

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE M. OLSEN,

Appellant/Petitioner,

v.

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

Appellees/Respondents.

Appellate Case No. 20100163 CA

Labor Commission Case No. 06-0377

BRIEF OF APPELLEE EMPLOYERS' REINSURANCE FUND

APPEAL FROM AN ORDER OF THE UTAH LABOR COMMISSION

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STATEMENT OF JURISDICTION

Appellee/Respondent Employers' Reinsurance Fund ("ERF") agrees with Appellant that this Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 63G-4-403 & 78A-4-103 (2010).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Issue: Whether the Utah Labor Commission ("Labor Commission") properly declined to apply the "odd-lot" doctrine where Appellant/Petitioner George M. Olsen ("Olsen") was able to return to work soon after his injury with no medical restrictions or modifications, worked successfully thereafter in a supervisory capacity for nearly a quarter of a century, moved freely in the labor market, and retired when he was eligible to do so for reasons unrelated to his injury.

Standard of Review and Preservation: ERF agrees that this issue was preserved below but disagrees with the "correction of error" standard of review set forth by Mr. Olsen. Application of the odd-lot doctrine is a mixed question of law and fact. *See Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 8, 128 P.3d 31; *Smith v. Mity-Lite*, 939 P.2d 684, 686 (Utah Ct. App. 1997). Because the odd-lot doctrine is highly fact-dependent, *see id.* at 687 (noting the "constellation of factors" that must be considered and evaluated in terms of the specific individual), the Labor Commission's determination is entitled to some deference, *see Drake v. Indus. Comm'n*, 939 P.2d 177, 181-82 (Utah 1997), and will not be disturbed unless it exceeds the bounds of reasonableness and rationality, *Mity-Lite*, 939 P.2d at 686.

2. Issue: Whether the Labor Commission's findings of fact were adequate where the Labor Commission considered the entire record and set forth sufficient bases for its conclusions, which were supported by substantial evidence.

Standard of Review and Preservation: ERF disagrees with Mr. Olsen's characterization of this issue but does agree with the standard of review set forth by Mr. Olsen.

3. Issue: Whether the Labor Commission's objectivity was compromised and whether the Labor Commission violated Mr. Olsen's due process rights by not promptly affirming the denial of benefits by the Administrative Law Judge ("ALJ").

Standard of Review and Preservation: Again, ERF disagrees Mr. Olsen's characterization of this issue. ERF also disagrees with the standard of review set forth by Mr. Olsen. He was not prejudiced by length of time taken by the Labor Commission to review the denial of benefits, since benefits were properly denied. Neither was this issue properly developed or preserved below. The Utah Administrative Procedures Act allows a reviewing agency a reasonable time within which to complete its review of an order, an appropriate allowance for an agency with a limited budget. The record reflects one letter inquiry to the Labor Commission during the pendency of Mr. Olsen's appeal, but no complaint about the amount of time that had passed and Mr. Olsen created no factual record about the budget and staff resources available to the Labor Commission against which the reasonableness of its conduct could be measured. There was no error by the Labor Commission here, and the "correction of error" standard does not apply to this issue.

STATEMENT OF THE CASE

I. Nature of the Case

This is a case where Utah's workers compensation program functioned exactly as it was intended to do. Mr. Olsen's arm was amputated in 1963 following an unfortunate industrial accident. He was able to return to work one week later, his permanent partial impairment was rated and paid, and he continued working for the rest of his career with no subsequent loss of earnings. At the time of the accident, Mr. Olsen worked for Utah Concrete Pipe as a supervisor. He continued to work in that capacity after his accident without medical restrictions or modifications beyond the expected accommodation required for his amputation. His skills were in demand – he was later hired away from his Utah employer to accept a similar position in California. While he lived there, he piloted a private airplane back and forth between California and Utah for visits. Several years later, Mr. Olsen was enticed to return to work for his Utah employer. Mr. Olsen retired voluntarily in 1986 at age 62. Even after his retirement, Mr. Olsen provided consulting services to his former employer.

In 2006, forty-three years after the accident and some twenty years after his voluntary retirement, Mr. Olsen filed a claim for permanent total disability compensation and interest dating back to his 1986 retirement. The claim was denied – first by and ALJ and then by the Labor Commission – because Mr. Olsen failed to establish that he was permanently and totally disabled by his industrial accident. Mr. Olsen disagrees with the Labor Commission's determination. He argues that the Labor Commission ignored evidence and violated his due process rights. It did not. The Labor Commission properly

considered the record evidence, including the particular evidence Mr. Olsen says it ignored. Neither did the Labor Commission violate Mr. Smith's rights by the way in which his appeal was addressed.

II. Course of Proceedings and Disposition Below

Mr. Olsen filed an Application for Hearing on or about April 13, 2006. (R. at 1.) An evidentiary hearing was held on September 15, 2006, at which Mr. Olsen testified. (R. at 50.) At the hearing, Mr. Olsen attempted to support his claim, principally by offering two "Summary of Medical Record" forms that purported to describe the reasons for Mr. Olsen's retirement in 1986. The forms had been filled out at Mr. Olsen's request by two doctors, Dr. Hunter and Dr. Lewis, who had originally treated Mr. Olsen's arm in the 1960's. (R. at 150-51, 159.) They apparently returned the forms to Mr. Olsen along with accompanying letters. (*See* R. at 103:406-07 (vol. 3 of Record on Appeal/Medical Records Exhibit #1B) & 102:315 (vol. 2 of Record on Appeal/Medical Records Exhibit #1A).)¹ ERF objected to the introduction of these documents. They were admitted over ERF's objections and then later disregarded when it became apparent that Dr. Hunter had not treated Mr. Olsen since 1963 and Dr. Lewis had not treated him since 1972. (R. at 150-51.) Neither physician had examined Mr. Olsen at the time of his retirement or since, and neither physician had reviewed the other medical records describing Mr. Olsen's treatment after he left their care. Without this essential foundation, the ALJ

¹ Mr. Olsen evidences some confusion about these materials and their location in the Record. At pages 12-13 of his brief, Mr. Olsen quotes portions of a letter from Dr. Lewis, citing to page 406 of the Medical Records Exhibit. The quoted language, however, does not appear there. Also, the Summary of Medical Record form prepared by Dr. Hunter appears at page 406, rather than page 407, of the Medical Records Exhibit.

excluded the two forms because the doctors' opinions were not supported and were irrelevant to the issues presented in the case. (R. at 52.)

The ALJ issued his Findings of Fact, Conclusions of Law, and Order on September 27, 2006. (R. at 50-58.)² The ALJ specifically set forth and analyzed various factors to determine whether Mr. Olsen was permanently totally disabled. (R. at 54-56.) In particular, he noted that Mr. Olsen was continuously employed for approximately twenty-four years following his injury and continued in the same important position with two different employers. (R. at 56.) He worked without any restrictions imposed by his employers or doctors. (R. at 56.) In fact, Mr. Olsen "was able to travel and live for 19 years without one medical reference to treatment of his [arm] injury." (R. at 56.) Mr. Olsen was even called back to work by his employer as a consultant after his retirement. (R. at 56.) There was no reduction in Mr. Olsen's earning power and Mr. Olsen "was successful for his entire career up to the day he retired." (R. at 56.) Accordingly, the ALJ determined that Mr. Olsen had not established that he was permanently and totally disabled under the odd-lot doctrine. (R. at 56-57.) Indeed, Mr. Olsen did not attempt to demonstrate the first requirement of the odd-lot doctrine – that he could no longer perform the duties of his occupation. (R. at 57.)

On November 16, 2006, Mr. Olsen filed a Motion for Review with the Labor Commission. (R. at 62-74.) On January 28, 2010, the Labor Commission issued an

² Mr. Olsen implies that the ALJ's decision was flawed because, he claims, the ALJ was released by the Labor Commission "for a series of legal errors, non-judicial demeanor, and incompetence generally." (Br. of Appellant at 12.) This unwarranted attack on the ALJ is without support in the Record and constitutes irrelevant, immaterial and scandalous material. As such, it should be stricken. *See* Utah R. App. P. 24(k).

Order Affirming ALJ's Decision. The Labor Commission acknowledged that Mr. Olsen's injury understandably caused him difficulty in some aspects of his work and in his personal life. (R. at 98.) While Mr. Olsen experienced chronic pain in his arm, he was able to treat his pain with Tylenol and "has experienced relatively few medical complications from the injury." (R. at 98.) The Labor Commission recognized that Mr. Olsen's decision to retire stemmed from several factors, including serious health issues unrelated to his injury, frequent travel requirements, and his concern about others of his age with similar employment who he believed died due to stress. (R. at 98.)

The Labor Commission noted that Mr. Olsen was able to continue in his employment for Utah Concrete Pipe Company, then went to work for Basalt Rock Company in California and was subsequently persuaded to return to work for his previous employer in Utah. (R. at 98.) "Mr. Olsen was a competent and sought-after management employee throughout the period of his active employment and afterwards during his retirement." (R. at 98.)

The Labor Commission confirmed that it had "reviewed the entire evidentiary record in this matter," (R. at 97), and "carefully considered Mr. Olsen's work history, both before and after the accident of November 3, 1963," (R. at 99). That work history revealed that Mr. Olsen was highly skilled and continued on with a successful career for twenty-three years following his injury. (R. at 99.) "It [was] apparent [to the Labor Commission] that Mr. Olsen faced a very real challenge when he lost his lower right arm." (R. at 99.) However, his injury "did not prevent him from performing 'work of the general character he was performing when injured.'" (R. at 99 (quoting *United Park City*

Mines Co. v. Prescott, 393 P.2d 800 (Utah 1964)).) The Labor Commission concluded that Mr. Olsen did not fall within the odd-lot doctrine because regular, dependable work was available to him. (R. at 99-100.) Mr. Olsen's services were in demand, both in Utah and California, after his injury and even after his retirement. (R. at 99-100.) On this explicit basis, the Labor Commission affirmed the ALJ's decision. (R. at 100.)

III. Statement of Facts

1. Mr. Olsen was injured on November 6, 1963, while working for Utah Concrete Pipe Company when his right arm was caught in a conveyor belt. (R. at 51, 105.)

2. As a result of the accident, Mr. Olsen's right arm was amputated just below the elbow. (*Id.*) Mr. Olsen was treated for the injury by Dr. Hunter at McKay Dee Hospital. (R. at 105.)

3. At the time of his injury, Mr. Olsen was a plant superintendent for Utah Pipe Company. (R. at 129.) Mr. Olsen's position was supervisory and he was not required to perform any manual labor. (*Id.*)

4. Approximately seven days after his accident, Mr. Olsen returned to work with Utah Concrete Pipe Company and at the same position. (R. at 51, 108.)

5. Six months after his accident, Mr. Olsen was hospitalized for a few days and again treated by Dr. Hunter. (R. at 51, 150.) Mr. Olsen was not again treated or seen by Dr. Hunter after that 1963 hospitalization. (R. at 150-151.)

6. Mr. Olsen's care was then taken up by Dr. Lewis until approximately 1972 or 1973, the last time Mr. Olsen saw Dr. Lewis on a professional basis. (*Id.*)

7. Mr. Olsen continued to work for Utah Concrete Pipe Company until the latter part of 1969 with no significant job modifications or medical restrictions, though it took Mr. Olsen longer to complete his work. (R. at 51, 129.) Mr. Olsen also worked longer hours because he supervised two eight-hour shifts and had to be present for both. (R. at 146-47.)

8. Mr. Olsen left his employment with Utah Concrete Pipe Company because he accepted employment in California with Basalt Rock Company in a supervisory capacity similar to the position he held in Utah. (R. at 5, 51, 130.)

9. Mr. Olsen worked for Basalt Rock Company for approximately six and one-half years. (R. at 5, 51.)

10. At the time, Mr. Olsen held a pilot's license and his wife owned an airplane. (R. at 132, 137.) Mr. Olsen piloted the plane to and from Utah on weekends to assist in the care for his ailing parents. (R. at 137.) He stopped piloting, however, after being diagnosed with heart arrhythmia. (R. at 133.)

11. In approximately 1977, Mr. Olsen was enticed to return to Utah and was again employed as a plant superintendent by the successor to Utah Concrete Pipe Company. (R. at 5, 51, 135.) He continued in his previous management duties but was also responsible for training new employees and traveling for his employer to represent it at buy-outs. (R. at 120, 123.) His duties included preparing reports industrial injuries for the Utah Labor Commission. (R. at 146.)

12. Mr. Olsen voluntarily retired on December 31, 1986. (R. at 51.)

13. At the time of his retirement, and as of the time of the hearing, the overall condition of Mr. Olsen's arm was the same as it had been shortly after his injury. (R. at 51, 135, 141, 151-52.) Mr. Olsen had required only occasional treatments for pain and infections after his amputation. (R. at 51, 135, 141.) Such treatments were generally limited to antibiotics and over-the-counter pain medication. (*Id.*)

14. In total, Mr. Olsen was fully employed for twenty-three years after he was injured. He was able to perform all of the requirements of his job during that time. Mr. Olsen did not receive any complaints from his employers regarding his work following the accident and received regular raises and bonuses. (R. at 145.)

15. Mr. Olsen has suffered from numerous additional health problems unrelated to his industrial accident including thyroid problems (which required surgery to remove the gland), heart arrhythmia (which required insertion of a pacemaker), carpal tunnel syndrome, depression, colon cancer and prostate cancer. (R. at 51, 132-34.) The bulk of Mr. Olsen's non-industrial health issues occurred during the period near his retirement date. (R. at 55.)

16. Following his retirement Mr. Olsen continued to provide consulting services to his employer. (R. at 51, 120.)

17. Since his retirement, Mr. Olsen has been able to travel extensively, including visits to Hong Kong, Japan, Taiwan, Korea, Mexico, Germany, Belgium, Holland, France and Switzerland. (R. at 139; R. at 103:373 (vol. 3 of Record on Appeal/Medical Records Exhibit #1B).)

18. In the late 1980's, Mr. Olsen and his wife also served a one-year mission for the LDS Church in Ohio. (R. at 148. *See also* R. at 103:373.)

19. Mr. Olsen did not consider himself to be legally disabled. On a new patient history form he filled out for the Salt Lake Clinic one year following his retirement, Mr. Olsen wrote "No" in response to the question "Are you legally disabled?" (R. at 103:373.)

20. Mr. Olsen filed an Application for Hearing with the Labor Commission seeking permanent total disability compensation on April 17, 2006, some forty-three years following his injury and nearly twenty years after his voluntary retirement. (R. at 1.)

SUMMARY OF ARGUMENT

Mr. Olsen argues that the Labor Commission incorrectly evaluated his case under the odd-lot doctrine and ignored evidence of his impairment. Mr. Olsen also claims that his due process rights were violated as a result of the time it took the Labor Commission to affirm the denial of his claim. However, Mr. Olsen failed to establish that the odd-lot doctrine is applicable. For the odd-lot doctrine to apply, as a threshold matter, the injured worker must demonstrate he can no longer perform work of the same or similar nature he was performing prior to his injury. Mr. Olsen failed to make this showing. In fact, he demonstrated just the opposite: he went back to the same job and remained gainfully and profitably employed in that capacity for more than two decades.

The Labor Commission properly considered all the relevant factors and the appropriately weighed all relevant evidence. There was no showing that Mr. Olsen could

no longer perform his work. Following his accident, Mr. Olsen was the plant superintendant for Utah Concrete Pipe Company. He continued to work in that or similar supervisory positions for more than twenty-three years. Mr. Olsen received regular raises and bonuses. He was able to move freely in the labor market, accepting employment in California for several years, again as a plant superintendant. Mr. Olsen was then enticed by his previous employer to return to Utah to work. The injury did not affect Mr. Olsen's earning capacity, and Mr. Olsen did not consider himself to be legally disabled.

Mr. Olsen retired voluntarily in 1986 because he was eligible to do so and because of a host of health issues that were not responding to treatment. These issues were unrelated to his injured arm. In fact, the record confirms that the condition of Mr. Olsen's arm has remained relatively consistent since his accident. There is no impairment rating indicating an increase or progression of the permanent partial arm impairment for which he was previously compensated. He has only infrequently required over-the-counter pain medication to treat his pain and oral antibiotics for occasional infections. The Labor Commission did not ignore this evidence. Mr. Olsen simply wants this Court to reweigh the facts and make a different determination based on a selective reading of the evidence. The evidence as a whole, however, does not support Mr. Olsen's claims. The Labor Commission's conclusion that Mr. Olsen had failed to meet his burden was a correct one.

Mr. Olsen's due process challenge is similarly unavailing. Mr. Olsen can show no prejudice caused by the amount of time the Labor Commission took to affirm the denial of his claim. Apparently because of budgetary and staffing limitations, it required three

years to rule on the Motion for Review. That delay was unfortunate but it was not prejudicial to Mr. Olsen. Where there are delays in affirming benefit awards, workers are paid interest on each foregone benefit payment at the now-above-market interest rate of 8% per annum under Utah Code Ann. § 34A-2-420(3); where the worker is not entitled to benefits there is, of course, no monetary loss. Here, Mr. Olsen's claim was denied because he failed to establish that he was permanently and totally disabled. His argument that he should be awarded benefits solely because of a delay in the processing of his claim and not based on a showing of medical and legal causation of a permanently totally disability (Br. of Appellant at 40) must be rejected.³

ARGUMENT

I. THE ODD-LOT DOCTRINE IS INAPPLICABLE IN THIS CASE

Mr. Olsen first claims that the Labor Commission erroneously interpreted and applied the odd-lot doctrine. (Br. of Appellant at 19.) He argues that the Labor Commission failed to consider the facts related to the conditions under which he returned to work, his pain, and his retirement. (Br. of Appellant at 23-30.) Mr. Olsen asserts that

³ With this argument, Mr. Olsen again departs from the accepted boundaries of advocacy. There is no record evidence to support accusations personally impugning the Labor Commissioner. Mr. Olsen variously complains that the Labor Commissioner has lost or compromised her objectivity, has "compromised her office," that she "has so compromised her position that she is in no position to render an unbiased opinion," that she "routinely holds appeals" up to five years, and that her disregard for the due process rights of injured workers is "blatant." (Br. of Appellant at 3, 7, 18 - 19, 33 - 39.) These *ad hominem* attacks are unwarranted and inappropriate. Delays in adjudications are always unfortunate, whether due to workload and budgetary constraints as apparently occurred here, or otherwise, but these personal attacks on the Labor Commissioner are irrelevant, immaterial and scandalous. They should be stricken. See Utah R. App. P. 24(k).

had the Labor Commission considered those facts, it would necessarily have determined that he is permanently and totally disabled under the odd-lot doctrine even though he continued to work until he retired. (*Id.*) The Labor Commission, however, properly considered the facts of this case. Its Order Affirming ALJ's Decision correctly interprets the odd-lot doctrine.

A. Mr. Olsen had Regular Dependable Employment Available to Him.

“[A]n employee in the odd-lot category [is] one who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1326 (Utah 1986) (quotation marks omitted). Injured employees who fall under the odd-lot doctrine are those who “are so handicapped that they will not be employed regularly in any well-known branch of the labor market.” *Marshall v. Indus. Comm’n*, 681 P.2d 208, 212 (Utah 1984) (quotation marks omitted). To qualify for disability payments under the odd-lot doctrine, the injured employee must establish that he cannot be rehabilitated and can no longer perform the duties required in his occupation. *Id.* That is, the claimant must demonstrate that he is not able to perform work of the character he was performing prior to the injury and that “no regular, dependable work is available to him.” *Id.*; *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572, 574 (Utah 1987).

Once the employee has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity and age.

Marshall, 681 P.2d at 212.

The odd-lot doctrine requires an assessment of “a constellation of factors . . . , only one of which is the physical impairment.” *Marshall*, 681 P.2d at 211. Other factors include the employee’s age, sex, education, economic and social environment, and ability to gainfully work. *Norton v. Indus. Comm’n*, 728 P.2d 1025, 1027 (Utah 1986).

Mr. Olsen claims that the Labor Commission failed to consider the conditions under which he returned to work and instead focused solely on the fact that he returned to work. (Br. of Appellant at 23-25.) Mr. Olsen is wrong. The Labor Commission explicitly considered the conditions under which Mr. Olsen returned to work.

The Labor Commission specifically and “carefully considered Mr. Olsen’s work history,” acknowledging that his injury caused Mr. Olsen difficulty in his work, made it difficult for him to attend to personal matters, and required additional time to fill out the required reports. (R. at 98.) Mr. Olsen worked long hours, in part because he supervised two eight hour shifts and he had to be present for both. (R. at 146-47.) Notably, there were no medical records evidencing ongoing treatment for, or subsequent aggravation of, the industrial injury suffered by Mr. Olsen. (R. at 55.) He worked for a nearly a quarter of a century thereafter without medical restrictions or modifications. Mr. Olsen did not consider himself to be legally disabled. (R. at 103:373 (vol. 3 of Record on appeal/Medical Records Exhibit #1B).) He wrote “No” in response to the question “Are you legally disabled?” on a new patient intake form at the Salt Lake Clinic. (*Id.*) While Mr. Olsen’s injury certainly caused him permanent impairment and altered his working

conditions, the Labor Commission properly considered those points as just two of the many factors that must be evaluated in determining whether regular dependable work was available to Mr. Olsen.

Mr. Olsen's argument further ignores the other factors considered by the Labor Commission, including the fact that Mr. Olsen demonstrated no loss of earning capacity. "[T]he fact that an injured employee returns to work after an industrial injury creates a rebuttable presumption that the claimant has not sustained permanent and total disability." *Peck*, 748 P.2d at 578. Mr. Olsen failed to rebut this presumption.

Following his injury, Mr. Olsen worked continuously for nearly twenty-four years, holding the same or similar positions he held prior to his injury. Within one week of his industrial accident, Mr. Olsen returned to work for the same employer and at the same position he had previously. (R. at 98.) In 1969, Mr. Olsen was induced to accept similar gainful employment in California. (*Id.*) Seven years later, Mr. Olsen was rehired by his previous employer in Utah "[a]t [its] persuasion." (R. at 113.) His skills and abilities were in demand.

Further, Mr. Olsen's job performance was more than satisfactory following his injury. His employers obviously appreciated his abilities as he received regular raises and bonuses. (R. at 145.) Mr. Olsen possessed expertise in his field and his duties included training new employees and traveling frequently on his employer's behalf to represent it in buy-outs. (R. at 120, 123.) Other employees were not required to perform his job for him. Instead, when Mr. Olsen traveled, his work waited for him to complete upon his return. (R. at 123.) *See Peck v. Eimco Process Equipment Co.*, 748 P.2d 572,

578 (Utah 1987) (holding that injured employee fell into odd-lot category in part because the injured employee could no longer adequately perform his job following and other employees had to do much of his work for him).

Regular, dependable work was available to Mr. Olsen for the remainder of his career following his injury. Such work remained available to Mr. Olsen following his retirement when he was asked to provide consulting services to his former employer. (R. at 51, 100.) “Mr. Olsen was a competent and sought-after management employee throughout the period of his active employment and afterwards during his retirement.” (R. at 98.) An undisputed physical impairment does not necessarily result in a disability, nor does it extinguish a claimant’s burden of proof. *See Marshall*, 681 P.2d at 211. An injured employee should be not classified as totally disabled under the odd-lot doctrine where there is proof of reasonably available employment of the general nature the employee was performing previously. *See Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1327 (Utah 1986). Mr. Olsen’s skills were not so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist. *See id.* at 1326.

B. The Labor Commission Properly Considered Mr. Olsen’s Pain and His Reasons for Retiring in Making its Odd-Lot Determination.

Mr. Olsen also contends that the Labor Commission failed to consider the pain resulting from his injury and the reasons he retired. (Br. of Appellant at 25-28.) He claims that he suffered from substantial pain as a result of the amputation and that such pain alone justifies a finding of permanent total disability. This is incorrect. His

condition was undoubtedly painful, but the presence of pain alone does not qualify an injured worker for inclusion in the odd-lot doctrine. Mr. Olsen's error stems from a misreading of *Norton*. There, the court stated that an employee "who cannot return to *any* gainful employment without suffering substantial pain is entitled to compensation benefits." *Norton v. Indus. Comm'n*, 728 P.2d 1025, 1028 (Utah 1986) (quotation marks omitted and emphasis added). The court qualified that proposition, however, stating that substantial pain may entitle a worker to benefits "[p]rovided that a worker's disability was also analyzed within the framework of the odd-lot doctrine." *Id.* The claimant must therefore show that he cannot return to gainful employment without suffering substantial pain and that the pain affects his ability to sell his services in a competitive labor market. *See id.* at 1028.

The injured employee in *Norton*, for example, returned to work for approximately six years following his injury, but had to undergo traction and physical therapy. *Id.* at 1026. He wore a back brace and took pain medication. *Id.* Conducting the required odd-lot analysis, the court determined that a number of factors weighed in favor of a finding of permanent total disability. The claimant's injury caused him numbness and even temporary paralysis in his extremities. *Id.* He had educational limitations, a learning disability, and marginal literacy. *Id.* The worker was approximately fifty years old when injured and had earned his living "by dint of his brawn, performing arduous physical labor." *Id.* These factors, coupled with the worker's considerable pain, prevented him from "be[ing] employed regularly in any well-known branch of the labor market." *Id.* at 1027.

There was no evidence establishing that Mr. Olsen's pain so handicapped him that he could not be employed regularly in any well-known branch of the labor market. The Labor Commission found that Mr. Olsen experienced relatively few medical complications from his injury. (R. at 98.) The Labor Commission recognized Mr. Olsen's claim of pain (i.e., "chronic moderate pain" or, as described by Mr. Olsen, a relatively consistent five on a scale of one to ten), but Mr. Olsen was able to manage his pain with over-the-counter pain medications. (*Id.*) There was no medical evidence presented of substantial pain and whatever Mr. Olsen's level of pain, it did not interfere with his work, require medical restrictions during his work, or affect his lateral movement within the market. (R. at 55-56.) It was not increasing and was not incapacitating.

An injured worker's reason for retirement is also one of the many factors to consider in making an odd-lot determination. The Court should consider the reasons for the employee's retirement and whether the decision was "significantly influenced" by the industrial injury. *See Peck v. Eimco Process Equip. Co.*, 748 P.2d 572, 578 (Utah 1987). A denial of disability benefits will be upheld on the basis of an employee's voluntary retirement "when a finding is made and supported by evidence that the employee's retirement is not substantially motivated by his industrial injury, but is due primarily to personal or other reasons." *Id.*

For example, in *Marshall v. Industrial Commission*, the injured worker was sixty-seven years old when he was injured and retired approximately six months after his injury. 681 P.2d 208, 210 (Utah 1984). The court held that the Industrial Commission

had improperly denied benefits because it relied solely on the percentage of the worker's impairment and his eligibility for retirement, rather than on his wage-earning capacity. *Id.* at 213. In *Peck*, the injured worker retired approximately one year after suffering his injury. 748 P.2d at 574. The court held that his retirement would not result in a denial of benefits because there was also substantial evidence that the worker could no longer perform his job, that his coworkers did much of his work for him, and that he was not a good candidate for rehabilitation. *Id.* at 574-78.

Here, the Labor Commission's determination was based on more than just Mr. Olsen's eligibility for retirement. There was ample evidence, as discussed, that Mr. Olsen suffered no diminution in earning capacity. The evidence also supports the Labor Commission's finding that Mr. Olsen's retirement was motivated by factors other than his industrial injury. These factors include a constellation of nonwork-related health issues such as thyroid problems (which required surgery to remove the gland), heart arrhythmia (which required insertion of a pacemaker), carpal tunnel syndrome, depression, colon cancer and prostate cancer. (R. at 51, 98, 132-34.) These health issues arose prior to his retirement date. (R. at 55.) In a letter to his employer, Mr. Olsen specified his "health problems" that were not responding to medical treatment as motivating factors in his decision to retire. (R. at 49.) He did not mention his arm, for which he had not sought treatment in years. Other considerations included Mr. Olsen's knowledge of others his age he believed had died as a result of stress from similar occupations. (R. at 98.)

The evidence does not support Mr. Olsen's claim that his decision to retire was significantly influenced by his injury that occurred twenty-three years earlier. Nor does the evidence support Mr. Olsen's claim that substantial pain rendered him permanently and totally disabled. Moreover, these two factors are not dispositive in an odd-lot analysis. The ultimate "determination whether to award permanent total disability benefits must focus on the decline in the claimant's wage-earning capacity." *Id.* The Labor Commission properly weighed Mr. Olsen's pain and the reasons for his retirement in making that determination. Because he failed to demonstrate a decline in his wage-earning capacity, Mr. Olsen's claim was properly denied.

C. The Remaining Factors Demonstrate that the Odd-Lot Doctrine is Inapplicable.

Consideration of other factors further confirms that Mr. Olsen is does not fall into the odd-lot category. The odd-lot doctrine is generally applied in situations where, in addition to the physical impairment suffered by the employee, the employee is of advanced age at the time of the injury, lacks formal education, and has limited training and skills. *See Hardman*, 725 P.2d at 1326. Indeed, "[a] considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury is constricted by lack of mental capacity or education." *Marshall*, 681 P.2d at 212 (quotation marks omitted). The *Marshall* court further emphasized that the "majority of the odd-lot cases are concerned with employees whose work required physical labor, and many of those employees were 50 years old or older [at the time of injury] with moderate or little education." 681 P.2d at 212. Mr. Olsen is well educated,

intelligent, and he consistently worked in a supervisory position, not as a laborer. (R. at 98-100.) *See Marshall v. Indus. Comm’n*, 681 P.2d 208, 211 (Utah 1984) (“Disability is evaluated not in the abstract, but in terms of the specific individual who has suffered a work-related injury. An injury to a hand would not cause the same degree of disability in a teacher, for example, as it would in an electrician.”).

For example, in *Marshall*, the injured employee had worked as a heavy laborer in mines for forty years and had less than a high school education. *Id.* at 213. He was sixty-seven years old when injured. *Id.* at 210. Following his injury he could no longer perform the duties required by his job and he could not be rehabilitated. *Id.* at 213. The court determined that the employee was disabled because there was no evidence that he had any reasonable wage earning capacity following his injury. *Id.*

Similarly, the injured employee in *Norton v. Industrial Commission* was a coal miner who began working full-time in the mines at age sixteen and continued for thirty-nine years. 728 P.2d 1025, 1026 (Utah 1986). “He earned a living throughout those years by dint of his brawn, performing arduous physical labor that required little, if any, skills. Norton’s literacy is marginal at best.” *Id.* Following his injury, the employee was ineligible for rehabilitation. *Id.* Based on these facts, the court concluded that the employee “will not be employed regularly in any well-known branch of the labor market, and therefore falls into the so-called ‘odd-lot’ category.” *Id.* at 1027 (quotation omitted).

Other cases also demonstrate that injured workers who fall into the odd-lot doctrine are laborers, with little education and little hope of obtaining the same or similar employment following an industrial injury. In *Peck*, the injured employee worked his

entire life as a heavy manual laborer and had no education beyond high-school. *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572, 575 (Utah 1987). He was sixty-three years old at the time of the accident and could not be rehabilitated. *Id. Smith v. Mity-Lite* involved a claimant who “had always worked as a general laborer, working such jobs as construction, custodial, and ditch digging. [His] formal education ended after the fifth grade, and he lacks the ability to read well.” 939 P.2d 684, 687 (Utah Ct. App. 1997).

The ALJ’s and Labor Commission’s findings confirm that Mr. Olsen does not fall into any of these categories. (R. at 54-56, 97-100.) Mr. Olsen completed three years of college. (R. at 54, 97.) He consistently worked in a supervisory position for his employers, gaining experience and expertise. (R. at 51, 55, 98.) Opportunities came to Mr. Olsen because of that expertise. (R. at 55.) He was able to transfer his skills in the national market.

Similarly, Mr. Olsen attempted no showing that he had educational limitations or required re-education or re-training. (R. at 55.) Mr. Olsen instead demonstrated the ability to acquire new skills, despite his impairment. Even though he had use of only one arm, he acquired a pilot’s license and flew regularly as a pilot in command. (R. at 132, 137.) While Mr. Olsen worked Basalt Rock Company he piloted his airplane between California and Utah as often as he could to help care for his ailing parents. (*Id.*) He stopped piloting, however, because of his heart arrhythmia. (R. at 133.) His overall health was such that he was able to serve a mission for his church in another state and travel to at least 10 foreign countries after he retired.

Mr. Olsen failed to demonstrate that he could no longer perform the duties required in his occupation or that his accident affected his earning capacity. The ALJ and Labor Commission weighed each of the factors identified by Mr. Olsen and correctly determined that he did not meet his burden. His argument only confirms that he disagrees with that conclusion, not that the Labor Commission ignored evidence or misinterpreted the odd-lot doctrine.

II. THE LABOR COMMISSION'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Mr. Olsen also claims that the Labor Commission ignored evidence and that its factual findings are inadequate as a matter of law. (Br. of Appellants at 31-32.) He argues that the Labor Commission failed to consider the conditions under which Mr. Olsen returned to work, the impairments in his daily living, that he retired as a result of his injury, and ignored statements from his treating physicians. This argument is entirely without merit.

The Labor Commission's findings of fact must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. *Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 16, 136 P.3d 1273. In reviewing decisions of the Labor Commission, the Court "will disturb its factual findings only if they are 'not supported by substantial evidence when viewed in light of the whole record before the court.'" *Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 8, 128 P.3d 31. There is no basis for Mr. Olsen's claim that the Labor Commission ignored evidence of the extra time Mr. Olsen required to perform his duties

or the difficulties it caused him in his personal life. Here, the Labor Commission “reviewed the entire evidentiary record in this matter,” (R. at 97), and “carefully considered Mr. Olsen’s work history,” (R. at 99). Indeed, the Labor Commission specifically acknowledged that the loss of his 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.

(R. at 98.)

Clearly, the Labor Commission did not ignore the evidence cited by Mr. Olsen. Its finding that the odd-lot doctrine is inapplicable is logically based on the entire record. *See Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 15, 164 P.3d 384 (rejecting argument that the Labor Commission’s factual findings were inadequate as a matter of law). As discussed above, there was substantial evidence that Mr. Olsen’s injury did not diminish his earning capacity or extinguish the employment market for him. The medical records were silent for decades on any treatments for Mr. Olsen’s arm injury except for occasional reference to over-the-counter pain medications and oral antibiotics. (R. at 51-53.) Mr. Olsen’s pain has not worsened since the time of his injury. (R. at 51.) Neither was he ever given an impairment rating indicating that his injury-caused limitations had increased above what was originally rated and paid. Mr. Olsen worked successfully for more than twenty-three years without medical restrictions or modifications. (R. at 51.) The difficulties Mr. Olsen experienced with his arm were not totally disabling and were not sufficient to implicate the odd-lot doctrine.

Likewise, there was ample evidence to support the Labor Commission's conclusion that Mr. Olsen retired for reasons unrelated to his industrial accident. As noted, the Labor Commission found that a number of factors contributed to Mr. Olsen's decision to retire, including a host of non-occupational problems and health issues. (R. at 51, 98, 132-34.) Mr. Olsen simply ignores all evidence that supports the ALJ's and Labor Commission's determinations in arguing his preferred interpretation.⁴

Mr. Olsen also claims that the ALJ, "not understanding the very nature of the 'odd-lot doctrine,'" improperly cut-off his testimony regarding difficulties he experienced in his personal life as a result of the amputation. (Br. of Appellant at 11.) This is incorrect. At the hearing, Mr. Olsen began testifying at length about how his injury affected his daily activities (activities such as eating, dressing, using the restroom, etc.), which it obviously did. Respondents objected to the evidence because it was unnecessary to establish Mr. Olsen's industrial claim and was becoming cumulative. The ALJ sustained the objection, stating

⁴ While marshaling evidence may not be required when a party challenges the Labor Commission's factual findings as a matter of law, Mr. Olsen's selective recitation of the facts appears to be an "indirect challenge" to the Labor Commission's findings and an attempt "to reargue the weight of the evidence in favor of [his] position, which is a futile tactic on appeal." *See Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 27, 128 P.3d 31. To the extent marshaling is required, Mr. Olsen's claim that a selective factual summary satisfies the marshaling requirement is incorrect. *See Shearer v. Labor Comm'n*, 2002 UT App 379, No 20010763-CA, 2002 WL 31600809, at *1 (Nov. 15, 2002) (noting that the challenging party "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the [challenging party] resists." (emphasis and alteration in original) (quotation marks omitted)). Mr. Olsen simply ignores the evidence that supports a denial of benefits.

it is within common experience of the Court that a person who has suffered a traumatic injury . . . will have difficulties I want to be sensitive to hear the things that are important, and everything about this case is important to some extent, but I believe it is within common experience of the Court to accept that his life has been impacted 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 taking him through some things that may just be uncomfortable to discuss.

(R. at 118.) The ALJ took proper notice of the difficulty Mr. Olsen has undoubtedly experienced in his personal life and then correctly requested that Mr. Olsen provide testimony on matters necessary to establish his permanent total disability claim.

Mr. Olsen also argues that the Labor Commission improperly ignored two “Summary of Medical Record” forms provided to him by Dr. Hunter and Dr. Lewis. (Br. of Appellant at 11-12, 32.) Mr. Olsen’s reliance on these forms, however, is completely misplaced. These forms were not relied upon by the ALJ because they lacked foundation and were irrelevant to the issues presented. (R. at 52.) Both forms were prepared in 2006 and purported to explain the reasons for Mr. Olsen’s retirement in 1986. ((*See* R. at 103:406-07 (vol. 3 of Record on Appeal/Medical Records Exhibit #1B) & 102:315 (vol. 2 of Record on Appeal/Medical Records Exhibit #1A).) However, Dr. Hunter had not treated or examined Mr. Olsen since 1963, while Dr. Lewis had not seen him professionally since approximately 1972. (R. at 52.) Neither had examined Mr. Olsen at, near, or since the time of his retirement, and neither had reviewed the medical records. These doctors evidenced no basis at all on which to offer opinions relating to Mr. Olsen’s retirement and the ALJ properly chose not to rely on their reports.

In summary, the fact that the Labor Commission concluded that the odd-lot doctrine is inapplicable in this case does not demonstrate that the Labor Commission ignored evidence. The Labor Commission correctly weighed the evidence, both for and against a determination of permanent total disability, and set forth adequate factual findings.⁵ The Labor Commission's findings are sufficiently detailed and include enough subsidiary facts to disclose the steps by which it determined Mr. Olsen is not permanently and totally disabled. *See Strate v. Labor Comm'n*, 2006 UT App 179, ¶ 21, 136 P.3d 1273.

III. THE LABOR COMMISSION DID NOT VIOLATE MR. OLSEN'S DUE PROCESS RIGHTS

Mr. Olsen's final argument is that the Labor Commission violated his due process rights by rendering a decision on his Motion for Review three years after it was filed. (Br. of Appellant at 33-40.) This argument should be rejected because Mr. Olsen can show no prejudice as a result of the Labor Commission's delay in reaching a decision. As explained, the odd-lot doctrine is not applicable in this case and Mr. Olsen was not entitled to an award of benefits. Neither is there evidence suggesting that the Labor Commission was anything less than objective in evaluating Mr. Olsen's claims. He was therefore not prejudiced by any delay on the part of the Labor Commission.

Like other state agencies, the Labor Commission has been limited by ongoing budget constraints. Unfortunately, a backlog of cases had accrued by the time Mr. Olsen

⁵ Even if, assuming *arguendo*, the Labor Commission had failed to directly address some of the facts cited by Mr. Olsen, that would not necessarily warrant reversal as a matter of law. *See Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 15, 164 P.3d 384. The Commission arrived at the correct result in this case based on the records as a whole.

filed his Motion for Review. Though not confirmed by this record, the number of cases filed with the Labor Commission increased substantially during the ten years prior to 2008. The legislature addressed the increasing case load by approving an increase in the number of administrative law judges at the Labor Commission. Unfortunately, however, the Labor Commission staff that handles appeals was not increased commensurately, resulting in the backlog that apparently delayed determinations in cases such this. The 2008 Utah Legislature authorized additional funding for the Labor Commission, allowing the Labor Commission to increase its appellate staff. Since that time, the backlog of cases on appeal has been dramatically reduced. The delay in resolving this case, however, did not deprive Mr. Olsen of due process.

Mr. Olsen also argues that the Workers Compensation Act should be construed liberally and that any doubt or uncertainty in the record must be resolved in favor of the worker. ERF does not disagree with the proposition that substantial doubts may be resolved in favor of injured workers, but ERF notes that there was no substantial doubt or uncertainty in the record before the Labor Commission in this case. Neither is there a general presumption of entitlement to workers compensation benefits under Utah law. Rather, petitioners have the affirmative burden to demonstrate such entitlement by a preponderance of the evidence. *E.g., Martinez*, 2007 UT 42, ¶¶ 46-54, 164 P.3d 384; Utah Code Ann. § 34A-2-413 (2010). Mr. Olsen failed to meet that burden and his “liberal construction” argument is not a substitute for his burden of proof.

CONCLUSION

For each and all of the foregoing reasons, ERF submits that that the decision of the Utah Labor Commission denying permanent total disability benefits to Mr. Olsen should be affirmed.

Dated this 27th day of October 2010.

CLYDE SNOW & SESSIONS

A handwritten signature in black ink, appearing to read 'E. C. Barnes', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee Employers' Reinsurance Fund to be mailed, via U.S. mail postage prepaid, to the following this 27th day of October 2010:

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