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LPI Services and/or Travelers Indemnity Co. of Connecticut v. Michael McGee, and the Utah Labor Commission : Reply Brief

Utah Supreme Court

SUPREME COURT OF UTAH

LPI SERVICES and/or TRAVELERS INDEMNITY CO. OF CONNECTICUT, Petitioners / Defendants vs. MICHAEL MCGEE, and the UTAH LABOR COMMISSION, Respondents.	**REPLY BRIEF OF PETITIONERS LPI SERVICES AND TRAVELERS INDEMNITY ON CERTIORARI** Case No. 20080063-SC **(Oral Argument Requested)**

ON CERTIORARI TO THE UTAH COURT OF APPEALS

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I. The Court of Appeals applied the wrong standard of review.

The Court of Appeals applied an abuse of discretion standard, rather than the appropriate correctness standard. Section 34A-2-413(1)(c)(iv) is plain on its face and contains no express or implied grant of authority. Without analysis, but in support of its determination, the Court of Appeals asserts that the term "reasonably" "is a broad, general, and subjective concept" that, standing alone, gives the Commission implied authority to interpret the statute when promulgating agency rules. LPI Servs. v. Labor Comm'n, 2007 UT App. 375, ¶15, 173 P.3d 858 (reasoning that the statute "implicitly granted the Commission deference" because "[t]he Utah legislature did not and has not defined what the term 'reasonably' means in the context of this statute.") Based upon this limited information, one must presume that the Court of Appeals found the statute to be ambiguous. However, a fair reading of Section 34A-2-413(1)(c)(iv) shows that it is plain on its face with no implied grant of authority for additional interpretation. Moreover, this Court has directed that the term "reasonably" is defined by the statute. Therefore, the Commission has no discretion to interpret the statute and the appropriate standard of review is correctness.

A. Section 34A-2-413(1)(c)(iv) is plain on its face and grants no discretion to the Labor Commission to decide if its own administrative rules conflict with state legislation.

The Commission states that Section 34A-2-413(1)(c)(iv) must be construed according to its plain meaning. With this, Petitioners agree. Comparing the statute with the Commission's rule, it is apparent that the administrative rule is invalid because it goes

beyond the plain meaning of the statute and imposes additional conditions that clearly were not contemplated by the legislature when it passed the current form of the statute. Section 413(1)(c)(iv) states the following:

> (c) To find an employee permanently totally disabled, the commission shall conclude that:
> . . .
> (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

A close reading of the relevant parts of the statute shows that the statute is plain on its face and, therefore, not subject to further interpretation by the Commission. Nor is the Commission authorized, under the plain meaning of the statute, to consider other requirements in order to implement the legislature's intent. Based upon the plain meaning of the statute, the Commission must determine whether an injured worker can perform other employment that is reasonably available, taking into consideration that worker's age, education, past work experience, medical capacity and residual functional capacity.

McGee and the Labor Commission cite no authority for the grant of discretion because none exists. In general, the Court defers to an administrative agency's interpretation of a statute when that agency's expertise is necessary. Whether an administrative rule conflicts with legislation should not depend upon the agency's expertise since the agency would not have promulgated the rule if it believed that the rule was in conflict with the statute. For that reason alone, such a determination is a classic judicial determination. No discretion was granted by the Legislature in this circumstance because none is necessary. The judiciary, not

an administrative agency, is best suited to determine whether an administrative rule conflicts with a state statute.

B. Granting discretion to the Commission to determine if its own rules conflict with legislation is bad judicial policy

Granting discretion in this circumstance even cedes judicial authority to the Labor Commission. Administrative rules are drafted and promulgated by the Commission with the belief that they do not conflict with legislation. See Utah Code Ann. § 34A-1-104(1) (2006). To defer to the Commission to decide if its own rule conflicts with legislation is tantamount to allowing the fox to guard the henhouse; it essentially hands over judicial review to the Commission. There is no need for deference in this circumstance, and granting such deference was an error of the Court of Appeals that has a widespread impact on all permanent total disability cases that must be corrected.

C. The Court of Appeals ignored case law from this Court that explains that the statute already defines the term "reasonably" for purposes of the statute

The Commission erroneously claims that because the word "reasonably" is used in the statute that this single term somehow grants wholesale discretion to determine whether an administrative rule conflicts with legislation. The use of one term is not a grant of discretion for a question of law. In this case, the term simply allows the Labor Commission discretion to apply the law to the facts, not to decide if a rule conflicts with a statute.

The Court of Appeals ignores this Court's holding in Martinez v. Media-Paymaster Plus / Church of Jesus Christ of Latter-Day Saints. In that case, the Martinez Court stated as follows:

> [t]he statute asks the Commission to determine if other work is reasonably available, "**taking into consideration the employee's [ ] . . . age; . . . education; . . . past work experience; . . . medical capacity; and . . . residual functional capacity." Utah Code Ann. § 34A-2-413 (1)(c)(iv). These factual considerations inform what is reasonable; its parameters are not further defined by an overarching legal principle, as in the case of reasonable suspicion, for example**. See Pena, 869 P.2d at 939.

2007 UT 42, ¶32, 164 P.3d 384 (emphasis added.) From the above, it is clear that this Court determined that the employee's "age, education, past work experience, medical capacity and residual functional capacity" were the factors for the Commission to consider when asked to make a determination whether or not alternative employment was "reasonably available" to the injured worker. In other words, the term "reasonably" is not broad or generalized as asserted by the Court of Appeals and Respondents. It is a defined term.

Because the term "reasonably" is defined and, therefore, not broad or generalized, the statute neither grants the Commission implied authority, nor allows for the Commission to draft rules that add additional factors that expand the statute. Without a grant of discretion, Utah law is clear that the appropriate Standard of Review is Correctness. See, e.g., Draughon v. Dep't of Financial Institutions, 1999 UT App 42, ¶¶ 4-7, 975 P.2d 935; Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n, 846 P.2d 1304, 1306 (Utah 1993). As discussed in further detail below, these cases are not distinguishable because the Commission had no implied authority.

D. Respondents fail to address the grammatical structure of the statute, which does not give the Commission discretion, and therefore requires a correctness standard of review

Respondents have failed to address the rule of the last antecedent. Instead of following Martinez and having the statutory factors define "other work reasonably available," Respondents essentially rewrite the statute and transpose clauses. As the Martinez Court directs, the clause "taking into consideration . . ." modifies the clause "reasonably available," which modifies the term "other work." Therefore, the five factors determine what is reasonably available, which is an assessment of other work. The Court of Appeals and the Commission assert, however, that the clause "taking into consideration . . ." modifies the clause "the employee cannot perform." Grammatically, it does not; and respondents cannot explain this, nor have they tried. The Respondents' interpretation would have this clause modify "the employee cannot perform," which is not how the statute was drafted. When analyzing the grammatical structure of the statute as indicated by Barnhart v. Thomas, 540 U.S. 20, 26 (2003), the term "reasonably" is defined and the Commission has no implied discretion to interpret it otherwise.

II. The Rule impermissibly expands the statute and is therefore invalid.

Instead of properly analyzing whether the administrative rule conflicts with the statute, the Court of Appeals adopted an improper standard of review, then improperly deferred to the Commission to decide if its own rule conflicted with the statute. The rule conflicts for the various reasons outlined in the opening brief, and the administrative agency is not the proper entity to decide if the rule conflicts with the statute.

A. The Court of Appeals Disregarded the Plain Statutory Language and Substituted Other Factors for the Five Factors Mandated by the Legislature.

Utah Code Section 34A-2-413(1)(c)(iv) expressly states that in order to be permanently disabled, an employee must prove that he cannot perform "other work reasonably available, **taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity**." (Emphasis added). Instead of harmonizing the statute, the Court of Appeals stops short after the phrase "reasonably available," and then substitutes administrative rule factors for the five statutory factors delineated by the legislature when the statute was passed. Proper analysis harmonizes the entire language, including the phrase "taking into consideration [the five factors]." Utah Code Ann. § 34A-2-413(1)(c)(iv) (2007).

Instead of properly "taking into consideration" the five statutory factors, the Court of Appeals reasons that "[a] determination of what constitutes other work reasonably available necessarily requires the Commission to consider . . . (1) the personal, physical characteristics of the injured employee, and (2) the prospective job market." LPI Servs., 2007 UT App 375 at ¶17. The Legislature never said that a determination of what constitutes other work reasonably available requires consideration of "(1) the personal, physical characteristics of the injured employee, and (2) the prospective job market." Rather, the Legislature stated that a determination of what constitutes other work reasonably available requires "**taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity**." The Court of Appeals should not be permitted to re-

write the statute by creating new areas of analysis, and the Commission should not be permitted to re-write the statute by adding factors that were rejected by the legislature when the statute was originally passed.

B. The Court of Appeals Disregarded Martinez v. Media-Paymaster Plus

Martinez v. Media-Paymaster Plus / Church of Jesus Christ of Latter-Day Saints is clear that the five statutory factors determine whether other work is reasonably available. Therefore, Martinez, not only affects the standard of review, but addresses the statutory construction. Martinez reiterates the five statutory factors and then specifically states:

> **These factual considerations inform what is reasonable; its parameters are not further defined by an overarching legal principle, as in the case of reasonable suspicion, for example.** See Pena, 869 P.2d at 939.

2007 UT 42, at ¶32, 164 P.3d 384 (emphasis added.) The Court of Appeals' failure to require the Commission to consider and apply the five statutory factors is contrary to Martinez. Without reference to this Court's holding in Martinez, or without even mentioning the five statutory factors, the Court of Appeals stated, "'reasonableness' is a broad, general, and subjective concept; its meaning depends on the context in which it is applied. Therefore, the legislature's use of the word 'reasonably' in Utah Code Section 34A-2-413 'bespeak[s] a legislative intent to delegate [its] interpretations to the [Commission].'" LPI Servs., 2007 UT App 375 at ¶15 (citations omitted). In addition to contradicting the statutory language, this contradicts the Supreme Court's direction in Martinez. This Court should not permit the Court of Appeals to ignore Martinez.

C. The Legislative History of Utah Code Ann. § 34A-2-413 indicates that the Legislature specifically considered and rejected the additional considerations that were incorporated in the Commission's administrative rule.

A review of the legislative history of Utah Code Ann. § 34A-2-413 reveals that the administrative rule is an attempt to permit the consideration of various factors that were evaluated by the legislature and expressly rejected. Such an end run around the legislative process should not be sanctioned by this Court. The Labor Commission, as an administrative agency created by the legislative process, has no authority to promulgate rules that expand on the statute and contain provisions expressly rejected in enacting the legislation at its inception.

The Commission argues that the statute is plain on its face and therefore not subject to analysis based on the legislative history.[1] At the same time, however, the Labor Commission promulgated a rule, purportedly to clarify ambiguity in the statute. This argument demonstrates the inconsistency of the Labor Commission and that the rule was improperly promulgated in contradiction to a plain and direct statute. Petitioners agree that the statute is plain on its face and the term "reasonably" is defined by the statute itself. However, the Labor Commission must have believed that the statute was ambiguous because it thought a rule was somehow necessary to fill in what the statute presumably left out. Such a tacit claim of ambiguity requires us to turn to the legislative history, not the administrative

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[1] The Commission relies on Kitches & Zorn v. Yong Woo Kim, 112 P.3d 1210 at 1212 for the proposition that legislative history is not relied upon in cases where the statute is plain and unambiguous. However, the court in Kitches still evaluated the legislative history, which they found consistent with their opinion. Id. at n.1.

body that applies the statute. The Court of Appeals gave no opinion on the legislative history and, because it is not favorable to the Commission, the respondents attempt to avoid the issue by claiming that the legislative history is too limited and confused. (Comm'n Br. at 16.)

While legislative intent of some statutes may be difficult to discern, it is clear in the instant case that factors expressly rejected by the legislature were made part of the administrative rule. Such an end-run around the legislative process is improper. For example, the administrative rule purports to permit the consideration of whether "[t]he work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident."[2] This "locality of the work" factor was rejected by the Senate on two occasions. Senator Taylor proposed to include as a factor whether work was available "within the same proximity as that formerly held." In discussing

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[2] **Utah Administrative Code R612-1-10**

D. For purposes of this rule, the following standards and definitions apply:
1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, **other work is reasonably available to a claimant if such work meets the following criteria:**
a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;
b. The work is regular, steady, and readily available; and
c. The work provides a gross income at least equivalent to:
(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
(2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

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

this proposal, it was even mentioned that the legislature should not abdicate authority to the administrative agency. Another proposal was to insert the term "local economy" to determine whether work was reasonably available. Both proposed amendments failed. (1995 General Legislative Session, Senate Bill 123, Senate Floor Debates, Day 37.) The administrative rule now purports to permit consideration of this very thing that was discussed and expressly rejected by the Senate: the locality of the work. Utah Admin. Code R612-1-10.D.1.a (2007), n.4, supra.

Regardless of whether the legislative history is clearly articulated, one thing is certain - issues that are now part of the administrative rule, i.e. wage[3] and location, were discussed. Neither was incorporated into the statute. Therefore, whether the legislative history makes clear the discussion regarding these issues, the decision is plain - consideration of wage and location were rejected by the legislature. However, rather than go before the legislature to have these issues re-addressed, the Commission, without authority to do the same, created a rule that impermissibly expands on the statute and adds the factors of wage and location when the legislature specifically declined to do so following floor debate on the issues. The Labor Commission must respect the legislative process and results, and not promulgate a rule as an end-run around legislation that rejected factors the Commission wants to consider.

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[3] The Court will recall from the opening brief the discussion of the floor debates in the House of Representatives. Representative Adair was asked to address the hypothetical similar to the instant case – the "engineer who can get a minimum wage job"; and this issue of wages was debated. In the end, Representative Adair explained that the statutory language was the result of a "great compromise" that came as a result of years of study in the Industrial Commission with both workers and employers represented in the discussions.

D. The statutory term "Past Work Experience" does not include wages, and especially not the "current state average weekly wage"

McGee argues that wages are a subset of past work experience and, therefore, the Rule does not expand on the statute. McGee asserts that Petitioners used only a partial definition of past work experience. However, using McGee's own definitions, the result is the same - wages are not a subset of past work experience.

McGee states:

> Webster's dictionary defines **past** as: "1 a: ago <12 years past> b: just gone or elapsed <for the past few months>"; **work** as: "(1) activity in which one exerts strength or faculties to do or perform something (a): sustained physical or mental effort to overcome obstacles and achieve an objective or result (b): the labor, task, or duty that is one's accustomed means of livelihood"; and, **experience** as: 1 (a): direct observation of or participation in events as a basis of knowledge (b): the fact or state of having been affected by or gained knowledge through direct observation or participation."

(McGee's Br. at 21.) Without any further explanation, McGee claims that, "if an employee participated in work that paid wages, then those wages are part of her 'past work experience.'" However, nowhere in McGee's own definitions can one find the term "wage." Instead, the definitions are consistent with LPI's argument that wages are not a subset of past work experience. "Work" is defined as the physical or mental effort, or the labor task, or duty. These definitions relate to skills and abilities, not wages. "Experience" is essentially defined as observation or participation that allows for learning; this is not synonymous with earnings or wages. The term "past" clearly has no application. Instead of even considering

past wages, the rule purports to permit the consideration of "[t]he current state average weekly wage." Utah Admin. Code R612-1-10.D.1.c (2007).

Therefore, wages, especially "[t]he current state average weekly wage," are not a subset of past work experience. Including factors that were discussed and debated and rejected by the legislature is improper, and doing so by rule impermissibly expands the statute. The rule conflicts with the statute and is therefore invalid.

E. McGee, the Labor Commission, and the Court of Appeals are inconsistent and contradictory.

The Court of Appeals' decision erroneously states that "[a] determination of what constitutes other work reasonably available necessarily requires the Commission to consider various factors, which the Commission categorizes in two ways: (1) the personal, physical characteristics of the injured employee, and (2) the prospective job market." LPI Servs. v. Labor Comm'n, 2007 UT App. 375, ¶17, 173 P.3d 858. However, this ignores both the statute and Martinez. Rather, "a determination of what constitutes other work reasonably available necessarily requires the consideration of"... "**the employee's age, education, past work experience, medical capacity, and residual functional capacity.**" Utah Code Ann. § 34A-2-413(1)(c)(iv) (2007); Martinez, 2007 UT 42, at ¶32, 164 P.3d 384 ("These factual considerations inform what is reasonable"). Creating a brand new analytical framework was error – the statute already provides the analytical framework.

Because of this new framework, the Court of Appeals' Order, and now the Respondents two Briefs, present inconsistent arguments. The Court of Appeals permits the consideration of a non-statutory factor in both categories of analysis. The Court of Appeals

contends that past wages are part of the second category – the prospective job market. LPI Sevs., 2007 UT App 375 at ¶19. However, the Court of Appeals also contends that wages are part of past work experience, which is part of the first category. LPI Sevs., 2007 UT App 375 at ¶22. In other words, not only does the Court of Appeals permit the consideration of a non-statutory factor, but it permits its consideration in categories of its new framework. This inconsistency reflects the Court of Appeals' flawed analysis that must be remedied, returning the proper analysis to the statutory framework.

In paragraph 19, the Court of Appeals claims that the five statutory factors, including "past work experience," fall within category (1)– the characteristics of the injured employee; and that the Rule's wage requirement falls within category (2) – the prospective job market. A different approach is then articulated in paragraph 22. The Court of Appeals states,

> [T]he Commission has the authority to evaluate the additional factors in rule 612-1-10.D.1 concerning the prospective job market because those factors more clearly define the "past work experience" factor found in Utah Code Section 34A-2-413. We conclude that past work experience necessarily raises the issues associated with a competitive labor market, including wages.

LPI at ¶22 (internal citations omitted). This now claims that the current state average weekly wage is part of category (1) as a subset of past work experience. In other words, three paragraphs after claiming that wages, including the state average weekly wage, were part of analytical category (2), the Court of Appeals claims that wages fall within category (1) as a subset of past work experience.

As explained above, wages (and especially not the current state average weekly wage) are not a subset of "past work experience," a factor that relates to the injured workers ability

to perform the job, as suggested by the factors created by the Court of Appeals and Commission, and a factor of the prospective job market. The different sets of factors are inconsistent and illustrate the Court of Appeals' flawed decision. If wages were part of "past work experience," neither the Court of Appeals, nor the Commission, would have needed to go through the gymnastics necessary to create two categories of analysis not plainly identified in the statute.

No contortions are needed in this matter. The statute contains five factors that do not include wages, much less the current state average weekly wage. The rule expands the statute, which is contrary to Utah law and the legislative intent.

F. Construction Rule of the Last Antecedent

As noted briefly above in discussing the standard of review, the Commission ignores the rule of the last antecedent. See Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (discussing the application of this rule).

This Court followed the rule of the last antecedent in Martinez. As Martinez directs, the clause "taking into consideration . . ." modifies the clause it follows: "reasonably available," which modifies the phrase it follows: "other work." Instead of following Martinez and the rule of the last antecedent, the Commission would essentially rewrite the statute and transpose clauses. The five statutory factors do not inform what the employee can or cannot perform. Rather, the five statutory factors "inform what is reasonable." Martinez, 2007 UT 42, at ¶32, 164 P.3d 384. The rule of the last antecedent is completely contrary to what the Court of Appeals and the Commission assert – that the clause "taking into

consideration . . ." modifies the clause "the employee cannot perform." When construing the statute in accordance with the rule of the last antecedent as indicated by Barnhart v. Thomas, 540 U.S. 20, 26 (2003), the five statutory factors modify or "inform" what is reasonably available. As a result, the Court of Appeals' decision is flawed and must be overturned.

G. The case law is not distinguishable.

The Labor Commission attempts to distinguish the cases cited by LPI. It does this, however, from a faulty premise. The Commission argues that the cases are distinguishable because, it claims, discretion should be permitted. (Comm'n Br. at 13-15.) This premise is incorrect for the reasons outlined in Section I – no discretion was granted by the legislature to interpret the statute and determine if an administrative rule conflicts with the statute. This court should not be misled into thinking the instant case involves a factual determination or a mixed question of law and fact. It does not. The instant case is a straightforward legal issue: whether an administrative rule conflicts with a statute. As a result, the cases are not distinguishable and therefore require reversal of the Court of Appeals' decision. See Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n, 846 P.2d 1304, 1306 (Utah 1993) (invalidating an administrative rule that improperly defined who was entitled to a tax exemption because the "Commission relied upon an administrative rule that impermissibly narrowed the availability of the exemptions."); Draughon v. Dep't of Financial Institutions, 1999 UT App 42, 975 P.2d 935 (invalidating an administrative rule because the employee's "involuntary reassignment," as defined by the administrative rule, violated the statutory prohibition against "demotions"). These cases require invalidation of Administrative Rule

R612-1-10.D.1.c. because the administrative rule, both on its face and as applied by the Commission, improperly modifies the statutory factors.

H. The rule, not the statute, creates an "absurd result."

The Commission argues that eliminating a wage consideration for permanent total disability claims works an "absurd result" because, it claims, someone making a high wage might have to go back to work earning a lower wage. Just because the legislation results in a result that is undesirable to McGee and the Commission does not mean that the legislation creates an absurd result. Arguably, it is just as "absurd" to declare someone permanently and totally disabled and say that person cannot work when that person is capable of working at available jobs. These competing arguments were considered and debated in the legislative process, which resulted in the "compromise" legislation that was enacted. The Labor Commission has no authority to substitute its judgment for that of the elected legislators whose authority it is to create and modify the law in Utah.

The Commission suggests that the legislation may result in a race to the bottom to minimum wage jobs. There is no support for this contention. Employers will present other work that is reasonably available in light of the individual's age, education, and past work experience. There is no incentive to present minimum wage jobs as alternatives. Employers have an incentive to get injured workers back to work, consistent with the statutory purposes, regardless of whether the wage pays more or less than the employee's previous job. When the factors to be considered include age, education, and past work experience, there will be no race to the bottom. There is no support for thinking that minimum wage jobs will be the

result of any rule. Moreover, LPI is not suggesting this; the purported race to the bottom is a red herring. An applicant with transferrable skills gained from education and past work experience (two statutory factors) will be able to be presented with work. Applying the proper statutory factors, there can be no race to the bottom.

As noted in the opening brief, Senator Adair, in response to the question about whether an engineer should take a minimum wage job, made the comment, "Only if he is permanently, totally disabled, and it has to meet his medical requirements also." (1995 General Legislative Session, Senate Bill 123, House of Representatives Floor Debates, Day 44.) In other words, the engineer doesn't have to take the minimum wage job if it is not a "reasonably available" job taking into consideration his age, education, past work experience, medical capacity and functional residual capacity. In the instant case, these factors were never even mentioned by the Commission, much less taken into consideration.

How this assessment works can be seen in two classes of workers, "white collar," such as an engineer, and "blue collar" workers who depend on physical labor or their functional capacity, such as a coal miner, with usually minimal education. The respective education and past work experience differs for both, and so whether a particular position is "reasonably available" must take into account each individual's own personal education and past work experience. How potential work compares to the state average weekly wage is not a factor. The injuries may be different (mental impairment or physical impairment may have different effects on different workers' future employability given their respective educational and past work experiences), but whether an individual is disabled has nothing to do with wages. For

example, a white-collar engineer might sustain a head injury, limiting future employability; while a "blue-collar" coal miner might suffer a physical injury. Whether each is permanently totally disabled depends on the application of the five factors, including education and past work experience, **despite** the wage the available jobs pay. Once age, education, past work experience, medical capacity and functional residual capacity are taken into consideration, whether a job is reasonably available can be determined. Just considering the rule and its factors of locality and the current state average weekly wage, without even mentioning the statutory factors, is improper.

Additionally, this fear that an ALJ will somehow decide that reasonably available work for a white-collar professional with significant education and past work experience is a minimum wage job, although unfounded, is an argument that should be made to the Legislature. The legislation was the result of deliberation, debate, and compromise. To create a rule that is an end-run around the statute is a blatant disregard of legislative authority. McGee and the Commission apparently fail to appreciate the fact that the Labor Commission has no inherent authority. All powers, rights, duties, and responsibilities of the Utah Labor Commission are granted by the Utah Legislature. Utah Code Ann. § 34A-1-103 (1997). As a result, because the Commission is a creature of statute, it must comply with the statutory mandate or seek modification of the statute with the Legislature – even if the Commission dislikes the legislation. See, e.g., Color Country Mgmt. v. Labor Comm'n, 2001 UT App 370, ¶43, 38 P.3d 969 (stating that arguments "are best directed to the Legislature"); Rekward v. Industrial Comm'n of Utah, 755 P.2d 166, 169 (Utah Ct. App. 1988) (stating that

"[a]lthough we sympathize with [the applicant's] unfortunate situation, the problem must be solved by the legislature and not this Court."). If the Labor Commission wants to consider the stability of possible future work, the work's location, the wage attached to the possible future work, and the state average weekly wage, it must persuade the Legislature to include these factors as statutory considerations. Otherwise, it should apply the statutory factors, which when properly applied, will lead to reasonable results.

Finally, to make a final finding of permanent total disability, the Commission takes, simplistically, three steps regarding the employment analysis. However, The Commission, under its Rule, considers wages in only part of this analysis, instead of all three parts (or none of the parts as the legislature initially enacted the analysis), which creates an absurd result.

The analysis works as follows. First, the Commission determines that,

> (iii) the industrial . . . impairments prevent the employee from performing the **essential functions of the work activities for which the employee has been qualified** until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim;

§34A-2-413(1)(c) (emphasis added). Second, the Commission must make the determination that no other work is reasonably available under subsection (iv). Third,

> (i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

§ 34A-2-413(6)(a).[4]

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[4] In Thomas v. Color Country Management, 2004 UT 12, 84 P.3d 1201, this Court explained the second and third steps of the process for determining whether an employee is entitled to permanent total disability compensation. Id. at ¶¶20-23. The court explained that the process "requires that a finding be issued in two parts – an initial

The evaluation of "work activities for which the employee has been qualified," (the first step) and Chapter 8 and its rules (the third step), contain no wage requirement. Wages have never been part of the second step, either, until the Commission created the new administrative rule. Only through the creation of Rule 612-1-10.D.1 did the Commission add a wage component to the permanent total statute. Now, the practical effect of this is that a previously held job, or a prospective job identified in a reemployment plan, is not subject to a wage requirement, but a prospective job identified as "other work reasonably available," without a need for a reemployment plan is subject to a wage requirement. The "absurd result" being that if an employee was previously employed in a job that he or she can now perform, a job that paid less than the state average weekly wage, that employee is not permanently totally disabled; but if an employee was not previously employed at that same job that he or she can still now perform, he or she is permanently and totally disabled if the wage is less than the state average weekly wage. Similarly, a job rejected as "other work reasonably available" based on wage can be considered in the reemployment plan as appropriate gainful employment regardless of wage. Such an application of this new rule is "absurd" and creates an administrative process that is inconsistent with the statutorily-mandated analytical framework.

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finding and a final finding." Id. at ¶ 21. The initial finding (steps 1 and 2) is governed by § 34A-2-413 (1)(c), but only step 2 is purportedly subject to the new wage rule. The second step of the hearing process (step 3) noted in subsection (6)(a)(iii), consideration of a reemployment plan that will return the injured worker to work, is not governed by the new wage rule, but by Chapter 8, as noted in subsection (6)(a)(i).

McGee and the Commission attack the legislation as creating an "absurd" result because it creates a result that is unfavorable to McGee. An unfavorable result is not necessarily absurd. Indeed, requiring someone who is capable of working to work is not "absurd"; and it is arguably just as "absurd" to permit McGee to subsist solely on benefits when he is capable of working at available jobs. The Commission asserts the overall purpose of the Workers Compensation Act is to provide coverage and compensation.[5] The permanent total disability statute has, however, a more specific purpose articulated by the legislature that the Commission ignores - to return citizens to the workforce. Utah Code Section 34A-2-413(6) states that a finding of permanent total disability is not final until an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act. Utah Code Section 34A-8-102 states that the Utah Injured Worker Reemployment Act "is intended to promote and . . . assist the injured worker in returning to the work force as quickly as possible." Utah Code Ann. § 34A-8-102 (1997); see also (1995 General Legislative Session, Senate Bill 123, Senate Floor Debates, Day 37 (discussing the goal of returning workers to the workforce who are able to work and contribute to society)). Refusing other work reasonably available because it pays less than the current state average weekly wage is contrary to that specific purpose. McGee is capable of gainful employment. As outlined above, the express purpose of the

[5] This initial purpose of the worker's compensation system scheme as a whole, providing coverage and compensation to injured workers, has already been satisfied in this case because Mr. McGee's medical expenses, temporary total and permanent partial disability benefits have already been paid. The specific purpose of the permanent total disability statute, returning citizens to the workforce, is the purpose of utmost concern at this point in the administrative process.

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

The Commission, in arguing the absurdity of how the statute works without the rule, stretches and mischaracterizes Petitioners' argument. The Commission suggests that, under Petitioners' alleged interpretation, jobs in Alaska or Florida could be used as other work reasonably available. (Comm'n Br. at 10.) However, the Commission ignores past case law addressing this point. The Court of Appeals indicated that a job offered must be "an actual job within a reasonable distance from [the employee's] home." Hoskings v. Indus. Comm'n, 918 P.2d 150, 157 (Utah App. 1996) (citing Lyons v. Indus. Special Indem. Fund, 565 P.2d 1360, 1364 (Idaho 1977)). Petitioners have suggested no variance from this case law. Moreover, Petitioners identified and explained the legislative history on this point. That history indicates that the terms "national economy" and "local economy" were both discussed. Neither were adopted, thus defaulting to the case law on point.

In short, the Commission argues the statute is plain so it can obtain the standard of review most beneficial to it and, on the other hand, argues the plainness of the statute works

an absurd result that must be corrected by a rule. This court should not be misled by these inconsistent positions. The statute is plain. There is no language addressing the standard of review, and the statute provides five factors for considering whether other work is reasonably available. It does not create an absurd result based on its plain language. Just because the legislation results in an outcome that is undesirable to McGee and the Commission does not mean that the legislation creates an absurd result. Arguably it is just as "absurd" to permit a person to subsist solely on benefits when that person is capable of working at available jobs. Therefore, the Commission should be given no deference and the Rule should be stricken.

CONCLUSION

Section 34A-2-413(1)(c)(iv) is plain on its face, not ambiguous or broad in any respect and, therefore, does not grant discretion to the Commission to determine if a conflict exists between an administrative rule and the statute. Because the statute is plain and self-defining and the Commission has no discretion, the Commission cannot create a rule that expands on the statute.

The administrative rule conflicts with the statute. Rule 612-1-10.D.1 adds, among other things, the consideration of the state average weekly wage to claims of permanent total disability and clearly expands on the statute. Therefore, the rule is invalid as a matter of law. Because the rule is invalid, the award of permanent total disability benefits must be reversed.

DATED this _____ day of _____, 2008.

RICHARDS, BRANDT, MILLER & NELSON

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MARK R. SUMSION
MICHAEL K. WOOLLEY
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this _____ day of _____, 2008, to the following:

Richard Burke
7390 S. Creek Road #104
Sandy, UT 94093

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

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