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George M. Olsen v. Utah Concrete Pipe Co., and/ or Employers Reinsurance Fund; Continental Insurance Co., : Brief of Appellant

Utah Court of Appeals

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Edwin C. Barnes, Thomas C. Sturdy; Alan Hennebold; Labor Commission of Utah; Attorney s for Appellees.

Aaron J. Prisbrey; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

GEORGE M. OLSEN,

Appellant/Petitioner,

v.

UTAH CONCRETE PIPE CO., and/or
EMPLOYERS REINSURANCE FUND;
CONTINENTAL INSURANCE CO.,

Appellee/Respondents

Case No. 20100163 CA

BRIEF OF APPELLANT

Edwin C. Barnes
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Employers Reinsurance Fund

Thomas C. Sturdy
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Utah Concrete Pipe Co.

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, UT 84114
Attorney for Labor Commission of Utah

Aaron J. Prisbrey
Aaron J. Prisbrey P.C.
1090 East Tabernacle
St. George, UT 84770
Attorney for Petitioner/Appellant

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One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Employers Reinsurance Fund

Thomas C. Sturdy
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Utah Concrete Pipe Co.

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, UT 84114
Attorney for Labor Commission of Utah

Aaron J. Prisbrey
Aaron J. Prisbrey P.C.
1090 East Tabernacle
St. George, UT 84770
Attorney for Petitioner/Appellant

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AARON J. PRISBREY (USB No. 6968)
Attorney for Petitioner and Appellant
1090 East Tabernacle
St. George, Utah 84770
Telephone 435/673-1661

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BRIEF OF APPELLANT

Case No. 20100163

JURISDICTION

This appellate review proceeding arises from the Utah Labor Commission's denial of workers' compensation permanent disability benefits in George Olsen's case. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Ann. §63G-4-403(1).

ISSUES PRESENTED AND STANDARD OF REVIEW

ISSUE NO. 1: Whether the Labor Commissioner erred in her application of the “odd-lot” doctrine to Olsen’s claim for permanent total disability benefits where she failed to recognize or analyze any of the four factors required to be addressed pursuant to the Supreme Court’s decision in *Marshall v. Industrial Comm’n*.

STANDARD OF APPELLATE REVIEW: Questions as to whether the Labor Commissioner properly applied the facts under the “odd-lot” doctrine are subject to a correction of error standard. *Nucor Corp. v. State Tax Comm’n*, 832 P.2d 1294, 1296 (Utah 1992).

PRESERVATION OF THE ISSUE IN THE ADMINISTRATIVE AGENCY

PROCEEDING: This issue was preserved in Olsen’s Motion for Review. (Record at 62-75.)

ISSUE NO. 2: Whether the Labor Commissioner’s Findings of Fact are adequate wherein she has ignored virtually all evidence favorable to Olsen.

STANDARD OF APPELLATE REVIEW: “Whether the findings [of fact] are adequate is therefore a legal determination that requires no deference to the Commission.” *Adams v. Board of Review of the Indus. Comm’n*, 821 P.2d 1, 5 (Utah App. 1991).

PRESERVATION OF THE ISSUE IN THE ADMINISTRATIVE AGENCY

PROCEEDING: This first became an issue when the Labor Commissioner supplanted the ALJ’s findings of fact with her own and was therefore not argued in the Administrative

Agency. This is Olsen's first opportunity to raise the issue of the adequacy of the Labor Commissioner's factual findings.

ISSUE NO. 3: Whether the Labor Commissioner's violation of Olsen's due process rights by sitting on his Motion for more than 38 months has compromised the Commissioner's office to the extent that office cannot maintain objectivity on this case.

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). Furthermore, 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 App. 1993).

PRESERVATION OF THE ISSUE IN THE ADMINISTRATIVE AGENCY PROCEEDING: This first became an issue when the Commissioner took 38 months to address Olsen's Motion for Review and was therefore not argued in the Administrative Agency. This is Olsen's first opportunity to raise the due process violation by the Labor Commissioner.

DETERMINATIVE LAWS

UTAH CONST. Art. I, § 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.”

UTAH CONST. Art. XVI, § 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.”

UTAH CODE ANN. §63G-4-208(1)(a) and (c):

“Informal adjudicative proceedings:

(1) within a reasonable time after the hearing, . . . the presiding officer shall sign and issue an order that includes:

(a) A statement of the presiding officer’s findings of fact based exclusively on the evidence of record in the adjudicative Proceedings or on facts officially noted. . . .

(c) A statement of the reasons for the presiding officer’s decision.”

UTAH CODE ANN. § 63G-4-301(6)(a):

(a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

UTAH CODE ANN. § 63G-4-403(4)(g):

“(4) The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . .

(g) The agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.”

UTAH CODE ANN. § 63G-4-404(1)(b)(i):

“In granting relief, the court may:

(i) order agency action required by law.”

UTAH CODE ANN. § 78A-2-223(1):

“A trial court judge shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge’s personal control.”

STATEMENT OF THE CASE

Petitioner George Olsen suffered a traumatic amputation and resultant 57% whole person impairment of his right arm on November 6, 1963 while acting in the course and scope of his employment with Respondent Utah Concrete Pipe Company. Within approximately one week of losing his arm, Olsen returned to work and proceeded to work for 23 plus years until he became eligible for early retirement. During that time, Olsen experienced substantial chronic pain. He was required to work an additional three hours per day to compensate for the loss of his arm and dominant hand. As he aged, it became more and more difficult to put in the additional hours and work through the pain. At age 61, Olsen told his supervisor, that in 18 months, when he became eligible, he would take out early retirement because of the pain and the serious cellulitis and infections he had developed in what remained of his right arm. Because of this he explained he could not continue to fulfill his duties without his dominant right hand and arm.

Olsen retired as soon as he was eligible. In so doing, he incurred a significant penalty in both his company pension and social security retirement benefits. The factors which Olsen considered in deciding to retire early was the stress of the job, including the long hours, hiring and training new employees, and travel for work in light of the problems

he was having with his right arm.

Olsen was never made aware of the fact Workers' Compensation provided for permanent total disability benefits, as such he never made a contemporaneous filing for workers' compensation disability benefits. He was first made aware of his eligibility for permanent total disability benefits in 2006 when he was having difficulty obtaining insurance approval related to equipment needed for his prosthetic device. He sought legal counsel for the concerns related to his prosthetic and was informed of the Utah code as it related to the permanent total disability claim. As such, Olsen, through legal counsel, filed a claim with the Labor Commission for permanent total disability benefits. Olsen has claimed throughout the case that he is permanently disabled under the "odd-lot" doctrine, as he had returned to work for a substantial period of time and, as such, the legal analysis under *Marshall* and its progeny must apply. The case was eventually tried in Parowan, Utah, before then ALJ Dale Sessions, wherein Olsen presented his case consistent with the factors set forth under *Marshall* pursuant to the "odd-lot" doctrine.

After hearing, the ALJ made several convoluted findings, many of which were not supported anywhere in the record, ignored all facts favorable to Olsen and through a bizarre analysis determined that Olsen was not permanently totally disabled, finding that as he had worked for a period of approximately 24 years, he was not entitled to benefits under the "odd-lot" doctrine. Obviously, the ALJ did not understand the very nature of the "odd-lot" doctrine.

Olsen timely filed a Motion for Review with the Labor Commissioner alleging

numerous improprieties in Judge Sessions' "Findings of Fact" and analysis of the "odd-lot" doctrine. The Labor Commissioner supplanted the ALJ's findings of fact with those of her own and then proceeded to misapply the "odd-lot" doctrine to those facts.

This appeal proceeds from the Commissioner's failure to correctly interpret and apply the "odd-lot" doctrine based on the undisputed facts, failure to set forth the facts which supported the ultimate findings as well as any meaningful analysis of the subsidiary facts that would show how and why the Labor Commissioner reached her decision. Olsen further appeals the Labor Commissioner's decision on the basis that the serious delay in adjudicating his case violated the Utah Administrative Procedures Act as well as Olsen's constitutional rights under the Due Process and Open Courts clauses of the Utah Constitution, placing in question the Commissioner's objectivity as such a violation has compromised her office.¹

STATEMENT OF FACTS

1. While working in the course and scope of his employment on November 6, 1963, Petitioner George Olsen ("Mr. Olsen") suffered a compensable industrial accident when he stuck his arm inside a conveyor belt to clear away small pieces of rock when suddenly the belt began to move and caught his arm. Mr. Olsen's right arm was

¹ As an initial matter, Olsen and Respondent Utah Concrete Pipe Company reached a tentative settlement in this case through participation in the Appeals Court's mediation program. That settlement is awaiting approval by the Labor Commission. However, until such time as the Labor Commission approves the settlement, Olsen must name Utah Concrete Pipe Company as a Respondent in this appeal.

amputated just below the elbow. (Record at 98.)

2. Within a week of the accident, Mr. Olsen returned to work at the same job without duty modifications or medical restrictions. (Record at 98.)

3. Olsen testified that he experienced a constant pain in his right arm, which he rated at a five on a scale of zero to ten. Furthermore, Olsen testified that the pain increased with activity. (Record at 118.)

4. In November 1984 Olsen was diagnosed with cellulitis of the right arm and was treated by Dr. Christian for this condition. (Record at 102-103, Medical Records Exhibit at page 403-406)

5. Olsen testified that around the time of the cellulitis in 1984, his physical condition was deteriorating with the cellulitis and with activity. As such, he made the conscious decision to attempt to work to age 62 so he would be eligible for early retirement even though he would sustain significant penalties of 30% in both his company pension and his social security retirement benefits by retiring early. He was not aware of the availability of workers' compensation permanent total disability benefits. (Record at 121, 124-125)

6. Olsen's decision to retire early because of problems related to his amputation is supported by Olsen's correspondence to his boss on July 31, 1986. Olsen sent his boss a letter indicating, "some 18 months ago, due to some health problems that were not responding to medical treatment, I indicated to you my desire to take early retirement any time after mid-year 1986. Since these same health problems still persist, I appreciate the

positive steps you have taken to make arrangements for my replacement.” (Record at 49.)

7. As to Olsen’s reason for retiring early, Olsen testified as follows:

AJP: Is there some reason that you quit work at that point?

GO (Olsen): I was having a lot of difficulty with this, with the stress, with the pain.

AJP: With “this” being what?

GO: My right arm. The pain. I was going downhill physically. And, I had to do a lot of training with my job. There was a lot of turnover in the work force, and every time you would hire a new person, you would have to train them.

AJP: Did that have any impact on your arm?

GO: Yes, it had an impact on my arm.

AJP: How did it impact your arm?

GO: Well, you try to demonstrate different things to them?

AJP: Like what?

OLSEN: Huh?

AJP: Like what?

OLSEN: Like how to measure, how to weigh things, how to handle things. It’s a process in most cases, you have to be careful how to handle fresh concrete, not totally cured concrete, those type of things, without damaging it.

(Record at 119.)

8. Dr. Chase indicated that for 40 years Olsen’s left hand had to do the work of two hands. (Record at 109.)

9. As he aged it got more and more difficult for Olsen to work the long hours

necessary to perform the work of two hands with one hand. (Record at 119.)

10. Olsen did in fact retire after working for 23 plus years at age 62 ½. Olsen never applied for workers' compensation disability benefits until he was made aware of the existence of those benefits through legal counsel in 2006. (Record at 121.)

11. Olsen presented the following additional evidence concerning the conditions under which he worked after the traumatic amputation of his right arm:

- a. It took additional time to perform his daily work, Olsen stated, "well, it added at least 2, possibly 3 hours to get the things done that I needed, and my normal work day was, you know, nine, ten hours anyway. So, it took a great deal more than that. It increased the work day "conservatively, to 12 hours." (Record at 113.)
- b. Regarding difficulty completing reports, Olsen stated, "actually it took more time, because struggling to fill out reports with my left hand. It took a great deal more time than it used to take with my right hand." (Record at 113.)
- c. Regarding difficulty answering the phone, Olsen stated, "well, if it was a situation where I need to write notes or anything, I would have to put the phone up here in order to write, you know, by ear. Yeah, it was a bit of difficulty." (Record at 115.)
- d. Regarding difficulty writing with his non-dominant left hand as opposed to his right hand, Olsen responded he was "never" as good with his right hand and he was not nearly as fast as he was prior. (Record at 115-116.)
- e. Olsen testified that he probably worked 12 hours per day after the accident to compensate for the loss of his right arm where he had worked nine hours per day prior. (Record at 113.)

12. In addition to the above difficulties, Olsen attempted to demonstrate to the ALJ how difficult activities of daily living had become after the accident in the following ways:

- a. Simply getting dressed would take "probably 10, 15 minutes" longer **with** the help of his wife. (Record at 116.)

- b. Going to the restroom would take approximately “7 or 8” more minutes. (Record at 117.)

13. Olsen attempted to further explain the difficulties he had with activities of daily living even as it related to eating a meal. The ALJ, not understanding the very nature of the “odd-lot doctrine” cut off this testimony indicating, “[i]t is within common experience of the Court to accept that his life has been impacted. I think your point is well taken. But I do think we need to focus more on the elements that are required for the proof, for him to establish his claim today, as opposed to make him go through some things that may just be uncomfortable to discuss and address.” (Record at 117.)

14. Respondents did not dispute Olsen’s testimony and, in fact, did not call one witness to refute the conditions under which Olsen worked after the accident. (Record at 162 and 104 – 164, generally.)

15. None of the Respondents presented evidence via medical records, written evidence or testimony that disputed Olsen’s testimony establishing the traumatic amputation of his right arm as the motivating factor for Olsen’s early retirement. (Record at 162.)

16. Additionally, Dr. Lewis, one of Olsen’s physicians stated:

I am currently retired from medical practice and have been retired since September of 1994. Any medical records I may have had on this man have been destroyed. However, I do remember this man well. I recall that he impressed me as being an intelligent, responsible and sensitive person and responded in a reasonable and mature way to the devastating accident and subsequent loss of his right arm. I understand he continued to work for many years in spite of this terrible injury. The loss of this arm undoubtedly had a profound negative effect on his physical and mental health and any special consideration or benefit he

is entitled to should certainly be extended to this man.

(Record at 102,103, Medical Records Exhibit at page 406².)

17. Dr. Hunter, one of Olsen's treating physicians stated that Olsen was required to be off work from January 1987 to the present as his line of work required "hands on skills." Dr. Hunter indicates "I believe he severely tried to do his work as a supervisor and got into other health problems because of the stress and effort." Dr. Hunter opines that "his loss of function and disability are major and irreplaceable." Dr. Hunter states that "his chronic stress and disability in his dominant hand are one and are permanent." (Record at 102-103, Medical Records Exhibit 1B at page 407.)

18. After Olsen filed for permanent total disability benefits, Respondents had Olsen evaluated by insurance medical evaluator Bart Fotheringham. Dr. Fotheringham determined Olsen sustained a 57% whole person impairment as a result of the traumatic amputation of his right upper extremity. (Record at 102-103, Medical Records Exhibit at page 50.)

19. The ALJ, who has since been released by the Labor Commissioner for a series of legal errors, non-judicial demeanor, and incompetence generally, issued inappropriate findings such as the following:

- a. Ignoring all evidence as to the impact of the amputation on Olsen's activities of "daily living" at work.
- b. Ignoring all evidence as to the impact of the amputation on Olsen's activities

² The final page of the Medical Record Exhibit was actually page 406. This record was received into evidence and as a clerical error was also numbered page 406 of Exhibit 1B.

of “daily living” at home.

- c. After refusing to permit Olsen to testify as to the impact of the amputation on his daily activities, and declaring that it was “within common experience of the court” to know what life is like for a 62 year old with one arm, made no findings as to what “common experience” would dictate as to the impact on the life of a one-armed man. (Record at 50-58, 98 - 100.)
- d. Ignoring, it is entirety, Olsen’s testimony regarding his reason for early retirement.
- e. Finding “[t]here is no contemporaneous treating record to show objectively that he was adversely impacted by his amputation to a level that would have caused his retirement” in spite of the records from Dr. Lewis, Dr. Hunter, Dr. Christian and Dr. Chase to the contrary. (Record at 53.)
- f. Finding the traumatic amputation played no factor in Olsen’s retirement, claiming “it appears more likely from the medical record and other evidence that the Petitioner retired from his non-industrial causes and not as a result of his industrial injury” when in fact there are no other medical records supporting that conclusion. (Record at 52 and record generally.)

20. Based on these erroneous findings, the ALJ concluded, as a matter of law, that Olsen did not satisfy the “odd-lot” criteria as he had worked for a period of almost 23 years. In so doing the ALJ failed to recognize that *Marshall* applied to a situation where an injured worker goes back to work for a substantial period of time. (Record at 57).

21. Olsen, on November 16, 2006, filed a Motion for Review challenging the sufficiency of the ALJ’s finding and the lack of any meaningful analysis as it relates to the “odd-lot” doctrine. (Record at 62-75).

22. More than 38 months after Olsen filed the Motion for Review, with no justification for the delay, the Labor Commissioner issued an order affirming the determination of the ALJ.

23. However, in doing so, the Commissioner recognized the obvious inadequacies in the ALJ's findings and consistent with authority granted by statute supplanted the ALJ's findings with her own.

24. Unfortunately, the factual findings and the legal analysis of the Commissioner are woefully inadequate. She devoted barely one page to the factual findings in this case. And like the ALJ, ignored reference to a single medical record addressing the problems Olsen was having with his right arm at the time he retired. Instead, she offered a broad summary of some of the evidence presented in the case, ignoring entirely the medical record as well as the following undisputed facts which were presented as evidence at the time of Hearing:

- a. With respect to the manner in which Olsen worked after the traumatic amputation of his arm, the Commissioner stated, "Mr. Olsen developed adaptive techniques to partially mitigate these problems." While the Commissioner indicated that the traumatic amputation of Olsen's right arm deprived him of his dominant hand, made it more difficult for him to attend to personal matters such as dressing and grooming and acknowledged the fact that it took longer for Olsen to perform his job duties, her factual analysis lacks any examination of the specific conditions under which Olsen testified he had worked for 24 years, including the fact that he had been required to work 12 hour days on a regular basis as opposed to nine prior to the accident. (Record at 98.)
- b. In terms of the pain under which Olsen labored after his injury, the Labor Commissioner made minimal factual findings. Again, there was no reference whatsoever to the medical record. Despite the fact that Olsen had offered specific testimony about the continuous nature, pain levels and the fact that his pain was increasing and subject to infection in the 18 months before he retired, the Commissioner discounted the true nature of Olsen's pain levels when she stated that Olsen "experienced chronic moderate pain" which was "essentially stable." (Record at 98.)
- c. With regard to the reasons for Olsen's decision to retire, the ALJ made a

factual finding that his decision “stemmed from several factors.” The Commission determined that these factors included Olsen’s age, the stress level of his work, the difficulty of hiring and training new workers, and the need to travel. The Commissioner further made a factual finding that Olsen believed his health was declining and indicated “the pain and functional limitations from his work injury added additional burdens.” However, the Commission failed to take Olsen’s testimony in its context and ignored the uncontroverted testimony that the “health problems which motivated Olsen’s decision to retire early” related to the increasing pain he was having in his arm, the infections in his right arm that he had begun to experience, and the difficulty continuing work with his amputated arm. (Record at 98, 120-121.)

- d. With regard to Olsen’s employability, the Commissioner failed to take into account Olsen’s age, mental capacity, social environment, and medical impairment in evaluating Olsen’s disability.
- e. The Commissioner failed to acknowledge a single medical record in relation to Olsen’s employability, including the fact that the IME doctor had determined that Olsen had a 57% whole person impairment rating related to the amputation of his right arm. (Record at 97-101, 102-103, Medical Records Exhibit at page 50.)
- f. The Commissioner devoted two paragraphs to legal analysis under the “odd-lot” doctrine, erroneously indicating she could not apply the “odd-lot” doctrine because Olsen had, in fact, returned to work for 23 years. (Record 100-101).

25. It is from the Labor Commissioner’s Order Affirming the ALJ’s Decision to deny workers’ compensation benefits which Petitioner appeals.

SUMMARY OF ARGUMENTS

George Olsen lost his arm in an industrial injury in 1963. He returned to work for the following 23 plus years. During that time, Olsen experienced substantial pain which

was constantly a five on a zero to ten scale. He regularly worked twelve hour days to complete the job duties that had previously taken him nine. 18 months before Olsen took early retirement at age 62, he discussed with his supervisor, Gailon B. Smith, the fact that he was experiencing increasing pain and problems with his right arm, including cellulitis, and would not be able to continue to work long term. Olsen did not file for workers' compensation disability because he was not aware that such benefits were an option. At age 62 ½, Olsen took early retirement, incurring a 30% penalty in both his company pension and Social Security retirement benefits as a result of retiring early. Because of the problems Olsen was having with his right arm, he was essentially compelled to retire.

Upon finding out he was eligible for workers' compensation disability benefits, and upon the advice of legal counsel, Olsen filed a claim for permanent total disability benefits in 2006. Due to the nature of Olsen's traumatic right arm amputation, the fact that he returned to work for a substantial amount of time, and he was forced to retire early because of the arm amputation, Olsen's claim for permanent total disability falls under the "odd-lot" doctrine. Under the "odd-lot" doctrine, the Labor Commission is not permitted to deny permanent total disability benefits based simply on the fact that an individual with permanent industrial injuries returns to work or because he stops working at the age of retirement. *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984); *Norton v. Industrial Comm'n*, 728 P.2d 1025 (Utah 1986); *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572 (Utah 1987). In fact, *Marshall* provides the framework for evaluation of a permanent total disability case where the injured worker goes back to work for a

substantial period of time and then quits that work because of the sequelae of the industrial injury.

Under *Marshall* and its progeny, the Labor Commission is required to engage in a fact-intensive analysis concerning not the fact that the individual returned to work, but the conditions under which that employee worked after the industrial injury. As part of this analysis, the Labor Commission is required to consider whether the injured worker continued to work under substantial pain. *Norton*. Similarly, the Labor Commission is required to make detailed factual findings as to whether the industrial injury was a motivating factor in an employee's decision to retire in claims for permanent total disability. *Peck*. Finally, the Labor Commission is further required to take into account the individual's age, mental capacity, social environment and medical impairment in making a determination as to whether he is permanently totally disabled. *Marshall; Norton; Peck*.

In this case, the Commissioner failed to comply with the analytical requirements of the "odd-lot" doctrine. The Commissioner neither considered the factors which she was mandated to consider, nor did she make sufficient factual findings to show how and why she denied benefits to Olsen. Based on the limited factual findings and legal conclusions made by the Commissioner, her denial is based squarely on the fact that Olsen returned to work, worked a substantial amount of time, and waited until he was eligible for retirement to cease working. However, a denial of permanent total disability benefits for those reasons alone is patently prohibited by the "odd-lot" doctrine as established by the Utah

Supreme Court, some 20 years ago.

Turning to the inadequacy of the Commissioner's factual findings, she failed to reference a single medical record relating to Olsen's amputation, or a single piece of evidence within its context supporting her determination that Olsen's decision to take early retirement was motivated by "other factors." The Commissioner is required to make factual findings that "disclose the steps taken by the Commission in reaching its decision[s]." *Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1, 5 (Ut. Ct. App. 1991).

In this case, the Commissioner provided a general reference to the facts of this case, ignored the bulk of the undisputed evidence, and failed to disclose how or why she made the factual findings and legal conclusions she did. Under these circumstances, there is not sufficient information to allow an appellate court to meaningfully review the Commissioner's decision without combing through the record itself. Consequently, the Commissioner's factual findings are inadequate as a matter of law.

Finally, the Commissioner sat on this case more than 38 months, without any justification. That is a violation of Olsen's due process rights to have a determination of his case in a "reasonable" period of time pursuant to UAPA. Under these circumstances, Olsen respectfully submits that his rights, pursuant to UAPA, to a decision within a "reasonable time" as well as protected under the due process and open courts clauses of the Utah Constitution, were violated. The Commissioner has so compromised her position as the ultimate finder of fact in this case that she is in no position to render an unbiased

opinion.

For these reasons, Olsen respectfully requests that the Commissioner's decision be reversed and that this Court analyze Olsen's case pursuant to the "odd-lot" doctrine promulgated in *Marshall* and its progeny and take into account the undisputed evidence, including medical records and the unrefuted testimony of Olsen.

ARGUMENT

A. The Labor Commissioner Erroneously Interpreted and Applied the "Odd-Lot" Doctrine With Respect to Olsen's Claims³.

The Commissioner erred when she disregarded uncontroverted evidence, including all of the medical records, and failed to consider Olsen's claims under well-established analytical framework of the "odd-lot" doctrine. Based on the limited information provided in her Order Affirming ALJ's Decision, the Commissioner apparently denied benefits based on the conclusory presumption that Olsen's return to work for a substantial period after the traumatic amputation of his arm and decision to work until he was eligible for retirement. In so doing, the Commissioner erroneously interpreted 20 years of Utah Supreme Court precedent with respect to what it required in analyzing cases under the "odd-lot" doctrine and misapplied the uncontroverted facts to the case – where they were applied at all. The appropriate standard of review of the Labor Commissioner's decision

³ As the Labor Commissioner is the ultimate finder of fact, pursuant to statute, Olsen will not address the inadequacies of the ALJ's "findings" as the Commissioner has obviously supplanted those findings with her own.

is for correction of error. *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992).

The common thread in “odd-lot” cases is that an employee sustains a permanent industrial injury and then continues to work for a period of time until he reaches a point where he can no longer work full time because of that injury. *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984)(employee continued to work after industrial low back surgery until he retired.); *Norton v. Industrial Comm'n*, 728 P.2d 1025 (Utah 1986)(employee injured his neck and shoulder at work and continued to work an additional six years.); *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572 (Utah 1987)(employee injured his knee and low back in two industrial accidents, continued to work until he was eligible for retirement.) Because Olsen lost his arm in 1963, the applicable permanent total disability statute that applies is §35-1-67. Furthermore, the “odd-lot” doctrine as set forth by the Utah Supreme Court in *Marshall* and its progeny was applicable to the time period in which Olsen was injured. *See Marshall*.

Under the “odd-lot” doctrine, “total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.” *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572, 574 (Utah 1987)(quoting *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984)). As for the mechanics of an “odd-lot” case, an employee establishes a prima facie case of total disability by presenting “evidence that he can no longer perform the duties required in his occupation and that he cannot be

rehabilitated to perform some other type of employment.” *Peck* at 575. The burden then shifts to the employer to prove the existence of regular, steady work that the employee can perform given his education, mental capacity and age. *Id.* And finally, “[f]ailure by the employer to meet its burden of proof entitles the employee to permanent total disability benefits.” *Id.*

In analyzing a case under the “odd-lot” doctrine, it is certainly proper for the Labor Commission to consider the fact that an injured employee returned to work. *Norton* at 1027. However, the employee’s return to work must be considered in light of other factors such as whether the employee worked despite substantial pain from the industrial injury, the circumstances under which he continued to work, and whether the industrial injury was a motivating factor in discontinuing work. *Norton* at 1027 – 1028; *Peck* at 578.

Furthermore, the Labor Commission is also required to take into account the employee’s “age, sex, education, economic and social environment, . . . [and] permanent impairment.” *Marshall* at 211. Indeed, it is reversible error for the Labor Commission to deny permanent total disability benefits based only on the fact that an injured worker returned to work, even for a substantial period of time. *Norton*. It is likewise reversible error for the Labor Commission to deny the same benefits based on the fact that an employee waited until he is eligible to retire. *Peck* at 578 (stating, “[t]he mere fact that an employee has retired will not adversely affect a determination of permanent total disability when the employee has demonstrated that his disability from the industrial injury significantly influenced his decision to retire.”)

In *Norton*, the Utah Supreme Court set forth the nature of such error in some detail:

[The ALJ] erred when he failed to consider the *condition* under which Norton continued his employment, as manifested by his finding “the very fact that the applicant continued to work in underground mining for six years following his accident is convincing evidence that his accident did not render him permanently and totally disabled.” Norton’s decision to return to work did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate that throughout the remainder of his employ he was not restored to health. The evidence is undisputed that Norton spent the last six of his working years in considerable pain.

Provided that a worker’s disability was also analyzed within the framework of the “odd-lot” doctrine, case law dealing with the factor of substantial pain has generally held that “[a] worker who cannot return to any gainful employment without suffering substantial pain is entitled to compensation benefits for total disability.” *Comeaux v. Cameron Offshore Services, Inc.*, 420 So.2d 1209 (La. App. 1982). (Emphasis added.)

Norton at 1027 – 1028.

The *Norton* Court explained that a permanent total disability claim under the “odd-lot” doctrine had to be analyzed in this manner so that an injured worker’s disability status would be “undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary luck, or the **superhuman efforts** of the claimant to rise above his crippling handicaps.” (*Id.* at 1028)(quoting *Calogero v. City of New Orleans*, 397 So.2d 1252, 1254 (La. 1980) (Emphasis added).

Likewise, the *Norton* court recognized that it might be years before a man would feel the effects of an industrial injury, which could cause significant disability to an individual. Finally, the Utah Supreme Court reiterated the purpose behind the Workers’ Compensation laws, “It need not be restated at great length that the Workmen’s Compensation Act is to be liberally construed and that any doubt with

respect to the right of compensation will be resolved in favor of the injured employee.” *Norton* at 1028 (internal citations omitted).

In this case, the Commissioner committed error when she neglected to follow the analytical framework set forth by the Utah Supreme Court in *Marshall*, *Norton*, and *Peck* in considering Olsen’s claim of total disability under the “odd-lot” doctrine. The Commissioner engaged in scarcely two paragraphs of legal analysis of Olsen’s claims where the crux of its reasoning was that Olsen returned to work after losing his arm and *could* perform his job for the next 23 years until he was eligible to retire. (Record at 100.)

Olsen does not dispute that it was proper for the Commissioner to weigh these facts. Olsen respectfully submits, however, that the Commissioner committed error when she ended her analysis there and relied on that to deny total disability benefits. There are four significant factors which the Commissioner should have considered, and which she did not, in analyzing Olsen’s claim. She failed to meaningfully examine the conditions under which Olsen worked after his injury. She failed to take into account the substantial nature of Olsen’s pain resulting from the injury. She failed to properly address the evidence concerning Olsen’s reasons for retiring. Finally, the Labor Commissioner failed to assess Olsen’s claim in terms of his age, mental status, social environment, and medical impairment. Olsen respectfully submits that a failure to consider any one of these factors constitutes reversible error under the “odd-lot” doctrine as set forth below.

- 1. The Commissioner Failed to Consider the Conditions Under Which Olsen Returned to Work After the Traumatic Amputation of His Right Arm.**

The Commissioner was required to consider a number of factors in evaluating Olsen's disability under the "odd-lot" doctrine. The central point of this analysis is to evaluate disability without the distortion of an employee who continues employment via the sympathy of friends and employer or the employee's own superhuman efforts. What is missing from the Labor Commission's analysis in this case is an examination of the *conditions* under which Olsen continued his employment.

The *Norton* Court stated that only where an injured employee returns to work under normal conditions will there be a presumption that continued work did not result in a loss of earning capacity. In this situation, Olsen never returned to work under normal working conditions. He had to learn how to write with his non-dominant hand. He had difficulty taking phone calls. He had difficulty even going to the restroom. Most importantly, it took him three additional hours every day to complete his scheduled work. Under no stretch of the imagination can this be considered a return to work "under normal working conditions." Counsel would submit that Olsen, in returning to work in one week after losing his entire right arm, working for a period of in excess of 23 years with one arm, putting in an extra three hours per day to complete his work, taking extra time in every aspect of his life, such as going to the restroom, putting on his pants, eating a meal and working into his early 60's with the cellulitis and sequelae from his injury are "superhuman" by definition.

However, the Commissioner failed to consider this at all in her legal analysis as it

was left out entirely of the Commissioner's factual findings. Instead, the Commissioner's conclusions of law refer euphemistically to Olsen's "impressive work ethic" and includes the conclusory statement that Olsen "rose to the challenge" of maintaining full time employment after losing his right arm. Olsen respectfully submits that this does not constitute the level of legal analysis required by established precedent and fails to control for Olsen's "superhuman efforts" to provide for his family.

2. The Commissioner Failed to Factor In the Substantiality Of Olsen's Chronic Pain Resulting from the Industrial Injury.

In like manner, the Commissioner failed to evaluate Olsen's disability in light of the substantial pain Olsen suffered as a result of his amputation. Olsen testified that he worked for 23 years with pain from his amputation being at a 5 on a 0 – 10 scale. He indicated that this would increase with activity. As he got older, he developed cellulitis and it simply became too difficult for him to continue working with that type of pain. He likewise communicated this to his supervisor approximately 18 months before he retired. The Commissioner merely made a factual finding that Olsen had "chronic moderate pain" that was "stable." What exactly "stable chronic moderate pain" is or from whence the Commissioner obtained that reference is unknown.

The Utah Supreme Court established in *Norton* that the presence of substantial pain alone was sufficient basis to reach a determination of total disability. The Commissioner sidestepped the issue altogether by focusing on the *stability* of Olsen's pain rather than the

substantial nature of it. There is no discussion in either the findings of fact or conclusions of law as to the substantiality of Olsen's pain in evaluating his disability. Neither did the Commissioner refer to the medical records, Olsen's cellulitis or Olsen's testimony that his pain was increasing in the months and years before he retired.

The Commissioner states that it "does not minimize the continuing challenges Mr. Olsen faced as a result of his work-related impairment, or the pain he suffered from his injury." But the Commissioner declined to analyze the nature of the pain Olsen endured after his accident under the "odd-lot" doctrine at all. Olsen respectfully submits that there can be no greater minimization of the substantial pain that Olsen endured while maintaining his employment.

3. The Commissioner Failed to Analyze Olsen's Reasons For Taking Early Retirement Based on the Undisputed Evidence.

As set forth in *Peck*, the fact that an injured employee waited until he was eligible to retire is not in and of itself a reason to deny permanent total disability benefits. The real inquiry is whether the industrial injury was a motivating influence on the employee's decision to retire. Again, the Commissioner failed to consider the reasons that Olsen retired, not to mention the less-than-ideal circumstances under which Olsen took retirement, in evaluating his disability claim.

Instead, the Commissioner focused on the fact that Olsen worked for a long period of time after his traumatic amputation and simply retired because he was eligible to do so.

Aside from the fact that this is not supported by the evidence, this reasoning is plain error under the “odd-lot” doctrine.

Olsen presented undisputed facts at the hearing that he could no longer maintain the stress-level of his job due to the increasing pain and infection he was experiencing in his right arm. To the extent that the Commissioner made a factual finding that Olsen’s reasons for retiring were based on “other factors,” it is not supported by Olsen’s testimony when taken in its proper context. Neither does the Commissioner’s attempt to support her determination with what “other” evidence she appears to rely on.

Olsen testified that approximately 18 months before he retired, he had talked to his supervisor, Gailon B. Smith, about the fact that it was getting too difficult to continue working with the problems he was having with his arm. Likewise, the court admitted into evidence a letter which Olsen sent his supervisor informing him of his intent to retire due to health problems. Olsen testified that the “health problems” that were compelling his decision to retire were the increasing pain and problems he was having that stemmed from the amputated arm.⁴

The Respondents elicited testimony from Olsen that among the reasons he had for retiring were that other men his age with similar work responsibilities were dying due to the stress, and that training new employees and the travel associated with his job became

4 Had the Respondents really believed that Olsen’s motivation for retiring was something other than the effects of his industrial injury, they could have put the matter to rest by calling Olsen’s supervisor as a witness concerning the circumstances surrounding Olsen’s retirement. However, Gailon B. Smith was conspicuously absent from the proceedings and the Respondents chose instead to argue alternate reasons for Olsen’s early retirement without a shred of competent evidence to support them other than taking Olsen’s testimony out of context. Even so, it was error for the Labor Commission to rely on such an argument to deny benefits.

more stressful and difficult as he aged. However, Olsen qualified these answers with the fact that he could no longer maintain those stress levels with the increasing problems in his arm.

Notwithstanding the evidence that is actually on the record, the Commissioner focuses her attention exclusively on the Respondents' questions and Olsen's answers, taken out of their full context, and ignored completely the undisputed evidence presented which showed that Olsen was compelled to retire as a result of his industrial injury. The Commissioner again side-stepped her obligation to consider the facts leading up to Olsen's retirement, including the undisputed evidence, and medical records as required by the "odd-lot" doctrine and simply concluded that she was "not persuaded" that Olsen's industrial injury was a motivating factor in his decision to take early retirement. It is difficult to understand how the testimony of Olsen, letter to his employer about the reasons for his retirement and the medical evidence from four different physicians of Olsen's would not persuade anyone that the reason Olsen retired was because that as he got older he could no longer complete his work as a one armed man.

4. The Commissioner Failed to Consider Olsen's Disability In the Context of His Age, Mental Capacity, Social Environment, and Medical Impairment.

Finally, the Commissioner neglected to analyze Olsen's disability in the context of his age, mental capacity, social environment, and medical impairment. Other than the fact that Olsen retired at age 62 and ½, there is no discussion of Olsen's disability in light of his

age. And there is no discussion at all relating to mental capacity, social environment, and medical impairment. Significantly, the IME doctor in this case determined that Olsen had a 57% whole person impairment related to the industrial amputation of his right arm. Likewise, the Medical Records Exhibit contains medical records which support the fact that Olsen was developing infections in his right arm prior to the time he decided to stop working.

However, the Commissioner makes no mention of the extent to which Olsen was impaired at all. She makes no effort to reconcile her position denying benefits with the records and opinions submitted by Olsen's treating physicians, including the fact that Olsen was having problems with cellulitis in his right arm exactly as Olsen had testified. It was clear error for the Labor Commission not to analyze these factors under the "odd-lot" doctrine.

In this case, the Commissioner commits the very errors which the Supreme Court sought to protect against in "odd-lot" cases. The Commissioner misinterpreted the law when she failed to evaluate Olsen's disability claim under the framework established by *Marshall, Norton, and Peck*. In like manner, the Commissioner misapplied the facts to the law when she failed to take the undisputed evidence into account in analyzing Olsen's claim under the "odd-lot" doctrine. As such, Olsen submits that the Commissioner committed serious prejudicial error in denying Olsen disability benefits under these circumstances and requests that the Labor Commission's decision be reversed consistent with all of the factors established by the Utah Supreme Court in "odd-lot" cases as applied

to Mr. Olsen's permanent total disability claim.

B. The Labor Commissioner's Factual Findings Are Inadequate As a Matter of Law

The Utah Administrative Procedures Act provides that a presiding officer must sign an order including "a statement of the officer's findings of fact based **exclusively** on the evidence. . . or on facts **officially noted**." Utah Code Ann. §63G-4-208(1)(a)(emphasis added.) Moreover, the presiding officer must give "a statement of the **reasons** for [his/her] decision." Utah Code Ann. §63G-4-208(1)(c)(emphasis added.) "Whether the findings [of fact] are adequate is therefore a legal determination that requires no deference to the Commission." *Adams v. Board of Review of the Indus. Comm'n*, 821 P.2d 1, 5 (Utah App. 1991).

In *Milne Truck Lines, Inc., v. Public Serv. Comm'n*, the Utah Supreme Court held that an administrative law agency was required to make findings of fact "on all necessary ultimate issues under the governing statutory standards," and that "[i]t is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions." *Milne Truck Lines*, 720 P.2d 1373, 1378 (Utah 1986).

The purpose behind this is to afford the appellate courts a meaningful opportunity to review how and why the administrative agency reaches the factual and legal conclusions it

does. This applies to the Labor Commission. *Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1 (Ut. App. 1991). Further, the Labor Commission's factual findings will be inadequate as a matter of law "if they do not disclose the steps taken by the Commission in reaching its decision to deny . . . benefits." *Id.* at 5.

As an additional matter, the Utah Supreme Court stated in *Jones v. California Packing Corp.*, 244 P.2d 640, 644 (Utah 1952), "The law does not invest the [Labor] Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence. . . ."

Findings of fact are only adequate when they are supported by "substantial evidence" viewed by the record as a whole. Utah Code Ann. § 63G-4-403(4)(g).⁵ In applying the substantial evidence test, a court must review the whole record including, "not only the evidence supporting the board's factual findings, but also the evidence that fairly detracts from the weight of the board's evidence." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

In this case, and as discussed above, the Commission ignored relevant and critical factual information on four separate issues and made findings that lacked evidentiary support. First, the Commissioner entirely ignored Olsen's work-related impairment including the fact that he put in an extra three hours a day to his job and worked under

⁵ Because the Labor Commission's factual findings are inadequate as a matter of law, Olsen is not required to marshal the evidence to show that the Commission's decision is not supported by "substantial evidence." However, to the extent that Olsen is required to marshal the evidence, he respectfully submits that he has done so in his Statement of Facts and that in any event, the only factual dispute in this case centers around the reasons for Olsen's early retirement, and which neither the Commission's factual findings nor its legal conclusions are supported by competent evidence whatsoever.

substantial pain. Second, the Commissioner ignored the impairments that Olsen has in activities of daily living. Third, the Commissioner ignored critical information that Olsen retired early because of his traumatic amputation. Fourth, the Commissioner ignored the determinations from Olsen's treating physicians as it related to his disabilities associated with the traumatic amputation. Finally, the Commissioner determined that Olsen retired for non-work related reasons, with no evidence to support such a finding.

As set forth in the Statement of Facts, Olsen presented uncontroverted competent evidence of his inability to continue working at the time he retired due to his industrial injury. Not one of the Respondents came forward with evidence to refute this. Neither did the Respondents present evidence that there was regular steady full time work available to Olsen at the time he ceased working which did not rely on the sympathy of friends or Olsen's superhuman efforts.

Because the "odd-lot" doctrine requires a fact-intensive inquiry of specific factors, the Labor Commissioner is necessarily required to disclose all of the facts upon which she relies for her analysis under that doctrine. Likewise, the Commissioner is not permitted to simply ignore undisputed evidence in a case. Yet the Commissioner failed to make basic factual findings in relation to the factors she was required to consider under the "odd-lot" doctrine. Although Olsen presented detailed uncontroverted evidence of his disability, the conditions of his employment after the amputation and the superhuman efforts he undertook to work after his industrial injury causing him to take early retirement, the Labor Commissioner failed to include almost all of this in her factual findings. Neither did the

Labor Commissioner refer to what facts were actually at issue and upon what evidence she relied to resolve those issues.

Instead, the Commissioner offered up a broad and euphemistic summary of Olsen's claims and the evidence he presented. She then went on to deny benefits because she wasn't "persuaded" that Olsen was totally disabled under the "odd-lot" doctrine or that other work was not available for him at the time of his retirement.

However, there is not sufficient information to apprise the appellate court of the ultimate or subsidiary factual issues and reasons for resolution of those in such a manner as to show the analytical steps that lead to the Commissioner's ultimate decision to deny Olsen benefits. There simply is not enough information in the Commission's factual findings to allow an appellate court to review how and why the Commission arrived at its decision to deny benefits. As such, Olsen respectfully submits that the Commission's factual findings are inadequate as a matter of law and this Court should review the record and issue a determination consistent with the "odd-lot" doctrine.

C. The Commissioner, By Sitting On Olsen's Motion for 38 Months Has Violated His Due Process Rights and Has Compromised Herself to the Point She Is No Longer Impartial.

The delays associated with Mr. Olsen's case have become the norm at the Labor Commission. The Commissioner's office routinely holds appeals for three, four or five years before issuing an opinion.

Counsel for Olsen would submit that as the administrative agency is under the exclusive control of the executive branch, concerns with due process and proper legal analysis are routinely left by the wayside. While Administrative law, under the direction of the executive branch, is less formal than proceedings before a constitutional court, the cavalier attitude of the Commissioner in letting motions sit for years is wholly inexcusable.

It has taken over 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. Within two weeks of the hearing, the ALJ issued an Order that was clearly contrary to Utah law. After more than three 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 Commissioner 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 contained 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.*, 29 N.M. 228, 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 Comm’n*, 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 Comm’n*, 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. §63G-4-208(1). Moreover, this Court has held that taking 17 months to issue an administrative opinion does not comply with the mandate to issue orders within a reasonable time under UAPA. *Rice v. Utah Secs. Div.*, 95 P.3d 1169 (Utah Ct. App. 2004).

Apparently the Labor Commissioner does not take seriously the mandates from the Utah Constitution, the Appellate Courts and the Utah Legislature. Olsen did not receive a remedy by "due course of law without denial or unnecessary delay." The Labor Commissioner did not "fairly represent" his interests nor did he receive a "simple, adequate and speedy" means of securing compensation in this case. Neither was the Commissioner's order issued in a "reasonable time".

There has been nothing simple, adequate or speedy about Olsen'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. The delays demonstrated in this case are now typical of what occurs in the Commissioner's office. The fact of the matter is that people are out of work, taking out bankruptcy and getting divorced because they are unable to pay bills. The Commissioner, unfortunately, has taken the position that it is acceptable for these cases to drag on for years without resolution. Then, when resolution comes, it is -- as in this case -- a curt dismissal of claims without any meaningful analysis.

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 38 months.

The circumstances for injured workers in this state are in a serious predicament. Counsel would suggest that pursuant to Utah Code Ann. §63G-4-404(1)(b)(i) this Court has jurisdiction to order the Labor Commission of Utah to act and conform with Utah law. Olsen 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.

It is no secret that in a workers' compensation setting delays always prejudice the injured worker. There is never prejudice to an insurance company that simply maintains control of its funds for a longer period of time. Injured workers, who are at the mercy of the executive branch through the Commissioner's office, are forced to enter into settlements they wouldn't otherwise agree to because of such inappropriate delay. Additionally, the Commissioner will compromise her ability to impartially analyze the decisions of the ALJ. Where an injured worker has been waiting for a decision for three or four years, there will always be a tendency to affirm the denial of benefits by the ALJ and rationalize that there has been no change in the status quo. Certainly "the injured worker couldn't have been prejudiced by the delay occasioned with the Commissioner's inaction as she is simply affirming the ALJ."

Appellate Courts have recognized the impropriety of administrative agency delay and the compromising nature of such a delay. In *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 490 (3d Cir. 1980) the Third Circuit Court of Appeals held that a three year and nine month delay in rendering a decision on an Application for Disability benefits in the administrative review process was a clear violation of the Applicant's due process rights and was "wholly inexcusable." The *Kelly* court went on to hold "although there is no magic length of time after which due process requirements are violated, we are certain three years, nine months, is well past any reasonable time limit when no valid reason for the delay is given."

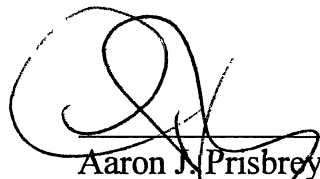
Due to the compromising nature of the agency's inactivity and delay, the Third

Circuit Appeals Court stated “[w]e see no reason why this applicant should undergo another bout in the agency. Four years is enough.” *Id* at 492. In the same fashion as the denial of disability benefits in *Kelly*, Mr. Olsen, nor any other injured worker for that matter, should be subject to the Commission’s blatant disregard for the due process rights of injured workers. As such, Olsen requests this court enter an order granting permanent total disability benefits consistent with the decision reached in *Marshall* and its progeny pursuant to the “odd-lot” doctrine.

CONCLUSION

For the foregoing reasons, Olsen respectfully requests that the Order Affirming ALJ’s Decision be reversed and benefits be awarded Olsen by this Court consistent with the facts and the legal framework established under the “odd-lot” doctrine.

DATED this 12 day of September, 2010.

A handwritten signature in black ink, appearing to read 'A. Prsbrey', is written over a horizontal line.

Aaron J. Prsbrey
Elizabeth B. Grimshaw
Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2010, a copy of the foregoing

APPELLANT'S BRIEF was mailed, postage prepaid, as follows:

Utah Court of Appeals (1 original)
450 South State Street (7 copies)
P.O. Box 140230
Salt Lake City, Utah 84111-0230

Labor Commission of Utah (2 copies)
160 East 300 South, 3rd floor
P.O. Box 146615
Salt Lake City, UT 84114-6615

Mr. Thomas C. Sturdy (2 copies)
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111

Edwin C. Barnes (2 copies)
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111



AARON J. PRISBREY
Elizabeth B. Grimshaw
Attorneys for Petitioner

ADDENDUM

1.....	Order Affirming ALJ's Decision
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Addendum 1

UTAH LABOR COMMISSION

GEORGE M. OLSEN,

Petitioner,

vs.

UTAH CONCRETE PIPE CO.,
CONTINENTAL INSURANCE CO.,
and EMPLOYERS' REINSURANCE
FUND,

Respondents.

ORDER AFFIRMING
ALJ'S DECISION

Case No. 06-0377

George M. Olsen asks the Utah Labor Commission to review Administrative Law Judge Sessions' denial of Mr. Olsen's claim for permanent total disability benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

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

BACKGROUND AND ISSUE PRESENTED

Mr. Olsen claims permanent total disability compensation for the accidental amputation of his right arm while working for Utah Concrete Pipe Co. on November 6, 1963. After an evidentiary hearing, Judge Sessions concluded that Mr. Olsen's work injury had not rendered him permanently and totally disabled. Judge Sessions therefore denied Mr. Olsen's claim for compensation.

In requesting Commission review of Judge Sessions' decision, Mr. Olsen argues that Judge Sessions' findings are inconsistent with the evidence presented at hearing and that such evidence establishes Mr. Olsen's entitlement to permanent total disability compensation.

FINDINGS OF FACT

The Commission has reviewed the entire evidentiary record in this matter and makes the following findings of fact.

Mr. Olsen was born in May 1924. He graduated from high school and served in the military during World War II, where he was wounded in the leg and also developed a chronic sinus condition. After his military service, Mr. Olsen completed approximately 3 years of college. Between 1949 and 1956, he supervised W.W. Clyde Co.'s construction of infrastructure for the city of Page, Arizona. Mr. Olsen then accepted employment as plant superintendant of Utah Concrete's facility at Ogden,

ORDER AFFIRMING ALJ'S DECISION
GEORGE M. OLSEN
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Utah. While working there on November 6, 1963, Mr. Olsen attempted to clear some rocks out of a conveyor apparatus. The conveyor belt unexpectedly began moving, catching Mr. Olsen's right arm. As a result of this accident, Mr. Olsen's right arm was amputated just below the elbow.

Remarkably, in less than a week after the traumatic amputation of his lower right arm, Mr. Olsen returned to his regular supervisory duties at Utah Concrete. He was subsequently fitted with a right-arm prosthesis and has used a prosthesis through the years since his accident. The loss of his dominant lower right arm caused Mr. Olsen difficulty in some aspects of his personal and work life. It was more difficult for Mr. Olsen to attend to personal matters such as dressing, grooming, and the like. At work, it was time consuming for Mr. Olsen to fill out required reports with his left hand. Mr. Olsen developed adaptive techniques to partially mitigate these problems. While Mr. Olsen experienced chronic moderate pain in his arm after his accident, the arm's condition has been essentially stable and he has experienced relatively few medical complications from the injury. He uses Tylenol for the pain and has rejected more potent pain medications due to their side effects.

In 1969, Mr. Olsen accepted an offer to work as a plant superintendent for Basalt Rock Co. in California. In 1976, Utah Concrete — by then known as Amcor — persuaded Mr. Olsen to return to its employment, again as a plant superintendent. Mr. Olsen returned to Utah and continued working as plant superintendent for Amcor until the date of his retirement on December 31, 1986.

At the time of his retirement from Amcor, Mr. Olsen qualified for a company pension and social security retirement benefits, as well as a military disability benefit as a result of his war injury. After his retirement, Mr. Olsen was called back to work by Amcor on a contract basis as a consultant and to design equipment. As demonstrated by his work history, Mr. Olsen was a competent and sought-after management employee throughout the period of his active employment and afterwards during his retirement.

Mr. Olsen's decision to retire on December 31, 1986, stemmed from several factors. He knew of others his age with similar work responsibilities who he believed had died due to stress. He found it difficult to hire and train new workers. Furthermore, at the time Amcor was acquiring other operations throughout the United States and Mr. Olsen was required to travel to those sites as well as perform his regular work duties. He believed his health was declining. The pain and functional limitations from his work injury added additional burdens. Although Mr. Olsen continued to successfully perform his work duties, over a period of several years he came to the conclusion that it would be prudent for him to retire when he qualified for his company pension and social security retirement benefits.

Mr. Olsen's non-work medical problems include the removal of his thyroid in 1956, several years prior to his work accident. After his retirement at the end of 1986, Mr. Olsen experienced heart arrhythmia and implantation of a pacemaker, prostate cancer, left carpal tunnel syndrome and ganglion cyst, arthritis, depression, and colon polyps.

DISCUSSION AND CONCLUSION OF LAW

The Utah Workers' Compensation Act provides various medical benefits and disability compensation to employees who suffer work-related injuries. There is no dispute that Mr. Olsen's injury is compensable under the Act, and he has previously received medical benefits and permanent partial disability compensation. The only issue now in dispute is whether Mr. Olsen is also entitled to permanent total disability compensation.

Mr. Olsen's claim for permanent total disability compensation must be evaluated according to the law in effect on November 6, 1963, the date of his work injury. At that time, § 35-1-67 of the Utah Workers' Compensation Act provided for payment of permanent total disability compensation but did not set out the standards for evaluating an injured worker's claim for such compensation. Instead, those standards were derived from appellate decisions of the Utah Supreme Court, such as the Court's decision in *United Park City Mines Company v. Prescott*, 15 Utah 410, 412 (Utah 1964), in which the Court held that:

[A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do

In light of the foregoing standard for determining whether an injured worker is permanently and totally disabled, the Commission has carefully considered Mr. Olsen's work history, both before and after the accident of November 3, 1963. It is apparent that throughout his career, Mr. Olsen was highly skilled in the technical aspects of his work, competent as a supervisor and manager, and possessed of an impressive work ethic. It is also apparent that Mr. Olsen faced a very real challenge when he lost his lower right arm. However, his work record demonstrates that he rose to the challenge and continued on with a successful career over the next 23 years. The Commission does not minimize the continuing challenges Mr. Olsen faced as a result of his work-related impairment, or the pain he suffered from his injury. Nevertheless, the Commission is not persuaded that those factors prevented Mr. Olsen from continuing to work or motivated his decision to retire. The Commission therefore concludes that Mr. Olsen's work injury did not prevent him from performing "work of the general character he was performing when injured." Consequently, Mr. Olsen does not satisfy the applicable standards for a determination of permanent total disability.

The Commission has also considered Mr. Olsen's argument that he is entitled to permanent total disability compensation under what is known as the "odd-lot" doctrine. The Utah Supreme Court discussed the application of the odd-lot doctrine in *Marshall v. Industrial Commission*, 681 P.2d 208, 212 (Utah 1984), stating that "[w]hether or not an employee falls into the odd-lot category depends on whether there is regular, dependable work available for the employee who does not rely on the sympathy of friends or his own superhuman efforts." In this case, the evidence establishes that regular, dependable work was available to Mr. Olsen. In fact, his expertise and abilities were in

ORDER AFFIRMING ALJ'S DECISION
GEORGE M. OLSEN
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real demand in the job market before and after his accident, and even after his retirement. The Commission concludes that the continuing availability of regular and dependable work for Mr. Olsen precludes application of the odd-lot doctrine to his claim.

In summary, the Commission finds that Mr. Olsen has not established that he is permanently and totally disabled under the standards in effect at the time of his 1963 accident, nor does Mr. Olsen's claim present circumstances that warrant application of the odd-lot doctrine. Consequently, the Commission concludes that Mr. Olsen is not entitled to permanent total disability compensation.

ORDER

The Commission affirms Judge Sessions' decision denying Mr. Olsen's claim for permanent total disability compensation. It is so ordered.

Dated this 28th day of January, 2010.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

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

ORDER AFFIRMING ALJ'S DECISION
GEORGE M. OLSEN
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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of George M. Olsen, Case No. 06-0377, was mailed first class postage prepaid this 28 day of January, 2010, to the following:

George M. Olsen
296 E 900 S #22
St George UT 84770

Utah Concrete Pipe Co
379 17th St
Ogden UT 84404


Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Continental Insurance Co.
C T Corp Designated Agent
136 E S Temple Ste 2100
Salt Lake City UT 84111

Aaron Prisbrey, Esq.
1090 E Tabernacle St
St George UT 84770

Thomas Sturdy, Esq.
57 E 200 S Ste 800
Salt Lake City UT 84111

Edwin C. Barnes, Esq.
One Utah Center 13th Fl
101 S Main St
Salt Lake City UT 84111


Sara Danielson
Utah Labor Commission