

2001

# Gordon Shearer v. Utah Labor Commission, Lin's Marketplace and Great American Insurance : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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GORDON SHEARER,

Petitioner,

v.

UTAH LABOR COMMISSION,  
LIN'S MARKETPLACE and GREAT  
AMERICAN INSURANCE,

Respondents.

*20010743-CA*  
Case No. ~~200130763-CA~~

Labor Commission Case No. 98-0065

Priority No. 7

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**REPLY BRIEF OF PETITIONER GORDON SHEARER**

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PETITION FOR REVIEW FROM ORDER OF THE  
UTAH LABOR COMMISSION

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SEP 12 2002

Paulette Stagg  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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GORDON SHEARER,

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## **ISSUES AND STANDARD OF REVIEW**

The Respondents, Lins Marketplace and Great American Insurance, (“Lins”) have rephrased and recharacterized Petitioner’s, Gordon Shearer’s, (“Shearer”) Statement of Issues to subtly result in a different set of issues that do not accurately reflect Shearer’s position on appeal. In reality, Lins is engaging in the logical fallacy of creating a strawman just for the purpose of knocking it down.

This is particularly true in regards to Shearer’s First Issue as to whether the Respondent, Utah Labor Commission, made adequate, proper and complete Findings of Fact which are supported by the record. Lins has rephrased that issue in terms that Shearer never couched it in, in an attempt to cover the deficiencies in the two decisions at the Labor Commission level. Nevertheless, the parties agree that the applicable standard of review is that the agencies findings of fact will only be affirmed if they are “supported by substantial evidence” Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989).

In regards to the second issue, i.e., whether the Labor Commission correctly applied the statute to the facts, Lins again improperly characterizes Shearer’s issue to obtain a different result. The law of this State is overwhelming that issues involving the interpretation and application of statutory provisions are governed by a “correction of error” standard and that no deference to the agency’s view of the law is required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4)(d) (1988). Esquivel v. Labor Commission, 7 P.3d 780 (Utah 2000). Drake v. Industrial Commission, 939 P. 2d 177 (Utah 1997). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991).

Lins mischaracterizes this issue as one of application of the facts to the law and then asserts that the Commission's determination will be upheld unless the determination "exceeds the bounds of reasonableness and rationality." In support, they cite McKesson v. Lieberman, 202 UT App 10. [sic]. That case is actually McKesson v. Labor Commission, 41 P.3d 468 (Utah App. 2002) and it did not involve a case of application of the law to facts, but rather one involving questions of law to be reviewed for correctness. Id. at 471.

### **STATEMENT OF FACTS**

Lins did not set forth an impartial and objective Statement of Facts which cite to the record. That part of its Brief is highly argumentative and is actually more advocacy than a statement of the uncontested and undeniable facts in this case. Lins has used the Statement of Facts section as a pretext for the making of a legal argument. Shearer will respond and dispel Lins' mischaracterization of the facts as they apply to each of the arguments below.

### **SUMMARY OF REPLY**

All of the parties agree that pursuant to the permanent total disability statute contained in Utah Code Annotated §34A-2-413, Shearer has demonstrated that he is not gainfully employed; that he has an impairment that limits his ability to do basic work activities and that by reason of his work related injuries he is prevented from performing the essential functions of his prior work. The sole issue on appeal is whether Shearer can "perform other work reasonably available, taking into consideration his age, education, past work experience,

medical capacity, and residual functional capacity.”

In this case, the Labor Commission abrogated its statutory duty to be an impartial fact finder and rather assumed the role of an advocate for denying benefits to the injured worker. The Labor Commissioner rejects the thoughtful and exhaustive findings of the Administrative Law Judge, ignores all evidence in favor of the claim and selectively cites to the record. The Commissioner’s Findings of Fact are so erroneous, incomplete and inaccurate as to be arbitrary and capricious. They are not supported by the record, are legally insufficient and must be reversed.

## A R G U M E N T

### I

#### **THE WORKERS COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.**

Lins does not dispute the overwhelming established legal principle that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. McKesson Corp. v. Labor Commission, 41 P.3d 468, 471 (Utah App. 2002) (quoting Ae Clevite, Inc. v. Labor Commission, 996 P.2d 1072 (Utah App. 2000)). Lins merely argues that the “liberal construction rules cannot relieve the applicant from the threshold requirement to demonstrate all elements of his claim.” (Respondents Brief at 16).



This is the first of many instances where Lins creates a strawman. Shearer does not claim he is relieved from demonstrating all the elements of his claim, in fact, he demonstrated all the elements by overwhelming evidence, which greatly exceeded his obligation to make his case by a preponderance of evidence. Shearer's argument, with which this Court has always agreed, is that the workers compensation statute must be "liberally construed" and that "doubt must be resolved in favor of the injured worker."

Lins next argues that "[t]he fact that the commission's ultimate factual findings are not as detailed as the ALJ's findings do not [sic] require the appellate court to disregard the findings 'due to a conceptional flaw.'" (Respondent's Brief at 17). Once again, that was never Shearer's argument. Shearer argued that the Commission's failure to make detailed and comprehensive findings, its failure to weigh the conflicting medical opinions as to Shearer's functional capacity and ability to return to any work, and the undue weight it gave to a flawed vocational rehabilitation report, resulted in a flawed order. The "findings" and "conclusions" do not evidence "humane and beneficent purposes" as required by law. The entire Order should be disregarded due to that very basic and fundamental flaw.

## **II**

### **THE FINDINGS OF THE RESPONDENT UTAH LABOR COMMISSION IN DENYING SHEARER PERMANENT TOTAL DISABILITY BENEFITS WERE ERRONEOUS, INCORRECT AND ARBITRARY AND CAPRICIOUS AS A MATTER OF LAW.**

#### **A. A Transcript of the Second Hearing was not Required in This Case.**

On October 20, 1999, a Hearing was held on Shearer's claim for workers

compensation permanent total disability compensation occasioned by his industrial injury of June 23, 1995. (R1 at 157). The Hearing was tape-recorded, but apparently the first few minutes of the tape were blank. The tape picked up with Shearer reviewing his work history starting at age 10. That testimony was transcribed and is a part of the record. (R4).

Following the Hearing, the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order, dated June 10, 2000, finding Shearer permanently and totally disabled, as a result of his industrial accident and ordered the payment of appropriate benefits. (R1 at 217-236).

Lins filed a Motion for Review with the Utah Labor Commission on February 25, 2000. (R2 at 242-256). The Motion for Review was granted by the Commission on June 30, 2000, who found that Shearer was not entitled to permanent, total disability benefits. (R2. at 281-284).

On July 19, 2000, Shearer filed a Request for Reconsideration with the Utah Labor Commission, requesting in part, that this matter be remanded to the Administrative Law Judge for the purpose of retaking Shearer's direct testimony, as part of it inadvertently was not recorded. (R2 at 335-352). The Commission issued an Order of Remand on August 30, 2000 directing the retaking of the omitted testimony. (R2 at 413-414). A telephone conference call was conducted on June 4, 2001 for the purpose of recording Shearer's testimony. (R2 at 420-421). That testimony was never transcribed and thus was not available to the Labor Commission. Nevertheless, on August 27, 2001 the Utah Labor Commission entered an Order Denying Request for Reconsideration, apparently without the benefit of

Shearer's testimony. (R2 at 427-432).

Lins now alleges that:

The second hearing in June of 2001 addressed matters that were not recorded in the first hearing. In particular, the hearing centered around the claimant's permanent total disability claim, which included, of course, discussion of the underlying findings necessary to support a permanent total disability claim. Given Petitioner's failure to obtain a hearing transcript and properly make it part of the appellate record, this Court has no other choice but to assume the accuracy of the Commission's factual findings. (Respondent's Brief at 19).

No citation to the record is offered by Lins for this remarkable allegation that the retaking of Shearer's testimony on June 4, 2001 "addressed matters that were not recorded in the first hearing." Actually, the record demonstrates otherwise. Lins, in its Memorandum in Opposition to Petitioner's Motion for Reconsideration, strongly argued to the Labor Commission that:

If, however, the commission concluded that it is necessary to re-establish the record for proper review, the remand hearing should be expressly limited to that portion of the hearing transcript which has been lost - Petitioner's direct testimony of the events prior to October 20, 1999. No additional witness or testimony should be admitted inasmuch as the limited purpose of the hearing would be to re-establish the lost record. (R2 at 398).

In sharp contrast with its present position on appeal, before the Commission, Lins stated that "The ALJ's findings accurately reflect the nature of Petitioner's testimony. The Respondents have no basis for objecting to these findings." (R2 at 397).

The Labor Commission in its Order of Remand specifically provided as follows:

The Commission therefore finds it necessary to remand this matter to the ALJ for the purpose of obtaining such omitted testimony. The ALJ will then submit the complete record to the commission for final resolution of Mr. Shearer's request for Reconsideration. (Emphasis added). (R2 at 413).

It appears from the record that there were not additional matters addressed in the June 2001 retaking of Shearer's testimony. Further, the Labor Commission specifically directed that following the retaking of Shearer's testimony that the Administrative Law Judge would be responsible to submit the "complete record" to the Commission.

Lins is now engaging in a duplicitous argument. Before the Labor Commission it argued that the record was complete, that the dispute was limited to Shearer's physical ability to return to work, that all evidence on that point was already part of the record and that the Administrative Law Judge who heard that testimony made complete and detailed Findings to which it did not object. Lins characterized the retaking of Shearer's testimony as an "unnecessary burden." (R2 at 397). The Labor Commission did not obtain a transcript of the retaking of Shearer's testimony, despite the fact that it had directed its own Administrative Law Judge to obtain one.

Although Lins indicated that it accepted the Findings of the Administrative Law Judge, the Commission largely discarded those 52 detailed and thorough Findings and substituted in their place, five general Findings of its own, most of which were in sharp contrast to those found by the Administrative Law Judge.

Without actual benefit of Shearer's testimony, the Labor Commission dismisses his testimony as lacking credibility, being "self-serving" and "uncorroborated." (R2 at 436). A remarkable conclusion given the fact that they now acknowledge that they did not even have a transcript of the testimony to review.

Lins can not have it both ways, nor can it take one position before the Labor Commission and an entirely inconsistent position on appeal. Lins properly characterized the retaking of Shearer's testimony as redundant and not necessary as to the issues before the Commission and which are now before this Court. It is somewhat remarkable to argue that a transcript of testimony must be provided to this Court, when that testimony was not before the Labor Commission and could not have formed any part of its decision below, from which this Petition for Review arises.

**B. Shearer has Exhaustively Marshaled the Evidence in Challenging the Labor Commission's Findings of Fact and Demonstrated that it is Inadequate to Support the Commission's Decision Denying Shearer Permanent Total Disability Benefits.**

Shearer acknowledges that it is his burden to marshal all the evidence supporting the Findings and then demonstrate that the evidence is inadequate to sustain the Findings. Lins, however, alleges that "Petitioner inadequately performs his marshaling duty", that the marshaling is "flimsy" and "weak." Absolutely no support for that allegation is provided. Shearer exhaustively and painstakingly went through the record and cited every piece of evidence both supporting and detracting from each challenged finding. Lins does not cite a single piece of evidence that Shearer failed to marshal. The allegation that Shearer did not marshal the evidence can not be made in good faith and is nothing more than sophistry given the total lack of any specifics or supporting evidence.

Lins' allegation appears to be motivated by a guilty conscience, for it is the Respondent, Utah Labor Commission, that made inadequate Findings, improperly

characterizing testimony it never heard, dismissing extremely persuasive evidence in support of the claim and overlooking the most glaring defects in the evidence against benefits. Lins verbally winces at the detailed and supported argument that it was the Labor Commission which made “weak” and “flimsy” Findings and generalized Conclusions. In response it alleges that the Commission’s duty to make factual findings does not require a lengthy recitation of the testimony, but merely only enough to reflect that the Commission fully reviewed the matter. Regrettably, the record as a whole demonstrates that the Labor Commission did not fully review the matter, rather their review was highly selective and inadequate.

In Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991), the Utah Court of Appeals has previously informed the Labor Commission that:

In order for us to meaningfully review the findings of the commission, the findings must be ‘sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factually issue was reached.’ Action v. Deliran, 737 P.2d 996, 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979)) ... [T]he failure of an agency to make adequate findings of fact on material issues renders its findings ‘arbitrary and capricious’ unless the evidence is ‘clear, uncontroverted and capable of only one conclusion.’ Id. (Quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Additionally, Findings of Fact are only adequate when they are supported by "substantial evidence" viewed by the record as a whole. Utah Code Ann. § 63-46b-16(4)(g). In applying the substantial evidence test, this Court must review the whole record including, "not only the evidence supporting the board's factual findings, but also **the evidence that**

fairly detracts from the weight of the board's evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989). (Emphasis added).

**C. There was Inadequate Evidence to Support the Labor Commission's Conclusion that Shearer Could Perform Other Work Reasonably Available and was Therefore not Permanently Totally Disabled.**

It is important to keep in mind that this is a claim for permanent, total disability benefits. It is alleged that as a result of his work related injuries, Shearer can no longer work and is thus entitled to appropriate benefits for such an injury. It is not disputed that Shearer was injured in the "course and scope of his employment" with Lin's Marketplace. There is no dispute that he has proved legal and medical causation for his injuries and that his work related injury of June 23, 1995 was responsible for at least a 10% impairment of the whole person. It is likewise not disputed that he was not able to engage in sustained work following his injury and that he has not worked for any wages since January 5, 1996.

It is acknowledged by Lins that Shearer has met all but one of the requirements under the permanent total disability statute. The only issue raised by Lins is whether Shearer can, "perform other work reasonably available, taking into consideration [his] age, education, past work experience, medical capacity, and residual functional capacity." (Utah Code Annotated, § 34A-2-413(1)(c)(iv)).

In his original Brief, Shearer recited all the details of the industrial injury, all prior jobs held by him, and all of his educational history, etc. Lins admits that the Commission, in its Findings, did not provide such an exhaustive recitation of the evidence, but alleges that

it “carefully reviewed this matter” and “cited ample support from the record in rendering its findings of fact.” (Respondent’s Brief at 25). The record however demonstrates that this is just another loose assertion by Lins totally lacking any supporting evidence. This is apparent by examining each of the elements of Utah Code Annotated, § 34A-2-413(1)(c)(iv).

Age: The statute requires that the Labor Commission make a finding as to the claimants age and how that impacts on his ability to work. The record is clear that Shearer was born on July 11, 1931. (R1 at 5). The Administrative Law Judge properly found that at the time of the Hearing [10/20/99] Shearer was 68 years old. (R1 at 222). The Labor Commission, however rejected that pure and indisputable fact and in its June 20, 2000, Order Granting Motion for Review found that he was still 68 years old, despite the lapse of a year. (R2 at 282). Over another year later on August 27, 2001 in its Order Denying Reconsideration the Labor Commission now found that Shearer was 67 years old (R2 at 430) when he was undisputably 70 years of age.

In its Brief, Lins states that “Contrary to Petitioner’s contention, the Commission did make a finding regarding Petitioner’s age in both its Orders.” (Respondents Brief at 25). This allegation is correct. The Commission did make a finding regarding Petitioner’s age in both its Orders and both times got it wrong. This error is compounded by the fact that the Labor Commission rejected the Administrative Law Judge’s correct Finding as to Shearer’s age and substituted an erroneous finding. It is not “merely a typographical error,” because contrary to Lins’ allegation it did not state Petitioner’s age correctly even in the Order Granting Motion for Review.



This is not a mere error in calculation. Even if the Labor Commission had correctly stated Shearer's age, it did not make any Finding as to the significance of that age on his ability to work. The Commission instead goes on to reference Shearer's "good general health" and refers to a surveillance video of dubious evidentiary value. The Commission thus confuses and combines the separate elements of age and medical capacity. It erroneously states Shearer's age and does not make any finding as to the ability of a 70 year old man (let alone even a 67 year old man) to "perform other work reasonably available."

Lins is quite correct that "Petitioner failed to reference any evidence which supported the trial court's factual finding that given Petitioner's age, he could perform other work reasonably available..." (Respondent's Brief at 26), because there was absolutely no evidence to support that finding, not even as much as a scintilla. This is indicative of the problems and defects in the Order below.

Shearer does however marshal the evidence that would dispute that assertion. Shearer's unsuccessful attempts to find other work (exhaustively set out in Petitioner's Brief) are indicative of the difficulties presented by his age alone. By any measure, Shearer has satisfied this requirement and the Commissioner's Finding on this issue must be disregarded.

**Education.** In its Order Granting Motion for Review, the Labor Commission found that Shearer "is a high school graduate and has completed two years of accounting course work at Stevens-Henager School of Business. He also took courses in solar technology at Dixie College." (R2 at 282). In its Order Denying Reconsideration, the Commission additionally found that "His educational history establishes his literacy and cognitive

abilities.” (R2 at 430). No further legal conclusion is drawn from that limited educational history. There is no additional evidence that can be marshaled to support that Finding.

Lins, however makes the astounding assertion that:

... there is no requirement that the commission recite the claimant’s entire educational history in making its factual finding. Indeed, the commission referenced the relevant facts necessary to make a finding that the Petitioner’s educational background make him a marketable candidate for remunerative employment. (Respondent’s Brief at 27).

Lins then goes on to make a patently false and **unsupported** allegation that “Petitioner’s failure to properly marshal the evidence in regard to his ability to work, given his educational history, requires this Court to affirm the Commission’s factual finding.” (Respondent’s Brief at 27). Nothing could be further from the truth, although the Commission claims it need not recite Shearer’s entire educational history, Shearer does set it out in full.

The Hearing testimony reveals that Shearer graduated from High School in 1950, (52 years ago), attended two years of business college between 1959 and 1961 (over 40 years ago) and one year at Dixie College in 1981, (over 20 years ago). (R6 at 7-8). He did not graduate from business college and his one year at Dixie, 20 years ago, was spent studying solar systems and alternate energy; virtually everything he learned in that field is now obsolete. He has not had any educational courses in the past 20 years, and has not used his accounting skills in the workforce since 1980. The Commission makes no note of these rather significant facts.

The only Conclusion the Commission can draw from Shearer's limited and dated education was to establish that he could read, write and think. No Finding or Conclusion that his educational skills are such as to enable him, at 70 years of age, to find gainful employment.

Any accounting skills which Shearer obtained 40 years ago, have long since lost their currency. His relevant work history over the past 20 years has been of the manual variety. He has not had any recent work history in which his educational background would be of much benefit. In today's workforce, Shearer would be competing against recent high school and college graduates with current skills. It strains credibility to claim that limited and incomplete 40 year old education demonstrates an ability to find "remunerative employment" in a modern workforce.

**Past Work History:** In it's Order Granting Motion for Review, the Commission makes the following Finding of Fact:

Among other employment, Mr. Shearer worked as a supervisor in one of J.C. Penney's accounting units and as a bookkeeper for several businesses in Kamas, Utah. Latter, he was employed by the U.S. Forest Service, primarily as a resource assistant preparing permits for timber sales. After 13 years with the Forest Service, followed by relatively short periods of employment in several varied positions, he worked as a cashier at Handy Mart and as a cashier/stockier at Lin's.

(R2 at 282).

In it's Order Denying Reconsideration, the Commission makes only this additional relevant Finding: "... his work history demonstrates an ability to function in a work environment. It also shows significant expertise in accounting and the ability to follow

policies and rules.” (R2 at 430). That is the extent of the Labor Commission’s Findings on this element.

In its Brief, the Commission acknowledges that it did not detail Shearer’s full work history from 1951 through the present but that is “... irrelevant to the material finding regarding Petitioner’s past work history and ability to return to gainful work.” (Respondent’s Brief at 28) and when Shearer exhaustively cites the record marshaling each and every job Shearer has ever held and the transferable skills he obtained thereby, Lins resorts to their now worn out and incredible allegation that it is a “flimsy attempt to marshal the evidence.” (Respondent’s Brief at 29). There is nothing flimsy about a comprehensive recital of all of the evidence on this issue. Lins once again is unable to cite a single fact, no matter how insignificant that Shearer failed to marshal and in fact they acknowledge that Shearer documented his “life-time work record.”

Contrary to Lins’ absurd allegation, Shearer did show the error in the Commission’s factual findings regarding his ability to work given his past history. Although the Labor Commissions Findings, such as they were, are completely accurate, they were also completely incomplete and misleading. The complete work history, as opposed to the selective Commission summary, shows that Shearer’s work history for the past 20 years has been manual, in the nature of janitorial, maintenance and cashier/stockier. At the time of his injury, Shearer had worked for 7 consecutive years doing manual labor stocking shelves at Lin’s Marketplace. His prior work experience was generally limited to maintenance and janitorial positions. He admittedly had worked for the forest service and had been in the

Army, but there was no evidence that he had any transferrable job skills from those jobs he had worked twenty to forty years previously.

The statute requires that prior work history be reviewed to determine if the claimant has any prior work skills that can now be applied in other work environments. All the Commission found was that Shearer's work history showed a history of working.

In both of its Orders, the Labor Commission placed great weight on the reports of Mr. Dirk Evertsen, a so called "rehabilitation specialist". Shearer marshaled all of the evidence both supporting and undermining that evaluation and demonstrated that it was of little evidentiary value.

Mr. Evertsen demonstrated his bias at the outset by revealing that in 33 years as a vocational rehabilitation specialist he had never seen anyone he believed to be a valid permanent total disability candidate. (R4, Hearing transcript at 116, lines 17-25 and page 117, lines 1-13.). The full marshaling and indictment of Mr. Evertsen's testimony is contained in Petitioner's original Brief at pages 18-23 and will not be restated in full here. Despite the Commission's conclusion that Mr. Evertsen had found several job opportunities that were within Shearer's capabilities, the full record demonstrates that absolutely no weight can be given to that opinion. Mr. Evertsen conceded that he had not been given all of Shearer's medical records and then when provided with them at the Hearing he conceded that he would have concerns about placing Petitioner in any of the jobs and that given his limitations in the uncontroverted medical records there was not one job available for him under the dictionary of occupational titles. He further testified that in order to get hired that

it would be necessary for Shearer to not disclose his limitations or physical disabilities. He would counsel Shearer to evade his prospective employer's questions, fail to fully answer those questions and hide the true nature of his physical limitations. If he did not do this, Mr. Evertsen testified that Shearer would not be able to find employment. Mr. Evertsen's emphasis was merely on getting a job, even if it required dishonesty, but not on keeping a job, since that would not be possible given Shearer's injuries and limitations which would become very apparent in the job setting.

**Medical Capacity:** Although the statute references medical capacity and residual functional capacity as separate elements to be considered, Lins tries to lump them together, as though the clearly weak and meager evidence will somehow appear stronger when combined. Shearer will continue to address them as separate elements, as mandated by the statute.

Lins does not dispute Shearer has a significant impairment as a result of his 1995 industrial accident at Lin's Marketplace. (R1 at 232). He has been awarded Social Security Disability benefits based on this work related injury. At the time of the Commission's Order denying him benefits, he was over 70 years old and had not worked for wages for 5 years. Other than quoting verbatim from the Commission's Orders, Lins makes no substantiative response to the detailed marshaling of the evidence in Shearer's original brief.

Compelling evidence of Shearer's medical capacity is the testimony of his treating doctors, all of whom advised him to cease working and seek disability benefits. (R1. at 220, 223 and 234). The Administrative Law Judge made that specific Finding, but that significant

evidence is not even referenced by the Commission.

Also unremarked and unrefuted are Shearer's attempts to return to work. Following his 1995 work related injury, Shearer attempted to return to light duty work with his employer, but aggravated his back and was again taken off work. (R1 at 219). He attempted to work as a cashier, but even that light duty aggravated his low back pain and made it impossible for him to work. (R1 at 220). His son attempted to make a job for him, one in which he could lay down and even take a nap, but even with that accommodation he was unable to work. (R1 at 224).

The Labor Commission dismisses Shearer's testimony as "self-serving" and "uncorroborated" (R2 at 428), but does not offer any support for that accusation. In truth, the Labor Commission did not even have a transcript of Shearer's June 4, 2001 testimony so its Finding or Conclusion on this issue carries no weight.

Although the Labor Commission placed great weight on the surveillance video, Lins, in its brief only reiterates the conclusionary statements contained in the Commission's Orders. There is no evidence that the Labor Commission actually watched the video, and it appears it did not. The Commission's characterization of the activity on the video parrots the exact phraseology of Lins' Memorandum, with no mention of any specific event on the video tape.

The Administrative Law Judge allowed the tape into evidence but characterized it as "not accurately depicting a day in his life, or a week in his life" and further being "incredibly boring". (R4 at 31, 34).

Thus, the overwhelming medical evidence from the doctors was to the effect that Mr. Shearer was incapable of working and needed to quit the workforce. It was his doctors who encouraged him to apply for disability benefits due to his injuries. His unsuccessful return to work efforts further showed that his medical condition was such that he could not work. Finally, the surveillance video tape is of little evidentiary value, as it only showed limited activity, which was followed by debilitating pain.

**Residual Functional Capacity:** The final consideration under the statute is that the injured worker's residual functional capacity be considered. In this regard, Shearer had been subject to two "functional capacity evaluations" (FCE).

The first was on January 16, 18, and 23, 1996, when Shearer was evaluated by physical therapist, Virgil Beck. Mr. Beck concluded that Shearer could perform sedentary work. (R5 at 34-45).

A second functional capacity evaluation was performed on May 14, 1999, at the request of the insurance carrier, by physical therapist, Dell Felix who concluded that Shearer could perform work of a "medium physical demand work level." (R1).

None of the evaluations in this case measured activities over more than a full day, nor was either evaluator able to see even the short term effects their "tests" had on Shearer. The uncontroverted testimony at the Hearing was that the functional capacity evaluations themselves greatly aggravated Shearer's medical condition, "putting him down" for several weeks with the onset of low back pain. (R1 at 222).



The Administrative Law Judge summed up the functional capacity evaluations by noting:

Therefore, although the Petitioner may be able to do certain types of physical activities on a 'good day,' the evidence does not show that the Petitioner can continue to perform work activities of even a sedentary nature on a consistent basis. The functional capacity evaluations, although they measured the Petitioner's physical capabilities over a short period of time, cannot accurately reflect the Petitioner's ability to work on a consistent basis, i.e. eight hours a day five days a week.

(R1. at 233).

In its initial Order Granting Motion for Review, the Commission found as follows: "... his most recent functional capacity evaluation indicates he is capable of moderate activity." (R2 at 282). No reference is made to Mr. Beck's evaluation, nor was there any analysis of the two evaluations. In its Order Denying Reconsideration, the Commission cited both reports and the surveillance video to find "...Mr. Shearer is physically capable of work activities at least as strenuous as described in Mr. Beck's functional capacity evaluation." (R2 at 429). The true nature of ones residual functional capacity is what one can do day in and day out and not just in the artificial confines of a Functional Capacity Evaluator's officer. Shearer's repeated unsuccessful return to work efforts show that he does not have sufficient residual functional capacity to enter the work force.

### III

#### **THE LABOR COMMISSION INCORRECTLY APPLIED UTAH CODE ANNOTATED §34A-2-423 AS IT APPLIES TO THE FACTS OF THIS CASE.**

The Utah Labor Commission had adopted Administrative Rule R612-1-10 dealing

with the procedure to be applied to claims for permanent total disability compensation. R612-1-10(C)(2) provides that after a tentative preliminary finding of permanent total disability, “an additional inquiry must be made into the applicant’s ability to be reemployed or rehabilitated, unless the parties waive such additional proceedings.”

The Administrative Law Judge is to hold a Hearing to consider whether an Applicant can be reemployed or rehabilitated. At this Hearing, the Employer or Insurance Carrier may submit a reemployment plan. If after the second Hearing, the Administrative Law Judge concludes that successful rehabilitation is not possible, then the Administrative Law Judge is to enter an final order for continuing payment of permanent total disability compensation.

In this case, Lins’ expert testified that Shearer would need vocational rehabilitation assistance in order to access the labor market because of his disability. Specifically, Mr. Evertsen, the vocational rehabilitation specialist noted that since Shearer has difficulty in twisting, it would be appropriate for him to have competent vocational rehabilitation counseling. (R4, Hearing transcript at page 136, lines 3-8) The Commission completely ignored the uncontroverted evidence that if Shearer were to return to gainful employment, we would require vocational rehabilitation assistance.

Shearer is simply asking for a tentative finding of permanent total disability so Lins can begin it’s rehabilitation process if it so desires. Shearer has satisfied all the requirements to be entitled to a preliminary finding of permanent total disability and have his case move to the vocational rehabilitation process to see if work can be reasonably made available to him. As Lins’ own expert acknowledges as Shearer is in need of vocational rehabilitation

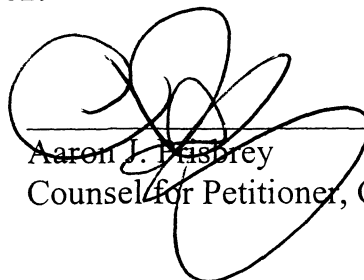
assistance, work is not reasonably available to him. To hold otherwise would totally eviscerate Utah Code Ann. §34A-2-413(6)(a)(ii), as there would never be a need to provide vocational rehabilitation assistance.

The failure to award Petitioner permanent total disability compensation or hold a hearing to determine if he can be reemployed, violates state statute and the Labor Commission's own Rule governing cases such as this.

### **CONCLUSION/STATEMENT OF RELIEF SOUGHT**

Shearer respectfully requests that the final agency action in his case be reversed and remanded with directions that Shearer be awarded permanent, total disability benefits as a result of his industrial injury, or in the alternative that the case be remanded with directions that the Commission enter a Tentative Finding of Permanent Total Disability and enable Lins to proceed with a vocational rehabilitation plan, should they so desire.

DATED this 12th day of September, 2002.

  
\_\_\_\_\_  
Aaron J. Hisebrey  
Counsel for Petitioner, Gordon Shearer

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of September, 2002, a copy of the foregoing  
REPLY BRIEF OF PETITIONER GORDON SHEARER was mailed, postage prepaid, to  
the following:

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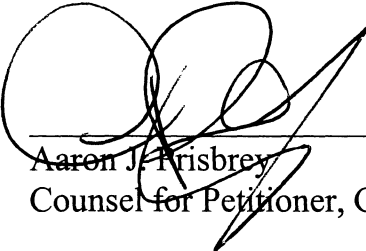
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