates, and the current state average weekly wage (as well as commuting distance and steadiness of potential work). The rule must be invalidated and the decision of the Labor Commission reversed.

4. Other subsections of Administrative Rule R612-1-10 have been declared invalid

This case would not be the first time that a portion of Administrative Rule R612-1-10 had to be declared invalid by this Court. In Target Trucking v. Labor Commission, this Court reiterated that an administrative body's rules must conform to, rather than be inconsistent with, statute. 2005 UT App 70, ¶6, 108 P.3d 128. In Target Trucking, this Court addressed whether Utah Administrative Rule 612-1-10.C.1.c, which purported to state that a preliminary determination of permanent total disability was a final agency action for purposes of appellate review, conflicted with the statutory rule that a finding of permanent total disability was not final unless agreed to by the parties or until a reemployment plan was prepared and considered by the Commission. Id. at ¶¶ 3-6. Because the administrative rule conflicted with the statute, this Court invalidated Administrative Rule R612-1-10 (C)(1)(c), stating, "[t]he rule must, therefore, yield to the statute." Id. In reaching this conclusion, this Court reiterated that administrative rules "must conform to, rather than be inconsistent, with statute." Id. at ¶6. For the reasons explained in detail above, other portions of this same administrative rule, the provisions

found in subsection R612-1-10.D., are also inconsistent with the statute and must be invalidated.³

In sum, as outlined above, an administrative agency may not “abridge, enlarge, extend or modify a statute.” Draughon, 975 P.2d at 937. However, through promulgation of Utah Administrative Rule 612-1-10.D.1, the Labor Commission made a significant modification to the Workers’ Compensation Act. The administrative rule is an impermissible substantive amendment which goes well beyond the scope of the statute. The administrative rule changes the basic requirements set by the Utah Legislature for a finding of permanent total disability. Such a change may be made only by the Legislature and is beyond the scope of the rule-making powers of the Labor Commission. As such, the administrative rule must be invalidated pursuant to established principles of Utah administrative law and the Commission’s finding of permanent total disability reversed. See Crowther, 762 P.2d at 1122.

³ In relying on Target Trucking, Petitioners acknowledge that the case of Ameritemps, Inc. v. Labor Comm’n, 2005 UT App 491, 128 P.3d 31, noted a disagreement with the Target Trucking opinion. Specifically, Ameritemps noted that while Target Trucking was correct in the general rule requiring the invalidation of an administrative rule that conflicts with legislation, the Target Trucking opinion failed to apply the three-part test adopted by the Utah Supreme Court in Union Pac. R.R. Co. v. Utah State Tax Comm’n, 2000 UT 40, ¶16, 999 P.2d 17, to determine when an agency action is final. Regardless of any confusion as to the standard for determining whether an agency action is final, the specific holding of Target Trucking remains clear: the administrative rule in Target Trucking was properly invalidated because administrative rules must conform to, rather than be inconsistent with statutes, and when an administrative rule conflicts with a statute, the rule must yield to the statute.

C. The Labor Commission’s application of the Administrative Rule is inconsistent, results in inefficient adjudication, and is contrary to the statutory purpose of returning workers to the workforce.

The Labor Commission’s application of the Rule also results in inefficient use of administrative resources, and it runs contrary to the statutory purpose of returning workers to the workforce.

The inconsistent and inefficient application of the rule is evidenced by the fact that the Labor Commission applied the Rule to the first step of the two-part test for determining whether an applicant is permanently totally disabled. By refusing to consider jobs paying a wage less than the current state average weekly wage in the initial finding stage, only to subsequently consider those same jobs in a subsequent hearing, the Labor Commission’s application of the rule results in inefficient, wasteful use of administrative resources.

In Thomas v. Color Country Management, 2004 UT 12, 84 P.3d 1201, the Utah Supreme Court explained the process for determining whether an employee is entitled to permanent total disability compensation. Id. at ¶¶20-23. The court explained that the process “requires that a finding be issued in two parts – an initial finding and a final finding.” Id. at ¶ 21. The initial finding triggers a review period, and after this initial finding the employer may submit a reemployment plan to be reviewed. A final finding of permanent total disability is held in reserve until the possibilities of reemployment are exhausted or abandoned. Id.

The Labor Commission applies Administrative Rule R612-1-10 to the initial finding stage, rejecting jobs presented by defendants that pay wages less than the current state average weekly wage. However, in the second part of the process, the Commission considers those same jobs that were deemed improper under the Administrative Rule. This approach not only applies a Rule that conflicts with the statute, but results in inefficient, wasteful use of administrative resources. The ALJ admonished defendants about this two-step process and suggested that “[p]erhaps Mr. Evertson” had identified these jobs that paid wages less than the state average weekly wage as part of a stage two “reemployemnet plan.” (R. 0046.) In other words, the ALJ suggested that the presentation of available jobs at wages less than the state average weekly wage was improper for a stage one determination, but proper for a stage two determination. Such a process is inconsistent with the statute and results in inefficient adjudication.

This inconsistent and inefficient adjudication by the Labor Commission demonstrates that the Administrative Rule is not in harmony with the overall administrative process. Utah Code Section 34A-2-413(1)(c)(iv) states that to establish that an employee is permanently totally disabled, the employee must prove that “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.” Subsection (6)(a) then states, “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.” Id. Application of the administrative rule reveals additional problems with the rule and an additional conflict with the statutory scheme. If the finding of permanent total disability cannot become final until after a review of the reemployment plan, it makes no sense to apply the Administrative Rule to the first step of the process, the tentative finding of permanent total disability, and reject potential gainful employment because it pays too little, only to turn around in the second step of the process to consider the very same potential gainful employment that was previously rejected. Given the fact that the Labor Code should be interpreted in favor of returning workers to the workforce as soon as possible, available employment should be introduced and considered by the Commission at the first hearing, irrespective of the amount of wages or other impermissible non-statutory factors, and the Labor Commission should set forth and apply only the statutory criteria mandated by the Legislature.

At least one Administrative Law Judge has acknowledged this inconsistency in Troy Carter v. EOTT Energy Operation LTD, Case Nos. 99522 and 99523 (See Addendum E.) The ALJ in Troy Carter stated the following:

The definition of “other work reasonably available” contained in the Commission’s rule does not apply to the evaluation of “gainful employment.” The evaluation of “other work reasonably available” is part of the first step analysis of whether a person is preliminarily permanently totally disabled. “Gainful employment” is the standard to be applied in second step proceedings to evaluate possible rehabilitation. There is nothing in the wording of the statute or rule which ties these terms together in a way that would require similar

definitions or analysis. That being said, the undersigned acknowledges the result could be reviewed as inconsistent. A job offered as “other work reasonably available” in the first step proceedings may not pay enough to meet the rule requirement and, in part, lead to a tentative finding of permanent total disability. Then, in the second step proceedings, that same job could be offered as “gainful employment” in a reemployment plan and the employee could be required to accept it, assuming it was vocationally appropriate.”

Troy Carter Order at 3, Addendum E.

Refusing to consider gainful employment in the first stage simply because it pays less than the current state average weekly wage is also contrary to the purpose of the Worker’s Compensation Act – to return citizens to the workforce. Utah Code Section 34A-2-413(6) states that a finding of permanent total disability is not final until an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act. Utah Administrative Rule 612-1-10.D.1 is in direct conflict with the purpose and provisions of the Utah Injured Worker Reemployment Act. Utah Code Section 34A-8-102 states that the Utah Injured Worker Reemployment Act “is intended to promote and . . . assist the injured worker in returning to the work force as quickly as possible.” Utah Code Ann. § 34A-8-102 (1997). The administrative rule is contrary to this purpose.

Pursuant to the Reemployment Act, the evidence presented in the instant case demonstrated that McGee is capable of gainful employment. As outlined above, the express purpose of the Utah Injured Worker Reemployment Act is to promote the return

of injured workers to work. If Utah Administrative Rule 612-1-10.D.1 is enforced as written, to eliminate from consideration jobs that are beneath the state weekly average wage for workers like McGee, it will significantly undermine the purpose and efficacy of the Utah Injured Worker Reemployment Act to return workers who are capable of working to the workforce. Nothing in that statute requires an employer to provide employment at the state average weekly wage or any other specific wage amount. Rather, the statute seeks to return injured workers to the work force as quickly as possible. The administrative rule is, thus, contrary to the purpose of the Reemployment Act and must be stricken according to Utah law.

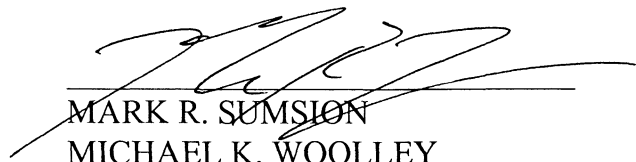
CONCLUSION

Instead of applying the statutory standard found in Utah Code Section 34A-2-413(c)(iv) which sets forth statutory criteria that must be analyzed and applied in evaluating whether an employee is permanently disabled, the Labor Commission applied Utah Administrative Rule R612-1-10.D.1.c. This Administrative Rule purports to permit consideration of factors beyond the statutory factors, and therefore conflicts with the statutory standard. The Administrative Rule must be invalidated because it goes beyond the statutory mandate.

Accordingly, the Labor Commission's determination of permanent total disability must be reversed. Additionally, the Utah Administrative Rule R612-1-10.D.1 must be declared invalid as an impermissible amendment to the Workers' Compensation Act.

DATED this 20 day of April, 2007.

RICHARDS, BRANDT, MILLER
& NELSON



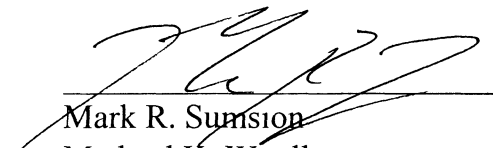
MARK R. SUMSION
MICHAEL K. WOOLLEY
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 30 day of APRIL, 2007, to the following:

Richard Burke
7390 South Creek Road #104
Sandy, Utah 94093

Alan Hennebold
Labor Commission
P.O. Box 146615
Salt Lake City, Utah 84114-6615



Mark R. Sunston
Michael K. Woolley

Addendum A
Statutes and Rules

the member. This Subsection (5) does not apply to the items listed in Subsection (4)(b)(iv).

(6) (a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

(b) Compensation for any impairment described in Subsection (6)(a) shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section.

(c) Permanent partial disability compensation may not:

(i) exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function; and

(ii) be paid for any permanent impairment that existed prior to an industrial accident.

(7) The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

1997

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) nor 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, the 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 permanent total disability compensation benefits.

(f) 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 evidence, and ends:

(i) with the death of the employee; or

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

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-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' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

(12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

1997

34A-2-414. Benefits in case of death — Distribution of award to dependents — Death of dependents — Remarriage of surviving spouse.

(1) (a) The benefits in case of death shall be paid to one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by an administrative law judge.

(b) The administrative law judge may apportion the benefits among the dependents in the manner that the administrative law judge considers just and equitable.

(c) Payment to a dependent subsequent in right may be made, if the administrative law judge considers it proper, and shall operate to discharge all other claims.

(2) The dependents, or persons to whom benefits are paid, shall apply the same to the use of the several beneficiaries thereof in compliance with the finding and direction of the administrative law judge.

(3) In all cases of death when:

(a) the dependents are a surviving spouse and one or more minor children, it shall be sufficient for the surviving spouse to make application to the Division of Adjudication on behalf of that individual and the minor children; and

(b) all of the dependents are minors, the application shall be made by the guardian or next friend of the minor dependents.

(4) The administrative law judge may, for the purpose of protecting the rights and interests of any minor dependents the administrative law judge considers incapable of doing so, provide a method of safeguarding any payments due the minor dependents.

(5) Should any dependent of a deceased employee die during the period covered by weekly payments authorized by this section, the right of the deceased dependent to compensation under this chapter or Chapter 3, Utah Occupational Disease Act, shall cease.

(6) (a) If a surviving spouse, who is a dependent of a deceased employee and who is receiving the benefits of this chapter or Chapter 3 remarries, that individual's sole right after the remarriage to further payments of compensation shall be the right to receive in a lump sum the lesser of:

(i) the balance of the weekly compensation payments unpaid from the time of remarriage to the end of six years or 312 weeks from the date of the injury from which death resulted; or

(ii) an amount equal to 52 weeks of compensation at the weekly compensation rate the surviving spouse was receiving at the time of such remarriage.

(b) (i) If there are other dependents remaining at the time of remarriage, benefits payable under this chapter or Chapter 3, Utah Occupational Disease Act, shall be paid to such person as an administrative law judge may determine, for the use and benefit of the other dependents.

(ii) The weekly benefits to be paid under Subsection (6)(b)(i) shall be paid at intervals of not less than four weeks.

34A-2-415. Increase of award to children and dependent spouse — Effect of death, marriage, majority, or termination of dependency of children — Death, divorce, or remarriage of spouse.

If an award is made to, or increased because of a dependent spouse or dependent minor child or children, as provided in this chapter or Chapter 3, Utah Occupational Disease Act, an award or increase in amount of the award shall cease

operated and monitored continuously with adequate maintenance, combustion, and water controls. The Division of Safety may extend the inspection interval in writing when proper evidence has been presented as to method of operation, performance records, and water treatment.

(4) All low pressure boilers shall be internally and externally inspected at least biennially where construction will permit. For purposes of this Subsection (4), a "low pressure boiler" is a boiler with steam 15 pounds per square inch pressure and water 60 pounds per square inch pressure, maximum.

(5) Boilers inspected by deputized inspectors employed by insurance companies, if made within the time limits herein provided, shall be considered to meet the provisions of this part if

(a) reports of the inspections are filed with the Division of Safety within 30 days after the inspection;

(b) the boilers are certified by the inspectors employed by insurance companies as being safe to operate for the purpose for which they are being used; and

(c) the inspection and filing of the report with the Division of Safety shall exempt the boiler or boilers from inspection fees provided for in this part.

(6) If a boiler shall, upon inspection, be found to be suitable and to conform to the rules of the commission, the inspector shall issue to such owner or user an inspection certificate.

(7) The Division of Safety may at any time suspend an inspection certificate when in its opinion the boiler for which it was issued may not continue to be operated without menace to the public safety or when the boiler is found not to comply with the safety rules of the commission. The suspension of an inspection certificate shall continue in effect until the boiler shall have been made to conform to the safety rules of the commission and a new certificate is issued.

(8) Inspectors deputized or employed by the Division of Safety under this part shall meet at all times nationally recognized standards of qualifications of fitness and competence for such work.

1997

34A-7-104. Fees.

The owner or user of a boiler required by this part to be inspected shall pay to the commission fees for inspection or for permits to operate in amounts set by the commission pursuant to Section 63-38-3.2.

1997

34A-7-105. Violation of chapter — Misdemeanor — Injunction.

(1) It is a violation of this part and a class C misdemeanor to operate a boiler or pressure vessel subject to this part if:

(a) certification has been denied or suspended; or

(b) the boiler or pressure vessel is knowingly operated while constituting a safety hazard.

(2) The Division of Safety may bring a lawsuit in any court of this state to enjoin the operation of any boiler or pressure vessel in violation of this part. The court may issue a temporary injunction, without bond, restraining further operation of the boiler or pressure vessel, ex parte. Upon a proper showing, the court shall permanently enjoin the operation of the boiler or pressure vessel until the violation is corrected.

1997

CHAPTER 8

UTAH INJURED WORKER REEMPLOYMENT ACT

Section	Title.
34A-8-101	Intent statement.
34A-8-102	Chapter administration.
34A-8-103	Definitions.
34A-8-104	Reemployment coordinator — Duties.

Section

34A-8-106. Initial report on injured worker.

34A-8-107. Evaluation of injured worker — Reemployment plan.

34A-8-108. Reemployment objectives.

34A-8-109. Rehabilitation counselors and reemployment coordinator.

34A-8-110. Duties not affected.

34A-8-111. Rulemaking authority.

34A-8-112. Administrative review.

34A-8-113. Effective date — Application.

34A-8-101. Title.

This chapter is known as the "Utah Injured Worker Reemployment Act."

1997

34A-8-102. Intent statement.

This chapter is intended to promote and monitor the state's and the employer's capacity to assist the injured worker in returning to the work force as quickly as possible and to evaluate the cost effectiveness of the program.

1997

34A-8-103. Chapter administration.

This chapter shall be administered by the commission in conjunction with its administration of Chapters 2, Workers' Compensation Act and 3, Utah Occupational Disease Act.

1997

34A-8-104. Definitions.

(1) "Disabled injured worker" means an employee who:

(a) has sustained an industrial injury or occupational disease for which benefits are provided under Chapter 2, Workers' Compensation Act, or Chapter 3, Utah Occupational Disease Act;

(b) because of the injury or disease;

(i) is or will be unable to return to work in the injured worker's usual and customary occupation; or

(ii) is unable to perform work for which the injured worker has previous training and experience; and

(c) reasonably can be expected to attain gainful employment after receiving the reemployment training and benefits provided for in this chapter.

(2) "Division" means Division of Industrial Accidents.

(3) (a) "Gainful employment" means employment that:

(i) is reasonably attainable in view of the industrial injury or occupational disease; and

(ii) offers to the injured worker, as reasonably feasible, an opportunity for earnings.

(b) Factors to be considered in determining gainful employment include the injured worker's:

(i) education;

(ii) experience; and

(iii) physical and mental impairment and condition.

(4) "Parties" means:

(a) the disabled injured worker;

(b) employer;

(c) workers' compensation insurance carrier;

(d) reemployment coordinator; and

(e) other professionals as deemed necessary by the commission.

(5) "Reemployment plan" means the written description or rationale for the manner and means by which it is proposed a disabled injured worker may be returned to gainful employment. The reemployment plan shall define the voluntary responsibilities of the disabled injured worker, employer, and other parties involved with the implementation of the plan.

1997

34A-8-105. Reemployment coordinator — Duties.

The commissioner shall appoint a reemployment coordinator to assist in administering this chapter. The coordinator's duties include:

- (1) identifying and verifying, if necessary, the qualifications of all public or private reemployment or rehabilitation providers who render any medical or vocational reemployment or rehabilitation services, including those directly employed by an insurer, employer, or self-insurer;
- (2) designing a study that will produce reliable data from employers, insurance carriers, employees, and rehabilitation providers for cost effective recommendations to carry out the intent of this chapter, the data shall include:
 - (a) the success rates of public and private rehabilitation and training programs in assisting in the employment of the injured worker;
 - (b) the costs in providing such services; and
 - (c) the amount of time it takes to get the injured worker into gainful employment;
- (3) evaluating results to determine whether early identification of potential candidates for retraining results in overall cost reduction and return of the injured worker to gainful employment;
- (4) assuring the contact and coordination of the employer or its workers' compensation insurance carrier and the disabled injured worker to encourage the development of evaluations and reemployment plans for the disabled injured worker so that the completion of the plans can be monitored by the commission;
- (5) recommending procedures to avoid the duplication of services provided by other state agencies or private rehabilitation services, including registering the disabled injured worker with the Division of Employment Development in the Department of Workforce Services for reemployment; and
- (6) perform other duties as may be prescribed by the commission.

1997

34A-8-106. Initial report on injured worker.

When it appears that an injured worker is or will be a disabled injured worker, or when the period of the injured worker's temporary total disability compensation period exceeds 90 days, whichever comes first, the employer or its workers' compensation insurance carrier shall, within 30 days thereafter, file with the division and serve on the injured worker an initial written report assessing the injured worker's need or lack of need for vocational assistance in reemployment. The employer or carrier shall also provide the injured worker information regarding reemployment.

1997

34A-8-107. Evaluation of injured worker — Reemployment plan.

When it appears that an injured worker is a disabled injured worker, the employer or its workers' compensation insurance carrier shall within ten days of receiving the initial report, unless otherwise authorized by the division, refer the disabled injured worker to the Utah State Office of Rehabilitation or, at the employer's or insurance carrier's option to a private rehabilitation or reemployment service, to provide an evaluation and to develop a reemployment plan.

1997

34A-8-108. Reemployment objectives.

(1) The division shall administer this chapter with the objective of assisting in returning the disabled injured worker to gainful employment in the following order of employment priority:

- (a) same job, same employer;
- (b) modified job, same employer;
- (c) same job, new employer;
- (d) modified job, new employer;

- (e) new job, new employer; or
 - (f) retraining in a new occupation.
- (2) Nothing in this chapter or its application is intended to,
- (a) modify or in any way affect any existing employee-employer relationship; or
 - (b) provide any employee with any guarantee or right to employment or continued employment with any employer.

1997

34A-8-109. Rehabilitation counselors and reemployment coordinator.

All rehabilitation counselors and the reemployment coordinator shall have the same or comparable qualifications as those established by the Utah State Office of Rehabilitation for personnel assigned to rehabilitation and evaluation duties.

1997

34A-8-110. Duties not affected.

The provisions of this chapter do not affect other duties and responsibilities of the Utah State Office of Rehabilitation.

1997

34A-8-111. Rulemaking authority.

The commission may provide for the administration of this chapter by rule in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

1997

34A-8-112. Administrative review.

The employer and the injured worker may apply to the Division of Adjudication for resolution of any issue of law or fact arising under this chapter in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

1997

34A-8-113. Effective date — Application.

This chapter is effective July 1, 1990, and it applies only to industrial injuries and occupational diseases which occur on or after that date.

1997

TITLE 35**LABOR — INDUSTRIAL COMMISSION****[RENUMBERED AND REPEALED]****TITLE 35A****UTAH WORKFORCE SERVICES CODE****Chapter**

1. Department of Workforce Services.
2. Regional Workforce Services Areas.
3. Employment Support Act.
4. Employment Security.
5. Training and Workforce Improvement Act.
6. Apprenticeship Act.
7. Centralized New Hire Registry Act.

CHAPTER 1**DEPARTMENT OF WORKFORCE SERVICES****Part 1****General Provisions****Section**

- | | |
|------------|---|
| 35A-1-101. | Title. |
| 35A-1-102. | Definitions. |
| 35A-1-103. | Department of Workforce Services — Creation — Seal. |
| 35A-1-104. | Department authority. |

R612-1-10. Permanent Total Disability.

A. This rule applies to claims for permanent total disability compensation under the Utah Workers' Compensation Act.

1. Subsection B applies to permanent total disability claims arising from accident or disease prior to May 1, 1995.
2. Subsection C applies to permanent total disability claims arising from accident or disease on or after May 1, 1995.

B. For claims arising from accident or disease on or after July 1, 1988 and prior to May 1, 1995, the Commission is required under Section 34A-2-413, to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations, amended April 1, 1993. The use of the term "substance of the sequential decision-making process" is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability. The Commission does not interpret the code section to eliminate the requirement that a finding by the Commission in permanent and total disability shall in all cases be tentative and not final until rehabilitation training and/or evaluation has been accomplished.

1. In the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf.

2. In evaluating industrial claims in which the injured worker has qualified for Social Security disability benefits, the Commission will determine if a significant cause of the disability is the claimant's industrial accident or some other unrelated cause or causes.

3. To make a tentative finding of permanent total disability the Commission incorporates the rules of disability determination in 20 CFR 404.1520, amended April 1, 1993. The sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. In short, these are:

- a. Is the claimant engaged in a substantial gainful activity?
- b. Does the claimant have a medically severe impairment?
- c. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509, amended April 1, 1993, and the listed impairments in 20 CFR Subpart P Appendix 1, amended April 1, 1993?
- d. Does the impairment prevent the claimant from doing past relevant work?
- e. Does the impairment prevent the claimant from doing any other work?

4. After the Commission has made a tentative finding of permanent total disability:

a. In those cases arising after July 1, 1994, the Commission shall order initiation of payment of permanent total disability compensation;

b. the Commission shall review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act, as well as any qualified reemployment plan submitted by the employer or its insurance carrier; and

c. unless otherwise stipulated, the Commission shall hold a hearing to consider the possibility of rehabilitation and reemployment of the claimant pending final adjudication of the claim.

5. After a hearing, or waiver of the hearing by the parties, the Commission shall issue an order finding or denying permanent total disability based upon the preponderance of the evidence and with due consideration of the vocational factors in combination with the residual functional capacity which the commission incorporates as published in 20 CFR 404 Subpart P Appendix 2, amended April 1, 1993.

C. For permanent total disability claims arising on or after May 1, 1995, Section 34A-2-413 requires a two-step adjudicative process. First, the Commission must make a preliminary determination whether the applicant is permanently and totally disabled. If so, the Commission will proceed to the second step, in which the Commission will determine whether the applicant can be reemployed or rehabilitated.

1. First Step - Preliminary Determination of Permanent Total Disability: On receipt of an application for permanent total disability compensation, the Adjudication Division will assign an Administrative Law Judge to conduct evidentiary proceedings to determine whether the applicant's circumstances meet each of the elements set

forth in Subsections 34A-2-413(1)(b) and (c).

(a) If the ALJ finds the applicant meets each of the elements set forth in Subsections 34A-2-413(1)(b) and (c), the ALJ will issue a preliminary determination of permanent total disability and shall order the employer or insurance carrier to pay permanent total disability compensation to the applicant pending completion of the second step of the adjudication process. The payment of permanent total disability compensation pursuant to a preliminary determination shall commence as of the date established by the preliminary determination and shall continue until otherwise ordered.

(b) A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.

(c) 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.

(d) Unless otherwise stayed by the Labor Commissioner, the Appeals Board or an appellate court, an appeal of the Labor Commissioner or Appeals Board's preliminary determination of permanent total disability shall not delay the commencement of "second step" proceedings discussed below or payment of permanent total disability compensation as ordered by the preliminary determination.

(e) The Commissioner or Appeals Board shall grant a request for stay if the requesting party has filed a petition for judicial review and the Commissioner or Appeals Board determine that:

- (i) the requesting party has a substantial possibility of prevailing on the merits;
- (ii) the requesting party will suffer irreparable injury unless a stay is granted; and
- (iii) the stay will not result in irreparable injury to other parties to the proceeding.

2. Second Step - Reemployment and Rehabilitation: Pursuant to Subsection 34A-2-413(6), if the first step of the adjudicatory process results in a preliminary finding of permanent total disability, an additional inquiry must be made into the applicant's ability to be reemployed or rehabilitated, unless the parties waive such additional proceedings.

(a) The ALJ will hold a hearing to consider whether the applicant can be reemployed or rehabilitated.

(i) As part of the hearing, the ALJ will review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act;

(ii) The employer or insurance carrier may submit a reemployment plan meeting the requirements set forth in Subsection 34A-2-413(6)(a)(ii) and Subsections 34A-2-413(6)(d)(i) through (iii).

(b) Pursuant to Subsection 34A-2-413(4)(b) the employer or insurance carrier may not be required to pay disability compensation for any combination of disabilities of any kind in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate.

(i) Any overpayment of disability compensation may be recouped by the employer or insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(ii) An advance of disability compensation to provide for the employee's subsistence during the rehabilitation process is subject to the provisions of Subsection 34A-2-413(4)(b), described in subsection 2.(b) above, but can be funded by reasonably offsetting the advance of disability compensation against future liability normally paid after the initial 312 weeks.

(iii) To fund an advance of disability compensation to provide for an employee's subsistence during the rehabilitation process, a portion of the stream of future weekly disability compensation payments may be discounted from the future to the present to accommodate payment. Should this be necessary, the employer or insurance carrier shall be allowed to reasonably offset the amounts paid against future liability payable after the initial 312 weeks. In this process, care should be exercised to reasonably minimize adverse financial impact on the employee.

(iv) In the event the parties cannot agree as to the reasonableness of any proposed offset, the matter may be submitted to an ALJ for determination.

(c) Subsections 34A-2-413(7) and (9) require the applicant to fully cooperate in any evaluation or reemployment plan. Failure to do so shall result in dismissal of the applicant's claim or reduction or elimination of benefit payments including disability compensation and subsistence allowance amounts, consistent with the provisions of Section 34A-2-413(7) and (9).

(d) Subsection 34A-2-413(6) requires the employer or its insurance carrier to diligently pursue any proffered reemployment plan. Failure to do so shall result in a final award of permanent total disability compensation to the applicant.

(e) If, after the conclusion of the foregoing "second step" proceeding, the ALJ concludes that successful rehabilitation is not possible, the ALJ shall enter a final order for continuing payment of permanent total disability compensation. The period for payment of such compensation shall be commence on the date the employee became permanently and totally disabled, as determined by the ALJ.

(f) Alternatively, if after the conclusion of the "second step" proceeding, the ALJ concludes that successful rehabilitation and/or reemployment is possible, the ALJ shall enter a final order to that effect, which order shall contain such direction to the parties as the ALJ shall deem appropriate for successful implementation and continuation of rehabilitation and/or reemployment. As necessary under the particular circumstances of each case, the ALJ's final order shall provide for reasonable offset of payments of any disability compensation that constitute an overpayment under Subsection 34A-2-413(4)(b).

(g) The ALJ's decision is subject to all administrative and judicial review provided by law.

D. For purposes of this rule, the following standards and definitions apply:

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

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.

2. Cooperation: As determined by an administrative law judge, an employee is not entitled to permanent total disability compensation or subsistence benefits unless the employee fully cooperates with any evaluation or reemployment plan. The ALJ will evaluate the cooperation of the employee using, but not limited to, the following factors: attendance, active participation, effort, communication with the plan coordinator, and compliance with the requirements of the vocational plan. In determining if these factors were met, the ALJ shall consider relevant changes in the employee's documents medical condition.

3. Diligent Pursuit: The employer or its insurance carrier shall diligently pursue the reemployment plan. The ALJ will evaluate the employer or insurance carrier's diligent pursuit of the plan using, but not limited to, the following factors: timely payment of expenses and benefits outline in the vocational plan, and as required by the educational institution providing the vocational training, communication with the employee, compliance with the requirements of the vocational plan, and timely modification of the plan as required by documented changes in the employee's medical condition.

4. Resolution of disputes regarding "cooperation" and "diligent pursuit": If a party believes another party is not cooperating with or diligently pursuing either the evaluations necessary to establish a plan, or the requirements of an approved reemployment or rehabilitation plan, the aggrieved party shall submit to the workers' compensation mediation unit an outline of the specific instances of non-cooperation or lack of diligence. Other parties may submit a reply. The Mediation Unit will promptly schedule mediation to reestablish cooperation among the parties necessary to evaluate or comply with the plan. If mediation is unsuccessful, a party may request the Adjudication Division resolve the dispute. The Adjudication Division will conduct a hearing on the matter within 30 days and shall issue a written decision with 10 days thereafter.

Addendum B
“Order Affirming ALJ’s Decision” dated December 28, 2006

**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.

00200

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

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
PAGE 4

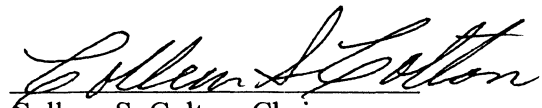
other work is "reasonably" available to Mr. McGee. In light of the provisions of the underlying statute and the function of the Commission's rule, the Appeals Board finds no reason why the rule cannot be applied to Mr. McGee's claim.

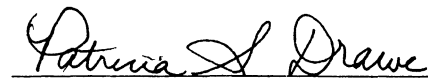
In summary, the Appeals Board concludes that Rule 612-1-10.D.1 is consistent with the provisions of § 34A-2-413(1)(c)(iv). The Appeals Board further concludes that Judge La Jeunesse properly applied the rule to Mr. McGee's claim.

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.

ORDER AFFIRMING ALJ'S DECISION
WAYNE MCGEE
PAGE 5

CERTIFICATE OF MAILING

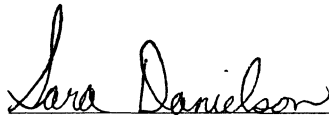
I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Wayne McGee, Case No. 02-1225, was mailed first class postage prepaid this 28th day of December, 2006, to the following:

Michael
Wayne McGee
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Sara Danielson
Utah Labor Commission

Addendum C
“Findings of Fact, Conclusions of Law, and Order” dated April 12, 2004

UTAH LABOR COMMISSION
P.O. BOX 146615
Salt Lake City, Utah 84114-6615

Case No. 20021225

MICHAEL MCGEE,

Petitioner,

vs.

LPI SERVICES and/or TRAVELERS,

Respondents,

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FINDINGS OF FACT,

CONCLUSIONS OF LAW,

AND ORDER

Judge: Richard M. La Jeunesse

HEARING: Room 332, Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on October 31, 2004 at 1:00 p.m. Said Hearing was pursuant to Order and
Notice of the Commission.

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

APPEARANCES: The petitioner, Michael McGee, was present and represented by his
attorney Richard R. Burke.

The respondents were represented by attorney Mark R. Sumsion.

I. STATEMENT OF THE CASE

The petitioner, Michael McGee, filed an "Application For Hearing" with the Utah Labor Commission on November 4, 2002 and claimed entitlement to the following workers' compensation benefits: (1) medical expenses; (2) recommended medical care; (3) temporary total disability compensation, and; (4) permanent partial disability compensation. On August 8, 2003 Mr. McGee amended his Application for Hearing to include permanent total disability compensation. Mr. McGee's claim for workers' compensation benefits arose out of an industrial accident that occurred on July 4, 2001 while employed for LPI Services.

The respondents acknowledged that Mr. McGee injured his low back on July 4, 2001 while employed for LPI Services (LPI). However, respondents maintained that they paid Mr. McGee all workers compensation benefits owed to him. Respondents denied that the injuries sustained by Mr. McGee on July 4, 2001 directly caused him to become permanently and totally disabled.

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II. ISSUE.

Did the injuries sustained by Michael McGee on July 4, 2001 directly cause him to become permanently and totally disabled?

III. FINDINGS OF FACT

A. Employment.

The parties agreed that Mr. McGee suffered an industrial accident on July 4, 2001 that arose out of and in the course of his employment with LPI.

B. Compensation Rate.

As of July 4, 2001 Mr. McGee was married with one dependent child. Mr. McGee's testimony provided the sole, unrefuted evidence of his wages with LPI.. On July 4, 2001 Mr. McGee's compensation with LPI equaled \$17.50 per hour, 40 hours per week average, which yielded the maximum permanent total disability compensation rate of \$471.00 per week. [$\$17.50/\text{hr} \times 40 \text{ hrs/week} = \$700.00/\text{week} \times 2/3 = \$467.00/\text{week} + \$10.00/\text{week} = \$477.00/\text{week}$].

C. The July 4, 2001 Industrial Accident.

Again, Mr. McGee's testimony supplied the unrefuted evidentiary account of his industrial accident at LPI. Mr. McGee worked for 10 months as a building engineer for LPI. As LPI's building engineer Mr. McGee maintained the building's boiler, HVAC,¹ elevators, lights, and plumbing.

While at work for LPI on July 4, 2001, Mr. McGee and three other employees attempted to install a rebuilt air-handler motor that weighed about 600 pounds. The crew of four men lowered by hand the 600 pound motor 13 inches from one level to the next. All of the men but Mr. McGee let go of the motor and he bore the brunt of the motor's weight on his right shoulder. Mr. McGee felt immediate, extreme pain in his right shoulder and low back.

Mr. McGee reported the July 4, 2001 industrial accident the same day to his immediate supervisor at LPI, Helen Smith. Eventually, Mr. McGee's right shoulder problems resolved. However, Mr. McGee continued to suffer low back pain from the date of the industrial accident through the date of the hearing.

¹Heating, ventilation and air conditioning.

In April of 2002 while engaged in physical therapy for his low back problems, Mr. McGee developed persistent migraine headaches. At the time of the hearing Mr. McGee disclaimed that his headaches caused the significant problems that kept him from working. Consequently, I gave no further attention to Mr. McGee's headaches, or right shoulder problems.

D. Michael McGee's Low Back Problems.

1. Low Back Problems Prior to July 4, 2001.

Mr. McGee acknowledged that he had some back problems that necessitated surgery prior to July 4, 2001. Dr. Robert Morrow M.D. diagnosed Mr. McGee with an "L5-S1 disc herniation." [Exhibit "J-1" at 154]. On September 6, 1982 Dr. Morrow operated on Mr. McGee and performed an "L5-S1 disc excision + foraminotomy." [id.].

An x-ray taken of Mr. McGee's lumbar spine on May 28, 1984 showed:

Heights of vertebral bodies and intervertebral spaces are normal with the exception of a very slight decrease at the L-5/S-1 level. [id. at 169].

On October 5, 1984 Mr. McGee sought medical treatment for a "low back strain." [id. at 263]. In sum, the undisputed evidence in this case established that prior to July 4, 2001, Mr. McGee suffered a lumbar herniated disc at the L5-S1 level for which he underwent a discectomy and foraminotomy on September 6, 1982.

2. Low Back Problems Caused by Michael McGee's July 4, 2001 Industrial Accident.

On October 31, 2001 Mr. McGee had a lumbar MRI scan that revealed:

IMPRESSION: Circumferential disk bulge in association with bilateral facet hypertrophy and ligamentum flavum² hypertrophy at L4-5 moderate to severely narrows the neural foramina and moderate to severely narrows the bilateral recesses. [Exhibit "J-1" at 146].

²Ligaments that attach to the ventral portion of the vertebrae.

On November 15, 2001 Dr. Charles Bova M.D. diagnosed Mr. McGee with:

IMPRESSION: Multilevel degenerative disk disease of the lumbar spine with disk bulges at L3-4, 4-5, and S-1 with foraminal stenosis at L4-5 right greater than left. [id. at 8].

On January 29, 2002 Dr. Alan Brown M.D. concluded: "I think that this patient's primary pain generator is at L4-5." [id. at 35]. Dr. Brown then commented on February 7, 2002:

I re-reviewed his x-rays and he has a lot of central foraminal stenosis, probably right sided foraminal stenosis at L4-5. He has multilevel disc disease as well. [id. at 218].

On February 25, 2002 Dr. Brown operated on Mr. McGee and performed:

1. Posterior spinal fusion L5.
2. Posterior interbody fusion L4-5.
3. Instrumentation L4-5 nonsegmental (Xia instrumentation).
4. Bone graft through separate incision, right iliac crest.
5. Placement of internal bone growth stimulator. [id. at 224].

On July 29, 2002 Dr. Richard Knoebel M.D. and Dr. Gerald Moress M.D. opined that Mr. McGee suffered a 15% whole person impairment as a result of his low back problems. [id. at 95]. Dr. Knoebel and Dr. Moress determined preexisting conditions accounted for 10% of the whole person impairment derived from Mr. McGee's low back problems. [id.]. Dr. Knoebel and Dr. Moress found that Mr. McGee's industrial accident of July 4, 2001 caused the additional 5% whole person impairment due to his low back problems. [id.]. Dr. Brown found that Mr. McGee's low back problems created at least a 13% whole person impairment without apportionment. [id. at 43-44].³

On February 10, 2003 Dr. Bova stated:

I am concerned, though that he has bulging at L-3/4 and 5/1, the areas that were not treated surgically, and these may be a source of residual pain. [id. at 19].

³I did not bother to resolve the disparity between the 15% and 13% whole person impairment ratings because the slight difference made no difference in the permanent total disability analysis.

The undisputed medical evidence in this case confirmed that after the industrial accident on July 4, 2001, Mr. McGee ended up with a previously undiagnosed herniated disc in his lumbar spine at the L 4-5 level treated surgically by Dr. Brown. Mr. McGee also had some degenerative disc disease at the L3-S1 levels of his lumbar spine. No dispute existed that Mr. McGee's industrial accident on July 4, 2001 caused him low back problems that resulted in no less than An additional 5% whole person impairment.

E. Permanent Total Disability.

1. Significant Impairment.

The medical evidence in this case established that Mr. McGee's low back problems resulted in at least a 13% whole person impairment. [see: Section III.D.2.]. The medical evidence in this case also verified that Mr. McGee's accident on July 4, 2001 necessitated surgery and caused no less than 5% of his total whole person impairment. [id.]. Accordingly, Mr. McGee suffered a significant impairment as a result of his industrial accident on July 4, 2001.

2. Gainful Employment.

The unrefuted evidence in this case confirmed that Mr. McGee never worked again after being released from the hospital for back surgery on February 28, 2002.

3. Ability to do Basic Work Activities.

As set forth in Section III. E.1. Mr. McGee's low back problems resulted in at least a 13% whole person impairment. On July 29, 2002 Dr. Knoebel and Dr. Moress stated that Mr. McGee's impairments precluded him from medium heavy work. [Exhibit "J-1" at 95 see: also id. at 112A]. Dr. Knoebel and Dr. Moress set Mr. McGee's lifting capacity at 50 pounds on an occasional basis and 25 pounds on a frequent basis. Dr. Knoebel and Dr. Moress also limited Mr. McGee's activities with respect to bending, squatting, kneeling, climbing, twisting, pushing, pulling, etc from occasional to frequent. [id. at 104]. Finally, Dr. Knoebel and Dr. Moress asserted that Mr. McGee's condition warranted vocational rehabilitation. [id.].

On October 8, 2002 Dr. Brown opined that Mr. McGee should apply for "medical retirement." [id. at 45]. Dr. Brown found that:

I do not think he is a good rehabilitation candidate given the symptoms that he is currently having. [id.].

After a year of treatment post-surgery, Dr. Brown on May 15, 2003 concluded:

My assessment is that Mr. McGee suffers from severe permanent physical impairment and is presently unable to perform any substantial gainful employment.

I do not think that he is going to be a candidate for vocational rehabilitation either. I think that he is at maximum medical improvement and cannot really function for more than two to three hours at a time without his pain becoming too much for him to tolerate. [id. at 216].

On May 29, 2003 Dr. Bova in agreement with Dr. Brown asserted:

[M]ichael McGee, who sustained a back injury July 4, 2001... [s]uffers from permanent physical impairments, and he is presently unable to perform any substantial gainful activities.

Due to these conditions, I believe he is unable to physically tolerate sitting, standing, or walking for no more that (sic) 30 minutes at this time. [id. at 217].

Del Felix PT performed a Functional Capacity Examination of Mr. McGee that concluded on August 22, 2003. Mr. Felix found that Mr. McGee's functional tolerances included: (1) sitting for 25-41 minutes; (2) static standing for 15 minutes; (3) dynamic standing for 45 minutes; (4) walking for .89 miles, and; (5) climbing two flights of stairs. [id. at 114C]. Mr. Felix felt that Mr. McGee's functional limitations put him in the "LIGHT Physical Demand Characteristics of Work Level" according to the DOT. [id. at 114F]. Mr. Felix to some extent challenged Mr. McGee's effort. [id. at 113F].

In short, the consensus of medical opinion in this matter demonstrated that Mr. McGee's impairments limited his ability to do basic work activities anywhere from not working at all to limited sitting, standing lifting, walking, bending, squatting, kneeling, climbing, twisting, pushing, pulling, in greater or lesser degrees according to the varying medical perspectives.

4. Ability to Perform Essential Functions of the Work Activities for which Michael McGee Qualified Prior to the Industrial Accident of July 4, 2001.

At 53 years old Mr. McGee's past work history consisted almost exclusively of building facility maintenance and heavy equipment operator. Mr. McGee went to work for Kennecott Utah Copper on September 22, 1969 as a millwright. Mr. McGee's duties at Kennecott as a millwright involved machinery maintenance similar to his work at LPI. Mr. McGee also engaged in the operation of heavy equipment at Kennecott.

On November 2, 1987 Ford, Bacon and Davis employed Mr. McGee as a building engineer and heavy equipment operator. Mr. McGee's duties as a building engineer at Ford, Bacon and Davis mirrored his duties at LPI.

On October 22, 1988 Mr. McGee went to work for Eastman Christensen again as a building engineer. September 11, 1990 found Mr. McGee at Jerry Seiner as a building engineer. On July 5, 1995 Mr. McGee became the building engineer at Thatcher Chemical. Then on May 5, 1996 Mr. McGee moved to Evergreen Canyons again as a building engineer. On August 4, 2000 Jones Lang LaSalle employed Mr. McGee as a building engineer.

On June 13, 2002 Dr. Brown declared that Mr. McGee could not return to his former employment. [Exhibit "J-1" at 42]. On September 5, 2002 Dr. Brown reasserted his admonishment that Mr. McGee not return to his former line of work. [id. at 43]. On July 29, 2002 Dr. Knoebel and Dr. Moress proclaimed: "[f]rom a medical viewpoint the patient cannot return to his usual and customary occupation...." [id. at 104].

The uniform medical opinion in this case verified that Mr. McGee medically lacked the ability to perform the essential functions of his lifetime profession as a building engineer, nor return to his usual line of work. Of note, Helen Smith told Mr. McGee that LPI did not want him back to work with his physical limitations.

5. Other Work Reasonably Available.

As found in Section III.E.3., the medical experts in this case placed limitations on Mr. McGee that ranged from no work at all to light physical demand characteristics to medium demand work characteristics. Both parties presented reemployment experts.

Mr. McGee provided the testimony of Kristy Farnsworth PhD. who based her vocational assessment of Mr. McGee on the medical restrictions set forth by Dr. Brown, Dr. Bova and Del Felix's FCE. Dr. Farnsworth did not consider Dr. Knoebel's opinion. Based on the medical opinions utilized by Dr. Farnsworth she predictably concluded that Mr. McGee was an unfit candidate for either reemployment or vocational rehabilitation.

The respondents advanced the testimony of Dirk Evertson a reemployment counselor who conducted a four hour assessment of Mr. McGee. Mr. Evertson reviewed the medical opinions of Dr. Brown, Dr. Bova, Del Felix, and Dr. Knoeble. As a vocational expert Mr. Evertson decided that Mr. McGee appropriately belonged in the light physical demand characteristics of work level according to the DOT⁴ of the U.S. Labor Department. Accordingly, the expert vocational opinion in this case after a review of all the medical evidence placed Mr. McGee in no greater than the light physical demand characteristics of work level according to the DOT.

Mr. Evertson then conducted a market survey that disclosed 30 job categories he thought appropriate for Mr. McGee within his limitations. Mr. Evertson then spoke to four specific employers from the job categories he identified. Mr. Evertson specifically identified two jobs he considered suitable for Mr. McGee. The first job specified by Mr. Evertson was a job as a lens stylist at Lenscrafters. The job at Lenscrafters only involved the handling of very small parts. Employment at Lenscrafters allowed employees to accommodate frequent position changes, but usually involved standing for 80%, and sitting for 20%, of the time in an eight hour day. The job at Lenscrafters paid \$7.00 per hour with commissions that Mr. Evertson calculated at \$2.50 per hour or more. Mr. Evertson estimated that the maximum income at Lenscrafters with commission amounted to between \$12.00 to \$13.00 per hour.

The second job designated by Mr. Evertson as appropriate for Mr. McGee was a position as car rental reservationist. The car rental reservationist job allowed employees to sit, stand and walk as they desired. The car rental reservationist position paid \$7.29 per hour with commissions that Mr. Evertson again approximated at \$2.50 per hour or more. Mr. Evertson estimated that the maximum income as a car rental reservationist with commission amounted to between \$12.00 to \$13.00 per hour.

As set forth in Section III.B. Mr. McGee earned \$17.50 per hour, 40 hours per week average, or \$700.00 per week while employed for LPI as of July 4, 2001. The average weekly wage for the State of Utah as of July 4, 2001 equaled \$554.00 per week, or \$13.85 per hour. The two jobs located by Mr. Evertson as lens stylist and car rental reservationist at most paid \$13.00 per hour, or less than the average weekly wage for the State of Utah as of July 4, 2001. Accordingly, no evidence existed that any employment remained reasonably available to Mr. McGee as of the date of the hearing pursuant to the requirements of Utah Code §34A-2-413(1)(c)(iv) and Utah Administrative Code R. 612-1-10.D.1.c.

⁴Dictionary of Occupational Titles.

6. Summary Concerning Permanent Total Disability.

Mr. McGee became permanently and totally disabled on February 28, 2002, after his July 4, 2001 industrial accident.

7. Direct Cause of Michael McGee's Permanent Total Disability.

The preponderance of the evidence in this case confirmed that Mr. McGee's industrial accident on July 4, 2001 served as the direct cause of his permanent total disability. Prior to the additional lumbar spine injuries caused by his July 4, 2001 industrial, Mr. McGee remained productively employed in his lifelong occupation as a building engineer.

IV. CONCLUSIONS OF LAW

A. Employment.

Mr. McGee suffered an industrial accident on July 4, 2001 that arose out of and in the course of his employment with LPI.

B. Compensation Rate.

As of July 4, 2001 Mr. McGee was married with one dependent child. On July 4, 2001 Mr. McGee's compensation with LPI equaled \$17.50 per hour, 40 hours per week average, which yielded the maximum permanent total disability compensation rate of \$471.00 per week. [$\$17.50/\text{hr} \times 40 \text{ hrs/week} = \$700.00/\text{week} \times 2/3 = \$467.00/\text{week} + \$10.00/\text{week} = \$477.00/\text{week}$].

C. The July 4, 2001 Industrial Accident.

While at work for LPI on July 4, 2001, Mr. McGee and three other employees attempted to install a rebuilt air-handler motor that weighed about 600 pounds. The crew of four men lowered by hand the 600 pound motor 13 inches from one level to the next. All of the men but Mr. McGee let go of the motor and he bore the brunt of the motor's weight on his right shoulder. Mr. McGee felt immediate, extreme pain in his right shoulder and low back.

Mr. McGee reported the July 4, 2001 industrial accident the same day to his immediate supervisor at LPI, Helen Smith. Eventually, Mr. McGee's right shoulder problems resolved. However, Mr. McGee continued to suffer low back pain from the date of the industrial accident through the date of the hearing.

D. Michael McGee's Low Back Problems.

1. Low Back Problems Prior to July 4, 2001.

Prior to July 4, 2001, Mr. McGee suffered a lumbar herniated disc at the L5-S1 level for which he underwent a discectomy and foraminotomy on September 6, 1982.

2. Low Back Problems Caused by Michael McGee's July 4, 2001 Industrial Accident.

After the industrial accident on July 4, 2001, Mr. McGee ended up with a previously undiagnosed herniated disc in his lumbar spine at the L 4-5 level treated surgically by Dr. Brown. Mr. McGee also had some degenerative disc disease at the L3-S1 levels of his lumbar spine. Mr. McGee's industrial accident on July 4, 2001 caused him low back problems that resulted in no less than a 5% whole person impairment.

E. Permanent Total Disability.

Utah Code §34A-2-413 (1) provides in pertinent part:

- (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 the 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 employees 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 of 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.

1. Significant Impairment.

Mr. McGee's low back problems resulted in at least a 13% whole person impairment. Mr. McGee's accident on July 4, 2001 necessitated surgery and caused no less than 5% of his total whole person impairment. Accordingly, Mr. McGee suffered a significant impairment as a result of his industrial accident on July 4, 2001.

2. Gainful Employment.

Mr. McGee never worked again after being released from the hospital for back surgery on February 28, 2002.

3. Ability to do Basic Work Activities.

Mr. McGee's low back problems resulted in at least a 13% whole person impairment. Mr. McGee's impairments limited his ability to do basic work activities anywhere from not working at all to limited sitting, standing lifting, walking, bending, squatting, kneeling, climbing, twisting, pushing, pulling, in greater or lesser degrees according to the varying medical perspectives.

4. Ability to Perform Essential Functions of the Work Activities for which Michael McGee Qualified Prior to the Industrial Accident of July 4, 2001.

At 53 years old Mr. McGee's past work history consisted almost exclusively of building facility maintenance and heavy equipment operator. Mr. McGee medically lacked the ability to perform the essential functions of his lifetime profession as building engineer, nor return to his usual line of work.

5. Other Work Reasonably Available.

Utah Administrative Code R. 612-1-10.D.1. states in relevant part that:

Other work reasonably available: subject to the 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:

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;

Utah Administrative Code R. 612-1-10.D.1. is consistent with principles enunciated by the Utah Supreme Court:

At the outset, we note that the purpose of the workers' compensation acts is to 'secure workmen...against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment....' (Citation omitted). This compensation is not in the form of damages for injury, as in a tort action, but in the form of payments to compensate for the *loss of employability* resulting from the injury. (Citations omitted). Marshall v. Industrial Comm'n of the State of Utah, 681 P. 2d 208, 211 (Utah 1984)(*emphasis in original*).

The Court in Marshall went on to hold:

[t]otal disability does not mean '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. 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 the injury*. Id. at 212. (Quoting: Entwistle v. Wilkins, 625 P. 2d 495, 498 (Utah 1981)(*emphasis in original*).

In fact, the Utah Supreme Court in another case elaborated on the principles articulated in Marshall:

Although the fact that an employee returns to work following an industrial injury may be relevant in determining the employee's ability to perform the duties of his occupation and thus may be a factor in assessing whether the employee has suffered any loss of earning capacity, that fact alone is not conclusive of his ability to work, nor is it dispositive of the issue of his earning capacity. We have recently held that: '[o]nly where the employee returns to work under normal conditions will the presumption of no loss of earning capacity stay unassailed.' *Norton v. Industrial Comm'n*, 728 P. 2d at 1028.

In *Norton*, we held that the fact that the claimant returned to work and continued to work for six years following his industrial accident 'did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate[d] that throughout the remainder of his employment he was not restored to health. *Peck v. EIMCO Process Equipment Co.*, 748 P. 2d 572, 577 (Utah 1987).

As set forth in Section III.B. Mr. McGee earned \$17.50 per hour, 40 hours per week average, or \$700.00 per week while employed for LPI as of July 4, 2001. The average weekly wage for the State of Utah as of July 4, 2001 equaled \$554.00 per week, or \$13.85 per hour. The two jobs located by Mr. Evertson as lens stylist and car rental reservationist at most paid \$13.00 per hour, or less than the average weekly wage for the State of Utah as of July 4, 2001. Accordingly, no evidence existed that any employment remained reasonably available to Mr. McGee as of the date of the hearing pursuant to the requirements of Utah Code §34A-2-413(1)(c)(iv) and Utah Administrative Code R. 612-1-10.D.1.c.

Utah Code §34A-2-413(6) "[a]llows an employer to submit a reemployment plan for an employee who is seeking permanent total disability benefits." Color Country Management v. Labor Commission, 436 Utah Adv. Rep. 4, 6 (Utah App. 2001). A reemployment plan is permissive, not mandatory, and sequentially comes after a preliminary finding of permanent total disability under Utah Code §34A-2-413(1). As stated in Utah Administrative Code R. 610-1-10.C.:

For permanent total disability claims arising on or after May 1, 1995, Section 34A-2-413 requires a two step adjudicative process. First the Commission must make a preliminary determination whether the applicant is permanently and totally disabled. If so, the Commission will proceed to the second step, in which the Commission will determine whether the applicant can be reemployed or rehabilitated.

Perhaps Mr. Evertson identified suitable jobs for which Mr. McGee could be rehabilitated and retrained as part of a reemployment plan. The reemployment plan presented by Mr. Evertson more appropriately belonged to the second phase of the permanent total disability proceeding.

V. ORDER

IT IS THEREFORE ORDERED that the respondents LPI Services and/or Travelers shall pay Michael McGee **permanent total disability subsistence benefits** in the amount of **\$471.00 per week** from February 28, 2002, through April 12, 2004 in the **lump sum amount of \$51,946.59**, with appropriate credit and offsets for compensation already paid for the time period. The respondents LPI Services and/or Travelers shall thereafter commence subsistence payments to Michael McGee in the amount of \$471.00 as of the date of this order pursuant to Utah Code §34A-2-413(6)(b)(i). Further benefits to be determined after accomplishment of the procedures set forth in Utah Code §34A-2-413 (6)(a).

IT IS FURTHER ORDERED that the respondents LPI Services and/or Travelers shall pay all medical expenses reasonably related to Michael McGee's injuries incurred on July 4, 2001 according to Utah Code § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission. The respondents LPI Services and/or Travelers shall also pay travel allowances under Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, under Utah Code § 34A-2-420 (3) and Utah Administrative Code, Rule 612-2-13.

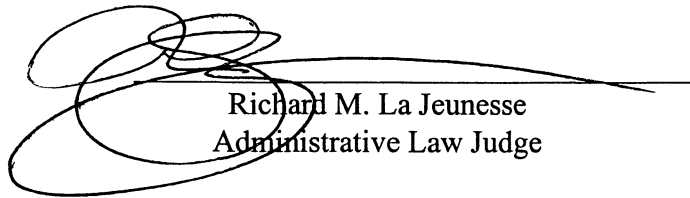
IT IS FURTHER ORDERED that attorneys' fees shall be paid by the respondents LPI Services and/or Travelers directly to Richard Burke according to Utah Administrative Code R 602-2-4, which fees shall be deducted from the benefits paid by the respondents to Michael McGee pursuant to this order.

IT IS FURTHER ORDERED that if the respondents intend to submit a reemployment plan, the respondents shall file notice of such intent within ten (10) days of the date of this order. The respondents shall file the reemployment plan within twenty (20) days after filing the notice of intent to file the plan, or within thirty (30) days of the date of this order.

IT IS FURTHER ORDERED that by separate notice hearing shall be set with respect to any reemployment plan submitted by respondents.

IT IS FURTHER ORDERED that as this is an Interim Order and not a Final Order, any Motion For Review or Appeal of this Order shall be reserved until the Final Order is issued in this matter. Accordingly, deadlines with respect to Motions For Review and/or Appeal shall not commence to run until after the Final Order is issued in this case.

Dated this 12th day of April 2004,



Richard M. La Jeunesse
Administrative Law Judge

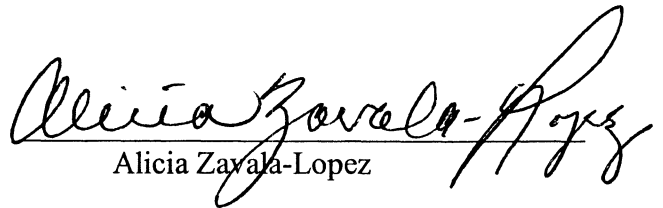
CERTIFICATE OF MAILING

I, Alicia Zavala-Lopez, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Findings of Fact, Conclusions of Law, And Order in the case of McGee v. LPI Services et al, Case No. 20021225 on the 12th day of April 12, 2004, to the following:

MICHAEL MCGEE
3186 DON FRANCISCO DR
TAYLORSVILLE UT 84118

RICHARD BURKE ESQ
648 E 100 S STE 200
SALT LAKE CITY UT 84102

MARK SUMSION ESQ
PO BOX 2465
SALT LAKE CITY UT 84110-2465


Alicia Zavala-Lopez

Addendum D

Troy Carter v. EOTT Energy Operation LTD, Case Nos. 99522 and 99523

RECEIVED

MMW
162W

MAR 09 2006

Richards, Brandt
Miller & Nelson

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

TROY CARTER,
Petitioner,

vs.

EOTT ENERGY OPERATING LTD and/or
EMPLOYERS REINSURANCE FUND,
Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER ON SECOND
STEP PROCEEDINGS**

Case No. 99522, 99523

Judge Debbie L. Hann

HEARING: Room 336 Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on June 29, 2005 at 10:00 AM.. Said Hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Donald L George, Administrative Law Judge.

APPEARANCES: The petitioner, Troy Carter, was present and represented by his/her
attorney Kenneth E Atkin Esq.

The respondents, Eott Energy Operating Ltd and Wausau Insurance Co.
were represented by attorney Mark Sumsion Esq. The respondents, Great
Lakes Timber Co. and Workers Compensation Fund were represented by
attorney Lori Hansen Esq. The Employers Reinsurance Fund was
represented by attorney Elliot R Lawrence Esq.

STATEMENT OF THE CASE

Amended Findings of Fact, Conclusions of Law Including Preliminary Determination of
Permanent Total Disability and Order was issued by Judge George on March 26, 2004 ordering,
among other things, that permanent total disability compensation in the form of subsistence
benefits be paid to the petitioner beginning November 2, 1999 as the result of the industrial
injury of December 13, 1998 when the petitioner was employed by the respondent, EOTT
Energy Operating Ltd. An interlocutory Motion for Review was subsequently filed. The
Commission Appeals Board upheld the determination of permanent total disability and remanded
the case for second step proceedings in an order issued January 25, 2005.

At the hearing, the respondents agreed that if the plan was ordered, they would agree to pay the
difference between the state average weekly wage at the time of the injury and the petitioner's
wages until those wages reached the level of this average weekly wage.

Following the June 29, 2005 hearing, the case was transferred to Judge Debbie L. Hann for decision. Because the only issue in these proceedings is related to reemployment as related to the permanent total disability compensation claim, "respondents" shall refer to EOTT Engery Operating Ltd. and their insurance carrier, Wausau.

FINDINGS OF FACT

The respondents submitted a vocational report entitled Proposed Reemployment Return to Work Plan for the petitioner and an Addendum to that report prepared by Mark Hedrick, a qualified vocational rehabilitation counselor.

Mr. Hedrick identified the potential vocational opportunity for the petitioner of parts salesperson, a job for which 15 potential employers were identified in the Uintah Basin, where the petitioner resides. In the February 12, 2005 Addendum, the mean wage for these positions was \$12.90 per hour, the entry level wage was \$9.00 per hour and the median wage was \$13.50 per hour.

Mr. Hedrick did not believe the petitioner required any additional training before being placed in a new position. His report notes that the petitioner's current work history and education give him the skills necessary to perform the functions of this position. The petitioner attended Utah State University from 1995 through 1997 and obtained 96 credits. The petitioner has also completed a truck driving school program and served in the U.S. Army Reserve from 1989 to 1995. The petitioner has previously performed light mechanical duties and operated heavy equipment and pneumatic tools.

The petitioner was earning \$750.00-800.00 per week at the time of the December 13, 1998 industrial injury which entitled the petitioner to the maximum weekly compensation rate for permanent total disability of \$414.00. The state average weekly wage at that time was \$487.00. The current state average weekly wage is \$609.00 and it was \$589.00 at the time of the hearing.

There was no dispute that the respondents were paying and would continue to pay the ordered subsistence benefits during the proposed reemployment efforts.

The respondents' reemployment plan is reasonably designed to return the petitioner to gainful employment. The definition of "other work reasonably available" contained in the Commission's rule does not apply to the evaluation of "gainful employment." The evaluation of "other work reasonably available" is part of the first step analysis of whether a person is preliminarily permanently totally disabled. "Gainful employment" is the standard to be applied in second step proceedings to evaluate possible rehabilitation. There is nothing in the wording of the statute or rule which ties these terms together in a way that would require similar definitions or analysis. That being said, the undersigned acknowledges the result could be viewed as somewhat inconsistent. A job offered as "other work reasonably available" in the first step

proceedings may not pay enough to meet the rule requirement and, in part, lead to a tentative finding of permanent total disability. Then, in the second step proceedings, that same job could be offered as “gainful employment” in a reemployment plan and the employee could be required to accept it, assuming it was vocationally appropriate. But, the legislature, in adopting 34A-2-413, did not use similar language in the second step proceedings that would evidence an intent to apply similar standards, such as using the words “reasonable work” as opposed to “gainful employment.” The statute also evidences a clear preference that an employee return to some type of work, even at part-time, minimum wage, in those provisions that require such employment to be accepted when an employee cannot be reemployed and is receiving permanent total disability compensation. But, contrasting with this preference is the underlying intent of the worker’s compensation to be more than a subsistence program. Compensation is not based upon a subsistence level payment standard and is tied to an injured worker’s level of income at the time of the injury up to the average state weekly wage and compensation rates can pay well above the current minimum wage of \$206.00 per week. The Utah Injured Worker Reemployment Act, defines “gainful employment” in terms of wage level to only require “an opportunity for earnings” and does not set forth a minimum standard. As submitted, the reemployment plan meets the requirement of gainful employment.

Successful rehabilitation of the petitioner is possible. The respondents shall diligently pursue and the petitioner shall fully cooperate in the reemployment plan.

PRINCIPLES OF LAW

Utah Code § 34A-2-413(1)(c)(iv) requires as an element of proof that an employee is permanently totally disabled that “...the employee cannot perform other work reasonably available...” when considering the employee’s age, education, past work experience, medical capacity and residual functional capacity.

“Other work reasonably available” for purposes of Utah Code § 34A-2-413 is defined by Commission rule at R612-1-10(D)(1) as:

...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
- 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.

If a preliminary determination of permanent total disability is made, the employer has the option as part of the “second step proceedings” to request the employee to participate in a reemployment plan. The reemployment plan must be prepared by a qualified rehabilitation provider and be “...reasonably designed to return the employee to gainful employment. Utah Code § 34A-2-413(6)(a)(ii)(A). The plan may also 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.” Utah Code § 34A-2-413(6)(e)(i). The plan must include “...payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.” Utah Code § 34A-2-413(6)(e)(i).

Once a plan is submitted, hearing is held to “...consider evidence regarding rehabilitation” and “...review any reemployment plan submitted by the employer or its insurance carrier...” Utah Code § 34A-2-413(6)(B)(iii). Only “[i]f a preponderance of the evidence shows that successful rehabilitation is not possible...” may benefits be awarded as a final determination. Utah Code § 34A-2-413(6)(f).

In the event a final order of permanent total disability is entered, that benefit ends when an employee is “...capable of returning to regular, steady work.” Utah Code § 34A-2-413(7)(a)(ii). An employer or insurance carrier may also “...provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-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...” and the employee is required to cooperate and accept such employment. Utah Code § 34A-2-413(7)(b) and (c).

“Gainful employment” is defined for purposes of the Utah Injured Worker Reemployment Act at Utah Code § 34A-8-104(3) as:

Gainful employment" means employment that:

- (i) is reasonably attainable in view of the industrial injury or occupational disease; and
 - (ii) offers to the injured worker, as reasonably feasible, an opportunity for earnings.
- (b) Factors to be considered in determining gainful employment include the injured worker's:
- (i) education;

Findings of Fact, Conclusions of Law and Order

Troy Carter vs. EOTT Energy Operating Ltd and Wausau Insurance; Employers Reinsurance Fund; Great Lakes Timber and Workers Compensation Fund

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- (ii) experience; and
- (iii) physical and mental impairment and condition.

CONCLUSIONS OF LAW

Successful rehabilitation of the petitioner is possible under the proposed reemployment plan.

The respondents shall continue to pay subsistence payments of \$414.00 per week less any offset required by Utah Code § 34A-2-413(5) and less attorneys fees payable directly to Kenneth E. Atkin, Attorney at Law, pursuant to R602-2-4, U.A.C.

The respondents shall pay all costs associated with implementation of the reemployment plan.

The petitioner shall cooperate with reemployment efforts.


The respondents shall diligently pursue the reemployment plan.

ORDER

IT IS THEREFORE ORDERED that the respondents, EOTT Energy Operating Ltd and Wausau Insurance shall diligently pursue the plan prepared for the petitioner and pay all costs associated with the plan and that the petitioner shall cooperate with the plan.

IT IS THEREFORE ORDERED that the respondents, EOTT Energy Operating Ltd and Wausau Insurance shall continue to pay subsistence payments of \$414.00 per week less any offset required by Utah Code § 34A-2-413(5) and less attorneys fees payable directly to Kenneth E. Atkin, Attorney at Law, pursuant to R602-2-4, U.A.C..

DATED March 8, 2006.


Debbie L. Hann
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

Findings of Fact, Conclusions of Law and Order

Troy Carter vs. EOTT Energy Operating Ltd and Wausau Insurance; Employers Reinsurance Fund; Great Lakes Timber and Workers Compensation Fund

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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.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on March 8, 2006, to the persons/parties at the following addresses:

Kenneth E Atkin Esq
1111 Brickyard Rd Ste 206
Salt Lake City UT 84106

Lori Hansen Esq
P O Box 57929
Salt Lake City UT 84107

Mark Sumsion Esq
50 S Main St Ste 700
P O Box 2465
Salt Lake City UT 84110

Elliot R Lawrence Esq
P O Box 146612
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UTAH LABOR COMMISSION



Clerk, Adjudication Division
PO Box 146615
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