

2007

LPI Services and Travelers Indemnity Co. of Connecticut vs. Michael McGee and Utah Labor Commission: Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

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

Mark R. Sumsion, Michael K. Wooley; Richards, Brandt, Miller and Nelson; counsel for petitioners.
Richard Burke, Alan Hennebold; counsel for respondents.

Recommended Citation

Reply Brief, *LPI Services v. McGee*, No. 20070077 (Utah Court of Appeals, 2007).
https://digitalcommons.law.byu.edu/byu_ca3/53

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

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.

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

Case No. 20070077-CA

(Oral Argument Requested)

PETITION FOR REVIEW FROM THE LABOR COMMISSION OF UTAH

Richard Burke
7390 South Creek Road #104
Sandy, Utah 94093
Counsel for Respondent Michael McGee

Alan Hennebold
P.O. Box 146615
Salt Lake City, Utah 84114-6615
*Counsel for Respondent Labor
Commission of Utah*

Mark R. Sumsion [8283]
Michael K. Woolley [8567]
Richards, Brandt, Miller & Nelson
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
*Counsel for Petitioners LPI Services and
Travelers Indemnity*

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.

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

Case No. 20070077-CA

(Oral Argument Requested)

PETITION FOR REVIEW FROM THE LABOR COMMISSION OF UTAH

Richard Burke
7390 South Creek Road #104
Sandy, Utah 94093
Counsel for Respondent Michael McGee

Alan Hennebold
P.O. Box 146615
Salt Lake City, Utah 84114-6615
*Counsel for Respondent Labor
Commission of Utah*

Mark R. Sumsion [8283]
Michael K. Woolley [8567]
Richards, Brandt, Miller & Nelson
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
*Counsel for Petitioners LPI Services and
Travelers Indemnity*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. Standard of Review: Correctness	2
A. Correctness: statutory interpretation and whether the administrative rule conflicts with the statute	3
B. No express or implied grant of discretion	4
II. Statutory Construction: the administrative rule conflicts with the statute	8
A Construing the Statute to give effect to each term	8
B. The administrative rule conflicts with the statute	14
1. Plain language	15
2. Utah case law	16
C. The Labor Commission’s argument is more properly made to the Legislature	18
D. Claiming benefits and asserting the purpose of the Workers Compensation Act is to provide benefits to injured workers does not satisfy the requirements of the Act	19
E. The Commission’s error in applying the invalid administrative rule and failure to apply the statutory factors has been raised all along	21
F. Other portions of the Administrative Rule have been invalidated	23
CONCLUSION	24
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

CASES

<u>Carter v. Labor Comm’n Appeals Board</u> , 2006 UT App 477, ¶ 16, 153 P.3d 763	21
<u>Chris & Dick’s Lumber v. Tax Com’n</u> , 791 P.2d 511 (Utah 1990)	6
<u>Color Country Mgmt. v. Labor Comm’n</u> , 2001 UT App 370, ¶43, 38 P.3d 969	17
<u>Crowther v. Nationwide Mut. Ins. Co.</u> , 762 P.2d 1119, 1122 (Utah App. 1988)	15, 17
<u>Draughon v. Dept. of Financial Institutions</u> , 975 P.2d 935, 937 (Utah App. 1999)	15, 16
<u>Esquivel v. Labor Comm’ of Utah</u> , 2000 UT 66, 7 P.3d 777	4, 5, 6
<u>Martinez v. Media-Paymaster Plus / Church of Jesus Christ of Latter-Day Saints</u> , 2007 UT 42	4-5, 6, 7, 8
<u>Morton Int’l, Inc. v. Auditing Div.</u> , 814 P.2d 581 (Utah 1991)	16
<u>Norton v. Industrial Comm’n</u> , 728 P.2d 1025 (Utah 1986)	21, 22
<u>Rekward v. Industrial Comm’n of Utah</u> , 755 P.2d 166, 169 (Utah Ct. App. 1988)	18
<u>Sanders Brine Shrimp v. Audit Div.</u> , 846 P.2d 1304, 1306 (Utah 1993)	13, 15, 16
<u>State v. Tooele County</u> , 2002 UT 8, 44 P.3d 680	7
<u>Target Trucking v. Labor Comm’n</u> , 108 P.3d 128 (Utah App. 2005)	22, 23
<u>Union Pac. R.R. Co. v. Utah State Tax Comm’n</u> , 2000 UT 40, 999 P.2d 17	23

STATUTES

Utah Code Ann. § 34A-1-103 (2006)	13
Utah Code Ann. § 34A-1-104(1) (2006)	2
Utah Code Ann. § 34A-1-301	5, 6
Utah Code Ann. § 34A-2-413 (1997)	1, 3-4, 5, 7, 8, 9, 10, 13, 14, 19, 23
Utah Code Ann. § 34A-8-102 (1997)	19
Utah Code Ann. § 63-46a-1 to -17 (2007)	2

REGULATIONS

Utah Admin. Code R612-1-10.D.1	1, 7-8, 10, 11, 14, 15, 17, 19, 22, 23, 24
--------------------------------------	--

OTHER

Merriam Webster's Collegiate Dictionary (10 th ed. 1993)	11
---	----

ARGUMENT

In Utah Code Section 34A-2-413(1)(c), the Legislature sets forth four criteria to be considered by the Labor Commission in determining whether or not an applicant is permanently totally disabled. Subsection (iv) sets forth five specific criteria, which focus on the injured worker, to assess whether the injured worker can perform other work reasonably available. The Labor Commission promulgated an administrative rule that purports to permit the consideration of additional factors, “location, stability, and wage rate of the work.” (Br. of Resps. at 1.). Because the administrative rule expands the statute, it is in conflict with statutory law, and is therefore invalid.

McGee and the Labor Commission do not challenge any fact set forth by Petitioners. (See Br. of Resps. at 4.) McGee sought permanent total disability benefits. Instead of applying the statutory standard found in Utah Code Section 34A-2-413(c)(iv), the Labor Commission applied Utah Administrative Rule R612-1-10.D.1.c.

In the administrative proceeding, evidence was presented showing that there was gainful work reasonably available to McGee. However, applying Administrative Rule R612-1-10.D.1.c. instead of the statute, the Commission concluded that McGee was entitled to benefits because the wages for this gainful employment didn’t pay enough.

I. Standard of Review: Correctness

McGee and the Commission misstate the standard of review. McGee and the Commission contend that this Court should concede discretion to the Commission in deciding whether the administrative rule is consistent with the statute. (See Br. of Resps. at

2.) The Commission should not be granted deference on a matter of statutory interpretation. Moreover, this Court should not be distracted away from the core issue that the administrative rule conflicts with the statute by the efforts of McGee and the Commission to move the focus onto the standard of review.

A. Correctness: statutory interpretation and whether the administrative rule conflicts with the statute

The proper standard of review is correctness. The administrative agency in this case, the Labor Commission, is not in a better position than the Judiciary to determine whether an administrative rule conflicts with legislation. Determining whether this Administrative Rule conflicts with a state statute does not require specialized expertise by the Commission. Indeed, this type of conflict between rule and statute is exactly the type of issue that courts deal with on a regular basis. To defer to the Commission the power to decide if its own rule conflicts with legislation would essentially result in handing over judicial review to the Commission. Administrative rules are drafted and promulgated by the Commission with the belief that they do not conflict with legislation. See Utah Code Ann. § 34A-1-104(1) (2006) (stating grant of authority to adopt rules in accordance with Utah Administrative Rulemaking Act); Utah Code Ann. § 63-46a-1 to -17 (2007) (Utah Administrative Rulemaking Act). If this Court were to grant discretion to the Commission (the entity that promulgated the Rule in the first place) to decide if the rule is consistent with legislation, this Court would essentially cede judicial authority to the Commission.

In some cases, the court gives some deference to an administrative agency when the agency's expertise is necessary to decide the issue.¹ The issue in the instant proceeding, however, is a classic judicial determination requiring no expertise – whether an administrative rule conflicts with legislation. McGee and the Commission do nothing more than claim that “[t]he Commission is well-suited to this responsibility because of its expertise in modern employment relationships and its understanding of the workers’ compensation system.” (Br. of Respondents at 5.) The determination of whether an administrative rule conflicts with legislation is a pure question of law which does not require any specific agency expertise.² There is nothing about this issue requiring agency expertise that would merit an abuse of discretion standard of review.

B. No express or implied grant of discretion

Respondents cite no valid authority to support their contention that the Legislature either explicitly or implicitly³ granted the Commission discretion to interpret Section 34A-2-

¹ The abuse of discretion standard of review may also be warranted for factfinding or application of the law to the facts. However, the instant case does not involve factfinding, nor does the instant case involve application of the law to the facts. Rather, the issue is purely a legal one: whether the administrative rule conflicts with a state statute. This is a determination of law, not a factual finding or application of the law to facts, and therefore the correctness standard must apply.

² Moreover, the Labor Commission is not the State agency responsible for vocational rehabilitation. That responsibility falls to the Division of Rehabilitation Services. Therefore, the Commission has no expertise germane to whether the rule it promulgated conflicts with legislation.

³ Although Respondents use the terms explicitly and implicitly, and the case law uses the terms expressly and impliedly; Respondents see no legal distinction between the terms, and Petitioners equate explicit with express and implicit with implied.

413(c)(iv). In fact, Utah authority is contrary to Respondents’ assertions. The very arguments McGee and the Commission make have already been rejected in Martinez v. Media-Paymaster Plus / Church of Jesus Christ of Latter-Day Saints, 2007 UT 42, ___ P.3d ___,⁴ and Esquivel v. Labor Comm’ of Utah, 2000 UT 66, 7 P.3d 777. Utah law is clear that in this circumstance, the Commission’s decision must be reviewed under the correctness standard.

McGee and the Commission’s claim of impliedly-granted discretion pursuant to Utah Code Section 413(1)(c)(iv) was rejected in Martinez, 2007 UT 42, ___ P.3d ___. McGee and the Commission claim that Section 413(1)(c)(iv) impliedly grants the Commission deference on the issue because the statute contains the term “reasonably.” (Br. of Resp. at 5, 8-10.) However, in Martinez, the Utah Supreme Court explained that subsection 413(1)(c) “only gives the Commission discretion to ‘find’ the facts required to establish the elements of permanent total disability.” *Id.* at ¶ 44. Martinez also states, “We . . . hold that the language of subsection (c) grants the Commission authority to determine only whether the facts presented meet the statute’s requirements for a finding of permanent total disability.” *Id.* at ¶ 42.⁵

⁴ Martinez was issued after Petitioners filed their opening brief.

⁵ In Martinez the Utah Supreme Court makes broad statements regarding the interpretation of Utah Code Section 34A-2-413(1). These statements are made in the context of considering, inter alia, who bears the burden of proof under Section 34A-2-413(1)(c). *Id.* at ¶ 9. While the context of Martinez differs somewhat from the issue of whether the administrative rule conflicts with the statute, the fact remains that the Utah Supreme Court interpreted Section 34A-2-413(1)(c) in Martinez, and stated that the five statutory factors are what must be considered in deciding whether work is reasonably available. *Id.* at ¶ 32 (“These factual considerations inform what is reasonable; its

Section 413(a)(c)(iv) does not impliedly grant any discretion to the Commission for questions of law such as whether an administrative rule conflicts with a statute. The instant issue is not one of factfinding, nor does the instant issue involve application of law to facts. Rather, the issue is purely a legal one: whether the administrative rule conflicts with a state statute. This is a determination of law, not a factual finding or application of law to facts. Accordingly, Section 413(1)(c) does not impliedly grant the Commission discretion for statutory interpretation.

McGee and the Labor Commission’s claim of expressly-granted discretion pursuant to Utah Code Section 34A-1-301, must also be rejected pursuant to Esquivel, 2000 UT 66, 7 P.3d 777, and Martinez, 2007 UT 42, ___ P.3d ___. McGee and the Commission claim that Section 34A-1-301 expressly grants the Commission deference because the statute “grants the Commission ‘full power, jurisdiction, and authority to determine the facts and apply the law in this chapter’” (Br. of Resps. at 5, 8.) The claim for discretion based on this statute was first rejected in Esquivel and affirmed in Martinez. In Esquivel, the court made clear that “matters of statutory construction are questions of law that are reviewed for correctness.” Id. at ¶ 13 (brackets and citations omitted). The Esquivel court then clarified that Section 34A-1-301 granted no deference to legal determinations, stating: “We have never previously viewed [Section] 34A-1-301 as a broad grant of discretion to the Labor Commission. In fact, we have, upon numerous occasions . . . reviewed commission decisions

parameters are not further defined by an overarching legal principle, as in the case of reasonable suspicion, for example.”). The court also stated that it reviews the “interpretation of section 34A-2-413(1)(c) for correctness,” id. at ¶ 46, and it declined to “read[] additional terms into the statute,” id. at ¶ 53.

concerning questions of law under the correctness standard.” Id. at ¶ 17 (citations omitted). Then, Esquivel went on to reject the argument for discretion, stating, “We are not convinced, and do not conclude, that section 34A-1-301 provides a general grant of discretion to the Labor Commission for statutory interpretation.” Id. at ¶ 18. Moreover, in the recent decision of Martinez, the Utah Supreme Court reaffirmed what it previously held in Esquivel, “that Section 34A-1-301 does not grant the Commission discretion for statutory interpretation.” Id. at ¶ 43. Section 34A-1-301 simply affords the Commission discretion to find facts and apply facts to the proper law. Determining whether a rule promulgated by the Commission conflicts with legislation merits no discretion, but must be reviewed for correctness.

In the end, this Court should not be distracted from the core issue that the administrative rule conflicts with the statute by the efforts of McGee and the Commission to direct the focus onto the standard of review.⁶ Utah law is clear that the proper standard of review is correctness. As this Court is well aware, questions of statutory construction are matters of law, and the court gives no deference to an administrative agency’s interpretation of a statute. Chris & Dick’s Lumber v. Tax Com’n, 791 P.2d 511 (Utah 1990).

⁶ Regardless, under either standard of review, for the reasons outlined in Petitioners’ opening brief and set forth below, the decision should be overturned as error; and even if the abuse of discretion standard applied, the Commission’s decision would also rise to the level of an abuse of discretion.

II. Statutory Construction: the administrative rule conflicts with the statute

Petitioners made clear in the opening brief that 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). McGee and the Labor Commission muddy the waters regarding the issue that is before the Court, and their interpretation of the statute fails to consider all of the statutory language and give effect to each term.

A. Construing the Statute to give effect to each term

McGee and the Commission's interpretation of the statute fails to take into consideration all of the statutory language. When interpreting 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. Because Utah law presumes the Legislature used each term advisedly, all parts of the statute should be harmonized so that all terms are relevant and meaningful according to their ordinary meaning. It is a court's fundamental duty to give effect, if possible, to every word of the statute. See e.g., Martinez, 2007 UT 42 at ¶ 46, ___ P.3d __.

McGee and the Commission read the statute to omit the language "taking into consideration." They focus solely on the term "reasonably available." They claim the Commission must merely consider whether work is reasonable available, ignoring the five statutory factors as nothing more than suggestions that might be taken into consideration, and promulgating a rule that permits consideration of other factors. McGee and the Commission's focus on "reasonableness" is demonstrated by their characterization of Rule

R612-1-10.D.1 as necessary “to interpret and apply [Utah Code Section] 413(1)(c)(iv)’s ‘reasonableness’ requirement.” (Br. of Resps. at 1.) They further state that the Commission must “determin[e] what ‘reasonable’ means,” and that whether the administrative rule conflicts with the statute “depends on the meaning of ‘reasonable’ as the word is used in [the statute].” (Br. of Respondents at 2.) However, the statutory language does not merely ask the Commission to decide what is “reasonable.” The statutory mandate to the Commission is 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.**” Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis added). Therefore, the Legislature has already defined what factors are to be considered in determining whether other work is “reasonably available.” Because the rule avoids the statutory factors and purports to permit consideration of other non-statutory factors, the rule expands on the statute and is improper and invalid.

Additionally, in Martinez the Utah Supreme Court stated that the five statutory factors are what must be considered in deciding whether work is reasonably available. In discussing the five statutory factors, the court stated, “These factual considerations inform what is reasonable; its parameters are not further defined by an overarching legal principle, as in the case of reasonable suspicion, for example.” Id. at ¶ 32. In other words, Martinez directs that whether work is reasonably available is determined by applying the five statutory factors, and nothing else.

McGee and the Commission also read the statute to omit the language “the employee cannot perform other work.” Thus, by omitting consideration of this phrase and the five statutory factors, their interpretation focuses almost exclusively on whether potential future work is reasonable in light of its wage, shifting the focus away from the employee and his or her ability to work. The statutory language, considers the employee, and whether “the employee [can] perform . . . work,” considering the employee’s “age, education, past work experience, medical capacity, and residual functional capacity.” In other words, instead of following the statutory language that keeps the employee’s ability to work in mind, and whether the employee is able to function; the Commission’s misinterpretation leads it to focus on future available work and what the work offers. A proper interpretation harmonizes all of the phrases and terms of the statute. It is improper for McGee and the Commission to consider solely whether future potential jobs are reasonable in light of an administrative rule that considers whether the future potential jobs pay a wage greater than the state average weekly wage. Rather, the full, harmonized reading of the statute requires greater focus on the employee, specifically whether the individual can perform other work, taking into consideration the employee’s “age, education, past work experience, medical capacity, and residual functional capacity.”

McGee and the Commission over-generalize Petitioners’ position, arguing that Petitioners insist that the Commission has no discretion to consider anything outside of the five statutory factors. (Br. of Resps. at 13.) Section 34A-2-413(1)(c)(iv) states what shall be considered by the Labor Commission in determining whether an employee is permanently

totally disabled. While some considerations may exist within those factors, the so-called “subsidiary considerations” alleged by McGee and the Commission are not statutory factors, nor are they subsidiary considerations to the statutory factors.

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.**” § 34A-2-413(c)(iv) (emphasis added.) Within these five factors there may be subsidiary considerations such as similarities or differences between an employee’s past work experiences, or changes over time in an employee’s education, or changes over time in medical capacity. However, the statute makes no mention of the “subsidiary considerations” claimed by Respondents – gross income, wage rates, or the state average weekly wage; the subsidiary considerations characterized by McGee and the Commission as “location, stability, and wage rate of the work.” (See Br. of Resps. at 1 (“location, stability, and wage rate of the work”; 5-6 (“1) the stability and regularity of the work; 2) the work’s location; and 3) the wage attached to the work”; 13 “1) stability, 2) location, and 3) wage”).) Because Administrative Rule R612-1-10.D.1.c purports to permit consideration of these additional factors, it impermissibly expands the statute, shifting the focus away from the injured worker and onto possible future work, and is therefore invalid.

McGee and the Commission appear to abandon the position they took in the administrative proceeding. In its final order, the Appeals Board reasoned that Administrative Rule R612-1-10.D.1 took “a broad[] view of the statutory term ‘past work experience.’”

(Order of Dec. 29, 2006, at p.3.) The Commission reasoned that the term “past work experience” permitted consideration of other aspects besides work experiences or duties, including “the location of the injured worker’s residence, . . . previous wage levels, and the availability and regularity of alternative work.” (*Id.*) The Commission’s reasoning must be rejected. The consideration of **past** work experience does not permit consideration of **current** wages. The evaluation of how the potential wage of potential future employment compares to the current state average weekly wage does not take into account any aspect of past wages, much less “past work experience.”

The Legislature used the term “**past** work experience” advisedly. The term “past” does not imply in any way the consideration of current available wages, nor does it suggest consideration of the “current state average weekly wage.” Utah Admin. Code R R612-1-10.D.1.c. (2007). The consideration of “past work **experience**” also does not suggest 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)). If the Legislature had wanted to permit consideration of wages in conjunction with consideration of experience, it would have said so. It did not.

McGee and the Labor Commission tacitly admit that the Commission considered three non-statutory factors. McGee and the Commission acknowledge that “[t]he Commission promulgated Rule R612-1-10.D.1 to identify the subsidiary considerations These

[subsidiary] considerations include the location, stability, and wage rate of the work.” (Br. of Respondents at 1; see also 5-6, 13.) Nowhere in the statute does the Legislature state that the Commission is to consider “location, stability, and wage rate of the work.” Rather, the Legislature directs the Commission to “tak[e] into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.” The alleged factors of “location, stability, and wage rate of the work,” are not statutory factors. Moreover, they are not “subsidiary” to the five statutory factors of age, education, past work experience, medical capacity, or residual functional capacity.

Any claim that the additional factors of “location, stability, and wage rate of the work,” are “subsidiary considerations” to the statutory factors has no merit. The location of possible future work cannot be a “subsidiary factor” of age, education, past work experience, medical capacity, or residual functional capacity. Location of future work is not a secondary consideration that must be taken into account in evaluating the employee’s age, education, past work experience, medical capacity, or residual functional capacity. The stability of possible future work cannot be a “subsidiary factor” of age, education, past work experience, medical capacity, or residual functional capacity. Whether future work is likely to be constant or consistent does not flow from evaluating the employee’s age, education, past work experience, medical capacity, or residual functional capacity. The wage rate of possible future work cannot be a “subsidiary factor” of age, education, past work experience, medical capacity, or residual functional capacity. How much a potential future job pays, and whether the wage is greater than the state average weekly wage, is not a secondary

consideration to an employee's age, education, past work experience, medical capacity, or residual functional capacity. Moreover, read in context of one another, the statutory factors all point to consideration of the employee's health and past work experience. Consideration of purported "subsidiary factors" that relate to possible future work and the wage rate of that work cannot reasonably be considered subsidiary or secondary to the statutory factors.

McGee and the Commission fail to acknowledge that the Labor Commission has no inherent authority apart from the legislative grant. All powers, rights, duties, and responsibilities of the Utah Labor Commission are granted by the Utah Legislature. Utah Code Ann. § 34A-1-103 (1997). The statutory language is clear: The Labor Commission is statutorily mandated by Section 34A-2-413(1)(c)(iv) 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.**" Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis added). The Commission is a creature of statute and must comply with the statutory mandate or seek modification of the statute with the Legislature.

B. The administrative rule conflicts with the statute

The administrative rule is invalid because it conflicts with the statute. "It 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.

Because Administrative Rule 612-1-10.D.1 is out of harmony with Section 34A-2-413(1)(c)(iv), the rule is invalid. The statute's plain language does not provide for consideration of "location, stability, and wage rate of the work"; and the Commission's application of the rule also impermissibly expands the statute.

1. Plain language

Comparing the plain language of the statute with the administrative rule, the administrative rule sets forth additional considerations beyond the five statutory criteria. The statutory language reads, in relevant part:

(c) To find an employee permanently totally disabled, . . .

. . .

(iv) the employee cannot perform other work reasonably available, **taking into consideration the employee's [1] age, [2] education, [3] past work experience, [4] medical capacity, and [5] residual functional capacity.**

Utah Code Ann. § 34A-2-413(c)(iv) (1997) (emphasis and brackets added). 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) (emphasis added.) If the Legislature had wanted to permit consideration of wages in conjunction with consideration of experience, it would have said so. It did not. Or if it had wanted to permit consideration of other factors, it would have said “taking into consideration, among other things, the employee’s . . .” Again, it did not. Accordingly, from a straightforward textual analysis, the administrative rule improperly expands the statute and must be invalidated by this Court.

2. Utah case law

McGee and the Commission acknowledge that the Commission’s application of the rule included the analysis of purported “subsidiary considerations” – “location, stability, and wage rate of the work.” This is an improper application.

In attempting to distract this Court away from whether the administrative rule conflicts with the statute and onto the standard of review, McGee and the Commission contend that three cases cited by Petitioners are inapplicable: Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm’n, 846 P.2d 1304 (Utah 1993); Draughon v. Dep’t of Financial Institutions, 975 P.2d 935 (Utah App. 1999), and Crowther v. Nationwide Mut. Ins. Co., 762 P.2d 1119 (Utah App. 1988). McGee and the Commission claim that these cases do not apply because they do not involve a situation in which the administrative agency was granted discretion to interpret the statute. (Br. of Resps. at 10.) This argument fails.

First, Respondents' claim of inapplicability makes little sense. McGee and the Commission argue that the cases are inapplicable because they apply the correctness standard of review rather than the abuse of discretion standard, **allegedly** because there was no grant of discretion.⁷ As noted above, abuse of discretion is not the correct standard of review. Therefore, the cases cited by Petitioners are applicable because they apply the proper standard of review – correctness.

Second, the cases are applicable and good law. Sanders Brine Shrimp and Draughon both hold that administrative rules which depart from statutory terms impermissibly modify the statute. Crowther articulates the longstanding Utah law that administrative regulations may not conflict with legislation.

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 who was entitled to a 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. In Draughon v. Dep’t of Financial Institutions, 1999 UT App 42, 975 P.2d 935, a civil service worker was reassigned pursuant to an administrative rule permitting “involuntary reassignments.” Id. at ¶1. The “involuntary reassignment” as defined by the administrative rule violated the statutory prohibition against “demotions.” Id.

⁷Respondents fail to note in their reliance on Morton Int’l, Inc. v. Auditing Div., 814 P.2d 581 (Utah 1991), that the Court relied on the correctness-of-error standard based on well established principles of statutory construction, which applies here to the unambiguous statute. Id. at 589.

at ¶5. This Court invalidated the rule because it purported to create new administrative criteria different from the statute. Id. Crowther simply states longstanding Utah law that an agency's rules must be consistent with its governing statutes, and that an administrative rule that is out of harmony with a statute is invalid. 762 P.2d at 1122. There is nothing about the issuance of the Crowther opinion "prior to the 'standard of review' jurisprudence subsequently articulated [in other cases]" that invalidates this longstanding law.

These cases require invalidation of Administrative Rule R612-1-10.D.1.c. The administrative rule, both on its face and as applied by the Commission, improperly modifies the statutory factors. The five statutory factors for evaluating what constitutes "other work reasonably available," include "age, education, past work experience, medical capacity, and residual functional capacity." The administrative rule purports to permit the consideration of gross income, current available wage rates, or the current state average weekly wage – factors that Respondents themselves characterize as "subsidiary considerations" of "location, stability, and wage rate of the work." (Br. of Resps. at 1, 13.) The administrative rule is invalid because it enlarges the statutory criteria and thereby improperly modifies the statute.

C. The Labor Commission's argument is more properly made to the Legislature

The Labor Commission's position that it should be able to consider these additional factors is properly submitted to the Legislature as an attempt to change the statute. See, e.g., Color Country Mgmt. v. Labor Comm'n, 2001 UT App 370, ¶43, 38 P.3d 969 (stating in context of denial of argument for additional procedures and considerations, that the petitioner's arguments "are best directed to the Legislature"); Rekward v. Industrial Comm'n

of Utah, 755 P.2d 166, 169 (Utah Ct. App. 1988) (stating in context of denial of benefits due that “[a]lthough we sympathize with [the applicant’s] unfortunate situation, the problem must be solved by the legislature and not this Court.”). If the Labor Commission wants to consider the stability of possible future work, the work’s location, and the wage attached to the possible future work, the Labor Commission should persuade the Legislature to have these factors enacted as statutory considerations.

D. Claiming benefits and asserting the purpose of the Workers Compensation Act is to provide benefits to injured workers does not satisfy the requirements of the Act

McGee and the Commission claim that the administrative rule is consistent with the Utah Workers’ Compensation Act because the rule supports a societal purpose of the Act – providing compensation to injured workers. (Br. of Resps. at 11-12.) Although providing compensation to injured workers may be a general purpose of the Act, providing compensation is not automatic for each case. This argument, that the injured employee should recover because the workers’ compensation system is meant to provide compensation to injured employees, could be made in any workers compensation proceeding; and if it were adopted, the requirements of the Act would have no meaning.

This over-simplified position fails to acknowledge, however, that before the employee may receive workers’ compensation benefits, the employee must satisfy the requirements of the workers’ compensation system. An employee does not simply make a claim, which then requires an employer or insurer to write out a check for the claimed benefits simply because

the workers' compensation system is meant to compensate injured employees. The employee must satisfy the requirements of the Workers' Compensation Act.⁸

In the instant case, Respondents maintain that McGee does not satisfy the requirements of the Act for obtaining permanent total disability benefits. The award of these benefits was improper because the Administrative Rule applied by the Labor Commission in awarding the benefits is invalid; it conflicts with state legislation. The ALJ held that available, gainful employment was 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, permits consideration of age, education, past work experience, medical capacity, and residual functional capacity; it does not provide for consideration of gross income, available wage rates, or the current State average weekly wage. Therefore, the Rule improperly expands the statute. As indicated by the ALJ, the jobs identified were appropriate given McGee's work injury (residual functional

⁸ In fact, the policy and purpose of returning workers to the workforce can be used to support Petitioners' position. Rejecting gainful employment because it pays less than the current state average weekly wage is contrary to the policy and purpose of returning citizens to the workforce. 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). Section 34A-2-413(6)(a)(i) specifically states that reemployment activities are to be undertaken "pursuant to Chapter 8, Utah Injured Worker Reemployment Act." The Petitioner's argument that the difference between the standards governing the first and second step proceedings cannot be confused also lacks support. On its face, the argument makes no sense that different standards would apply to two steps in the same process. However, the subsistence benefits, on which Petitioners rely, cease upon a return to gainful employment. Therefore, those benefits do not justify a different standard.

capacity) and his transferrable skills (past work experience). 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, the award of permanent total disability benefits must be overturned. Just because the Act's purpose is to secure compensation for injured employees does not mean that McGee has satisfied the requirements of the Act, or that the Labor Commission did not err.

E. The Commission's error in applying the invalid administrative rule and failure to apply the statutory factors has been raised all along

McGee and the Commission attempt to avoid the fact that the Commission's orders (both from the ALJ and the Appeals Board) failed to set forth and apply the statutory factors; they claim failure to set forth and apply the statutory factors was never raised in the administrative proceeding. (Br. of Resps. at 16-17.) This argument fails for two reasons.

First, Petitioners maintained all along through the administrative proceeding that the Commission applied the wrong law (an invalid rule) and, therefore, failed to apply the statutory factors. The Court should not be misguided into thinking that the issue was not raised in the administrative proceeding. It comes as no surprise to McGee and the Commission that Petitioners argue that the Commission failed to apply the proper statutory criteria. However, McGee and the Commission attempt to avoid the issue by claiming that the language and authority used in the opening brief was not part of the administrative Motion for Review. (Br. of Resps. at 16, quoting Opening Br. of Petitioners at 17-18.) The fact of the matter is that Petitioners identified legal authority to this Court to support their position for which Respondents have no response other than to attempt to avoid the issue.

The fact that Norton v. Industrial Comm’n, 728 P.2d 1025 (Utah 1986), was not cited to the Appeals Board does not mean that the issue of applying an invalid rule instead of the proper statutory factors was not raised. The argument that the Commission failed to apply the statutory factors was raised all along.

In Norton, the Industrial Commission’s ruling was invalidated because it failed to set forth and apply the proper statutory factors. Id. at 1026, 28. At the time, to determine whether a worker was permanently, totally disabled, 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. The Labor Commission failed to set forth and apply the proper factors in the instant case.

Second, even if the Court is inclined to believe that the ALJ’s failure to apply the statutory criteria was not raised to the Appeals Board, the Appeals Board’s failure to set forth and apply the statutory criteria is properly raised to this Court. The Appeals Board is the ultimate finder of fact in this case. See, e.g., Carter v. Labor Comm’n Appeals Board, 2006 UT App 477, ¶ 16, 153 P.3d 763. Therefore, this appeal is Petitioners’ first and only chance of addressing deficiencies in the Appeals Board’s Order. Instead of applying the statutory factors, the Appeals Board simply defended the decision to follow the administrative rule. (R. 0201.) In so doing, the Appeals Board failed to apply the statutory criteria. Because of this, Norton requires the Commission’s order to be reversed. This Court should not permit McGee and the Commission to sidestep this authority.

F. Other portions of the Administrative Rule have been invalidated

McGee and the Commission complain that Petitioners reminded the Court that subsection C of Administrative Rule R612-1-10 has already been invalidated. McGee and the Commission claim that this Court has “withdrawn support” from Target Trucking v. Labor Commission, 2005 UT App 70, ¶6, 108 P.3d 128, and that Petitioner’s reference to it is “misleading.” (Br. of Respondents at 17-18.) This argument has no merit.

Petitioners cited Target Trucking to remind the Court that: (1) an administrative body’s rules must conform to, rather than be inconsistent with, statute; and (2) subsection C of the administrative rule at issue has already been invalidated. In Target Trucking, this Court concluded that Administrative Rule 612-1-10.C.1.c was invalid because it conflicted with the statute.⁹ Id. at ¶¶ 3-6. There is nothing “misleading” about citing this case.

Petitioners explained in their opening brief why the claim that “this Court has withdrawn support from the Target decision” is erroneous. Any disagreement with Target Trucking has to do with when an agency action is final. Petitioners explained in their opening brief:

. . . [Ameritemps, Inc. v. Labor Comm’n, 2005 UT App 491, 128 P.3d 31] 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

⁹ The administrative rule stated that a preliminary determination of permanent total disability was a final agency action for purposes of appellate review, while the statute stated that such a finding was not a final action for purposes of appellate review unless agreed to by the parties or until a reemployment plan was considered.

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.”

(Opening Br. of Petitioners at 25, n.3.) Target Trucking was not overturned; it is still good law for the proposition that when an administrative rule conflicts with a statute, the rule must yield to the statute. The only issue with Target Trucking is that it failed to apply the three-part test of Union Pac. R.R. Co. v. Utah State Tax Comm'n, 2000 UT 40, ¶16, 999 P.2d 17, a test that is inapplicable to the instant case. Thus, Respondents’ allegations that Target Trucking is inapplicable or misleading are simply unfounded and without merit.

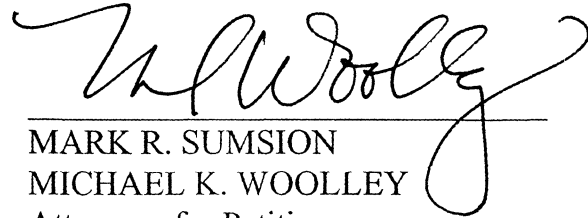
CONCLUSION

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 21 day of August, 2007.

RICHARDS, BRANDT, MILLER
& NELSON



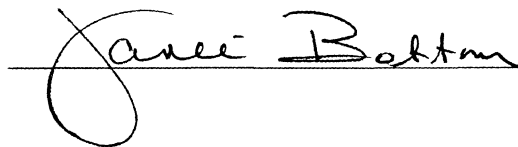
MARK R. SUMSION
MICHAEL K. WOOLLEY
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 21 day of Aug., 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



G:\EDS\DOCS\06724\1655\UN2258 WPD