

2017

**Javier Rojas, Petitioner/Appellant, v. Utah Labor Commission,  
Ferrari Color and/or Workers Compensation Fund, Respondents/  
Appellees**

Utah Court of Appeals

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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**JAVIER ROJAS,**  
Petitioner/Appellant,

v.

**UTAH LABOR COMMISSION,  
FERRARI COLOR and/or WORKERS  
COMPENSATION FUND,**

Respondents/Appellees.

Court of Appeals  
Case No.: 20160644

Labor Commission  
Case No.: 13-0714

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**APPEAL FROM UTAH LABOR COMMISSION**

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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**REPLY BRIEF OF APPELLANT  
JAVIER ROJAS**

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## ARGUMENT

### **I. The Appeals Board Did Not Use the Correct Formula Set Forth In *Van Waters & Rogers v. Workman* To Determine Willful Failure**

Mr. Rojas and Ferrari Color agree that the Utah Supreme Court has defined “willful failure” when it comes to workers’ compensation cases. Both parties cite to the cases of *Van Waters & Rogers v. Workman* and *Salt Lake County v. Labor Commission*, which cases set forth what constitutes “willful failure”. *Van Waters*, 700 P.2d 1096 (Utah 1985); *Salt Lake County*, 208 P.3d 1087 (Utah App. 2009). However, Ferrari Color’s position that the concepts of “specific excuses” and “plausible purpose” are only considered once the Labor Commission finds that willful failure existed confuses the Utah Supreme Court analysis from its clear and straightforward formula.

The *Van Waters* case specifically creates a “workable formula [to use] in distinguishing willful failure from less culpable conduct”. *Van Waters* at 1099. This formula is stated as follows:

“But the general rule can be stated with confidence that the deliberate defiance of a reasonable rule laid down to prevent serious bodily harm to the employee will usually be held to constitute willful misconduct, in the absence of a showing of . . . specific excuses. . . If the employee had some plausible purpose to explain his violation of a rule, the defenses of violation of safety rules or willful misconduct are inapplicable. . .”

*Id.* The court in *Salt Lake County* followed this test as set forth in *Van Waters*. (*Salt Lake County* at 1090).

Specific excuses and plausible purpose are not secondary questions that may be considered after willful misconduct is found; rather, the rule provides that these determinations are used to help decide whether willful misconduct existed. Specific excuse or plausible purpose are an integral part of the rule established in *Van Waters*, and each part of the rule must be considered before a determination of willful failure can be made. Therefore, *Van Waters* and *Salt Lake County* courts conducted a specific fact analysis to determine willful failure by looking for a specific excuse or plausible purpose for the safety violation. *Id.*

In the case at bar, the Appeals Board limited its inquiry to whether Ferrari Color's actions amounted to "deliberate defiance" of a reasonable safety rule. However, the Appeal Board's analysis was in error, as the standard to determine "willful failure" requires the Commission to make findings of a specific excuse or plausible purpose for the violation of the safety rule.

The Appeals Board did find that Ferrari Color knew that its employees had been operating the printer – the same one Mr. Rojas had been using – without its safety panels in place. (Record, p. 363). Further, the Appeals Board found that Ferrari Color knew that one of its industrial printers was being operated with the safety sensor overridden. *Id.* However, the Appeals Board did not determine if there was a specific excuse or

plausible reason for allowing such safety violations. There is no dispute that Mr. Rojas' hand was injured because Ferrari Color knew that its employees were operating the industrial printing machine without the safety panels in place. There is no dispute that these safety panels are designed to prevent Ferrari Color's employees from being injured while operating the industrial printing machine.

Additionally, these facts support a finding of a "conscious motion of will" that would lead to a "willful" violation, as found in *Gil v. Campfire Inc.* Labor Commission Case No. 98-1030. This opinion was used by the Appeals Board dissent to find that based on the undisputed facts, Ferrari Color had willfully failed to enforce safety rules by permitting its employees to operate the printer without the safety panels in place. (Record, p. 364). Because of these undisputed facts and the case law, the Appeals Board erred when it modified the ALJ's Order and set aside the increase of 15% in the temporary disability compensation due to Mr. Rojas.

## **II. Petitioner Is Not Appealing the Appeals Board's Factual Findings and Thus Had No Duty to Marshal the Evidence**

"To successfully challenge an agency's factual findings, the party 'must marshal [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.'" *Martinez v. Media-Paymaster Plus*, 164 P.3d 384,



390 (Utah 2007). The purpose of this requirement is to help “ensure that the factual findings of the agency are overturned only when lacking in substantial evidence.” (*Id.*)

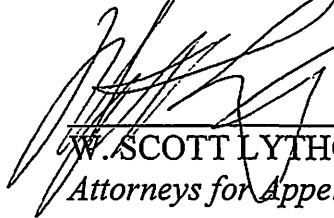
In this case, Petitioner is not challenging the factual findings of the Appeals Board. Rather, he is challenging whether the Appeals Board correctly reached its legal conclusion that Respondents’ actions were not willful failure. Petitioner asserted in his brief that the Appeals Board did not correctly follow the rule of law set forth in the *Van Waters* case, specifically that it did not consider whether or not a specific excuse or plausible purpose existed for the safety rule violation. Additionally, the discussion of deliberate defiance is contained in the section of the Appeals Board’s order titled “Discussion and Conclusions of Law”. Petitioner is not disputing the facts of the case, and therefore no marshaling requirement exists.

### **CONCLUSION**

In conclusion, the ALJ’s Findings of Fact and Conclusions of Law are soundly grounded in the law and the facts, and supported by the dissenting Appeals Board opinion. Based upon the foregoing argument, Petitioner respectfully requests that the Appeals Board’s Order Modifying ALJ’s Decision be reversed.

DATED this 31<sup>st</sup> day of March, 2017.

LARREAU & LYTHGOE, PC



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**CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1), UTAH R. APP. P.**

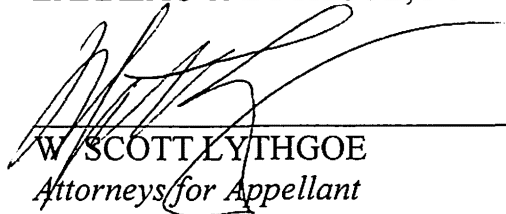
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1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 914 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 13 point font.

DATED this 31<sup>st</sup> day of March, 2017.

LARREAU & LYTHGOE, PC



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of March, 2017, I sent via electronic mail true and correct copies of the foregoing pleading to the following:

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