

2008

Lindsay Germer v. Famous Dave's, Wausau Insurance Company : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDSAY GERMER,

Appellant/Petitioner,

v.

FAMOUS DAVE'S and/or WAUSAU
INSURANCE COMPANY,

Appellee/Respondents.

Case No. 20080442 CA

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UTAH APPELLATE COURTS

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Case No. 20080442 CA

BRIEF OF APPELLANT

APPELLATE JURISDICTION

This appellate review proceeding arises from the Utah Labor Commission's denial of workers' compensation benefits in Lindsay Germer's case. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Ann. §63G-4-403(4).

ISSUES PRESENTED AND STANDARD OF REVIEW

Issue No. 1 Whether the Labor Commission erroneously interpreted and applied the “unusual and extraordinary exertion” rule set forth in *Allen v. Industrial Commission* and its progeny when it failed to consider the totality of the circumstances of Petitioner’s industrial accident.

Standard of Appellate Review: The interpretation and application of agency specific law is reviewed for correction of error. *Nucor Corp. v. State Tax Comm’n*, 832 P.2d 1294, 1296 (Utah 1992). The decision making process of an agency is reviewed under a correction of error standard when the statutes at issue are unambiguous and subject to traditional methods of statutory construction. *King v. Industrial Comm’n of Utah*, 850 P.2d 1281, 1290 (Utah Ct. App. 1993).

Preservation of the Issue in the Administrative Agency Proceeding: This issue was preserved in Petitioner’s Motion for Review. (R. at 61 - 63.)

Issue No. 2: Whether the Labor Commission violated Petitioner’s right to procedural due process under Article I, § 7 and Article 16, § 2 of the Utah Constitution, Utah Code Ann. § 34A-2-802 as well as Labor Commission Rule when the ALJ admitted into evidence information that had been improperly withheld from Petitioner without giving Petitioner a reasonable opportunity to investigate the credibility of the information or provide rebuttal evidence, and then relied on that information for purposes of denying Petitioner workers’ compensation benefits.

Standard of Appellate Review: “Due process challenges are questions of law that we review applying a correction of error standard.” *West Valley City v. Roberts*, 993 P.2d 252 (Utah 1999). Moreover, the interpretation and application of agency specific law is reviewed for correction of error. *Nucor Corp. v. State Tax Comm’n*, 832 P.2d 1294, 1296 (Utah 1992).

Preservation of the Issue in the Administrative Proceeding: Petitioner objected to the introduction of the evidence and testimony that had been improperly withheld at the time of hearing. In addition, this issue was preserved in Petitioner’s Motion for Review. (R. at 59 - 61.)

Issue No. 3: Whether the Labor Commission has failed in its statutory and constitutional obligations when it failed to enter an order in a reasonable period of time where this case waited for the Labor Commissioner to address Petitioner’s Motion for Review for almost two years.

Standard of Review: The decision making process of an agency is reviewed under a correction of error standard when the statutes at issue are unambiguous and subject to traditional methods of statutory construction. *King v. Industrial Comm’n of Utah*, 850 P.2d 1281, 1290 (Utah Ct. App. 1993). Moreover, “[a]n administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.” *Adams v. Board of Review of Indus. Com’n*, 821 P.2d 1, 4 (Utah Ct. App. 1991).

Preservation of the Issue in the Administrative Proceeding: This first became an issue when the Utah Labor Commissioner took almost two years to address Petitioner's Motion for Review and was therefore not argued in Petitioner's Motion for Review. This appeal is Petitioner's first opportunity to raise the issue of timeliness of the Labor Commissioner's actions in the case.

DETERMINATIVE LAWS

Utah Constitution, Article I, Section 7

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article II, Section 11

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Constitution, Article XVI, Section 2

The Legislature shall provide by law, for a Board of Labor, Conciliation and Arbitration, which shall fairly represent the interests of both capital and labor. The Board shall perform duties, and receive compensation as prescribed by law.

Utah Code Ann. §34A-2-401. Compensation for industrial accidents to be paid

(1) An employee described in Section 34A-2-104 who is injured. . .by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:

(a) Compensation for loss sustained on account of the injury or death;

(b) The amount provided in this chapter for:

(i) medical, nurse, and hospital services;

(ii) medicines; and

(iii) in case of death, the amount of funeral expenses

Utah Code Ann. §34A-2-802. Rules of evidence and procedure before commission –
admissible evidence

(1) The commission, the commissioner, and administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission pursuant to this chapter and Chapter 3, Utah Occupational Disease Act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter.

- (2) The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:
- (a) Depositions and sworn testimony presented in open hearings
 - (b) Reports of attending or examining physicians, or of pathologists;
 - (c) Reports of investigators appointed by the commission;
 - (d) Reports of employers, including copies of time sheets, book accounts, or other records; or
 - (e) Hospital records in the case of an injured or diseased employee.

Rule 602-2-1(C)(2) Answer

2. The answer shall admit or deny liability for the claim and shall state the reasons liability is denied. The answer shall state all affirmative defenses with sufficient accuracy and detail that the petitioner and the Division may be fully informed of the nature and substance of the defenses asserted.

Rule 602-2-1(F)(1), (6) Discovery

1. Upon filing the answer, the respondent and the petitioner may commence discovery. Discovery allowed under this rule may include interrogatories, requests for production of documents, depositions, and medical examinations. Discovery shall not include requests for admissions. Appropriate discovery under this rule shall focus on matters relevant to the claims and defenses at issue in the case. All discovery requests are

deemed continuing and shall be promptly supplemented by the responding party as information comes available.

6. Parties shall diligently pursue discovery so as not to delay the adjudication of the claim. If a hearing has been scheduled, discovery motions shall be filed no later than 45 days prior to the hearing unless leave of the administrative law judge is obtained.

Rule 602-2-1 (I)(3) Hearing

No later than 45 days prior to the scheduled hearing, all parties shall file a signed pretrial disclosure form that identifies: (1) fact witnesses the parties actually intend to call at the hearing; (2) expert witnesses the parties actually intend to call at the hearing; (3) language translator the parties intend to use at the hearing; (4) exhibits, including reports, the parties intend to offer in evidence at the hearing; (5) the specific benefits or relief claimed by the petitioner; (6) the specific defenses that the respondent actually intends to litigate; (7) whether, or not, a party anticipates that the case will take more than four hours of hearing time; (8) the job categories or titles the respondents claim the petitioner is capable of performing if the claim is for permanent total disability, and; (9) any other issues that the parties intend to ask the administrative law judge to adjudicate. The administrative law judge may exclude witnesses, exhibits, evidence, claims, or defenses as appropriate of any party who fails to timely file a signed pre-trial disclosure form as set forth above. The parties shall supplement the pre-trial disclosure form with information that newly becomes available after filing the original

form. The pre-trial disclosure form does not replace other discovery allowed under these rules.

Rule 602-2-1(N) Procedural Rules

In formal adjudicative proceedings, the Division shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas, except as the Utah Rules of Civil Procedure are modified by the express provisions of Section 34A-2-802, Utah Code or as may be otherwise modified by these rules.

STATEMENT OF THE CASE

Petitioner Lindsay Germer injured her right knee when she attempted to exit a walk-in cooler while working at Famous Dave's restaurant. At the time of the accident, Germer balanced 50 pounds of ribs on three trays, and while standing on a wet floor, grounded her feet and attempted to kick the cooler door open, at which point she fell to her knees with enough force to dislodge hardware that had been in her right knee for years. With the exception of the fact that the floor was wet and that the fall resulted in hardware torn from her knee, these are the undisputed facts adopted by the Commission in this case. It is also undisputed that Germer had pre-existing injuries to her right knee.

In addition, Germer testified that the cooler door had had a problem with sticking and that when she kicked the door at the time of her accident, it was stuck closed and did not open. Germer had no notice from Famous Dave's that it planned to challenge

Germer's testimony in this regard. At the time of hearing, however, Famous Dave's introduced the testimony of Scott Morton as well as photographs of the walk-in cooler in order to assert for the first time an affirmative defense that the cooler door did not stick shut and that legal causation was therefore not satisfied. Germer objected on the basis that the substance of the evidence Famous Dave's intended to present had never been disclosed to Germer as required by Labor Commission Rule and pursuant to Germer's direct discovery requests.

The ALJ overruled Germer's objection and allowed Morton's testimony and the introduction of the photographs without so much as taking a recess to allow Germer to obtain and prepare for the substance of Morton's testimony. The ALJ went on to deny workers' compensation benefits to Germer based primarily on Morton's testimony that the cooler door did not stick and by disregarding, isolating, and parsing the facts of Germer's accident. Germer timely filed her Motion for Review challenging the ALJ's application of the "unusual and extraordinary exertion" rule and the admission of Morton's testimony and photographs. Two years later, the Labor Commission affirmed the ALJ's denial by summarily adopting the ALJ's Findings of Fact and Conclusions of Law and addressing the merits of Germer's Motion. This appeal proceeds from the Commission's failure to correctly interpret and apply the law based on the undisputed facts as well as violation of Germer's constitutional rights under the Due Process and Open Courts clauses of the Utah Constitution.

STATEMENT OF FACTS

1. Petitioner Lindsay Germer slipped and injured her right knee while working at Famous Dave's restaurant when she attempted to exit the walk-in cooler while carrying three large trays of meat weighing over 50 pounds and walking on a wet floor. (R. at 100-101).

2. Famous Dave's denied workers' compensation benefits to Ms. Germer claiming that any injury to her knee was related to a pre-existing condition and not the industrial accident. (R. at 13 – 18.)

3. On or about March 29, 2005, Germer filed an Application for Hearing with the Labor Commission of Utah. (R. at 1.)

4. On May 11, 2005, Famous Dave's filed an Answer to the Application for Hearing denying Germer was entitled to benefits based upon "lack of legal causation." (R. at 13 - 18.)

5. Thereafter, on May 13, 2005, Germer served Interrogatories and Request for Production of Documents upon Famous Dave's. (Interrogatories and Requests for Production of Documents attached hereto as Addendum A.)

6. The relevant interrogatories and request for production of documents and responses are as follows:

INTERROGATORY NO. 3: State the name and telephone number of **each witness** who has person [sic] knowledge regarding this lawsuit and

include the **substance of the knowledge** they have as it relates to this lawsuit. (Emphasis added.)

ANSWER: Objection. Interrogatory No. 3 is overly broad and burdensome. There may be several individuals who have knowledge of the claims filed by Petitioner with Respondent of whom Respondent cannot be reasonably expected to identify at this time. Notwithstanding and without waiving such objection, however, if Petitioner seeks only the names of those individuals who witnessed Petitioner's accident of October 30, 2004, **Respondents are not aware of any individuals** who witnessed such accident. Discovery is ongoing. Respondents' will supplement this discovery response, if necessary, upon completion of discovery. (Emphasis added.)

INTERROGATORY NO. 7: If you intend to offer into evidence at the time of hearing or deposition of this matter any **impeachment evidence** as it relates to Petitioner, identify such impeachment evidence, (.e. if it is in the form of documents, identify those documents specifically). If the impeachment evidence is in the form of witness testimony, indicate the name and telephone number of such witnesses including a brief description of the impeachment information the witness(es) have. (Emphasis added.)

ANSWER: **Respondents have not completed discovery.**

Respondents have not identified all witnesses that Respondents intend to call at the hearing. Respondents **will supplement this discovery request** at the time Respondents file their pretrial disclosures with the Labor Commission at least 45 days prior to the evidentiary hearing.

(Emphasis added.)

REQUEST FOR PRODUCTION NO. 2: **Provide all photographs,** films, video tapes or similar reproductions of the Petitioner and/or which involve the Petitioner's claim in any way. (Emphasis added.)

ANSWER: None.

(Addendum A.)

7. The last discovery in this case occurred on July 6, 2005, when Famous Dave's took Germer's deposition. (R. at 55.)

8. Famous Dave's provided no further information to Germer in the ensuing 7 ½ months until its Pretrial Disclosures were filed, some 7 days late, on February 27, 2006. (R. at 55.)

9. Similarly, in their Pretrial Disclosures, Famous Dave's indicated that they intended to call as witnesses, "Petitioner, any other witness identified by Petitioner in Petitioner's Pretrial Disclosures." (R. at 24.)

10. According to Germer's Pretrial disclosures, which had been timely filed 7 days earlier, she indicated that she and her husband were the only witnesses they intended to

call at the hearing. (R. at 21.)

11. On March 8, 2006, and without leave of court or any explanation for the delay, Famous Dave's filed "Supplemental Pretrial Disclosures" where Famous Dave's indicated for the first time that they would be calling Scott Morton to testify at the hearing. However, Famous Dave's failed to provide any information as to who Mr. Morton was, or what his testimony would be. In addition, Famous Dave's further stated that it would introduce "pictures of the walk-in cooler and walk-in cooler door at Respondent Famous Dave's Restaurant" into evidence at the time of the hearing. Again, Famous Dave's neglected to provide copies of photographs prior to the hearing date. (R. at 29 – 33.)

12. On that same date, and again without explanation for the delay, Famous Dave's amended their Answers to Interrogatories as follows:

Respondents intend to call Scott Morton as a lay witness. Mr. Morton is a regional manager for William Tell/Famous Dave's. He will testify regarding the nature of restaurant's walk-in cooler, cooler door operation, and he will provide a lay-out of the walk-in cooler. He may be called upon to lay foundation for certain photographs taken of the walk-in cooler and area inside and immediately outside of the walk-in cooler. Mr. Morton can be contacted, if necessary, through counsel for Respondent.

(Respondents' Supplemental Answers to Interrogatories attached hereto as Addendum B.)

13. No further information as to the substance of the testimony anticipated to be provided by Mr. Morton was provided to Germer, neither were photographs

provided prior to the hearing. (R. at 56.)

14. A hearing was convened on Germer's claim, as previously scheduled, on March 31, 2006 before the Honorable Dale Sessions. Germer testified that while carrying 50 pounds of ribs on a tray and while attempting to open the walk-in door with her foot, she slipped and fell, because of water on the floor and a sticking door. This tore out metal in her knee from a previous injury and repair that had been done years earlier. (R. at 56 – 57.)

15. Famous Dave's attempted to offer the testimony of Mr. Morton and the photographs to which Germer timely objected based upon the fact that the disclosure of Mr. Morton was untimely and the photographs had never been provided to Germer in discovery, and in fact, Famous Dave's had represented to Germer in its discovery responses that no photographs existed. (R. at 57.)

16. The ALJ acknowledged that there were some "problems" with the timing of Famous Dave's disclosures. (R. at 116.)

17. Germer requested that the ALJ take a recess from the hearing so that she could talk to Mr. Morton and find out what he intended to testify to. (R. at 118.)

18. The ALJ overruled Germer's objections and permitted Mr. Morton to testify and allowed the introduction of the photographs into evidence. Contrary to what Famous Dave's had previously represented to Germer in its discovery responses and Supplemental Answer to Discovery, Mr. Morton testified that the door to the walk-in cooler was not sticking and there had been no problems with the door sticking. He went

into detailed testimony regarding repair to the cooler, etc., none of which was previously disclosed to Germer. (R. at 57; Hearing Transcript at 97-98.)

19. There were witnesses who had seen Germer immediately after the fall and could have testified as to observing Germer after the accident and to the fact that the door was sticking. As the issues regarding Germer's fall and the sticking door, had never previously been identified, Germer had not called these witnesses. (R. at 57.)

20. On cross-examination, Mr. Morton testified that the photographs, which had been taken one week before the scheduled hearing, were not true and accurate depictions of the actual walk-in cooler as it was at the time of the accident. He testified that soon after Germer's accident, the floor needed to be replaced as it was "coming up." This was the first time that Germer had been given this information, or seen the photographs. (R. at 57.)

21. The ALJ made a determination that Mr. Morton's testimony regarding the non-sticking door was more credible than Germer's testimony that it stuck and consequently denied her petition for workers' compensation benefits. (R. at 48.)

22. Had Germer seen the photographs prior to the Hearing or known that Morton would testify that the cooler floor was coming up, Germer would have obtained an expert who would have provided testimony that that would have led to the door sticking. (R. at 80.)

23. Despite the ALJ's findings that Germer was carrying 50 pounds of meat and the mechanism of the accident included Germer falling to her knees, he determined that

the causation of the accident turned on whether the walk-in cooler door stuck or not and denied Germer benefits based on his determination that the door did not stick. (R. at 45 – 50.)

24. On May 5, 2006, Germer timely filed a Motion for Review challenging the ALJ's decisions to permit Mr. Morton's testimony and allow the introduction into evidence of photographs, both of which Famous Dave's had withheld from Germer despite her discovery requests for exactly such information 7 months earlier. Germer also challenged the ALJ's determination that the compensability of Germer's industrial injury turned on whether the cooler door was stuck closed as the ALJ's other findings that she was carrying 50 pounds of meat and fell to her knees while attempting to open the cooler door satisfied the "unusual and extraordinary exertion" requirement set forth in *Allen v. Industrial Comm'n* and its progeny. (R. at 51 – 80.)

25. On April 23, 2008, almost two years after Germer had filed her Motion for Review, Utah Labor Commissioner Sherrie Hayashi issued an Order Affirming ALJ's Decision. While the Labor Commissioner acknowledged that the Motion for Review squarely challenged the ALJ's admission of evidence improperly withheld prior to hearing and reliance upon by the ALJ to deny benefits, the Labor Commissioner chose not to address the issue and instead adopted the ALJ's factual findings as if there were no evidentiary issues presented by the Motion for Review. The Labor Commissioner went on to affirm the ALJ's denial of benefits with a cursory recitation of the "unusual and extraordinary exertion" rule. In one paragraph the Labor Commissioner summarily

concluded that the ALJ's determination about whether the cooler door stuck was supported by the evidence, and as such Germer's injury did not meet the *Allen* test. In her final sentence, the Labor Commissioner indicated that she was not "convinced" that the totality of the circumstances based on the uncontroverted evidence would meet the *Allen* test. (R. at 147 – 149.)

26. It is from the Labor Commissioner's Order Affirming the ALJ's Decision to deny workers' compensation benefits that Germer seeks appellate review.

SUMMARY OF ARGUMENTS

In denying workers' compensation benefits to Germer, the Labor Commission violated the plain terms of the Workers' Compensation Act as well as Germer's rights under the Utah Constitution under the Due Process and Open Courts clauses. Because Germer had a pre-existing injury to her knee at the time of the industrial accident, the higher standard of legal causation applies and Germer was required to show that her industrial accident involved an "unusual and extraordinary exertion." *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986).

Under *Allen* and its progeny, the Commission is required to consider the totality of the circumstances of the industrial accident and determine whether there was an "unusual and extraordinary exertion" in the actual context of the work accident. *Allen*; *Stouffer Foods Corp. v. Industrial Comm'n*, 801 P.2d 179, 183 (Utah Ct. App. 1990). *Stouffer*

Foods Corp. v. Industrial Comm'n, 801 P.2d 179, 183 (Utah Ct. App. 1990); *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912, 915 (Utah Ct. App. 1988). In this case, however, the Commission failed to consider the totality of the circumstances.

Instead, the Commission disregarded uncontroverted evidence that the cooler floor was wet and that the fall caused hardware to dislodge from Germer's knee. Then the Commission adopted the ALJ's analysis which involved isolating the facts of the accident from each other and parsing an application of the unusual and extraordinary exertion rule as if Germer's balancing 50 pounds of meat on three trays was utterly separate from her attempting to kick the cooler door open. The Commission also adopted the ALJ's efforts to separate Germer's fall to her knees from the entirety of the events preceding her fall.

However, the Commission is not at liberty to disregard undisputed facts. *Jones v. California Packing Corp.*, 244 P.2d 640, 644 (Utah 1952). Nor is the Commission authorized to isolate and parse the facts of an industrial accident for purposes of determining legal causation. As a result, the Commission failed to consider the totality of the circumstances of Germer's accident as required by well-established case law. Had the Commission considered and analyzed the facts in the manner required by law, the undisputed facts alone would have satisfied the "unusual and extraordinary exertion" test as set forth in *Allen* and its progeny.

Next, the Commission violated Germer's Due Process rights when it tacitly approved the ALJ's admission of evidence, the true substance of which Famous Dave's had never disclosed to Germer prior to the hearing. To be clear, Germer's position is that

the undisputed findings of fact in the ALJ's decision satisfy the *Allen* test as argued above. But since the Commission, by adopting the ALJ's Findings of Fact and Conclusions of Law, relies so heavily on whether the cooler door stuck, the admissibility of Morton's testimony is at issue.

It is well settled law that while the Labor Commission may employ a relaxed standard of fact-finding under Utah Code Ann. §34A-2-802(1), it may not do so at the expense of the parties' due process rights to fair notice of the issues, opportunity to prepare for the hearing and, opportunity to rebut evidence. *Ocean Accident & Guarantee Corporation v. Industrial Comm'n of Utah*, 245 P. 343 (Utah 1926). Additionally, Labor Commission Rule 602-2-1 governs in specific and mandatory language the parties' disclosures in the Answer to a Petition for Hearing, in responding to discovery requests through adoption of the Utah Rules of Civil Procedure, and in submitting Pre-trial disclosures.

In this case, Famous Dave's did not raise an affirmative defense based on whether the cooler door stuck until the time of trial. Famous Dave's Answer consisted of little more than boilerplate denials of legal causation. Neither did Famous Dave's respond to Germer's direct discovery requests concerning the factual basis for its denials and defenses in its Answer or submit any information in the timeframe or provide photographs as requested in the discovery requests. Nor did Famous Dave's timely disclose its witnesses or actual defenses in a timely-filed Pre-trial disclosure as required by Labor Commission Rule. It was not until three weeks before the hearing that Famous Dave's indicated that it

intended to call Scott Morton to testify as a lay witness about the layout of the walk-in cooler and the door operation.

Because of the late timing of Famous Dave's disclosure, Germer had few options as Labor Commission Rule does not provide for Motions to Compel or the re-opening of discovery after the Pre-trial disclosures are to be filed. Moreover, any such motion would not have been completed prior to the date of the hearing. And as a practical matter, three weeks before trial is not adequate time to conduct a game of cat-and-mouse in preparation for hearing. This is precisely what the Labor Commission Rule was designed to avoid.

At the hearing, the ALJ acknowledged the "problems" with Famous Dave's disclosures, but allowed the testimony of Scott Morton and the introduction of photographs of the cooler, over Germer's objection, and without so much as calling a recess to allow Germer to investigate the substance of Morton's testimony. At that time, the true substance of Famous Dave's argument became apparent – to raise for the first time an affirmative defense based on whether the cooler door had been sticking. It is this testimony which the ALJ, and later the Commission, relied almost exclusively on to deny Germer workers' compensation benefits for her industrial injury.

Yet Germer had no opportunity to rebut Morton's testimony with witnesses who were actually present at Famous Dave's on the date of her industrial accident and had actual knowledge of the circumstances surrounding the accident, including whether the cooler door was sticking. Germer had no opportunity to call an expert witness to bolster her testimony concerning how a damaged and wet cooler floor would affect the operation

of the door. Aside from the fact that the Commission winked at Famous Dave's blatant violation of Labor Commission Rule, it does not comport with basic notions of fairness and violated Germer's due process rights to adequate notice of the issues and a fair hearing. As such, Germer requests that the Commission's decision be reversed, that Morton's testimony, and the photographs be excluded from evidence, and the facts be considered according to law, taking into account the totality of the circumstances. In the alternative, Germer requests the opportunity to investigate and rebut Morton's testimony in a new hearing.

Finally, Germer challenges the constitutionality under the Open Courts clause of the Utah Constitution of the Commission's inaction on this case. It took 1 ½ years to get this case before an ALJ, which resulted in the disregard of Labor Commission Rule and the misapplication of substantive law, denying benefits to Germer. The Labor Commission took another 2 years to summarily adopt the ALJ's fact findings and reasoning, without meaningful discussion. This is not a just, speedy and fair resolution of Germer's workers' compensation claim.

The history and case law behind the establishment of the Workers' Compensation system and its administration by the Labor Commission was for the purpose of simplifying and speeding up the claims process for injured workers. Where district court judges are required to issue decisions on a myriad of complex cases within two months of a hearing, it is incomprehensible why the Labor Commission requires two years to issue a cursory decision in which it simply adopts the ALJ's findings without meaningful review. Under

these circumstances, Germer respectfully submits that the Commission's failure to act in a timely manner is a denial of Germer's rights under the Open Courts clause of the Utah Constitution. As such, Germer requests that the Commission be ordered to issue decisions within a reasonable time and by a date certain in this case.

ARGUMENT

I. The Labor Commission Erroneously Interpreted and Applied the "Unusual and Extraordinary Exertion" Rule Set Forth in *Allen v. Industrial Commission* and its Progeny When it Failed to Consider the Totality of the Circumstances of Petitioner's Industrial Accident.

The Labor Commission erred when it disregarded uncontroverted evidence and failed to consider the totality of the circumstances surrounding Germer's industrial accident. Utah Code Ann. §34A-2-401 provides benefits to workers injured in industrial accidents. The Utah Supreme Court has interpreted Utah Code Ann. §34A-2-401 to require an employee to establish both legal and medical causation to obtain workers' compensation benefits. *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986).

It is undisputed in this case that Germer suffered from a preexisting condition in her right knee. Consequently, Germer was required to show that her industrial injury was the result of an "unusual and extraordinary exertion" in connection with her employment duties. *Allen*. Germer submits that the undisputed portions of the ALJ's Findings of Fact, along with additional undisputed evidence which the Commission disregarded

satisfies the “unusual and extraordinary exertion” rule. In this case, the Labor Commission failed to consider the totality of the circumstances of Germer’s industrial accident. In so doing, the Labor Commission erroneously interpreted and applied the law in order to deny Germer workers compensation benefits for her industrial injury.

As discussed below, the Labor Commission does not have discretion to disregard uncontroverted evidence or to parse the facts in determining what constitutes an “unusual and extraordinary exertion.” This is in accordance with over 20 years of well-established unambiguous judicial interpretation of Utah Code Ann. §34A-2-401. As such, the appropriate standard of review is for correction of error. *Nucor Corp. v. State Tax Comm’n*, 832 P.2d 1294, 1296 (Utah 1992) (The interpretation and application of agency specific law is reviewed for correction of error). Additionally, the decision making process of an agency is reviewed under a correction of error standard when the statute at issue is unambiguous and subject to traditional methods of statutory construction. *King v. Industrial Comm’n of Utah*, 850 P.2d 1281, 1290 (Utah Ct. App. 1993).

Had the Labor Commission considered the totality of the circumstances with regard to the undisputed facts in this case, the “unusual and extraordinary exertion” test would have been satisfied. Because the Labor Commission failed to correctly apply the law in this respect, Germer has been prejudiced in the denial of workers’ compensation benefits for her industrial injury. For the reasons discussed below, Germer respectfully requests that this matter be reversed and remanded to the Commission for a decision that is in accordance with law.

A. The Labor Commission Erred When It Disregarded Uncontroverted Evidence.

Utah Code Ann. §34A-1-301 gives the Labor Commission authority to “determine the facts and apply the law” in workers’ compensation cases. However, that authority is not unfettered. In *Jones v. California Packing Corp.*, 244 P.2d 640, 644 (Utah 1952), our Supreme Court stated, “The law does not invest the [Labor] Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence. .”

In this case, the ALJ made findings of fact that at the time of the accident Germer was carrying three trays the size of large cookie sheets loaded with 50 pounds of meat at waist height out of the walk-in cooler at Famous Dave’s. The ALJ further found that Germer grounded her feet, kicked the cooler door open with her right foot, contacted the door with the ball of her foot, felt immediate pain in her right knee and “went down on both knees.” Germer does not dispute these findings.

Significantly, the ALJ neglected to include among his findings the uncontroverted testimony of Germer that the walk-in cooler floor was wet with condensation from thawing meat at the time of the accident. Germer had testified that she grounded her feet before attempting to open the door because the floor was wet. Famous Dave’s did not dispute this testimony.¹

¹ In fact, Scott Morton testified at hearing that the cooler floor was “coming up” and “pooling” in areas, which was repaired soon after Germer’s industrial accident. As argued in Section II below, Germer challenges the admissibility of Morton’s testimony on several grounds, but Morton’s testimony illustrates the degree to which this evidence was uncontroverted.

In contrast, the ALJ's Findings of Fact, which were adopted by the Commission, make much of the fact that Germer "was careful to approach the [walk-in cooler] door" after picking up the trays of meat, that she "grounded" her feet before proceeding to kick open the cooler door, and that she was able to continue to balance the meat trays when she fell to her knees after kicking the door. Yet nowhere in the Findings of Fact is mention of the undisputed fact that the walk-in cooler floor was wet with condensation and that it was actually pooling in places. The Commission is not at liberty to disregard uncontroverted evidence. This is especially so where the uncontroverted evidence has significant bearing on the facts of the industrial accident. Neither is it proper for the Commission to disregard such evidence when, as discussed below, it has been charged with considering the totality of the circumstances of the industrial accident.

Likewise, the Commission neglected to include the undisputed findings of Germer's orthopedic surgeon in the medical record that Germer's fall had enough force to tear hardware out of Germer's knee that had been placed there years earlier. Germer was balancing 50 pounds of meat on a wet floor. Beyond the issues related to medical causation, which the Commission never reached in this case, the medical findings provide uncontroverted evidence of the force of Germer's fall. In this regard, these findings should have been taken into account equally with the fact that she managed to save the trays of meat from falling to the floor in the course of the industrial accident.

B. The Labor Commission Must Consider the Totality of the Circumstances in Determining Legal Causation.

In determining what constitutes an unusual and extraordinary exertion, the Utah appellate courts have directed the Labor Commission to consider legal causation in the actual context of the work accident. *Stouffer Foods Corp. v. Industrial Comm’n*, 801 P.2d 179, 183 (Utah Ct. App. 1990). In *Stouffer Foods Corp.*, this Court stated, “Instead of looking at only isolated aspects of a claimant’s employment activities, such as duration, we apply a ‘totality of circumstances’ test.” *Id.* at 183 (internal citations omitted). In that case, the employee developed carpal tunnel syndrome after operating a high pressure water hose to clean equipment for several hours on a daily basis. The court affirmed the Labor Commission’s determination that the employee met legal causation under *Allen* after considering all of the circumstances involved with the worker’s operation of the hose.

Significantly, the court refused to adopt a bright line test or minimal requirements for determining what constitutes an unusual and extraordinary exertion. The court stated that the injured worker’s squeezing of a high-pressure hose needed to be put in context before the ALJ could properly determine whether it was unusual and extraordinary because “the existence of unusual exertions or additional risks in the workplace are the pivotal factors.” *Stouffer Foods* at 184.

In that same vein, the courts have expressly rejected bright line tests or determinations based on isolated aspects of an accident. *Stouffer Foods* at 183; *Smith & Edwards Co. v. Industrial Comm’n*, 770 P.2d 1016 (Utah Ct. App. 1989) (holding that the weight of an

object, by itself, is not sufficient information for an ALJ to determine whether lifting the object was an “unusual or extraordinary ” exertion.); *American Roofing Co. v. Industrial Comm’n*, 752 P.2d 912, 915 (Utah Ct. App. 1988) (holding that the weight alone of a 30-pound bucket did not make lifting it an unusual and extraordinary exertion, but that the manner in which the bucket was lifted and the fact that it snagged did.) This is consistent with the mandate that legal causation be determined based on the totality of the circumstances.

Additionally, the Labor Commission is required to make findings of fact determining what exertions were involved in the work accident and set forth its analysis of whether legal causation is met by comparison to typical non-employment activities. See *Allen*; *Stouffer Foods* at 182; and *Price River Coal Co. v. Industrial Comm’n*, 731 P.2d 1079 (Utah 1986). In *Price River Coal Co. v. Industrial Comm’n*, the Utah Supreme Court held that a “talismanic incantation” of the term “unusual and extraordinary exertion” was “not a substitute for careful analysis by the Commission.” *Price River Coal Co.* at 1083 (reversing and remanding Labor Commission’s determination that an accident involved an unusual and extraordinary exertion without supporting facts or analysis). When the Utah Supreme Court decided *Allen v. Industrial Commission*, it stated, “We believe an objective standard of comparison will provide a more consistent and predictable standard for the Commission and this Court to follow” in determining what constitutes an unusual and extraordinary exertion. *Allen* at 26.

In this case, however, the Commission presents an inconsistent and unpredictable standard for legal causation where it has allowed the ALJ to isolate, parse, and ignore the facts of Germer's industrial injury for the purpose of denying workers' compensation benefits to Germer. Aside from the fact that the Commission ignored undisputed evidence as discussed above, the ALJ's analysis, which was adopted by the Commission, expressly isolated the facts of the accident and failed to provide a meaningful comparison of Germer's industrial accident with typical non-employment activities as contemplated by *Allen*.

In her Motion for Review, Germer set forth the proper application of the "unusual and extraordinary exertion" rule and argued that it was satisfied based upon the undisputed facts of this case. However, the Commission failed to address the substance of Germer's challenge and instead disposed of it in a single paragraph and resorted to the mere talismanic incantation of the rule itself as stated in *Price River Coal Co.* Not only did the ALJ fail to consider legal causation in the full context of Germer's industrial accident, but the Labor Commission failed to provide meaningful oversight. Instead, the Commission adopted the ALJ's Findings of Fact outright, sprinkled its decision with a few terms of art, affirmed the ALJ's Conclusions of Law and Order without substantive discussion, and took two years to do it.

No one at the Labor Commission determined legal causation in the actual context of Germer's accident. *See Stouffer Foods* at 183 (stating "the usualness or unusualness of a claimant's exertion must be determined in its actual context."). Because the Commission

did little more than adopt the ALJ's Findings of Fact and Conclusions of Law, the substance of the Commission's decision is framed in terms of the ALJ's analysis, which is the only analysis available.

Contrary to the standards established in *Allen* and *American Roofing*, the ALJ only considered isolated aspects of Germer's accident. First, the ALJ misinterpreted *American Roofing v. Industrial Commission* and *Allen* for the proposition that since "lifting alone is [not] extraordinary or unusual," the fact that Germer was balancing 50 pounds of meat on three trays was not the focus of the accident. Then the ALJ's entire analysis shifted to citations to examples of people simply kicking things. The ALJ stated that people "use their feet to kick or otherwise assist in sliding boxes and garbage cans while moving them." He further stated that "it is common experience for people to use the toes (or ball) of their feet to open or close a door. It may even be common for people to use the toes or ball of their feet to kick a ball." Findings of Fact, Conclusions of Law and Order at 4 – 5. And the Commission adopted this analysis.

Nowhere in the ALJ's analysis did he account for the fact that Germer was balancing 3 large cookie-sheet sized trays loaded with 50 pounds of meat while standing on a wet floor and kicking the door open, then fell. By their dimensions alone, the trays are awkward when compared to garbage cans or boxes. Germer was not kicking the trays themselves on the floor of the cooler, as the ALJ's analysis appears to imply. Neither does the ALJ compare the size, heft, and vacuum seal of a walk-in cooler door with the front door of a home or other building, for instance. And, as discussed above, the ALJ completely

disregarded the fact that the walk-in cooler floor was wet and Germer fell.

The Commission adopted the ALJ's explicit separation of kicking the door open and balancing 50 pounds of meat trays as if they were totally unrelated events, then ignored the fact she fell and tore out the prior hardware in its entirety. Then the Commission adopted the ALJ's determination on legal causation based on a single disputed finding of fact that the walk-in cooler door did not stick.² This is the crux of the Commission's decision -- that Germer's attempt to kick the door open, divorced of the context of the accident, did not involve an unusual and extraordinary exertion because the door did not stick. This is not a consideration of the totality of the circumstances. Neither is it reasoned analysis of how the context of Germer's industrial accident compared with typical non-employment life.

Germer respectfully submits that the Commission erroneously interpreted and applied the unusual and extraordinary exertion rule when it failed to consider the totality of the circumstances of her industrial accident. Regardless of whether the cooler door stuck closed or not, the undisputed facts contained in the ALJ's findings of fact are sufficient to meet the *Allen* requirement of legal causation and the Labor Commission erred when it considered only isolated aspects of her industrial accident. For these reasons, Germer respectfully requests that this decision be reversed and remanded for consideration in compliance with the law.

² In Section II, Germer argues that Famous Dave's should not have been allowed to present evidence concerning the walk-in cooler because it had been improperly withheld from Germer and she was denied the opportunity to challenge the credibility of the evidence presented. For purposes of Section I, Germer's discussion of the merits of the Commission's Finding that the cooler door did not stick is only to illustrate that it did not rise to the level of being the single determinative factor in this case on balance with the totality of the circumstances.

II. The Labor Commission Denied Germer Due Process When It Denied Workers' Compensation Benefits Based Upon Information that Had Been Improperly Withheld From Germer Prior to Hearing and Without Affording Germer a Meaningful Opportunity to Test the Credibility of the Information Presented.

In this case the ALJ, and then the Labor Commission, permitted Famous Dave's to present information at hearing which it had improperly withheld from Germer, and then denied Germer's claim for workers' compensation benefits based on the previously undisclosed information. In so doing, the Labor Commission denied Germer the basic right to due process, ignored the substantive and mandatory requirements set forth in the Workers' Compensation Act and its own Rule with respect to disclosure between the parties. Germer was effectively prevented from assessing the credibility of the surprise evidence and presenting rebuttal evidence at the hearing.

To be clear, Germer's position is that the undisputed findings of fact in the ALJ's decision satisfy the *Allen* test as argued above. But since the Commission, by adopting the ALJ's Findings of Fact and Conclusions of Law, relies so heavily on whether the cooler door stuck, its role in permitting Famous Daves' to present the information at hearing demands scrutiny. At the hearing, the ALJ allowed the testimony of Scott Morton and the introduction of photographs of the cooler, the true substance of which had not been fairly disclosed to Germer. Neither did the ALJ allow a recess to permit Germer to talk to Famous Dave's witness or review the photographs prior to the introduction of the testimony and photographs. In addition, the Commission denied Germer the opportunity

of presenting rebuttal evidence after the hearing in the form of an affidavit from a walk-in cooler expert.

Although Germer challenged the ALJ's actions in this matter, the Labor Commission simply subsumed the question and adopted the ALJ's factual findings as if no procedural issue had been presented. As such, Germer was not afforded a fair opportunity to meet the evidence relied upon by the Labor Commission for denial of her benefits. The Commission denied Germer of due process.

Article I, Section 7 of Utah's Constitution mandates that "No person shall be deprived of life, liberty or property, without due process of law." Because workers' compensation hearings bear on the determination of a property interest between the workers' compensation insurer and the injured worker, the requirements of due process apply. *Ocean Accident & Guarantee Corporation v. Industrial Comm'n of Utah*, 245 P. 343 (Utah 1926) (stating, "[t]he facts found must and do determine the property rights of the parties to a controversy"). Specifically, the Utah Supreme Court set forth the hallmarks of due process as judicial action that cannot be taken against a person "until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and **at which he had an opportunity to be heard and to give evidence as to his rights or defenses.**"

Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945) (emphasis added).

Utah Code Ann. §34A-2-802 expressly relaxes the formal rules of procedure, except those adopted by the Commission, so that the Commission may get at the facts "in

such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter.” Utah Code Ann. §34A-2-802(1). But this relaxation of procedural rules does not give the Labor Commission authority to disregard the due process rights of the parties. *Ocean Accident & Guarantee Corporation v. Industrial Comm’n of Utah*, 245 P. 343 (Utah 1926) (stating, “in adopting . . . short cuts or new rules for determining facts care should be exercised not to deprive any party of every fair means of eliciting the facts to be finally determined or not to unnecessarily limit cross-examination of witnesses before it.”).

The fact that an administrative body such as the Labor Commission has exclusive jurisdiction to hear certain types of cases does not deprive the appellate courts of jurisdiction to review the substance of administrative decisions to ensure that the parties’ due process rights are protected. *Linden v. Dept. of Corrections*, 81 P.3d 802, 805 (Utah Ct. App. 2003). Indeed, “[d]ue process challenges are questions of law that we review applying a correction of error standard.” *West Valley City v. Roberts*, 993 P.2d 252, 254 (Utah Ct. App. 1999).

At the same time, the Labor Commission is bound by its own procedural rules. Utah Code Ann. § 34A-2-802(1) (stating that the Labor Commission is not bound by formal rules of procedure, “other than as provided in this section or as adopted by the commission.”); *Willardson v. Industrial Comm’n*, 904 P.2d 671 (Utah 1995) (holding that the Labor Commission’s adoption of rules limits its discretion.)

Indeed, the Labor Commission has promulgated a detailed and specific rule delineating the procedures to be used in adjudicating workers' compensation cases. Rule 602-2-1. To be clear, Rule 602-2-1 is written in mandatory language. With respect to the employer's Answer to an Application for Hearing, the answer "**shall state all affirmative defenses with sufficient accuracy and detail** that the petitioner and the Division may be fully informed of the nature and substance of the defenses asserted." R602-2-1(C)(2). *See Barnard & Burk Group, Inc. v. Labor Commission*, 122 P.3d 700 (Utah Ct. App. 2005) (holding that an employer's failure to plead the factual basis or cite to statutory authority beyond a bare reference to the Workers' Compensation Act did not comply with Labor Commission Rule that affirmative defenses be pled with sufficient accuracy and detail to fully inform the injured worker of the affirmative defense).

Similarly, the rule establishes the form and scope of discovery allowed. Rule 602-2-1(F)(1) further states, "All discovery requests are deemed continuing and **shall** be promptly supplemented by the responding party as information comes available." R602-2-1(F)(1)(emphasis added). Again, "Parties **shall diligently pursue discovery** so as not to delay the adjudication of the claim. If a hearing has been scheduled, discovery motions **shall be filed no later than 45 days prior to the hearing** unless leave of the administrative law judge is obtained." R602-2-1(F)(6)(emphasis added).

With respect to Pre-trial Disclosures, the Rule states, "No later than 45 days prior to the scheduled hearing, all parties **shall** file a signed pretrial disclosure form that identifies: (1) fact **witnesses the parties actually intend to call** at the hearing. . . (4) exhibits,

including reports, the parties intend to offer in evidence at the hearing; . . . (6) **the specific defenses that the respondent actually intends to litigate.** . . . The administrative law judge may exclude witnesses, exhibits, evidence, claims, or defenses as appropriate of any party who fails to timely file a signed pre-trial disclosure form as set forth above. The parties **shall** supplement the pre-trial disclosure form with information that newly becomes available after filing the original form. **The pre-trial disclosure form does not replace other discovery allowed under these rules.**” R602-2-1(I)(3)(emphasis added).

Finally, the Labor Commission expressly adopted the Utah Rules of Civil Procedure except as they were modified by Utah Code Ann. §34A-2-802 and Labor Commission Rule. With respect to the timely disclosure of information, the Utah Rules of Civil Procedure are in accord with the Labor Commission Rule. As stated by the Utah Supreme Court,

the purpose of [Utah’s discovery rules] is to make procedure as simple and efficient as possible. . . ; and to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible.

Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967). In addition, providing photographs or video at the time of the trial is error which must result in reversal. See *Roundy v. Staley*, 984 P.2d 404, 409-410 (Utah Ct. App. 1999).

In this case, the ALJ permitted Famous Dave’s to raise an affirmative defense and present evidence based on alleged facts that had not been set forth in the Answer, had not been raised as an issue in response to direct discovery requests and was never actually

disclosed in Pre-trial Disclosures.

Three weeks before the hearing, Famous Dave's informed the Labor Commission and Germer that it would be calling a witness that it had never disclosed in discovery as someone who had knowledge about the accident despite Germer's direct requests. At that time, Famous Dave's also informed the Labor Commission and Germer at that time that it may introduce photographs into evidence. However, Famous Dave's had previously responded under oath to Germer's Request for Production of Documents and Things that no photographs existed. Neither did Famous Dave's supplement its discovery responses by providing Germer with a copy of the photographs until the time of the hearing. Under no reading of Labor Commission Rule was this disclosure adequate or timely. Neither did the Rule provide Germer with the opportunity to file an objection or motion to compel that would not have forced the hearing to be postponed.

At the hearing, Germer objected to introduction of Scott Morton's testimony as well as previously undisclosed photographs of the walk-in cooler based upon the fact that they had not been timely disclosed pursuant to Labor Commission Rule and Germer's specific discovery requests. Germer further argued that the late partial disclosures did not give Germer adequate notice of the substance of Morton's testimony or the purpose for which the photographs were to be introduced. While the ALJ agreed that there were "problems" with the timeliness of Famous Dave's filings, he overruled Germer's objection and allowed Mr. Morton to testify and introduce the photographs into evidence without giving Germer the opportunity to take a recess from the hearing and talk to Morton to anticipate the

substance of his testimony.

Indeed, the true nature of those photographs and the testimony was never revealed until the time of the hearing. Namely, that Morton would testify that the door “did not stick,” and offer the photographs which showed a floor that had been replaced since Germer’s industrial accident.

Germer was never provided information that this was going to be an issue. This is exactly the type of surprise that the Utah Supreme Court has said is impermissible. In the workers’ compensation context, this court has previously ruled that the failure to adequately state an affirmative defense in the Answer beyond broad reference to workers’ compensation law is a waiver of that defense. *Barnard & Burk Group, Inc. v. Labor Commission*, 122 P.3d 700, 703 (Utah Ct. App. 2005).

Had Germer known that Famous Dave’s planned to offer Morton’s testimony and the photographs for the purpose of raising the condition of the cooler door as an affirmative defense, she could have prepared to rebut the defense. Germer would have subpoenaed fact witnesses, who all happen to be employees of Famous Dave’s, to support the fact that the door had been stuck at the time of Germer’s accident. Further, Germer could have obtained an expert who could have bolstered her testimony that the door would, in fact, stick. After the hearing, Germer attempted to submit the affidavit of an expert after the hearing for rebuttal purposes, to which Famous Dave’s adamantly objected as prejudicial.

What was prejudicial was the Commission’s tacit approval of the ALJ’s disregard of multiple provisions of Labor Commission Rule, Utah Code Ann. §34A-2-802(1), and

Germer's due process right to have sufficient information to adequately prepare for the hearing. Neither should Famous Dave's, or the Commission, be allowed to argue that Germer should have filed some sort of motion with the Commission or attempted to undertake discovery where neither Labor Commission Rule nor workers' compensation statute provides for such given the late timing and lack of substance of Famous Dave's amended pre-trial disclosures.

The Commission's denial of benefits to Germer was based on the ALJ's determination that the cooler door did not stick as offered by Mr. Morton's testimony. This finding was based upon testimony that no one had *reported* to Scott Morton that the cooler door was sticking, not on actual evidence that the door did not stick at the time of the accident. In addition, Mr. Morton testified that on cross-examination that the photographs introduced into evidence were not a fair and accurate depiction of the cooler floor as it existed at the time of the accident. Be that as it may, the ALJ relied on Morton's testimony, without providing Germer adequate opportunity to rebut, that the door did not stick and denied workers' compensation benefits to Germer on that basis.

This is contrary to law and should be reversed. As such, Germer respectfully requests that the Commission's decision be reversed, that the evidence as it relates to the testimony of Mr. Morton be excluded, and that the matter be remanded for consideration in accordance with Germer's due process rights. In the alternative, Germer requests that she be provided the opportunity to present evidence to challenge Mr. Morton's testimony and have full answers to her previously propounded discovery.

III. The Labor Commission Violated the Open Courts Provision of the Utah Constitution When it Took Almost Two Years to Address on Petitioner's Motion for Review.

It has taken three and one half years from the filing of the Application for Hearing to go through the legal process and present this case to the Court of Appeals. During that time, Germer waited twelve months for a hearing. Within a week of the hearing, the ALJ issued an Order that was clearly contrary to Utah law. After almost two years the Commissioner affirmed the ALJ's Order without addressing the substance of the Motion for Review. Undoubtedly litigation takes time and delays can be expected. However, the actions by the Commission in this case are deplorable. This is not a case in district court. This is a workers' compensation claim which, by Constitution and Statute, must move forward rapidly. The open courts provision of the Constitution provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which **shall be administered without denial or unnecessary delay.**

(Emphasis added)

UTAH CONST. art. I, §11.

Further, the Constitution provides for workers compensation as follows:

The legislature shall provide by law for a Board of Labor, Conciliation and Arbitration which **shall fairly represent the interests of both capital and**

labor. (Emphasis added).

UTAH CONST. art. XVI, § 2

While the open courts provision applies equally to all courts throughout the State, the Constitution mandates that a Board of Labor be instituted that fairly represents the interests of both capital and labor. This necessarily provides for the even - handed speedy resolution of a workers' compensation claim. As Professor Larson points out:

Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents [footnote omitted] against the employer [footnote omitted] and insurance carrier [footnote omitted]. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts. [footnote omitted]

2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Desk Edition, §100.01 (2006)

The procedural law of workers' compensation, like the substantive, takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal. The initial handling of claims, and perhaps the first review, are administrative [footnote omitted] in all but a few states [footnote omitted]. **The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route** [footnote omitted]. (Emphasis added).

3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Desk Edition, §124.01 (2006).

More than 70 years ago, the Utah Supreme Court, espousing those principles set forth in our Constitution and consistent with most states as indicated by Professor Larson, set forth succinctly the purpose of the Workers' Compensation Act:

The whole purpose, plan and intent of the Industrial Act is to provide a simple, adequate and speedy means to all applicants for compensation to have their applications heard and determined upon the merits, and to have the acts of the Commission as speedily reviewed by this court by any interested party if he thinks that the Commission has exceeded its powers or has disregarded some provision of the statute.

Woldberg v. Industrial Commission, 279 P.609, 611 (Utah 1929)(internal citation omitted).

“The clear intention of the Legislature was ‘to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of their death,’ which the more humane and moral conception of our time requires.” *Park Utah Consol. Mines v. Industrial Comm’n*, 36 P.2d 979, 981 (Utah 1934)(quoting *Gonzales v. Chino Copper Co.*, 222 P. 903, 904). The act affords, through administrative bodies, injured industrial workmen or their dependents simple, adequate, and speedy means of securing compensation. *Utah Fuel Co. v. Industrial Commission*, 194 P. 122, 124 (Utah 1920).

Moreover, **the Legislature sought to promote the public welfare by relieving society of the support of unfortunate victims of industrial accidents.** *Salt Lake City v. Industrial Commission*, 199 P. 152, 154-155 (Utah 1921) (stating, the "cost of human wreckage may be taxed against the industry which employs it," rather than the state or taxpayers.); *Reteuna v. Industrial Commission*, 185 P. 535, 537 (Utah 1919). As such, if there is any doubt "respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be." *Chandler v. Industrial Commission*, 184 P. 1020, 1022 (Utah 1919). The speedy and adequate means of securing

compensation for injured workers “is predicated on the police power inherent in every sovereignty -- the power to legislate and to govern for the best interests of the state.” *Utah Fuel Co. v. Industrial Commission*, 194 P. 122, 124 (Utah 1920).

The mandate that injured workers have a speedy remedy has been echoed by our courts over the decades.

The purposes which underlie the Workmens’ Compensation Act are: to assure to the injured employee’s dependents an income during the period of his total disability and to provide compensation for any resulting permanent disability; **to accomplish this by a simple and speedy procedure which eliminates the expense, delay, and uncertainty in having to prove negligence on the part of the employer**; and to thus require industry to bear the burden of the injuries suffered in it.

Wilstead v. Industrial Comm’n, 407 P.2d 692, 693 (Utah 1965)(emphasis added). See also, *Thomas v. Color Country Management*, 84 P.3d 1201, 1213 (Utah 2004).

Indeed the Utah legislature recognized the need, at least in an administrative setting, that all administrative agencies must issue an order “within a reasonable time after the hearing.” Utah Code Ann. §63-46b-10(1).

Apparently the Labor Commission does not take seriously the mandates from the Utah Constitution, the Appellate Courts and the Utah Legislature. Germer did not receive a remedy by “due course of law without denial or unnecessary delay.” The Labor Commission did not “fairly represent” her interests nor did she receive a “simple, adequate and speedy” means of securing compensation. Finally, Orders were not issued in a “reasonable time”.

There has been nothing simple, adequate or speedy about Germer's attempt to secure compensation in this case. Further, the delay in this case ensures that the purpose of the Workers' Compensation Act will be violated. Anyone waiting three and one half years for a resolution of her workers' compensation claim will likely become an "object of charity or a ward of the State."

The delays demonstrated in this case are not atypical of what occurs at the Commission. There is a cavalier approach in remedying the concerns of these injured workers which must not be tolerated. It is unconscionable for the Labor Commission to take years in ruling on an injured workers' claim. There is no injunctive relief that is provided in the Utah Workers' Compensation Act. People are out of work, taking out bankruptcy and getting divorced because they are unable to pay bills. The Labor Commission, unfortunately, has taken the position that it is acceptable for these cases to drag on for months and years with no resolution. Then, when resolution comes it is, as in this case, a curt dismissal of claims without any meaningful analysis. This must stop.

District Court judges deal with much more complex issues, yet are required by statute to issue a decision within two months of the hearing pursuant to Utah Code Ann. §78-7-25. The question which begs to be answered is why a district court judge who is presented with complex real estate claims, probate procedures, contract disputes, divorce proceedings, criminal cases, and all other manner of disputes must render a decision in two months, when the Administrative Law Judge, or the Labor Commissioner herself, in a workers' compensation case, dealing with one type of law, cannot render a decision for

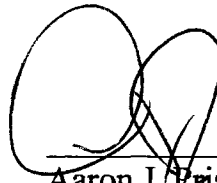
months or years.

The circumstances for injured workers in this state are in a dire predicament. Counsel would suggest that pursuant to Utah Code Ann. §63-46b-17(1)(b)(I) this Court has jurisdiction to order the Labor Commission of Utah to act and conform with Utah law. Germer would suggest that issuing a decision in a reasonable amount of time should be something less than what is required of a district court judge. There is no reason the Labor Commissioner or ALJs cannot issue decisions within 30 days. Workers' Compensation law is not complex to those who have practiced in that arena for years. The Labor Commissioner should be hiring judges and legal counsel who understand the law. These decisions can and must be entered in a timely fashion. As the Commission has done little to remedy this situation, Germer respectfully requests that this Court hold the Labor Commission accountable for administering the Workers' Compensation Act in the manner it was intended.

CONCLUSION

For the foregoing reasons, Germer respectfully requests that the Commission's decision be reversed and remanded for consideration in compliance with established law and that the Labor Commission do so in a timely manner with a date certain.

DATED this 27 day of February, 2009.



Aaron J. Frisbrey
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of February, 2009, a copy of the foregoing

BRIEF OF APPELLANT was mailed, postage prepaid, as follows:

Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84111-0230

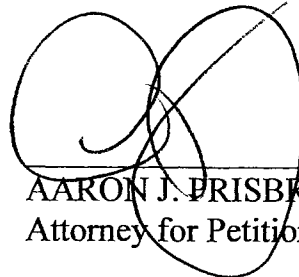
(1 original)
(7 copies)

Labor Commission of Utah
160 East 300 South, 3rd floor
P.O. Box 146615
Salt Lake City, UT 84114-6615

(2 copies)

Mr. Bret Gardner
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111

(2 copies)



AARON J. FRISBREY
Attorney for Petitioner

ADDENDUM

- A.....Interrogatories and Requests for Production of Documents
- B..... Respondents' Supplemental Answers to Interrogatories

Aaron J. Prisbrey #6968
Aaron J. Prisbrey, P.C.
Attorney for Petitioner
1071 East 100 South Bldg D Suite 3
St. George, Utah 84770
Telephone 435/673-1661

LABOR COMMISSION OF UTAH

<p>LINDSAY GERMER,</p> <p>Petitioner,</p> <p>v.</p> <p>FAMOUS DAVE'S and/or WAUSAU INSURANCE COMPANY,</p> <p>Respondents.</p>	<p>INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS & THINGS</p> <p>Case No. 05-0318</p>
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Petitioner, pursuant to Rule 33, 34, 35 and 36 U.R.Civ.P. and the Administrative Rules and Regulations of the Industrial Commission of Utah, inter alia, requests Respondents¹ respond to the following discovery related to the Petitioner's claim for compensation within thirty (30) days after service of these Requests upon them. To the extent that the information requested is not now available or subsequently changes, Respondents are required to supply the information promptly after it becomes available or changes. Pursuant to Rule 36(a), U.R.Civ.P., the matters set forth in the Request for Admissions will be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the Court may allow.

¹ The term "Respondents" shall mean the Employer (self-insured, insured or uninsured), the Employer's workers compensation insurance carrier, the Employers' Reinsurance Fund and the Uninsured Employers' Fund, as the case may be. NOTE: Each of the Respondents are required to respond in writing to all of the discovery requests referenced herein.

INTERROGATORIES

1. State the factual basis for each affirmative defense you have claimed in your answer to the Application for Hearing.

2. State the factual basis for each denial you have made to the allegations Application for Hearing as contained in your answer.

3. State the name and phone number of each witness who has personal knowledge regarding this lawsuit and include the substance of the knowledge they have as it relates to this lawsuit.

4. If not provided in the answer to the Application for Hearing, indicate the total amount of monies paid for medical expenses and disability compensation in the above referenced matter, indicating the dates the payments were made.

5. If, at the time of Petitioner's alleged injury wages were fixed by the hour, please indicate Petitioner's hourly rate and the number of hours Petitioner would have worked for the week if the alleged accident had not intervened.

6. If Petitioner was not paid an hourly rate, please indicate the amount Petitioner was to be paid including the amounts on a weekly or monthly basis.

7. If you intend to offer into evidence at the time of hearing or deposition of this matter any impeachment evidence as it relates to Petitioner, identify such impeachment evidence, (i.e. if it is in the form of documents, identify those documents specifically. If the impeachment evidence is in the form of witness testimony, indicate the name and telephone number of such witnesses including a brief description of the impeachment information the witness(es) have.

8. Identify all expert witnesses you have retained in this matter including the city in which the expert(s) practice.

9. Indicate the opinion(s) of your expert(s) as it pertains to the above referenced lawsuit.
10. Identify all evidence upon which your expert relies or will rely in forming his/her opinion(s) including, but not limited to, hearsay evidence, depositions, IMEs, documentary evidence, verbal information obtained from conversations with potential employers or other sources, medical records, DOT information, functional capacity evaluations, or any other information relied upon by the expert(s) in forming opinion(s) in this lawsuit.
11. If your expert witness has determined that Petitioner can perform other work reasonably available, indicate the work which he/she opines Petitioner is capable of performing. Indicate the category of jobs, specific job, and all relevant mental and functional requirements of the job.
12. Please indicate all assumptions your expert has made in rendering his/her opinion(s).

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Provide all statements, written or recorded, taken by adjustors, attorneys, or other individuals of the Petitioner or other witnesses relating to this lawsuit.
2. Provide copies of all correspondence that you or your attorneys have sent to any medical examiner who may provide an opinion regarding this lawsuit.
3. Provide copies of all correspondence you or your attorneys have sent to any physical therapist who may offer an opinion or functional limitations regarding this lawsuit.
4. Provide copies of all correspondence you or your attorneys have provided to any vocational rehabilitation counselors or experts regarding this lawsuit.
5. Provide copies of all correspondence you or your attorneys have provided to any other expert or lay witness in this lawsuit.

6. If you have received information from any physical therapist, medical doctor, vocational rehabilitation expert, or other expert or lay witness regarding this lawsuit, provide that information. (This request includes, but is not limited to, request for clarification from the doctor, therapist or vocational rehabilitation expert, reports from these individuals, or any other written correspondence.)

7. Provide a copy of the Petitioner's work file. This should include, but not be limited to, all performance reports regarding the Petitioner, all wage records including time cards, W-2 statements, work releases received from physicians, leave of absence forms, disability applications, insurance applications, statements from Petitioner or statements about Petitioner.)

8. Provide all documentation including, but not limited to, written statements regarding this lawsuit which have not been previously requested.

9. Provide all documentation you have relied upon in answering the interrogatories served upon you herewith.

10. Provide all documentation relevant to this lawsuit and which you may attempt to offer into evidence at the time of the trial or any deposition in this lawsuit. (Please note that this applies to all rebuttal evidence, evidence which may be rebuttal or impeachment evidence).

11. Provide copies of all documents obtained by you or your attorneys as a result of the subpoenas or releases issued in this case.

REQUEST FOR PRODUCTION OF THINGS

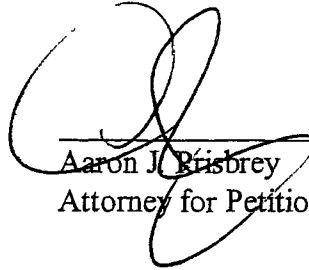
1. Provide all recordings of the Petitioner regarding this lawsuit. (This requests all tape recordings, whether via computer, CD, videotape, audiotape, or any other reproduced format.)

2. Provide all photographs, films, video tapes or similar reproductions of the Petitioner

and/or which involve the Petitioner's claim in any way.

3. Provide all physical things which involve Petitioner's claim in any way, including but not limited to diagrams, charts, lists and drawings.

DATED this 12 day of May, 2005.



Aaron J. Brisbrey
Attorney for Petitioner

Aaron J. Prisbrey #6968
Aaron J. Prisbrey, P.C.
Attorney for Petitioner
1071 East 100 South Bldg D Suite 3
St. George, Utah 84770
Telephone 435/673-1661

LABOR COMMISSION OF UTAH

LINDSAY GERMER,	
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Petitioner,	
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v.	
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FAMOUS DAVE'S and/or WAUSAU INSURANCE COMPANY,	
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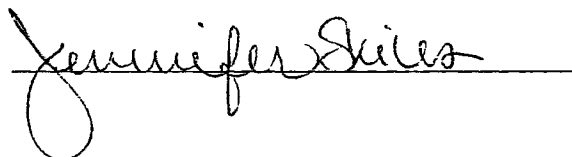
Respondents.	
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CERTIFICATE OF SERVICE

Case No. 05-0318

I hereby certify that I deposited in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS and this CERTIFICATE OF SERVICE in the above referenced matter this 13 day of May, 2005, addressed to the following:

Bret A. Gardner
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048



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RESPONDENTS' SUPPLEMENTAL ANSWERS TO INTERROGATORIES

Case No.: 05-0318

Judge Dale W. Sessions

)

supplemental answer to a customer's first set of interrogatories

7. If you intend to offer into evidence at the time of hearing or deposition of this matter any impeachment evidence as it relates to Petitioner, identify such impeachment evidence (i.e. if it is in the form of documents, identify those documents specifically. If the impeachment evidence is in the form of witness testimony, indicate the name and telephone number of such witnesses including a brief description of the impeachment information the witness(es) have.

ANSWER: Respondents intend to call Scott Morton as a lay witness. Mr. Morton is a regional manager for William Tell/Famous Dave's. He will testify regarding the nature of the restaurants walk-in cooler, cooler door operation, and he will provide a lay-out of the walk-in cooler. He may be called upon to lay foundation for certain photographs taken of the walk-in cooler and area inside and immediately outside of the walk-in cooler. Mr. Morton can be contacted, if necessary, through counsel for Respondent.

DATED this 8th day of March 2005.

BLACKBURN & STOLL, L.C.

A handwritten signature in cursive script, appearing to read "Bret A. Gardner", written over a horizontal line.

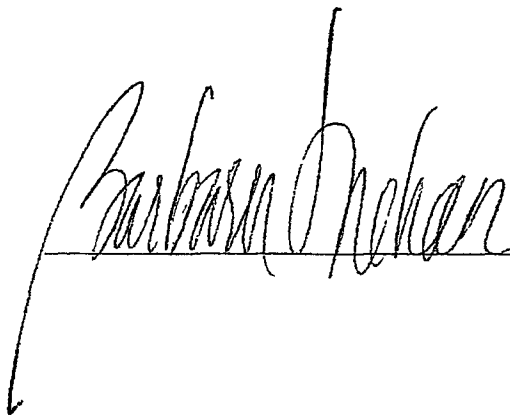
Bret A. Gardner, Attorney for Respondents
Famous Dave's and/or Wausau Insurance Co.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of **Respondent's Supplemental Answers to Interrogatories** was mailed, first class, postage pre-paid on this 7th day of March 2006 to:

Aaron Prisbrey
1071 East 100 South, Bldg. D, Suite 3
St. George, Utah 84770

Kim McDonough
Wausau Insurance Co.
P.O. Box 4025
Beaverton, OR 97076

A handwritten signature in cursive script, appearing to read "Barbara McKean", is written over a horizontal line. The signature is fluid and extends slightly above and below the line.