

2001

Gordon Shearer v. Utah Labor Commission; Lins Marketplace and Great American Insurance : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

GORDON SHEARER, :
Appellant/Petitioner, : Court of Appeals
Case No.: 20010763
vs. : Priority 7
UTAH LABOR COMMISSION; LINS :
MARKETPLACE and GREAT :
AMERICAN INSURANCE, :
Appellees/Respondents. : Labor Commission No.: 98-0065

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INSURANCE**

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**RESPONDENTS REQUEST ORAL ARGUMENT AND THAT THIS CASE BE
REPORTED**

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JURISDICTION OF THE UTAH COURT OF APPEALS

Petitioner, Gordon Shearer, has filed a Petition for Review from two orders of the Utah Labor Commission: The first, dated June 30, 2000, Order Granting Motion for Review; the second, dated August 27, 2001, Order Denying Request for Reconsideration. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a) (1995).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1: Did the Labor Commission err in failing to “liberally” apply the Utah Workers’ Compensation Act in favor of coverage to the injured employee?

Standard: This involves a matter of agency discretion reviewed under an abuse of discretion standard. See Utah Code Ann. § 63-46b-16(4)(h)(i). Since the Commission has discretion on this matter, the appellate court will not disturb the agency’s decision unless it exceeds the bounds of reasonableness and rationality. See Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 242-43 (Utah Ct. App. 1998).

Issue 2: Are the Labor Commission’s findings of fact, necessary to determine Petitioner’s permanent total disability status (i.e., age, education, past work history, medical capacity, and residual functional capacity pursuant to Utah Code Ann. 34A-2-413(1)(c)(iv)), adequately detailed and supported by the record so as to support a denial of permanent total disability benefits?

Standard: An agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review. See La Sal Oil Co. v. Department of Env'tl. Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992). An agency's failure to make adequate findings of fact renders the findings arbitrary and capricious. See Hidden Valley Coal Co. v. Utah Bd. of Oil, Gas & Mining, 866 P.2d 564, 568 (Utah Ct. App. 1993); Adams v. Board of Review, 821 P.2d 1, 4-5 (Utah Ct. App. 1991). The appellate court will not affirm the Commission's factual findings regarding permanent total disability if they are "arbitrary and capricious" or "wholly without cause", or without substantial evidence to support them. See Kerans v. Industrial Comm'n, 713 P.2d 49, 51 (Utah 1986). Factual findings will not be overturned if based on substantial evidence, even if another conclusion is permissible. See Whitear v. Labor Commission, 973 P.2d 982 (Utah Ct. App. 1998). Moreover, a party seeking to overturn the Commission's factual findings "must marshal 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." Id.

Issue 3: Did the Labor Commission correctly refuse to require Respondents to provide vocational rehabilitation and reemployment assistance to the Petitioner pursuant to Utah Code Ann. § 34A-2-413(6) and Rule 612-1-10(C) of the Utah Administrative Code?

Standard: This issue involves the Labor Commission's application of the Utah

Workers' Compensation Act to the specific facts of this case. The Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. As such, the appellate court will uphold the Commission's determination unless the determination exceeds the bounds of reasonableness and rationality. See McKesson v. Lieberman, 2002 UT App 10, ¶11.

DETERMINATIVE LAW

The general provision of the Utah Workers' Compensation Act (the "Act") authorizing workers' compensation for industrial accidents reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401. Among the four types of worker's compensation allowed is permanent total disability ("PTD") compensation. The determinative law regarding permanent total disability benefits, which is at issue in this case, is Utah Code Ann. § 34A-2-413(1)(c)(iv).¹ This section reads as follows:

¹ It is well settled that the court must apply the substantive law in effect at the time of the industrial injury. See, e.g. Smith v. Mity Lite, 939 P.2d 684, 687 n.1 (Utah Ct. App. 1997). At the time of Mr. Shearer's alleged injury in 1995, the relevant version of the Utah Code was codified at 35A-3-413. It was renumbered in 1997 at 35-1-67. It is currently codified at 34A-2-413 with no major substantive

(c) To find an employee permanently totally disabled, the commission shall conclude that:

- (i) the employee is not gainfully employed;
- (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
- (iii) the industrial or occupationally caused impairment or combination of 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; and
- (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.**

Utah Code Ann. § 34A-2-413(1)(c)(iv) (emphasis added).

STATEMENT OF THE CASE

The sole issue in this case is whether Mr. Gordon Shearer (the “Petitioner”) is entitled to permanent total disability benefits arising from an injury sustained at work with Lin’s Market Place on June 23, 1995.

On January 26, 1998, Petitioner filed an Application for Hearing claiming entitlement to permanent total disability benefits sustained from an injury of June 23, 1995. (R1 at 4-29). The employer, Lin’s Market Place, by and through its workers’ compensation carrier (the “Respondents”), filed an Answer to Application for Hearing on

changes. For ease of reference, Appellee will refer to the Act as it is currently numbered.

March 4, 1998. (R1 at 32-33). A formal hearing was held on October 20, 1999 before Administrative Law Judge Sharon J. Eblen (the “ALJ”) at the Utah Labor Commission. (R4). At issue was whether there was other work reasonably available to Mr. Shearer given his age, education, work experience, and physical limitations – pursuant to Utah Code Ann. § 34A-2-413(1)(c)(iv)(iv), so as to justify an award of permanent total disability benefits. See id.

On January 10, 2000, the ALJ entered her Findings of Fact, Conclusions of Law and Order, finding that Mr. Shearer was permanently totally disabled as a result of the industrial accident. (R1 at 217-36). On February 25, 2000, Respondents filed a Motion for Review with the Utah Labor Commission. (R2 at 242-56). On June 30, 2000, the Commission entered an Order Granting Respondents’ Motion for Review. (R2 at 281-84). The Commission found that the claimant did not meet the requirements of 34A-2-413(1)(c)(iv)(iv) and, therefore, denied permanent total disability benefits. See id.

On July 19, 2000, Petitioner filed a Request for Reconsideration with the Commission, asking that the matter be remanded to the ALJ to retake Petitioner’s testimony since the prior hearing was not properly recorded. (R2 at 335-52). On August 30, 2000, the Commission remanded the case to the ALJ for the purpose of taking the omitted testimony. (R2 at 413-14). A telephone conference took place on June 4, 2001 for the purpose of recording Petitioner’s testimony. (R2 at 420-21). Petitioner has not attached a copy of the conference transcript for purposes of this appeal.

On August 27, 2001, the Commission entered an Order Denying Request for Reconsideration. (R2 at 427-32). Petitioner filed a Petition for Review with the Utah Court of Appeals (the "Court") on or around September 25, 2001. (R2 at 433-40).

STATEMENT OF FACTS

Petitioner, Mr. Gordon Shearer, was born on July 11, 1931. He hurt his back in an industrial accident on June 23, 1995 while employed as the Frozen Food Manager by Lin's Market in Hurricane, Utah. At the time of this injury, Petitioner was 64 years-old. Lin's and its workers' compensation insurance carrier accepted liability for the claim and paid the Petitioner's medical expenses, temporary total and permanent partial disability compensation.

Following a period of conservative medical care, Petitioner had surgery on his back on September 8, 1995 by Dr. William S. Muir. (R5 at 111-13, 124). Petitioner returned to work as a cashier at Lin's in January 1996. After approximately one week, he told Lin's that he could not perform his work as a cashier due to the repetitive bending and twisting; he quit and applied for Social Security Disability benefits which were granted effective January of 1996. (R5 at 126; R1 at 182-84). Petitioner has not earned wages since January 5, 1996. (R1 at 220).

On February 26, 1996, Dr. Max Root rated Petitioner with a 10% whole person impairment as a result of the industrial injury. (R5 at 5, 129).

Mr. Shearer urges you to find that he is severely disabled due to his industrial

accident. While the Petitioner has some impairment, the evidence shows that he has substantial physical ability. The Commission's Order Denying Request for Reconsideration noted that, "...the Commission notes that although Mr. Shearer is 67 years old, his general health and vitality are remarkable." (R1 at 430) The evidence clearly supports that conclusion. Mr. Shearer goes hiking in the desert over uneven terrain. (R3). His only accommodation is that he uses a walking stick. (R4 at 455 T. 26). At the time of his deposition, Mr. Shearer testified that he walks in his hometown of Hurricane, Utah for three and a half to four miles, which takes him forty-five minutes. (R4 at 455 T. 35). Although Mr. Shearer complains that he gets sharp jolts of pain when he walks over uneven surfaces, he was observed to hop down a three foot embankment during a functional capacity evaluation on May 13 and 14, 1999. (R1 at 191)

Mr. Shearer met with Dirk Evertsen, a vocational rehabilitation counselor, on August 15, 1998. (R1 at 196-215; R2 at 382, 389-92). Mr. Evertsen conducted a two hour evaluation at the office of the Petitioner's attorney and followed up with two hours of vocational testing. Mr. Shearer demonstrated the ability to do deep knee bends and a karate kick with his leg fully extended horizontally and with no hint of discomfort. (R1 at 207).

A surveillance video taken on November 12, 1998, shows some of Shearer's true abilities. (R3). This is what the video shows:

- a. Active from 7:30 a.m. to 12:30 p.m.;

- b. Walking brief and lengthy distances without difficulty or any apparent pain limitations.
- c. Walking on flat and uneven terrain without difficulty, hesitation, or limitation;
- d. Squatting, bending, and stooping without difficulty, apparent distress, or limitation;
- e. Standing in a relaxed manner with his hands in his pockets in no apparent distress;
- f. Getting in and out of a pick-up truck numerous times without difficulty, delay, distress, or limitation;
- g. Twisting around numerous times while driving his pick-up truck;
- h. Going up and down a short flight of stairs without difficulty, limitation, hesitation, or apparent distress;
- i. Climbing into and out of the bed of his pick-up truck without apparent distress, difficulty, or limitation;
- j. Jumping down to the ground out of the bed of his pick-up truck without apparent hesitation, limitation, or distress;
- k. Lifting an apparently heavy item with the assistance of another person;
- l. Bending over for approximately 20 minutes working on an item.

(R3).

Shearer has had two functional capacity evaluations. The first was on January 16, 18, and 23 1996, by Virgil Beck, physical therapist. (R5 at 34-45). The second, by Dell

Felix, a physical therapist, was on May 13 and 14, 1999. (R1 at 190).

Mr. Beck concluded that Petitioner could perform sedentary work, exerting 10 pounds of force occasionally, or up to one-third of the time. Petitioner reported to Mr. Beck that he walked up to one hour per day and did exercises that he had been taught by his physical therapist. (R1 at 217, ¶¶19, 30, and 21). During the evaluation, Petitioner demonstrated the ability to lift 45 pounds from floor to waist one time; lift 23 pounds from waist to shoulder one time; carry 50 pounds at waist level a distance of 4 to 5 feet; push a 200 pound cart 30 feet; pull a cart weighing 170 pounds backwards 30 feet; stand for 30 minutes; walk at a normal pace on a treadmill 8 minutes; squat 20 times; ascend and descend a flight of stairs for 100 steps; and, safely ascend and descend a stepladder for 30 steps in five trips. See id. at ¶21; (R5 at 34-45).

The second FCE showed that Mr. Shearer's condition had markedly improved since the 1996 evaluation by Mr. Beck. The 1996 FCE demonstrated that Shearer could perform work in a medium physical demand capacity. (R1 at 193). Petitioner demonstrated the ability to sit for 30 minutes during his intake interview with two to three standing up breaks; stand for 12 minutes in one place or 60 minutes with repeated activities; walk for one mile on a treadmill and walk outside over varied terrain, including jumping down a three foot embankment with a problem, walk up and down two flights of stairs while carrying 25 pounds; reach over head, stoop, kneel and bend, although he avoided twisting. (R1 at 217, ¶35; R1 at 191). Petitioner additionally demonstrated that he could lift 47.8

pounds with his arms, 20.7 pounds in a high far lift, 58 pounds in a high near lift, and 132 pounds with a leg lift. (R1 at 191). He lifted 30 pounds from the floor with his arms, lifted a 50 pound box from the floor 20 times in 20 minutes, carried a 35 pound dumbbell for 40 feet, and carried a 25 pound dumbbell up and down stairs and for 100 feet. (R1 at 192). He demonstrated the ability to pull a cart using 25 pounds of force, was slower than average in manual dexterity. He also completed an obstacle course involving lifting and lowering a 10 pound dumbbell, lifted a 50 pound box two times, pulled a cart 10 feet, and carried a 10 pound tray 40 feet. (R1 at 217, ¶36; R1 at 192).

As noted above, Dirk Evertsen, a rehabilitation counselor with 33 years of experience, identified a number of jobs that Mr. Shearer was qualified to perform. Those jobs included a night watchman position at a youth home, an artistic craftsman, a pharmacy helper, a dispensing optician, a desk clerk, a foster parent, and a school crossing guard. (R1 at 208-11; R2 at 382, 389-92). Note that all of the jobs Mr. Evertsen found met the light-sedentary physical demand capacity shown by the outdated 1996 FCE by Mr. Beck. There are many more jobs available in the medium physical demand capacity which Shearer demonstrated in the 1999 FCE by Mr. Felix. Mr. Evertsen noted that the security position required no lifting. He was required to stay awake and make periodic rounds of the facility. Mr. Evertsen indicated that along with P.T.s Beck and Felix, Dr. Max Root opined that the claimant has a “permanent light duty capability.” (R1 at 215; R5 at 118-21). Mr. Evertsen also stated that Petitioner is capable of working in employment areas

ranked higher than sedentary. (R1 at 206). Mr. Evertsen further recognized that Petitioner is a high school graduate and completed two years in business college which included accounting, management, and solar technology. (R1 at 201).

At the Labor Commission hearing, Petitioner demonstrated the following activities without difficulty:

- a. Bending to the side;
- b. Deep knee bends;
- c. Moving arms in various actions and positions;
- d. Sitting comfortably in a chair.

(R4 at 455 at T. 20, 35-36).

Mr. Shearer asks you to believe that he is only qualified for manual labor jobs. That is simply not true. Although Shearer has worked some “blue collar” jobs, he has also been a bank teller, insurance salesman, stock trader, department head for the J.C. Penney company, and resource assistant for the United States Forest Service. (R4 at 455 T. 5-12). Shearer was a supervisor for J.C. Penney and, “Bossed a bunch of gals, provided them with bills of lading, so that an invoice could be processed for payment.” (R4 at 455 T. 22). He supervised the preparation of Penney’s W-2s, and the annual inventory of all the stores in the western states. (Id.). Shearer’s job as a resource assistant for the Forest Service required him to account for funds and fees collected, perform accounting and prepare contracts. (Id. at T. 24). Mr. Shearer studied solar technology at Dixie College, following

which he sold solar systems before beginning his own business conducting energy audits.
(Id. at T. 13-14)

Petitioner subsequently filed a claim with Respondents seeking workers' compensation benefits arising from this alleged industrial accident, in particular, permanent total disability benefits. Respondents denied Petitioner's claim for these benefits. Petitioner then sought review of his claim with the Utah Labor Commission.

The ALJ issued 52 findings of fact. The ALJ correctly recognized the claimant's burden to prove that he is permanently totally disabled as a direct result of the industrial accident. (R1 at 217-36). Despite the evidence presented regarding Petitioner's ability to do certain types of physical activities, however, the ALJ ruled that the Petitioner could not perform work activities, even of a sedentary nature, on a consistent basis. (R1 at 233-34). The ALJ ultimately ruled that Petitioner met the requirements of Utah Code Ann. § 34A-2-413(1)(c)(iv). Since the claimant stopped working on January 6, 1996, the ALJ awarded permanent total disability benefits from that date forward.

Following Respondents' Motion for Review, the Labor Commission, as the ultimate fact finding tribunal, subsequently reversed the ALJ's decision to award Petitioner permanent total disability benefits. (R2 at 281-84). The Commission recognized that the claimant was capable of performing at least moderate activity. (R2 at 282-83). The Commission relied upon the investigative video recordings of Petitioner which showed he was capable of vigorous activity, including walking bending, twisting and light lifting. See

id.; (R3). The Commission also relied upon the vocational evaluation of Mr. Evertsen which demonstrated Petitioner's above average ability to learn, perform new work tasks, and indicated that there were several different employment fields in the Hurricane/ St. George area that were within the claimant's capabilities. In support of its ruling, the Commission determined that the claimant's education in accounting and his past work experience in this field, as well as handling government paperwork and clerking experience, reveals that there are employment opportunities available within the Petitioner's medical and functional capacity, and that his age does not preclude him from these positions. Therefore, the Commission denied Petitioner permanent total disability benefits under the relevant statute.

The Petitioner then discovered that the tape recorder had not functioned for the first portion of his testimony during the hearing on October 20, 1999. Mr. Shearer brought that problem to the Commission's attention by a Motion for Reconsideration dated July 19, 2000. The Commission remanded the case to the administrative law judge for the purpose of conducting a second hearing to allow the Petitioner to make a record of the lost testimony. The hearing on remand was held on June 4, 2001. Although there is a transcript of the first hearing on October 20, 1999 (which was requested by Respondents to support their Motion for Review), Mr. Shearer has not requested the transcript of the second hearing. Accordingly it is not part of the appellate record.

Petitioner subsequently filed a Request for Reconsideration with the Commission.

He maintained that the Commission erred in relying on Mr. Felix's evaluation of his functional capacity, the Commission erred in relying on Mr. Evertsen's vocational evaluation of Petitioner, the Commission made inadequate factual findings, and, the Commission incorrectly applied section 34A-2-413(6) to this case. The Commission denied Petitioner's Motion for Reconsideration. (R2 at 429-32). The Commission found that based upon the two functional capacity evaluations and the November 1998 video, the Petitioner was in good general health and physically capable of work activities at least as strenuous as sedentary levels described by P.T. Beck. (R2 at 427-30). The Commission rejected Petitioner's argument that it improperly relied upon the vocational rehabilitation testimony of Dirk Evertsen, a rehabilitation specialist, regarding Petitioner's ability to find work within his physical capabilities. (R2 at 429-30). The Commission indicated that Mr. Evertsen's expert evaluation--that Petitioner is able to find work in the St. George area, given his limitations--was appropriate since Mr. Evertsen reviewed the functional capacity evaluations, had personal conversations with the Petitioner and potential employers, and had over 30 years experience as a vocational rehabilitation specialist working with 2,000 to 3,000 clients. (R2 at 429). The Commission further added that it fully evaluated Petitioner's age, cognitive abilities, educational history, and medical and functional capacity in coming to a determination that the claimant could work at a sedentary position such as a hotel/motel clerk. (R2 at 430).

Petitioner subsequently filed this Petition for Judicial Review. (R2, at 433).

SUMMARY OF THE ARGUMENT

First, Mr. Shearer's Petition for Review improperly attacks the Labor Commission's Findings of Fact without marshaling the evidence. *Second*, he elected not to provide a transcript of the June 4, 2001 hearing, thereby forfeiting any claim for a factual review by this Court. *Third*, the record in this case as reflected in the Labor Commission's Findings of Fact, Order Granting Motion for Review and Order Denying Reconsideration shows that the Petitioner failed to prove by a preponderance of the evidence that he is entitled to permanent and total disability compensation under the Workers Compensation Act. *Fourth*, despite liberal construction rules in favor of providing workers' compensation benefits to an injured worker, the Commission accurately held Petitioner to his burden of proof and correctly ruled that the Petitioner is not permanently totally disabled pursuant to Utah Code Ann. § 34A-2-413(1)(c)(iv). *Fifth*, contrary to Petitioner's assertion, the Commission's findings of fact regarding Petitioner's ability to work considering his "age, education, past work experience, medical capacity, and residual functional capacity" are adequately detailed and amply supported by the record. *Sixth and finally*, because Petitioner did not meet the requirements of Section 34A-2-413(6), no reemployment hearing or rehabilitation plan was compelled in this case.

ARGUMENT

POINT I

LIBERAL CONSTRUCTION RULES DO NOT APPLY WHEN UTAH LAW DOES NOT SUPPORT SUCH AN AWARD

Petitioner argues that because Utah law promotes liberal construction of the Act, permanent total disability benefits are justified in this case. Respondents agree that Utah's courts and the Labor Commission should generally construe the Act in favor of coverage and compensation. See Heaton v. Second Injury Fund, 796 P.2d 676, 679 (Utah 1990). However, this command does not dispense with the requirement that an injured party prove his case by a preponderance of the evidence. See Lipman v. Ind. Comm'n, 592 P.2d 616, 618 (Utah 1979). Indeed, the Court of Appeals held in Jackson v. Industrial Comm'n, Memorandum Decision, 920804-CA (Utah Ct. App. 1993), that regardless of the remedial nature of the worker's compensation statutes, a liberal construction rules cannot relieve the applicant from the threshold requirement to demonstrate all elements of his claim. Id.; see also Utah Code Ann. § 34A-2-401 (allowing workers' compensation benefits only if requirements of this provision are met). This mandate is also set forth in the relevant statute, 34A-2-413, which provides:

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

- (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial**

- accident or occupational disease that gives rise to the permanent total disability entitlement;
- (ii) the employee is permanently totally disabled; and
- (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

Utah Code Ann. § 34A-2-413(1)(b) (emphasis added).

The Act further provides that “To find an employee permanently totally disabled, the commission shall conclude that”:

- (i) the employee is not gainfully employed;
- (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
- (iii) the industrial or occupationally caused impairment or combination of 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; and
- (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.

Id. at (1)(c).

The issue in this case is the fourth requirement of subsection (c) -- whether Petitioner can perform other work reasonably available, taking into considering his age, education, past work experience, medical capacity, and residual functional capacity. The fact that the Commission’s ultimate factual findings are not as detailed as the ALJ’s findings do not require the appellate court to disregard the findings “due to a conceptional flaw.” See Appellant’s Brief at 11. The burden of proof by a preponderance of evidence rested

on the Petitioner. Liberal construction rules certainly do not lessen Petitioner's burden in this case.

POINT II

THIS COURT SHOULD AFFIRM THE LABOR COMMISSION'S FACTUAL FINDINGS

A. Petitioner's Failure to Include a Transcript of the Second Hearing Requires the Court to Assume that the Proceedings in the Labor Commission Support its Findings of Fact.

This Court should affirm the Labor Commission's factual findings because Petitioner failed to provide a transcript of the June 4, 2001 hearing as required by Utah Appellate Rules. Rule 11(e)(2) of the Utah Rules of Appellate Procedure requires the appellant, Mr. Shearer, to request the relevant transcript of the lower court's proceedings within ten days of filing the notice of appeal (or petition for review in this case). If an appellant intends to urge on appeal that a factual finding is unsupported or is contrary to the evidence, which is the case here, the appellant must include in the record, a transcript of all evidence relevant to such finding. See Utah R. App. P. 12(e)(2). This rule is not permissive. "Neither the court nor the appellee is obligated to correct the applicant's deficiencies in providing the relevant portion of the transcript." Id.

Utah's appellate courts have held that without a transcript, the appellate court is bound to assume that the proceedings in the lower court support the result reached. See Prudential Capital Group v. Mattson, 802 P.2d 104 (Utah Ct. App. 1990); Fackrell v.

Fackrell, 740 P.2d 1318, 1319 (Utah 1987) (Appellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower courts' rulings and decisions on disputes can be measured. In this case without a transcript no such record was available, and therefore no measurement of the district court's action can be made as urged upon us by defendant).

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.

B. The Petitioner has Failed to Marshall the Evidence in Challenging the Labor Commission's Findings of Fact.

It is also well-settled that a party challenging a lower court's findings of fact has the burden of establishing that those findings are not supported by the evidence and thus, are clearly erroneous. See Utah R. Civ. P. 52(a); Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). In order to successfully challenge a trial court's findings of fact on appeal, an appellant must list all the evidence supporting the findings and then demonstrate that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. See Valcarce v. Fitzgerald, 961 P.2d 305, 312

(Utah 1998). Utah's courts have stated that the marshaling process is not unlike being the devil's advocate. An appellant may not merely present selected evidence favorable to his or her position without presenting any of the evidence supporting the lower court's findings.

See Whitcar v. Labor Comm'n, 973 P.2d 982 985 (Utah Ct. App. 1998).

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

When an appellant fails to meet the heavy burden of marshaling the evidence, appellate courts are bound to assume the record supports the trial court's factual findings. In fact, appellate courts have shown no reluctance to affirm when the appellant fails to meet its marshaling burden. See Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994).

Here, Petitioner challenges several of the Labor Commission's factual findings underlying its ultimate determination of permanent total disability. Specifically, Petitioner challenges the Labor Commission's findings regarding Petitioner's ability to return to work considering (1) his age, (2) education, (3) past work experience, (4) medical capacity, and (5) residual functional capacity.

Petitioner inadequately performs his marshaling duty. As explained in more detail below, Petitioner fails to list all the evidence supporting the Commission's factual findings

on each of these matters, fails to list all detracting evidence, and does not “ferret out the fatal flaw” in the Commission’s findings.

C. The Labor Commission’s Factual Finds are Adequately Detailed and Amply Supported by the Record.

Petitioner vehemently claims that the Commission’s factual findings regarding Petitioner’s permanent total disability status are inadequately detailed and are, therefore, “arbitrary and capricious”. Petitioner additionally submits that the Commission’s factual findings regarding Petitioner’s age, education, past work history, medical capacity, and residual functional capacity--which are the required material findings for a determination of permanent total disability under Section 34A-2-413(1)(c)(iv), U.C.A.-- are deficient because they are not supported by “substantial evidence” in the record. Respondents disagree with these assertions.²

² *First*, it is well-settled that an administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review. See La Sal Oil Co. v. Dep’t of Env’tl. Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992). An agency’s failure to make adequate findings of fact on material issues render’s its findings “arbitrary and capricious” unless the evidence is clear and uncontroverted and capable of supporting only one conclusion. See Hidden Valley Coal Co. v. Utah Bd. of Oil, Gas & Mining, 866 P.2d 564, 568 (Utah Ct. App. 1993); Adams v. Board of Review, 821 P.2d 1, 4-5 (Utah Ct. App. 1991).

Second, it is well known under the Utah Administrative Procedure’s Act (“UAPA”), that an agency’s factual findings will be affirmed by the appellate courts only if they are supported by substantial evidence when viewed in light of the whole record before the court. See Utah Code Ann. § 63-46b-16(4)(g). Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. See Harken v. Board of Oil, Gas & Mining,

Under the provisions of the Utah Administrative Procedures Act (“UAPA”), the Labor Commission’s adjudication of workers compensation claims are formal adjudicative proceedings. See Utah Code Ann. § 63-46(b)-4. Pursuant to section 63-46(b)-10, in formal adjudicative proceedings, the Commission must do the following:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

- (a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;
- (b) a statement of the presiding officer's conclusions of law;
- (c) a statement of the reasons for the presiding officer's decision;
- (d) a statement of any relief ordered by the agency;
- (e) a notice of the right to apply for reconsideration;
- (f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and
- (g) the time limits applicable to any reconsideration or review.

Utah Code Ann. § 63-46(b)-10.

The Commission’s duty to make factual findings does not require a lengthy recitation

920 P.2d 1176, 1180 (Utah 1997). Substantial evidence is more than a scintilla of evidence, though less than the weight of the evidence. Commercial Carriers v. Industrial Comm’n, 888 P.2d 707, 711 (Utah Ct. App. 1994). Indeed, when reviewing an agency’s decision under the substantial evidence test, the reviewing court does not conduct a de novo credibility determination or reweigh the evidence. See Questar Pipeline Co. v. State Tax Comm’n, 850 P.2d 1175, 1178 (Utah 1993). Because a party seeking review of an agency order must show that the agency’s factual determinations are not supported by substantial evidence, the reviewing court examines the facts and inferences drawn therefrom in the light most favorable to the agency’s findings. See Hales Sand & Gravel v. Audit Div., 842 P.2d 887, 888 (Utah 1992).

of all of the testimony and evidence that is presented to the Commission. Rather, factual findings are intended to reflect that the Commission fully reviewed the matter, and the purpose of the findings are to resolve the factual disputes. See La Sal Oil v. Department of Env'tl. Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992) (when Director made vague, conclusory findings of fact which lacked detail and explicit reference to specific evidence or exhibits found to be pivotal to the ultimate decision, findings were insufficient). Unlike a party challenging a factual finding, the Commission is not required to “marshal” the evidence before stating its factual finding.

The Utah Supreme Court has explained that “in administrative matters such as this, there must be findings on all material issues.” Milne Truck Lines, Inc. v. Public Serv. Comm’n, 720 P.2d 1373, 1378 (Utah 1986) (quoting Mountain States Legal Foundation v. Utah Public Service Comm’n, 636 P.2d 1047, 1058 (Utah 1981) (Emphasis added)). In Mountain States, the Supreme Court explained that to enable appellate review of an order, “the Commission must make findings of fact which are sufficiently detailed to apprise the parties and the Court of the basis for the Commission's decision.” Id. (emphasis added).

The material factual findings in this case relate to Section 34A-2-413(1)(c)(iv), Utah’s permanent total disability statute, which provides:

(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.

Utah Code Ann. § 34A-2-413(1)(c)(iv) (emphasis added).

Contrary to Petitioner's contention, the Commission's factual findings sufficiently summarize the material facts, exhibits, and evidence presented, reflecting that it carefully reviewed this matter. Both the Commission's Order Granting Motion for Review and Order Denying Request for Reconsideration discuss, in detail, Petitioner's age, education, past work history, medical capacity, and residual functional capacity in relation to his ability to return to gainful employment. Although not reciting all details of the industrial injury, all prior jobs held by the claimant, and all of the Petitioner's educational history, etc., the Commission properly summarized the relevant evidence needed to make a finding regarding the Petitioner's ability to return to work. In addition, the Commission addressed the adequacy of its findings when it stated the following in its Order Denying Request for Reconsideration:

Adequacy of Commission's Findings: Mr. Shearer contends the Commission made inadequate findings of fact in its prior decision [Order Denying Motion for Review]. It is true that the Commission did not address several issues, such as the circumstances of Mr. Shearer's work accident, his medical treatment and his compensation rate, that had been addressed in the ALJ's decision. The Commission did not consider these issues for the simple reason that neither party asked that they be considered. **The Commission limited its fact finding to only those issues in dispute.**

With respect to the issues that were actually raised before it, the Commission acknowledges its duty to set forth the basis for its decision in adequate detail. The essential basis for the Commission's decision is explained in its initial order. This second order supplement and amplifies the

first. The Commission believes that these two decisions, when taken together explain the basis for its decision.

(R2 at 430) (emphasis added).

A careful review of the Commission's orders reveals that it sufficiently addressed all material facts and cited ample support from the record in rendering its findings of fact. Addressed below is a recitation of the Commission's findings on the material issues of this case as well as Respondent's response to Petitioner's hurried, and inadequate attempt to "marshal" the evidence.

Age: In regard to age, the Commission stated in its Order Granting Motion for Review: "Mr. Shearer was born in 1931 and is now 68 years old." (R2 at 282). It further stated in its Order Denying Request for Reconsideration:

Mr. Shearer is in good general health and has maintained a daily exercise routine. A surveillance video taken on two consecutive days in November 1998 demonstrate his abilities to walk briskly for more than 30 minutes, lift and carry small items, operate a motor vehicle, twist, turn, bend climb up and down from the bed of a pickup truck. Mr. Shearer did all the foregoing activities with no apparent pain or limitation. . . .

[T]he Commission notes that, although Mr. Shearer is 67 years old [sic], his general health and vitality is remarkable.

(R2 at 429-30). Contrary to Petitioner's contention, the Commission did make a finding regarding Petitioner's age in both of its orders. See Appellant's brief at 14. Although the Commission misstated Petitioner's age by three years in the later order, it is fairly evident that this was merely a typographical error since it stated Petitioner's age correctly in its

Order Granting Motion for Review. Given the Petitioner's age and good health, the Commission properly determined that he could return to gainful employment.

Petitioner's mentioning the fact that the Commission incorrectly listed Petitioner's age by three years in one of its orders does not satisfy the marshaling requirement on this factual finding. Indeed, 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, and then show why his actual age precluded him from gainful employment. The claimant's brief merely points to a typographical error. This is not sufficient to meet the marshaling standard.

Education: In regard to Petitioner's education, the Commission stated in its Order Granting Motion for Review:

He 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). It further stated in its Order Denying Motion for Reconsideration: "His educational history establishes his literacy and cognitive abilities." (R2 at 430).

Petitioner submits that this particular finding is insufficient since it lacks a legal conclusion and fails to account for Petitioner's entire educational background. Respondents disagree. The Commission came to a determination based upon all of the relevant factors articulated in Section 34A-2-413(1)(c)(iv). Ultimately, the Commission concluded that Petitioner's educational background (and the other material factors noted), would allow him

to obtain gainful employment in the St. George/ Cedar City area. (R2 at 430). As previously stated, 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 Petitioner's educational background made him a marketable candidate for remunerative employment.

In any event, 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. Although Petitioner lists the evidence which supports the Labor Commission's finding that his scholastic training qualifies him to work in other gainful employment, he fails to convincingly demonstrate why this evidence is insufficient to sustain the finding.

Past work experience: In regard to Petitioner's past work experience, the Commission stated in its Order Granting Motion for Review:

Among other employment, Mr. Shearer worked as a supervisor in one J.C. Penney's accounting units and as a bookkeeper for several businesses in Kamas, Utah. Later, 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 as a cashier/stocker at Lin's. . .

(R2 at 282). In its Order Denying Reconsideration, the Commission stated: "[H]is 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)."

Again, Petitioner's argument that the Commission's findings are inadequate since they do not detail his full work history from 1951 through the present is unfounded. The Commission's failure to reference the fact that Petitioner has most recently worked in manual positions is irrelevant to the material finding regarding Petitioner's past work history and ability to return to gainful work. The Commission's finding--that given the Petitioner's prior work history, he could obtain gainful employment--is based upon the evidence in the record which includes not only his prior work positions, but also the testimony of vocational rehabilitation expert, Dirk Evertsen who reviewed the Functional Capacity Evaluations and interviewed the claimant before conducting his vocational assessment. (R2 382, 389). Mr. Evertsen indicated that several of the jobs he found for Petitioner required a high school graduate or were not specified. On this point, the Commission stated:

Mr. Shearer has also undergone vocational evaluations. The most persuasive of these evaluations, performed by Mr. Evertsen, establishes that Mr. Shearer has the an above average ability to learn and perform new tasks. Mr. Evertsen's evaluation also establishes that specific job opportunities existed in several different employment fields in the Hurricane/St. George area that are within Mr. Shearer's capabilities.

(R2, at 281). Given Mr. Evertsen's reports, Petitioner's argument that the Commission's order is deficient because it heavily references Petitioner prior work history in a variety of non-manual positions is groundless.

It also is important to emphasize the fact that even if this Court *could* come to a

different determination regarding Petitioner's ability to work based upon his prior work experience does not mean that the Commission's findings are not supported by substantial evidence or are otherwise inadequate. See V-1 Oil Co. v. Department of Env'tl. Quality, 904 P.2d 214, 216 (Utah Ct. App. 1995) (an appellate court "will not substitute its judgment as between two reasonable conflicting views, even though [it] may have come to a different conclusion had the case come before [it] for de novo review"). In this case, the Commission's findings must be affirmed since they are supported by substantial evidence in the record.

Petitioner also makes a flimsy attempt to marshal the evidence in regard to this factual finding. Although Petitioner documents his life-time work record, the fact remains that the Petitioner did not show any error in the Labor Commission's factual findings regarding his ability to work given his past work history. Indeed, the Labor Commission's findings are entirely accurate and show that he is versatile in several vocations. The fact that he worked in some of these vocations many years ago does not negate his resume.

Medical capacity / Residual Functional Capacity. In regard to Petitioner's medical capacity and residual functional capacity, the Commission stated in its Order Granting Motion for Review:

Mr. Shearer contends he is severely limited from physical activity due to his back injury. However, his most recent functional capacity evaluation indicates he is capable of moderate activity. Mr. Shearer's own demonstrations of his physical abilities indicate he is capable of more than merely sedentary work. Likewise, surreptitious video recordings indicate

Mr. Shearer is capable of relatively vigorous activity, including walking, bending, twisting, and light lifting.

Mr. Shearer has also undergone vocational evaluations. The most persuasive of these evaluations, performed by Mr. Evertsen, establishes that Mr. Shearer has an above average ability to learn and perform new tasks. Mr. Evertsen's evaluation also establishes that specific opportunities existed in several different employment fields in the Hurricane/St. George area that are within Mr. Shearer's capabilities.

(R2 at 282). In its Order Denying Reconsideration, the Commission stated:

Functional Capacity: The record in this matter contains evidence from several sources regarding Mr. Shearer's functional capacity. Mr. Shearer has testified that he is severely limited in his ability to perform any tasks. Such testimony is self-serving, but more importantly, it is uncorroborated by any other evidence. Furthermore, Mr. Shearer's testimony regarding his limitations is inconsistent with other evidence as follows.

During mid-January 1996, a little more than four months after his back surgery, Mr. Shearer underwent a "functional capacity evaluation" by Virgil Beck, a physical therapist. It was Mr. Beck's conclusion that Mr. Shearer could meet the physical demands of sedentary work:

Mr. Shearer does qualify for work at a sedentary work level which is described under the physical demand characteristics of work in the following manner: "sedentary work-exerting up to 10 pounds of force (occasionally); activity or condition exists up to 1/3 of the time and/or negligible amount of force (frequently): activity or condition exists from 1/3 to 2/3 of the time to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work includes sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required occasionally and all other sedentary criteria are met.

During May of 1999, three and one-half years after his surgery, Mr. Shearer underwent another functional capacity evaluation, this time by physical therapist Dell Felix. Mr. Felix concluded that Mr. Shearer could

tolerate the physical activities of a “medium” work level, with the following explanation:

This evaluation demonstrated that Mr. Shearer could tolerate the physical activities in the MEDIUM Physical Demand Characteristic of Work Level. He feels that he must be careful in his reaching activities, limit his sitting tolerance, and avoid twisting. In spite of these limitations he was measured to be safe in moderate work activities with frequent lifts of fifty pounds and occasional carrying up to thirty five pounds.

Furthermore, Mr. Shearer is in good general health and has maintained a daily exercise regime. A surveillance video taken on two consecutive days in November 1998 demonstrate his abilities to walk briskly for more than 30 minutes, lift and carry small items, operate a motor vehicle, twist, turn, bend, climb up and down from the bed of a pick up truck. Mr. Shearer did all the foregoing activities with no apparent pain or limitation.

In summary, the Commission finds that Mr. Shearer is physically capable of work activities at least as strenuous as described in Mr. Beck’s functional capacity evaluation. The Commission will therefore rely upon Mr. Beck’s evaluation in determining whether Mr. Shearer meets the requirements of 34A-2-413(1)(c)(iv). . . .

His medical and functional capacity leave him capable of at least sedentary levels of exertion, as well as driving to and from work. While his medical and functional capacities do not permit him to return to his most recent work at Lin’s, they allow him to work in other capacities, such as a hotel/motel clerk. Such employment is a recognizable, reasonably available occupation in the St. George/Cedar City area. The Commission therefore reaffirms its prior conclusion that Mr. Shearer has not established that he cannot perform other work reasonably available to him, as required by §34A-2-413(1)(c)(iv).

(R2, at 428-30).

Petitioner submits that the Commission’s findings on these two matters are deficient since they overlook: (1) the fact that the claimant attempted to return to work after the

injury but had a difficult time doing so due to his physical limitations; (2) the fact that some of his treating doctors advised him to cease working and seek disability benefits; (3) the fact that the functional capacity evaluations are simply a “snapshot” of an individual’s ability to perform certain functions in a particular day; and, (4) the fact that the surveillance video does not accurately depict the claimant’s actual life. Petitioner also submits that the findings are inadequate since there was no reference made to Mr. Beck’s evaluation or any analysis of the two function capacity evaluations.

At best, Petitioner makes a weak attempt to marshal the evidence on the issues of medical capacity and residual functional capacity. As previously stated, the Commission has no duty to cite all evidence regarding the industrial event, including his inability to work after the injury at the video rental counter, as a cashier in a convenience store, and in his son’s antique store. The Commission need only make findings on the material issues of the case “in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions.” Adams, 821 P.2d at 5. It is axiomatic that appellate courts give great deference to the trial court’s findings of fact because the trial court “is in the best position to assess” the evidence, determine the facts and “gain a sense of the proceeding as a whole.” Valcarce v. Fitzgerald, 961 P.3d 305, 314 (Utah 1998). Although he has listed the evidence the trial court failed to reference in its orders, Petitioner has not “ferreted out the fatal flaw” in the evidence which supports the Commission’s findings. See Whitear, 973 P.2d at 985. In any event, Petitioner’s contentions in Point II of his

argument are somewhat misleading. The fact that the Petitioner attempted to return to work after the injury but had a difficult time doing so does not mean that the claimant is not capable of gainful employment in all jobs. Certainly the Commission recognized this when it stated that the Petitioner may not be able to return to his identical position at Lin's but that there is other work available such as a hotel/motel clerk. (R2 at 430).

Petitioner's claim that because his treating doctors have advised him to cease working and seek disability benefits, he is not physically capable of gainful employment, is also misleading. See Appellant's Brief at 27, citing R1 at 220, 223, and 234. One of the doctors Petitioner refers to for this proposition, Dr. Gauvin, did not actually state that the Petitioner should cease working. (R5 at 56-62). At most, Dr. Gauvin indicates that the claimant should avoid "real heavy lifting." (R5 at 62). Moreover, Dr. Root, the other doctor referred to by Petitioner in his brief, actually indicated to the contrary on February 26, 1996. Dr. Root stated that "if the claimant desired to work, th[e]n he should stay within the realms of his functional capacity evaluation . . . The functional capacity evaluation evaluated the patient to be capable of doing no more than sedentary work." (R5 at 129). Accordingly the doctors Petitioner cites in his brief do not support his position at all.

More importantly, the Commission's findings are supported by two functional capacity evaluations. Virgil Beck, P.T., evaluated the claimant for three days in coming to his conclusion that the Petitioner could perform sedentary work. P.T. Beck noted that

during his three day evaluation in 1996, Petitioner demonstrated the following abilities:

- A. Exerting 10 pounds of force occasionally, or up to one-third of the time.
- B. Walking up to one hour per day and doing exercises he had been taught by his physical therapist.
- C. The ability to lift 45 pounds from floor to waist one time;
- D. The ability to lift 23 pounds from waist to shoulder one time;
- E. The ability to carry 50 pounds at waist level a distance of 4 to 5 feet;
- F. The ability to push a 200 pound cart 30 feet;
- G. The ability to pull a cart weighing 170 pounds backwards 30 feet;
- H. The ability to stand for 30 minutes;
- I. The ability to walk at a normal pace on a treadmill 8 minutes;
- J. The ability to squat 20 times;
- K. The ability to ascend and descend a flight of stairs for 100 steps; and,
- L. The ability to safely ascend and descend a stepladder for 30 steps in five trips.

(R5 34-45). The Commission, although not detailing each of these findings in its orders, references P.T. Beck's evaluation in its orders. Interestingly, Petitioner does not refute any of these findings.

In his May 14, 1999 evaluation, Dell Felix, P.T., determined that the claimant could work in a medium physical demand capacity. During his functional capacity evaluation, P.T. Felix noted that Petitioner demonstrated the following abilities:

1. The ability to sit for 30 minutes during his intake interview with two to three standing up breaks;
2. The ability to stand for 12 minutes in one place or 60 minutes with repeated activities;
3. The ability to walk for one mile on a treadmill and walk outside over varied terrain, including jumping down a three foot embankment with a problem, walk up and down two flights of stairs while carrying 25 pounds;
4. The ability to reach over head, stoop, kneel and bend, although he avoided twisting;
5. The ability to lift 47.8 pounds with his arms, 20.7 pounds in a high far lift, 58 pounds in a high near lift, and 132 pounds with a leg lift. (R1 at 191). He lifted 30 pounds from the floor with his arms, lifted a 50 pound box from the floor 20 times in 20 minutes, carried a 35 pound dumbbell for 40 feet, carried a 25 pound dumbbell up and down stairs and for 100 feet;
6. The ability to pull a cart using 25 pounds of force; and,
7. The ability to complete an obstacle course involving lifting and lowering a 10 pound dumbbell, lifting a 50 pound box two times, pulling a cart 10 feet and carrying a 10 pound tray 40 feet.

(R1 at 217, ¶¶35-36; R1 at 191-92). Again, the Commission's failure to reference each of these determinations does not make its findings inadequate. It was sufficient that the Commission noted P.T. Felix's evaluation in its orders and cited the general opinion of P.T. Felix. Like P.T. Beck's findings, Petitioner does not challenge the results of this evaluation.

Additionally, Petitioner's contention that the functional capacity evaluations are simply a "snapshot measurements of the individual's ability to perform on a certain day"

is hardly convincing. The fact remains that P.T. Felix conducted his evaluation on three separate days. Surely, if P.T. Felix and P.T. Beck's evaluations are insufficient because they did not measure Petitioner's capabilities over a prolonged period, then Petitioner's treating physician's opinions, which apparently state that Petitioner must cease working, are also inherently unreliable for the same reason. In addition, as evidenced above, Petitioner's claim that the Commission's findings are inadequate because there was no reference made to Mr. Beck's evaluation or any analysis of the two functional capacity evaluations is simply untrue. Both orders amply address the functional capacity evaluations. (R2 at 282-83, 428-30). Finally, Petitioner's argument that the surveillance video does not accurately depict the claimant's "actual life" is also outrageous. The video was properly admitted into evidence and depicts Petitioner actively moving about for a two day period in November of 1998. The fact that the surveillance was surreptitiously taken supports the fact that this is indeed the way Petitioner acts in his non-employment life. This video is an objective observation of Petitioner's activities during approximately a five hour period in which Petitioner engages in a number of activities. The video clearly shows that Petitioner is able to engage in a number of activities without difficulty, limitation, or apparent distress. It shows Petitioner walking various distances, getting in and out of a pick-up truck numerous times, twisting around while driving his pick-up truck, walking on flat and uneven terrain without hesitation, squatting, bending, and stooping, standing in a relaxed manner with his hands in his pockets, going up and down a short flight of stairs

without hesitation, climbing into and out of the bed of his pick-up truck without problem, jumping down out of the bed of his pick-up truck, lifting an apparently heavy item with the assistance of another person, and, finally, bending over in an awkward position for approximately 20 minutes. After this active day, Petitioner was observed the following day taking his dog on an early morning walk. He moved without any apparent difficulty, limitation, or problem. These recorded observations of Petitioner are inconsistent with Petitioner's testimony of his limitations. As the saying goes, if a picture is worth a thousand words, a video is worth a million.

POINT III

THE COMMISSION CORRECTLY APPLIED SECTION 34A-2-413(6) AND RULE 612-1-10(C) IN THIS CASE

Petitioner finally submits that the Commission incorrectly applied Section 34A-2-413(6). In particular, Petitioner indicates that he is entitled to vocational rehabilitation assistance pursuant to Section 34A-2-413(6)(a)(ii). He also requests a tentative finding of permanent total disability pursuant to Rule 612-1-10(C)(2) of the Utah Administrative Code. Petitioner additionally submits that the Commission erred in failed to allow a hearing on whether the claimant can be reemployed or rehabilitated. Respondents disagree with each of these assertions.

Section 34A-2-413(6), U.C.A., provides:

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

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

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability

compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

Utah Code Ann. § 34A-2-413(6).

Rule 612-1-10(C) of the Utah Administrative Code further addresses the adjudicative process regarding permanent total disability. It provides:

C. For permanent total disability claims arising on or after May 1, 1995, Section 34A-2-413 requires a two-step adjudicative process. First, the Commission must make a preliminary determination whether the applicant is permanently and totally disabled. **If so, the Commission will proceed to the second step**, in which the Commission will determine whether the applicant can be reemployed or rehabilitated.

1. First Step- Preliminary Determination of Permanent Total Disability: On receipt of an application for permanent total disability compensation, the Adjudication Division will assign an Administrative Law Judge to conduct evidentiary proceedings to determine whether the applicant's circumstances meet each of the elements set forth in Subsections 34A-2-413(1)(b) and (c).

(a) If the ALJ finds the applicant meets each of the elements set forth in Subsections 34A-2-413(1)(b) and (c), the ALJ will issue a preliminary determination of permanent total disability and shall order the employer or insurance carrier to pay permanent total disability compensation to the applicant pending completion of the second step of the adjudication process. The payment of permanent total disability compensation pursuant to

a preliminary determination shall commence as of the date established by the preliminary determination and shall continue until otherwise ordered.

(b) A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.

(c) A preliminary determination of permanent total disability by the Labor Commissioner or Appeals Board is a final agency action for purposes of appellate judicial review.

(d) Unless otherwise stayed by the Labor Commissioner, the Appeals Board or an appellate court, an appeal of the Labor Commissioner or Appeals Board's preliminary determination of permanent total disability shall not delay the commencement of "second step" proceedings discussed below or payment of permanent total disability compensation as ordered by the preliminary determination.

(e) The Commissioner or Appeals Board shall grant a request for stay if the requesting party has filed a petition for judicial review and the Commissioner or Appeals Board determine that:

- (i) the requesting party has a substantial possibility of prevailing on the merits;
- (ii) the requesting party will suffer irreparable injury unless a stay is granted; and
- (iii) the stay will not result in irreparable injury to other parties to the proceeding.

2. Second Step-Reemployment and Rehabilitation: Pursuant to Subsection 34A-2-413(6), if the first step of the adjudicatory process results in a 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.

(a) The ALJ will hold a hearing to consider whether the applicant can be reemployed or rehabilitated.

- (i) As part of the hearing, the ALJ will review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act;
 - (ii) The employer or insurance carrier may submit a reemployment plan meeting the requirements set forth in Subsection 34A-2-413(6)(a)(ii) and Subsections 34A-2-413(6)(d)(i) through (iii).
- (b) Pursuant to Subsection 34A-2-413(4)(b) the employer or insurance carrier may not be required to pay disability compensation for any combination of disabilities of any kind in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate.
- (i) Any overpayment of disability compensation may be recouped by the employer or insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.
 - (ii) An advance of disability compensation to provide for the employee's subsistence during the rehabilitation process is subject to the provisions of Subsection 34A-2-413(4)(b), described in subsection 2.(b) above, but can be funded by reasonably offsetting the advance of disability compensation against future liability normally paid after the initial 312 weeks.
 - (iii) To fund an advance of disability compensation to provide for an employee's subsistence during the rehabilitation process, a portion of the stream of future weekly disability compensation payments may be discounted from the future to the present to accommodate payment. Should this be necessary, the employer or insurance carrier shall be allowed to reasonably offset the amounts paid against future liability payable after the initial 312 weeks. In this process, care should be exercised to reasonably minimize adverse financial impact on the employee.
 - (iv) In the event the parties cannot agree as to the reasonableness of any proposed offset, the matter may be submitted to an ALJ for determination.
- (c) Subsections 34A-2-413(7) and (9) require the applicant to fully cooperate

in any evaluation or reemployment plan. Failure to do so shall result in dismissal of the applicant's claim or reduction or elimination of benefit payments including disability compensation and subsistence allowance amounts, consistent with the provisions of Section 34A-2-413(7) and (9).

(d) Subsection 34A-2-413(6) requires the employer or its insurance carrier to diligently pursue any proffered reemployment plan. Failure to do so shall result in a final award of permanent total disability compensation to the applicant.

(e) If, after the conclusion of the foregoing "second step" proceeding, the ALJ concludes that successful rehabilitation is not possible, the ALJ shall enter a final order for continuing payment of permanent total disability compensation. The period for payment of such compensation shall be commence on the date the employee became permanently and totally disabled, as determined by the ALJ.

(f) Alternatively, if after the conclusion of the "second step" proceeding, the ALJ concludes that successful rehabilitation and/or reemployment is possible, the ALJ shall enter a final order to that effect, which order shall contain such direction to the parties as the ALJ shall deem appropriate for successful implementation and continuation of rehabilitation and/or reemployment. As necessary under the particular circumstances of each case, the ALJ's final order shall provide for reasonable offset of payments of any disability compensation that constitute an overpayment under Subsection 34A-2-413(4)(b).

(g) The ALJ's decision is subject to all administrative and judicial review provided by law.

Utah Admin. Code R612-1-10(C). (Emphasis added.)

It is evident under Rule 612-1-10 of the Utah Administrative Code that a claimant must first comply with the "First Step" (a preliminary determination of permanent total disability) before "Step Two" (a reemployment and rehabilitation plan) is triggered. In other words, only if a preliminary finding of permanent total disability is found under

Section 34A-2-413(1)(b) and (c) must the tribunal look into the applicant's reemployment or rehabilitation. See Utah Admin. Code 612-1-10(C)(2). At such time, the administrative law judge must hold a hearing to consider reemployment and rehabilitation.

Petitioner's assertion that the Commission improperly applied section 34A-2-413(6) is unconvincing. Although the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits, the Commission reversed this order based upon the fact that Petitioner did not meet Section 34A-2-413(1)(c)(iv). Accordingly, because the Petitioner never complied with the First Step, as articulated in Rule 612-1-10(C)(1), there was simply no need for the Commission to require Respondents to submit a vocational reemployment or rehabilitation plan.

CONCLUSION

Respondents should prevail in this appeal. Petitioner has not provided a complete copy of the hearings on this matter which requires this Court to assume the accuracy of the Commission's ruling. Moreover, liberal construction rules do not absolve Petitioner of his burden to prove the necessary facts to support a determination of permanent total disability. In this case, the Commission's orders adequately detail the material findings necessary to support its ruling that Petitioner can return to gainful employment considering his age, education, past work experience, medical capacity, and residual functional capacity.

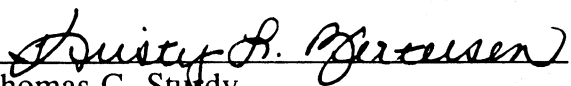
It is evident that the Commission's factual findings are supported by substantial evidence in the record which includes, by way of example, the vocational rehabilitation

documents of Dirk Evertsen, the two functional capacity evaluations, the medical records, and, the November 1998 video tape. The fact that this Court *could* come to a different determination regarding Petitioner's ability to work based upon his prior work experience does not mean that the Commission's findings are not supported by substantial evidence or are otherwise inadequate. In any event, Petitioner has not sufficiently met his marshaling duty in challenging the Commission's findings of fact.

Finally, the Commission properly rejected Petitioner's argument that Respondents must prepare a vocational rehabilitation or reemployment plan and attend a reemployment hearing in this case. Because the Commission found that the claimant did not meet the statutory requirements for permanent total disability under Section 34A-2-413(1)(c)(iv), U.C.A., there was no need for further adjudicatory action on that matter.

DATED this 8th day of July, 2002.

BLACKBURN & STOLL, L.C.

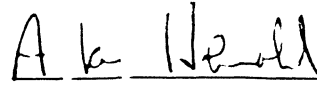

Thomas C. Study

Kristy L. Bertelsen

Attorneys for Respondents Lins Market Place
and/or Great American Insurance

DATED this 5th day of July, 2002.

Utah Labor Commission

A handwritten signature in cursive script, appearing to read "Alan Hennebold", is written over a horizontal line.

Alan Hennebold, General Counsel

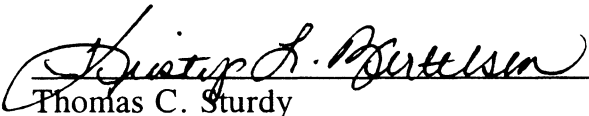
CERTIFICATE OF SERVICE

I certify that a true and correct copies of the **RESPONDENT'S/APPELLEE'S APPELLATE BRIEF** was hand delivered and/or sent by first class mail on the 9th day of July, 2002 to:

Utah Court of Appeals Scott M. Matheson Courthouse 450 South State Street P.O. Box 140230 Salt Lake City, Utah 84114-0230	(8 copies, one w/ original signatures)
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