

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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Recommended Citation

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UTAH COURT OF APPEALS

JAVIER ROJAS,

Petitioner/Appellant,

v.

UTAH LABOR COMMISSION,
FERRARI COLOR, and WORKERS
COMPENSATION FUND

Respondents/Appellees.

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Case No. 20160644-CA

Utah Labor Commission
Case No. 13-0714

Brief of Appellees Ferrari Color and Workers Compensation Fund

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FILED
UTAH APPELLATE COURTS

MAR 02 2017

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Respondents/Appellees Ferrari Color and the Workers Compensation Fund (jointly “Ferrari Color”) present this Response Brief under Rule 24 of the Utah Rules of Appellate Procedure.

COURT OF APPEALS JURISDICTION

Ferrari Color agrees with the statement of jurisdiction and standard of review in petitioner/appellant Javier Rojas’s (“Mr. Rojas”) opening brief and reiterates the Utah Labor Commission’s (“Commission”) order is to be granted discretion as long it is reasonable and rational.¹ Further, if an appellant challenges a court’s findings of fact on appeal it is his/her burden to “show that the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding.”²

ISSUE PRESENTED FOR REVIEW

Ferrari Color agrees with the issue presented in Mr. Rojas’s opening brief.

CONTROLLING PROVISIONS

UTAH CODE §34A-2-301. Places of employment to be safe -- Willful neglect -- Penalty.

(1) An employer may not:

- (a) construct, occupy, or maintain any place of employment that is not safe;
- (b) require or knowingly permit any employee to be in any employment or place of employment that is not safe;
- (c) fail to provide and use safety devices and safeguards;
- (d) remove, disable, or bypass safety devices and safeguards;
- (e) fail to obey orders of the Commission;

¹ *Hymas v. Labor Commission*, 996 P.2d 1072 (Utah App. 2008).

² *Wood v. Salt Lake City Corp.*, 374 P.3d 1080, 1083. (Utah App. 2016).

- (f) fail to obey rules of the Commission;
 - (g) fail to adopt and use methods and processes reasonably adequate to render the employment and place of employment safe; or
 - (h) fail or neglect to do every other thing reasonably necessary to protect the life, health, and safety of the employer's employees.
- (2) Compensation as provided in this chapter shall be increased 15%, except in case of injury resulting in death, when injury is caused by the willful failure of an employer to comply with:
- (a) the law;
 - (b) a rule of the Commission;
 - (c) any lawful order of the Commission; or
 - (d) the employer's own written workplace safety program.

STATEMENT OF THE CASE

Nature of the Case

This case involves a workplace injury and application of the 15% add-on penalty outlined in Utah Code §34A-2-301. Mr. Rojas alleges Ferrari Color knowingly allowed him to work on an industrial printer with the safety sensor disabled, resulting in injury to his left hand. Based on Utah Code §34A-2-301, Mr. Rojas claims he is entitled to a 15% increase in the weekly compensation benefits he was awarded by the Commission.³

Course of the Proceedings

Mr. Rojas filed an application for hearing with the Commission on September 13, 2013 requesting various benefits, including a 15% increase in temporary total disability

³ R. 370.

compensation benefits under Utah Code §34A-2-301.⁴ Ferrari Color filed its answer to the application on November 1, 2013 and argued, among other defenses, that Ferrari Color is entitled to the 15% reduction penalty outlined in Utah Code §34A-2-302.⁵

A hearing was held on March 27, 2015. On March 3, 2016, the ALJ awarded Mr. Rojas all the requested benefits, including the 15% increase in compensation benefits.⁶ On March 31, 2016, Ferrari Color filed a Motion for Review with the Commission appeals board challenging the ALJ's order.⁷ On July 5, 2016, the appeals board set aside the ordered 15% penalty, but affirmed the remainder of the March 3, 2016 order.

Disposition of the Court Below

In the July 5, 2016 order, the appeals board stated:

. . . the evidence does not preponderate to show that Mr. Baker (owner) or Ferrari Color deliberately defied or bypassed safeguards on the printing machine at the time Mr. Rojas was injured. Accordingly the Appeals Board finds that Mr. Rojas's left-hand injury was not caused by the willful failure of Mr. Baker or Ferrari Color to comply with §301(1).⁸

Petitioner filed a timely Petition for Review of the July 5, 2016 order on August 4, 2016.

⁴ R. 1-33.

⁵ R. 36-38.

⁶ R. 370.

⁷ R. 373-382.

⁸ R. 442.

Statement of Facts

Industrial Injury

1. Mr. Rojas alleged he injured his left hand in the course and scope of his employment with Ferrari Color on January 18, 2013, when the printer head of an industrial printer trapped his left hand against a support bar.⁹ He alleged this occurred as a result of a safety sensor override.¹⁰

Safety Sensor

2. The employer (Travis Baker) testified at the hearing that he did not override the safety sensor on the printer or know it had been overridden before the date of injury because he did not know how to do it before that time.¹¹

3. The ALJ concluded “although Mr. Baker testified that he did not remove or override the safety sensor before Petitioner’s injury, because he did not know how to effect an override, he testified that he knew it had been overridden by the . . . service technician at the time of the UOSH inspection.”¹²

4. The UOSH inspection did not occur until April 9, 2013, 81 days after the accident.¹³

⁹ R. 1.

¹⁰ *Id.*

¹¹ R. 363.

¹² R. 364.

¹³ R. 676 – 682.

5. The ALJ also concluded “the Court finds credible Mr. Baker’s testimony that he did not override the sensor himself.”¹⁴

6. Mr. Rojas testified that Mr. Baker disabled the safety sensor due to a vacuum failure¹⁵. However, there is no record of a service call for a vacuum failure in January or February of 2013. There was no indication of a vacuum failure on the daily preventive maintenance log maintained by Ferrari Color during that period of time.¹⁶

7. Mr. Baker testified if there was a vacuum failure on the date of the industrial accident the printer would have been inoperable because the media would not be able to move through the printer’s conveyor system. Such a malfunction would have warranted a service call to the printer servicing company, which, as outlined above, did not occur.¹⁷

SUMMARY OF THE ARGUMENT

The Commission reasonably concluded the employer’s conduct in this case did not rise to the level of “deliberate defiance” or “willful failure” required to impose the 15% increase in compensation benefits under Utah Code §34A-2-301(2). The facts, when viewed in the light most favorable to the Commission’s order¹⁸, establish Ferrari Color had no knowledge about the safety sensor override on the printer before the

¹⁴ R. 364.

¹⁵ R. 363 and 439.

¹⁶ *Id.*

¹⁷ R. 363.

¹⁸ *Wood v. Salt Lake City Corp.*, 374 P.3d 1080, 1083. (Utah App. 2016).

accident occurred. As a result, the Commission concluded there was no “willful failure” and the 15% penalty was not assessed. In that circumstance, Ferrari Color was not required to establish a “plausible purpose” for the safety failure as urged by Mr. Rojas. Finally, Mr. Rojas failed to meet his burden of persuasion by failing to marshal the most critical evidence supportive of the Commission’s order that there was no “willful failure.” Based on those arguments, Ferrari Color requests that the Commission’s July 5, 2016 order be affirmed.

ARGUMENT

I. THE LABOR COMMISSION APPEALS BOARD REASONABLY SET ASIDE THE 15% INCREASE IN TEMPORARY DISABILITY BENEFITS BECAUSE FERRARI COLOR’S CONDUCT DID NOT RISE TO THE LEVEL OF “WILLFUL FAILURE”.

A. There was no “deliberate defiance” of a safety rule.

The Commission appropriately set aside the ALJ’s order of the 15% penalty because there was no “willful failure” by Ferrari Color. Utah Code §34A-2-301(2) only allows the Commission to order a 15% increase in a compensation award “when injury is caused by the willful failure of an employer to comply with: (a) the law; (b) a rule of the Commission; (c) any lawful order of the Commission; or (d) the employer’s own written workplace safety program.”¹⁹ Thus, it requires a direct causal link between a “willful failure” to follow a safety rule and the alleged injury. That is a factual determination

¹⁹ Emphasis Added.

requiring deference to the Commission's findings as long as they are reasonable and rational.²⁰

The Utah Supreme Court has defined "willful failure" in the workers compensation context as "deliberate defiance of a reasonable rule . . ."²¹ Further, "the term 'willful' implies something in addition to mere negligence. . . negligence alone or even gross negligence is not sufficient to constitute "willful failure".²² The definition of gross negligence is instructive. It is defined as "carelessness or recklessness to a degree that shows utter indifference to the consequences that may result."²³ Thus, "willful failure" requires more than "utter indifference" of the risks posed by a safety failure. It is a stringent standard that the Commission reasonably concluded has not been met in this case.

Ferrari Color reiterates the facts must be viewed in the light most favorable to the Commission's order.²⁴ Those facts are Ferrari Color's owner, Mr. Baker, did not know how to disable the safety sensor at the time of the accident.²⁵ He did not learn the safety sensor had been overridden until the time of the UOSH inspection several months

²⁰ *Hymas v. Labor Commission*, 996 P.2d 1072 (Utah App. 2008).

²¹ *Van Waters & Rogers v. Workman*, 700 P.2d 1096, 1099 (Utah 1985) and *Salt Lake County v. Labor Commission*, 208 P.3d 1087, 1090 (Utah App. 2009).

²² *Id.* Emphasis Added.

²³ *Blaisdell v. Dentrax Dental Systems*, 284 P.3d 616, 621 (Utah 2012).

²⁴ *Wood v. Salt Lake City Corp.*, 374 P.3d 1080, 1083. (Utah App. 2016).

²⁵ R. 363.

later.²⁶ Mr. Rojas claimed the safety sensor was overridden on the date of the accident due to a vacuum failure on the printer. However, a vacuum failure would have rendered the printer inoperable, which would require a service call to the printer servicing company to fix the problem.²⁷ There was no service call to fix such an issue in January or February of 2013, and there is nothing in the maintenance logs for that time period indicating there was a vacuum failure.²⁸

Those facts all reasonably support the Commission's conclusion that Ferrari Color was not aware of a sensor override on the date of accident, and thus there was no "deliberate defiance" or "willful failure" to comply with a safety rule.

B. A "plausible purpose" explanation is not necessary under the circumstances of this case.

Mr. Rojas's main argument is the 15% add-on penalty under Utah Code §34A-2-301(2) is justified because Ferrari Color did not demonstrate it had a "plausible purpose to explain the violation of a rule." Mr. Rojas misconstrues how a "plausible purpose" explanation works in a "willful failure" analysis.

The first obvious step is a finding of "willful failure". If there is no "willful failure" the analysis stops there and the 15% penalty is not assessed. However, if "willful failure" is found, as an affirmative defense an employer can avoid the 15% penalty by

²⁶ R. 364 and 442.

²⁷ R. 363.

²⁸ R. 363 and 439.

establishing there was a “plausible purpose to explain [the] violation.”²⁹ Thus, “willful failure” is a threshold finding that must be established before there is any need to explain a “plausible purpose” for a safety failure. That makes sense because the penalty is not assessed until there is a finding of “willful failure”. In this case, the Commission concluded there was no “willful failure.” Therefore, no “plausible purpose” explanation was necessary to avoid an unassessed penalty.

C. Absence of a “specific excuse” should not be conflated with “willful failure”.

As an extension of his “plausible excuse” argument, Mr. Rojas attempts to water down the “willful failure” or “deliberate defiance” standard by asking the court to conclude “in the absence of a showing of specific excuses, the employer’s conduct is willful.”³⁰ That is not the standard established by the Supreme Court. He conflates lack of specific excuse for a safety failure with “willful failure.” The practical impact of that interpretation is even a failure caused by negligence would qualify for the 15% add-on penalty if no specific excuse for the safety failure is established. That is contrary to the court’s directive that “‘willful’ implied something in addition to mere negligence, and that negligence alone or even gross negligence is not sufficient to constitute “willful failure.” The “deliberate defiance” standard should not be usurped by a “specific excuse” requirement. As outlined above, establishing a “specific excuse” or “plausible

²⁹ *Id.*

³⁰ See Brief of Appellant – p. 12.

purpose” is merely a mechanism to avoid the 15% penalty after a finding of “willful failure”. It should not become the factor that establishes the failure.

D. “Deliberate defiance” is the appropriate standard.

Mr. Rojas also argues a specific finding of “deliberate defiance” is not required to find there was “willful misconduct.” He cites *Gil v. Campfire Inc.*, Labor Commission Case No. 98-1030, in which the Labor Commission found that a voluntary and “conscious motion of will” that leads to a violation can be deemed “willful.” This is not a standard adopted by any Utah appellate court. It was applied in a 1998 Labor Commission decision and has not been applied in any published decision since. It is contrary to Utah appellate court precedent which has adopted “deliberate defiance” as the standard.

Regardless, the facts of this case don’t support a finding of “willful failure” even under a “conscious motion of will” standard. The facts adopted by the Commission, and viewed in the light most favorable to the Commission’s order, demonstrate there was no voluntary or “conscious motion of will” because the employer wasn’t even aware the safety sensor was disabled until months after the accident occurred. There is no evidence the employer knew the sensor was overridden on the day of the accident. He was not “conscious” of the safety failure. There was no “willful failure” under either standard.

II. MR. ROJAS FAILED TO MARSHAL THE EVIDENCE SUPPORTIVE OF THE LABOR COMMISSION'S ORDER.

If an appellant challenges a court's findings of fact on appeal it is his/her burden to "show that the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding."³¹ To that end, "the challenging party must marshal all the supporting evidence and demonstrate its insufficiency."³² The Supreme Court recently held "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal."³³ Further, this Court has stated "if a party fails to satisfy the marshaling requirement, this court may, in its discretion, assume that the record supports the factual findings of the agency."³⁴

Mr. Rojas failed to marshal several critical facts the Commission relied on to reach the conclusion that Ferrari Color did not "deliberately defy" a safety rule. Most of the facts outlined in the "statement of facts" section above were not marshaled by Mr. Rojas in his brief. The most critical omitted facts are the following:

1. Mr. Baker did not override the safety sensor before the date of the accident because he did not know how to do it before that time.³⁵ The ALJ specifically

³¹ *Wood v. Salt Lake City Corp.*, 374 P.3d 1080, 1083. (Utah App. 2016)

³² *Id.* Emphasis added.

³³ *State v. Nielsen*, 326 P.3d 647, 645 (Utah 2014).

³⁴ *Hunting v. Labor Commission*, 269 P.3d 998, 1002 (Utah App. 2012). Citing *Martinez v. Media-Paymaster Plus*, 164 P.3d 384, 390 (Utah 2007).

³⁵ R. 363 and 442.

stated it “finds credible Mr. Baker’s testimony that he did not override the sensor himself.”³⁶

2. Mr. Baker was not aware the sensor had been overridden until the UOSH inspection nearly three months after the accident.³⁷

3. Although Mr. Rojas testified the safety sensor was disabled on the date of his accident due to a printer vacuum failure, there is no evidence the printer vacuum system was in need of service on that date. Mr. Baker testified such a failure would have rendered the printer inoperable, which would have prompted a service call and repair. There are no service call records for a printer vacuum problem in January or February 2013 and no maintenance log records of such a problem.³⁸

Failure to marshal those facts is significant. Those are the very facts the Commission relied on to conclude there was no “deliberate defiance” or “willful misconduct” by Ferrari Color. As stated by the Supreme Court, “[Mr. Rojas] . . . will almost certainly fail to carry [his] burden of persuasion on appeal if [he] fails to marshal.” The evidence has not been marshaled and the burden of persuasion has not been met when there is no citation or analysis of the very evidence Mr. Rojas seeks to challenge. Due to that marshalling failure, this court should exercise its discretion and assume the record supports the factual findings of the Commission.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

CONCLUSION

The Commission reasonably and rationally concluded the employer's conduct does not rise to the lofty "deliberate defiance" standard required to impose the 15% increase in compensation benefits under Utah Code §34A-2-301(2). There was no employer knowledge about the safety override before the accident occurred. As a result, the Commission concluded there was no "willful failure". Since there was no finding of "willful failure" and no assessment of the 15% penalty, there is no need for Ferrari Color to explain a "plausible purpose" to avoid the penalty. Based on the preceding arguments, Ferrari Color respectfully requests that the Labor Commission's July 5, 2016 order be affirmed.

ADDENDUM

No addendum to this brief is necessary. The parts of the record of central importance in this matter were included in the addendum to Mr. Rojas's brief.

Dated March 2, 2017

WORKERS COMPENSATION FUND

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CERTIFICATE OF COMPLIANCE

As required by Utah Rule of Appellate Procedure 24(f)(1)(C), I certify that this brief contains 2,951 words and is therefore in compliance with the 14,000 word limitation required by Rule 24(f)(1)(A).

Matthew J. Black

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CERTIFICATE OF SERVICE

I certify that on March 2, 2017 I e-mailed electronic copies of **BRIEF OF APPELLEES**
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