

2001

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GORDON SHEARER,

Appellant/Petitioner,

v.

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

Appellee/Respondents.

Case No. 200130763-CA

Labor Commission Case No. 98-0065

Priority No. 7

BRIEF OF APPELLANT

PETITION FOR REVIEW FROM ORDER OF THE
UTAH LABOR COMMISSION

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Thomas C. Sturdy
Clerk of the Court

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JURISDICTION OF THE COURT

This appellate review proceeding arises from the Utah Labor Commission's determination that Petitioner's work related injuries do not entitle him to permanent total disability benefits. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Ann. §78-2a-3 (2) (a) (1953, as amended) and Utah Code Ann. §34A-2-801 (8) (1997).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

Issue 1: Did the Utah Labor Commission make adequate, proper, and complete Findings of Fact, and as a corollary issue, is the Commission's determination supported by the record?

Standard: In reviewing the factual findings of an administrative agency, the appellate Court reviews the "whole record" before the Court, and considers not only the evidence supporting the agency's factual findings, but also the evidence that "fairly detracts from the weight of the [Commission's] evidence." The agency's Findings of Fact will be affirmed only if they are "supported by substantial evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. (e.g. State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).)

Preservation for appeal: This issue was raised by Petitioner in a Motion for Reconsideration which was denied by the Utah Labor Commission. A Petition for Review was timely filed.

Issue 2: Did the Commission correctly apply Utah Code Ann. §34A-2-413 to the facts of this case?

Standard: This issue involves the interpretation and application of statutory provisions. A “correction of error” standard is applied to such issues. Esquivel v. Labor Commission, 7 P.3d 780 (Utah 2000). This is because it involves a question of law and no deference to the agency's view of the law is required. Utah Administrative Procedures Act, Utah Code Ann., §63-46b-16(4)(d) (1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Drake v. Industrial Commission, 939 P. 2d 177 (Utah 1997).

Preservation for appeal: This issue was raised by Petitioner in a Motion for Reconsideration which was denied by the Utah Labor Commission. A Petition for Review was timely filed.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. §34A-2-413(1997)¹, is the applicable permanent total disability statute and is attached in full in Addendum “A”. The parties agree that at dispute is the application of Utah Code Ann. §34A-2-413 (1) (c) (iv) which provides as follows:

¹ At the time of Mr. Shearer’s work related injury, the Workers’ Compensation statute provisions for permanent total disability compensation were codified as §35-1-67. Shortly thereafter, §35-1-67 was renumbered as §34A-2-413, without any substantive changes. For ease of reference, the parties have referred to the Act as it is currently numbered.

(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.

STATEMENT OF THE CASE

Nature of the Case: The Petitioner, Gordon Shearer, seeks review of the Labor Commission's denial of his claim for permanent total disability benefits from his work related injuries.

Course of Proceedings: On January 26, 1998, Mr. Shearer filed an Application for Hearing claiming permanent total disability benefits sustained as the result of his industrial injury of June 23, 1995. (R1 at 4-29). The employer and its workers compensation carrier filed an Answer to the Application on March 4, 1998. (R1 at 32-33). After several continuances, Notice of Formal Hearing was sent to all parties on August 6, 1999, setting Mr. Shearer's claim for hearing on October 20, 1999. (R1 at 157).

The Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order, dated June 10, 2000, finding Mr. Shearer permanently and totally disabled as a result of his industrial accident and ordered the payment of appropriate benefits. (R1 at 217-236). A signed copy of said Order is attached hereto as Addendum "B".

The Employer/Carrier 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, wherein the Commission found that Mr. Shearer was not

entitled to permanent total disability benefits. (R2. at 281-284). A signed copy of said Order is attached hereto as Addendum “C”.

On July 19, 2000, Mr. 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 Mr. Shearer’s direct testimony, as 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 Mr. Shearer’s testimony. (R2 at 420-421). On August 27, 2001, the Utah Labor Commission entered an Order Denying Request for Reconsideration. (R2. at 427-432). A signed copy of said Order is attached hereto as Addendum “D”.

A Petition for Review of Agency Action was timely filed with this Court on or about September 25, 2001. (R2 at 433-440).

Statement of Facts: A complete, detailed, and comprehensive Statement of Facts is contained in the Findings of Fact, Conclusions of Law and Order by the Administrative Law Judge, attached hereto as Exhibit “A”. (R1 at 217-236). The Utah Labor Commission’s Order Granting Motion for Review, dated June 30, 2000, and attached hereto as Exhibit “B”, supplanted the 52 detailed Findings of Fact of the Administrative Law Judge with five general findings of its own. (R2 at 281-284). The Order Denying Request for Reconsideration, attached hereto as Exhibit “C”, is likewise skimpy on the facts. (R2 at 427-432).

Since Petitioner challenges the Commission's Findings of Fact, a detailed marshaling of the relevant facts is incorporated in the various legal arguments discussed below. An overall summary of the facts, however, is set forth here for continuity.

Petitioner was injured in the course and scope of his employment with Lin's Marketplace, a grocery store located in Hurricane, Utah. (R1 at 1). Mr. Shearer began working for Lin's Marketplace in May of 1988, as the Frozen Food and Dairy Manager. His duties included ordering and stocking merchandise in the frozen food and dairy sections of the market, although he described the work as 90 percent stocking merchandise. (R1 at 218. See also, ALJ's Findings of Fact, Conclusions of Law and Order, Addendum "B" page 2, paragraph 1).

On June 23, 1995, the Petitioner was moving a pallet of frozen food on a pallet jack. He squatted and reached down to lift and drag the pallet which he estimated weighed between 10 and 15 pounds. He dragged the pallet 3 to 4 feet, but then felt a pain in his low and mid back. He reported the injury and went immediately home. (R1 at 1 and 217. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 2, paragraph 4).

He sought chiropractic care with Dr. Nile Kennedy on June 26, 1995, and received treatments from him until August 4, 1995. (R5 at 68-91). On August 1, 1995, Mr. Shearer was examined by Dr. Max Root, who recommended a course of physical therapy and released him to return to work with permanent light duty restrictions. (R5 at 118-132).

Mr. Shearer attempted to return to work in August of 1995, running the video rental

counter at Lin's Marketplace. However, he aggravated his back injury and was again taken off work. (R2 at 219. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 3, paragraph 6).

On August 30, 1995, Mr. Shearer received an MRI of the lumbar spine at Dixie Regional Medical Center, which was read to show a herniated disk. (R5 at 111-112). On September 25, 1995, Dr. Muir performed a laminotomy, foraminotomy, and discectomy. (R5 at 113 and 124).

On January 6, 1995, Mr. Shearer returned to Dr. Muir. Although he was not having the same amount of pain he had prior to surgery, he was complaining of back pain and felt that he could not tolerate the repeated bending associated with his employment duties. Rather than undergo another surgery, Dr. Muir recommended that Mr. Shearer cease working and take early retirement. (R5 at 126. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 4, paragraph 12).

The Petitioner has not worked for wages since January 5, 1996. (R1 at 220. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 4, paragraph 13). He applied for and eventually received Social Security Disability benefits effective in January of 1996. (R1 at 182-184. See also, Addendum "B", the ALJ's Findings of Fact, Conclusions of Law and Order, page 4, paragraph 14).

On February 9, 1996, Dr. Root concurred in the Petitioner's decision to apply for Social Security Disability benefits as he felt Mr Shearer could no longer work. (R5 at 128. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 7,

paragraph 25).

At the time of his injury in June of 1995, Mr. Shearer was 64 years old. Although capable of applying for early retirement, he testified that he did not want to retire but had planned to continue working until he was 70 years old. At that time, he planned to work 12 to 18 antique shows a year until he reached age 75. At the time of the hearing on Mr. Shearer's Application for permanent total disability benefits, he was 68 years old. (R1 at 6 and 220. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 4, paragraph 15).

On February 26, 1996, Dr. Root assigned a 10 percent whole person permanent impairment rating for the Petitioner's herniated disc, which was stabilized with surgery. (R5 at 129).

Two functional capacity evaluations (FCE) of Mr. Shearer were performed. The first FCE was performed on three separate dates, January 16, 18, and 23, in 1996. Physical therapist, Virgil Beck, conducted the FCE and concluded that Mr. Shearer could only perform sedentary work. (R5 at 34-45). The second evaluation was performed at the request of the insurance carrier by physical therapist, Dell Felix, on May 14, 1999. Mr. Felix found that Mr. Shearer was capable of working at a medium physical demand level. (R1 at 190-193).

Mr. Dirk Evertsen, a vocational rehabilitation provider hired by Respondents, testified at the hearing that there were only two jobs which would be suitable for Petitioner, one being a convenience store clerk, and the other being a night watchman. At the time of the hearing,

only the night watchman position remained open. (R4, hearing transcript at 99, lines 18-25, and page 100, lines 1-4. See also, Addendum “B”, ALJ’s Findings of Fact, Conclusions of Law and Order, page 11, paragraph 49).

Although the Administrative Law Judge concluded that Mr. Shearer was permanently and totally disabled as a result of his industrial accident (R1 at 234. See also Addendum “B”), the Utah Labor Commission reversed, finding that Petitioner failed to show that he could not perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity, and residual functional capacity. (R2 at 281-284 and 427-432. See also Addendum “C” and “D”).

SUMMARY OF ARGUMENT

The parties concede that pursuant to the permanent total disability statute contained in Utah Code Ann. §34A-2-413, the Petitioner 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 Mr. Shearer can “perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity, and residual functional capacity.”

In rendering its determination that Petitioner is not entitled to permanent total disability benefits, the Labor Commissioner makes no reference to any of the evidence favorable to Mr. Shearer. All evidence in favor of the claim is ignored, and all doubt is

resolved in favor of denying benefits. The Commissioner's Findings of Fact are so erroneous, incomplete, and inaccurate that they become arbitrary and capricious. Rather than act as an impartial fact finder, the Respondent Commissioner has assumed the role of an advocate for denying benefits to the injured worker. His purported findings are not supported by the record, are legally insufficient, and must be reversed.

ARGUMENT

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.

Few principles of workers' compensation law are as well established in this state as the 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 petitioner. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, *supra*, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

We are also reminded that our statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

* * * * *

In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee, his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. *Id.* at 1021-1022. (Emphasis added)

The Administrative Law Judge in rendering her Findings of Fact, Conclusions of Law and Order, properly applied this vital rule of construction. Her findings and conclusions are detailed, thorough, and evidence a “liberal construction” and “resolution of doubt in favor of the claim.” The Respondent Utah Labor Commission in rendering its Order Granting

Motion for Review (R2 at 281-284. See also, Addendum “C”) and Order Denying Request for Reconsideration (R2 at 427-432. See also, Addendum “D”) failed to recognize and apply this cornerstone rule of construction in Utah workers’ compensation law. The Commissioner made only the most general and passing reference to the facts, and whenever any doubt or uncertainty appears in the record, the Commissioner construed it against the injured worker and in a light most favorable to the insurance company and the defeating of benefits.

In light of the Commission’s failure to make detailed and comprehensive findings, its failure to weigh the conflicting medical opinions as to the Petitioner’s functional capacity and ability to return to any work, and the undue weight it gave to a flawed and defective vocational rehabilitation report (as set forth below), the entire underlying basis of the Order is flawed. The “findings” and “conclusions” do not evidence “humane and beneficent purposes” as required by law. The entire Order should be disregarded due to this conceptional flaw.

II

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

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)).

In Milne Truck Lines, Inc. v. Public Service Commisson, 720 P.2d 1373, 1378 (Utah 1986), the Utah Supreme Court clearly articulated the proper standard regarding findings of fact:

The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. . . Without such findings, this Court cannot . . . [protect] the parties and the public from arbitrary and capricious administrative action.

Additionally, findings of fact are only adequate when they are supported by “substantial evidence” when viewed by the record as a whole. Utah Code Ann. § 63-46b-16(4)(g). In applying the substantial evidence test, the 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).

In finding Mr. Shearer entitled to permanent total disability benefits, the Administrative Law Judge made 52 detailed Findings of Fact supporting that conclusion. The Respondent, Utah Labor Commission, rejected those findings and made a scant five

findings in its Order Granting Motion for Review, which touched only in the most general way the issues on review.

Petitioner, in his Motion for Reconsideration, raised the gross inadequacies of the Commission's Findings in the Order Granting Motion for Review. The Commission's response in its Order Denying Reconsideration was that:

The Commission limited its fact finding to only those issues in actual 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 supplements and amplifies the first. The Commission believes that its two decisions, when taken together, adequately explain the basis for its decision. (R. at 430. See also, Addendum "D").

Petitioner will thus quote extensively from both Commission Orders and show that any and all facts explicitly found by the Commission were inadequate to support its denial of permanent total disability benefits to Mr. Shearer. Furthermore, marshaling all of the evidence presented in this case demonstrates that an overwhelming case was made for the award of benefits.

This is a claim for permanent total disability benefits. It is alleged that as a result of his work related injuries, Mr. Shearer can no longer work and is thus entitled to appropriate benefits for such an injury. No one disputes that Mr. 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 percent 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 admitted that Mr. Shearer has met most of the requirements under the permanent total disability statute. The only issue raised by Respondents is whether Mr. Shearer can, “perform other work reasonably available, taking into consideration [his] age, education, past work experience, medical capacity, and residual functional capacity.” (Utah Code Ann., § 34A-2-413(1)(c)(iv)).

Petitioner will address each of those factors in turn, marshal all evidence in support of the Commission’s decision, and show that it is inadequate to support the Commission’s legal conclusion that Mr. Shearer has failed to meet each of the requirements of the statute for the award of permanent total disability benefits.

A. Age. At the time of his work related injury Mr. Shearer was 64 years of age, having been born on July 11, 1931. (R1 at 5). The Administrative Law Judge in her Findings of Fact, found that “At the time of the hearing [October 20, 1999] the Petitioner was 68 years old.” (R1 at at 220. See also Addendum “B” ALJ’s Findings of Fact, Conclusions of Law & Order, page 4, paragraph 15). The Utah Labor Commission made no finding as to Mr. Shearer’s age in its Order Granting Motion for Review, but in its August 27, 2001, Order Denying Reconsideration, it found that he was now somehow 67 years old! (R2. at 430. See also Addendum “D”, page 4, paragraph 5).

The Commissioner’s finding as to age, the first factor to be considered under Utah Code Ann. §34A-2-413(1)(c)(iv), is obviously grossly in error. Petitioner asks this Court

to take judicial notice that given Mr. Shearer's undisputed birth date of July 11, 1931, that at the time of the Commission's August 27, 2001, Order he would actually have been 70 years old.

The Commission makes only the passing erroneous finding of Mr. 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." Mr. Shearer's unsuccessful attempts to find other work (as set forth below) is indicative of the difficulties presented by his age alone. By any measure, Mr. Shearer has satisfied this requirement, and the Commissioner's finding on this issue must be disregarded.

B. Education. In its Order Granting Motion for Review, the Labor Commission found that Mr. 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. See also Addendum "C", page 2, paragraph 3.) In its Order Denying Reconsideration, the Commission additionally found that "His educational history establishes his literacy and cognitive abilities." (R2 at 430, See also Addendum "D", page 4, paragraph 5.) No further legal conclusion is drawn from that limited educational history.

The hearing testimony reveals that Mr. Shearer graduated from high school in 1950, attended two years of business college between 1959 and 1961, and one year at Dixie College in 1981. (R6 at 7-8). He did not graduate from business college; his one year at Dixie, 20 years ago, was spent studying solar systems and alternate energy. The

present value of which has been eroded by recent scientific advances in those fields, making that education 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 cites Mr. Shearer's limited education to establish literacy and cognitive abilities. No one disputes that he can read, write, and think. Literacy is not a disqualification from permanent total disability benefits! The criterion is whether his educational skills are such as to enable a 70 year old severely disabled man to find gainful employment. His relevant work history over the past 20 years has been of the manual variety. Any accounting skills which Mr. Shearer obtained 40 years ago have long since lost their currency. He has not had any recent work history in which his educational background would be of much benefit. In the workforce, Mr. Shearer would be competing against recent high school and college graduates with current skills. His 40 year old post-secondary education can not fairly be held against his otherwise entitlement to permanent total disability benefits.

C. Past Work History. In its 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. 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 and as a cashier/stocker at Lin's.

(R2 at 282. See also Addendum "C", page 2, paragraph 4.)

In its 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. See also Addendum “D”, page 4, paragraph 5.)

The full record, which is not cited by the Commission, sets forth Mr. Shearer’s complete work history which is as follows:

- a. While in the Army (1951-1954) Mr. Shearer was trained as a “scout sniper” and was sent to radar school, however it does not appear that he was ever able to apply those skills. At the hearing, legal counsel for the employer/carrier suggested that his sniper skills could qualify him for a job in the mafia! (R4, Hearing transcript at 4, lines 15-22).
- b. Discharged from the army, he worked as a bank teller for an unknown period of time. (R4, Hearing transcript at 4, lines 15-22).
- c. He sold insurance briefly, but then worked various odd jobs in factories such as in a battery factory and fabricating wire grocery bags. He also sold penny uranium stocks for 5 or 6 months and then filled cigarette machines. (R4, Hearing Transcript at 8-9).
- d. Thereafter, Petitioner worked at J. C. Penney doing inventory and in the bill of lading department and worked with the Forrest Service for 13 to 15 years selling timber permits and other activities. After he left the Forest Service, he went to work for Western Thriftway doing the same type of work he had done for Respondent. (R4, Hearing transcript at 10; page 11 at lines 1-25; page 12 at lines 1-23; and page 14 at lines 14-25).
- e. Petitioner worked for St. George Steel thereafter doing janitorial work. (R4, Hearing transcript at 13, lines 2-6).
- f. Petitioner worked for the Park Service thereafter doing maintenance. (R4, Hearing transcript at 14, lines 12-22).
- g. Petitioner worked for Handi Mart thereafter as a cashier. (R4,

Hearing transcript at page 15, lines 9-19).

- h. He was employed at Lin's as the Frozen Food and Dairy Manager from 1988 to the date of his injury in 1995. (R1 at 6).

The complete work history, as opposed to the selective Commission summary, shows that Mr. Shearer's work history for the past 20 years has been manual, in the nature of janitorial, maintenance, and cashier/stocker. At the time of his injury, Mr. Shearer had worked for seven 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 20 to 40 years previously.

The Commission's finding that his work history shows "an ability to function in a work environment" is of no value in evaluating his ability to "perform other work reasonably available," as required by the statute. The work history is only important to show work skills that can now be applied in other work environments. All the Commission found was that his work history showed a history of working.

The Respondent did obtain a vocational rehabilitation report by Mr. Dirk Evertsen, a so-called "rehabilitation specialist." Although Petitioners often complain that the insurance companies expert witness is a mere hired gun, that characterization seems to be appropriate in Mr. Evertsen's case. In 33 years of experience as a vocational rehabilitation specialist, he shockingly testified that out of 2,000 to 3,000 people he had evaluated, **he did not believe that any of them would be a valid permanent total**

disability candidate. (R4, Hearing transcript at 116, lines 17-25 and page 117, lines 1-13.) The conclusion is compelling that if Mr. Evertsen has never seen a permanently totally disabled worker in 33 years out of thousands of injured workers, then perhaps he has a bias making him incapable of recognizing an individual with such a limitation.

The Commission places great reliance on Mr. Evertson's vocation rehabilitation report and generally summarizes the findings of that evaluation which support their pre-formed conclusion that Mr. Shearer was not permanently totally disabled. Completely omitted from the Commission's findings were the following uncontroverted aspects of Mr. Evertson's testimony which are favorable to Mr. Shearer and his claim:

1. Petitioner, because of his disability, had an inability to access a substantial section of the open labor market as a result of his back injury. (R4, Hearing transcript at page 118, lines 9-13.)
2. If Petitioner were required to lay down during an eight hour time period, as his medical records indicate, there would not be one job available for him under the dictionary of occupational titles. (R4, Hearing transcript at page 120, lines 16-25 and page 121, line 1.)
3. If Mr. Evertsen would have been provided the radiology report from Dixie Regional Medical Center where it indicates that Petitioner has a "focal right posterior paracentral disc herniation with inferior extrusion or free fragment affecting the right S1 nerve root," he would have concerns about placing Petitioner in any of the jobs that he had identified. (R4, Hearing transcript at page 133, lines 18-25 and page 134, lines 1-21.)
4. Petitioner has difficulty in twisting which would cause him pain and it would be very appropriate for him to have competent vocational rehabilitation counseling. However, the Commission felt otherwise based upon their reliance on selective portions of Mr. Evertson's report and testimony. (R4, Hearing transcript at page 136, lines 3-8).
5. That in obtaining potential work, Shearer would have to be careful not to identify his disabilities because that would make it more difficult to obtain a

job. (R4, Hearing transcript at page 77, lines 18-23).

6. That Lin's Marketplace did not have employment available for Mr. Shearer in his original line of work. (R1 at 227, See also Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 11, paragraph 50.)
7. That Mr. Felix's functional capacity evaluation did not address Mr. Shearer's ability to stand for an 8 hour shift on a concrete floor, nor did it address his limitations in bending and twisting. Those problems would need to be addressed with accommodations by an employer. (R1 at 227. See also Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 11, paragraph 47.)

Not only does the Commission ignore any favorable information in Mr. Evertson's testimony, but they also totally ignore the following glaring omissions which render his report of little evidentiary value:

1. There were only two jobs he could find which would be suitable for Petitioner, one being a convenience store clerk, and the other being a night watchman. (Only the night watchman position was available, however, at the time of the hearing). He felt that in order to work as a convenience store clerk, he would need an employer "that would work with him" and help with lifting, etc. (R. 4, Hearing transcript at 99, lines 18-25, and page 100, lines 1-4.)
2. In determining that Mr. Shearer could work only the two jobs, Mr. Evertsen admitted that he did not specifically mention all of Petitioner's limitations to potential employers because, "In [his] line of work if you start telling about all major problems he has, sometimes you shoot yourself in the foot, and the job doesn't come through." (R4, Hearing transcript at 77, lines 18-23.)
3. He would not necessarily tell potential employers of Petitioner's physical disabilities because that could sabotage their ability to obtain work and that prior to ADA going into effect, ". . . we advised our clients when they filled out an application that they leave those questions blank. Because as certain as they fill them in, that application would wind up in the round file." (R4. Hearing transcript at 113, lines 9-25 and page 114, lines 1-3.)
4. Mr. Evertsen testified that, "If I were to go to an employer and say, I have a

back injury, and I have problems all the time, he is not going to want to hire me, because that's the first thing out of my mouth." (R4, Hearing transcript at 114, lines 17-23.)

5. In rendering his opinion, Mr. Evertsen indicated that in determining whether an individual is capable of returning to work, it is generally necessary to determine what transferable job skills he has. In rendering his opinion as to Shearer's ability to find other work, Mr. Evertsen admitted that he made **no** effort to list transferrable job skills which Petitioner may have had. (R4, Hearing transcript at 86, lines 1-20.)
6. His entire time spent in labor market research in finding employment was about four hours. (R4, Hearing transcript at 88, lines 5-10.)
7. In conducting his labor market research, and in rendering his opinion, Evertsen **neglected to obtain even one job description**. (R4, Hearing transcript at 90, lines 2-6.)
8. He testified that when rendering his opinion, it **was necessary to review medical records** in making such a determination, but that he was **not** familiar with any of Petitioner's medical records, including those from: Cottonwood Hospital, Dixie Regional Medical Center, Kyle Landers, Dr. Gauffin, Hurricane Family Clinic, Dr. Kim Dee Chiropractor, Dr. Canable [sic], Dr. David Moore, and Dr. Tebbs, who were the majority of Petitioner's health care providers. (R4, Hearing transcript at 90, lines 10-25, page 91, lines 1-25, and page 92, lines 1-15.)
9. In rendering his opinion, Mr. Evertsen indicated that his opinion was based upon the medical restrictions of physical therapist, Mr. Felix, whose restrictions were much more stringent than those of Mr. Beck. Mr. Evertsen indicated that if he would have used the report of Mr. Beck as opposed to Mr. Felix, there would have been fewer jobs potentially available to Petitioner. (R4, Hearing transcript at 120, lines 3-15). As noted below, the Utah Labor Commission, in its Order Denying Reconsideration, relied on Mr. Beck's evaluation, thereby undercutting the evidentiary value of Mr. Evertsen's vocational rehabilitation report.

In short, Mr. Evertson testified that in order to find work for Mr. Shearer he would have to hide his limitations from the employer and intentionally evade and fail to answer usual and permissible inquiries from the prospective employer, although he would

contradictorily, require accommodations from the employer in order to keep the job. He was explicit that if Mr. Shearer disclosed his undisputed injuries and limitations that he would not be hired.

Mr. Evertson also admitted on cross-examination that although it was necessary to review medical records, he had not seen the majority of Mr. Shearer's. In addition, he had made no effort to determine Mr. Shearer's transferable skills, and he had relied on a flawed functional capacity evaluation to gage Mr. Shearer's physical abilities.

Experts called to give expert opinion must lay foundation for giving that opinion. Patty v. Lainhart 977 P. 2d 1193 (Utah 1999). In order for an expert to give an opinion, he must have personal knowledge of the facts relative to the case or must be made aware of those facts at the time of trial. Highland Construction Co. v. Union Pacific Railroad, 683 P. 2d 1042 (Utah 1984).

Over Petitioner's objections, Mr. Evertsen testified regarding Petitioner's ability to find work in the open labor market. However, he did not have the requisite knowledge upon which to base his testimony. He offered these opinions without benefit of the majority of Petitioner's medical records, ignoring the physical limitations set forth by Mr. Beck, one of the functional capacity evaluators, and ignoring Mr. Shearer's subjective complaints. Mr. Evertsen admitted that if Mr. Shearer was required to lay down during an 8 hour day as he had testified and the Administrative Law Judge found to be fact, **there is not one job in the Dictionary of Occupational Titles** that Mr. Shearer could do.

Mr. Evertsen also recognized that even with the two jobs he had identified,

Petitioner would need the assistance of a qualified vocational rehabilitation provider to ensure success at those jobs. Mr. Evertsen admitted that if Mr. Shearer had problems in his low back with the scarring and the disc fragment identified by Dr. Gaufin, it would cause him concern that Mr. Shearer would be able to do the two jobs he had identified. It is noteworthy that Respondent never supplied Mr. Evertsen with Dr. Gaufin's records to even review.

The testimony of Respondent's own expert is sufficient to award benefits and demonstrates the Commission's misapplication of the code. The sole basis for denial of benefits was the Commission's determination that Petitioner could do other work reasonably available. The Utah Permanent Total Disability statute contemplates that if an injured worker is in need of vocational assistance, other work is not reasonably available as the remedy for an injured worker without vocational rehabilitation assistance pursuant to Utah Code Ann. §34A-2-413(6)(a)(ii).

D. Medical Capacity. Medical capacity is not defined by the statute, which then goes on to also refer to "residual functional capacity" as a separate factor to be considered. For the sake of clarity, Petitioner will discuss these two items as though they are separate considerations and discuss here only those items that go to Mr. Shearer's medical condition. His functional capacity, if any, will be addressed in a separate point below.

The parties do not dispute Mr. Shearer has a significant impairment as a result of his industrial accident at Lin's Marketplace, in June of 1995. (R1 at 232. See also, Addendum "B," ALJ's Findings of Fact, Conclusions of Law and Order, page 16,

paragraph 42.) 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 five years.

Perhaps best indicative of his medical capacity is Mr. Shearer's attempts to return to work. The Administrative Law Judge made specific findings in regards to Mr. Shearer's return to work efforts, noting that, "The evidence in the record indicates the Petitioner's desire to return to work in early 1996, despite the recommendations of Dr. Gaufin and Dr. Root that he cease working." (R1 at 234. See also, Addendum "B" ALJ's Findings of Fact, Conclusions of Law and Order, page 18, paragraph 2). The Utah Labor Commission, however, in two separate Orders failed to even once mention this significant evidence, even in passing.

Following his work related injury, Mr. Shearer attempted to return to work on light duty in August of 1995 running the video rental counter at Lin's Marketplace. He operated a cash register and rented and filed video tapes. The video tapes were stored behind large glass or plastic doors, six to seven feet tall and four feet wide. He aggravated his low back injury working at the video counter and was again taken off work, but continued with physical therapy. (R1 at 219. See also, Addendum "B" ALJ's Findings of Fact, Conclusions of Law and Order, page 3, paragraph 6.)

In January of 1996, Mr. Shearer again attempted to return to work as a cashier in the 10 Items or Less Express Check stand. However that also proved unsuccessful. Mr. Shearer testified that the bending, twisting, and standing for a full eight hour shift

associated with working at the check stand, aggravated his low back pain. After working for one week, he told his employer that he couldn't do that work and returned to see his doctor. (R1 at 220. See also, Addendum "B", the ALJ's Findings of Fact, Conclusions of Law and Order, page 4, paragraph 11.)

Mr. Shearer's son, Doug, was a partner in an antique store located in downtown St. George, Utah. In the fall of 1997, the Petitioner tried to help his son at antique shows and at the store. At antique shows, the Petitioner was unable to help his son load and unload the merchandise, so he talked to customers. He found that the exertion of standing and selling at an antique show was similar to the exertion of operating a check stand and aggravated his low back pain. However, the Petitioner was able to make himself a bed under the table and could lay down when his back started to hurt. When his son and his partner opened a second antique store in Bloomington, Utah, the Petitioner agreed to watch the St. George store for them without pay. He sat at the antique shop six days a week, eight hours a day for two months, although he wasn't expected to clean or stock and could lay down or read most of the time. After one month, the Petitioner's back began to greatly bother him. Business picked up, and he was unable to rest and take naps as he had done before. Therefore, he was forced to quit working for his son. (R1 at 224. See also, Addendum "B", ALJ's Findings of Fact, Conclusions of Law and Order, page 8, paragraph 31.)

Based upon his prior work experience and physical conditions, Petitioner did not

feel there were any jobs which he had been trained for or that he had worked in the past which he could do at the time of the hearing. (R4, Hearing transcript at 16, lines 19-23.)

The Commission dismisses all of Mr. Shearer's testimony as "self-serving" and "uncorroborated". (R2 at 428. See also Addendum "D" Order Denying Reconsideration, page 2, paragraph 4.) No analysis is provided for this startling declaration. The Administrative Law Judge, who actually observed Mr. Shearer testify twice, made a specific finding that he was a credible witness. (R1 at 228. See also Addendum "B", page 12, paragraph 51.) In the "Analysis" section of her decision, she again referred to Mr. Shearer as being "quite credible." (R1 at 223. See also Addendum "B", page 17, paragraph 2).

Any witnesses testimony will, of course, be somewhat self-serving. The mere fact that a witness's testimony supports his/her claim is not any reason for rejecting or discounting it. A witness's interest in testifying a certain way is no greater than that of a paid defense expert. The Commission was unable to find any inconsistencies, contradictions or evasions in Mr. Shearer's testimony.

Actually, there is no evidence that the Commission even reviewed Mr. Shearer's testimony, as no aspect of it is ever cited by the Commission. Indeed, at the time of the Commission's initial Order Granting Motion for Review, a transcript of Mr. Shearer's testimony was not available due to a recording error. Although the Commission entered an Order of Remand (R2 at 413-414) for the purpose of retaking that testimony, it never

cites the testimony and could not have relied on it as it was never fully transcribed.

Further, Mr. Shearer's testimony, contrary to the Commission's finding, was in fact corroborated by his treating doctors, who all advised him to cease working and seek disability benefits. (R1 at 220, 223 and 234). This significant evidence is not even referenced by the Commission.

While the Respondent completely overlooks the results of Mr. Shearer's actual attempts to work, it does place great reliance on a surveillance video which was surreptitiously taken by the insurance carrier. In its Order Granting Motion for Review, the Commission finds: "... surreptitious video recordings indicate Mr. Shearer is capable of relatively vigorous activity, including walking, bending, twisting and lift lifting." (R2 at 282. See also, Addendum "C", Order Granting Motion for Review, page 2, paragraph 5). In its subsequent Order Denying Reconsideration, the Commission found that:

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.

(R2 at 429. See also, Addendum "D" Order Denying Reconsideration, page 3, paragraph 3).

Although the surveillance video was admitted into evidence, (R3) it was not actually screened at the hearing. The Administrative Law Judge placed no weight on it, noting:

I mean, everybody understands that these videotapes don't accurately depict

a day in his life, or a week in his life. You know, it's whatever the PI decides to – whenever the PI decides to turn the tape on. (R4 at 31, line 15-19).

Although the Respondent Labor Commission refers to what the video shows, they make no claim to having actually watched it for themselves. The Administrative Law Judge noted “... these videotapes are incredibly boring for the judges to have to watch.” (R4 at 34, line 14-17). Indeed, the Commission’s characterization of what the video shows would lead one to believe that they never actually watched it. There is scant activity on the tape which could properly be labeled as “vigorous.”

At the hearing, the Petitioner testified that his injuries had left him unable to do yard work and that there was a “conflict” over the junk in his yard. Illustrating his limitations, Mr. Shearer testified: “I can’t mow the lawn, I can’t trim my trees or my bushes. I can’t do any of that stuff. And I certainly can’t pick up stuff and haul it to the dump.” (R4, Hearing transcript at 45-46). The videotape goes on for a period of time with Petitioner’s sons working outside cleaning up the yard. Mr. Shearer further testified:

That’s what my boys were doing, is cleaning up my place, doing that. ...The only reason I was out there is they called me out to make some decisions. You see, we’d been working all morning long. This is what it doesn’t show on the tape. We’d been working all morning long, they had, and I’d been in the house. In fact, I took a nap in there while they were doing it. And they called me out to make some decisions before I moved the truck, took it into town, they were doing that loading.

(R4, Hearing transcript at 27-28).

The videotape further supports Petitioner's testimony that he is unable to do simple, daily tasks as the videotape shows Petitioner's son bringing firewood into the home as Petitioner is unable to do this relatively simple task for himself. Petitioner's sons do not live with him. (R4, Hearing transcript at 46, lines 19-25 and 47, lines 1-13).

Although the Commission finds that the video shows Petitioner is able to do "vigorous" activities with "no apparent pain or limitation," that is not actually supported by the video. The video actually shows Petitioner placing his hand on his back at the area of his injury with a somewhat unconscious reaction which indicates he was having back pain. Mr. Shearer testified:

I'm reaching with the back of my hand, wrist, and arm back there to massage the small – the waist, or just the lower part of the back, below the waist. It's subconscious – or an unconscious thing that I do when my back is bothering me. ... I don't even know I'm doing it. ... My back is bothering me.

(R4 Hearing transcript at 29, lines 7-25). Even the Respondent's own expert acknowledged that the video showed Mr. Shearer reacting in pain to response to his activities. (R4 Hearing transcript at 29, lines 12-13).

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, followed with pain. Further, there is great doubt that it was even actually viewed by the Commissioner.

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

The first was on January 16, 18, and 23, of 1996, when Petitioner was evaluated by physical therapist, Virgil Beck. Mr. Beck concluded that the Petitioner's physical abilities were inconsistent with the physical requirements of his employment as a Frozen Food Manager and suggested that he could not physically return to that job without modification.

Significant deficits identified by Mr. Beck include a nine minute sitting tolerance with increased pain down the right leg, hand coordination, and the Petitioner's refusal to try forward bent work while standing and un-weighted rotation in sitting. (R5 at 34-45. See also, Addendum "B," ALJ's Findings of Fact, Conclusions of Law and Order, page 6, paragraph 22). Mr. Beck's report notes that the Petitioner reported his symptoms were aggravated by lifting, sitting more than 30 minutes, driving his truck with a clutch, hiking, and bending activities.

Mr. Beck concluded that the Petitioner could perform sedentary work. Sedentary work was defined as exerting up to 10 pounds of force occasionally, or up to one-third of the time, and exerting a negligible amount of force frequently, or one-third to two-thirds

of the time. According to Mr. Beck, “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.” (R5 at 34-45. See also, Addendum “B”, ALJ’s Findings of Fact, Conclusions of Law and Order, page 5, paragraph 19).

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 Mr. Shearer could perform work at a “medium physical demand work level.” (R1).

At best, functional capacity evaluations are snapshot measurements of the individual’s ability to perform certain functions on a given day. 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 that their “tests” had on Mr. Shearer.

Approximately one to three days after being evaluated by Mr. Beck, Petitioner’s back pain increased. He testified that the first functional capacity evaluation “put him down” for several weeks with the onset of low back pain shortly after the FCE. He was only able to obtain relief by sleeping on the floor. (R1 at 222. See also, Addendum “B”, ALJ’s Findings of Fact, Conclusions of Law and Order, page 9, paragraph 23).

The Petitioner testified that the second FCE, by Dell Felix, caused the onset of pain a few days after the evaluation. However, sleeping on the floor and decreasing his activity level did not provide relief in the same manner as before. (R1 at 225. See also,

Addendum “B”, ALJ’s Findings of Fact, Conclusions of Law and Order, page 9, paragraph 38).

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, See also, Addendum “B” ALJ’s Findings of Fact, Conclusions of Law and Order, page 17, paragraph 4).

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. See also, Addendum “C,” Order Granting Motion for Review, page 2, paragraph 5). No reference is made to Mr. Beck’s evaluation, nor was there any analysis of the two evaluations. Petitioner raised this defect in his Motion for Reconsideration. 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. See also, Addendum “D,” Order Denying Reconsideration, page 3, paragraph 4).

This resulted in a reversal of the Commission's earlier finding that in reliance on Mr. Felix's FCE, Mr. Shearer could do medium physical demand level work, and in a new finding, that he was only capable of "sedentary" work. The vocational evaluation of Mr. Evertson, however, is based on jobs in excess of the sedentary demand level. The Commission's Order Denying Reconsideration adopting Mr. Beck's evaluation completely undercuts the evidentiary value of the vocational rehabilitation report.

The two functional capacity evaluations differ, but the Commission, after being forced to weigh the two opinions, ultimately found that Mr. Shearer could do sedentary work. Even that finding is undercut by Mr. Shearer's aggravated condition following the FCEs, and his actual unsuccessful attempts to return to even sedentary work. As the Administrative Law Judge noted, the FCEs cannot accurately reflect the Petitioner's ability to work on a consistent basis of eight hours a day, five days a week. Mr. Shearer's good faith attempts to return to work demonstrate that he could not.

III

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

In denying Petitioner benefits, the Labor Commission concludes that Petitioner had failed to meet one element of his claim for permanent total disability benefits. The Commission found that pursuant to Utah Code Ann. §34A-2-413(1)(c)(iv), Petitioner had

failed to show that he was unable to perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity and residual functional capacity.

The testimony of Respondent's own expert is sufficient to award benefits and demonstrates the Commission's misapplication of the code. The sole basis for denial of benefits was the Commission's determination that Petitioner could do other work reasonably available. The Utah permanent total disability statute contemplates that if an injured worker is in need of vocational assistance, other work is not reasonably available as the remedy for an injured worker without vocational rehabilitation assistance pursuant to Utah Code Ann. §34A-2-413(6)(a)(ii).

In this case, Respondent's expert testified that Mr. Shearer would need vocational rehabilitation assistance in order to access the labor market because of his disability. Specifically, Mr. Evertson, the vocational rehabilitation specialist, noted that since Mr. 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 Mr. Shearer were to return to gainful employment, he would require vocational rehabilitation assistance.

Petitioner is simply asking for a tentative finding of permanent total disability so Respondent can begin its rehabilitation process if it so desires. As Respondent's own expert acknowledges, Petitioner is in need of vocational rehabilitation assistance as work

is not reasonably available to Shearer. 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 Respondent, 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 ALJ 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 ALJ concludes that successful rehabilitation is not possible, the ALJ shall then enter a final order for continuing payment of permanent total disability compensation.

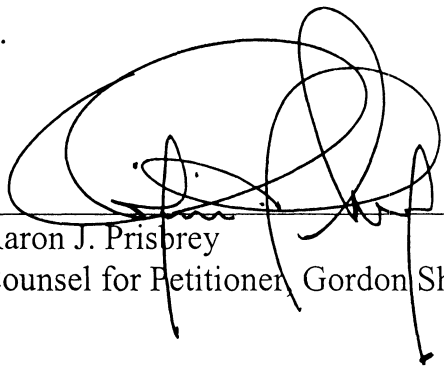
The failure to award Petitioner permanent total disability compensation, or the failure to hold a hearing to determine if he can be reemployed violates state statute and the Labor Commission’s own rule governing cases such as this.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Petitioner respectfully requests that the final agency action in Mr. Shearer’s case be reversed and remanded with directions that Mr. Shearer be awarded permanent total

disability benefits as a result of his industrial injury, or in alternative, the case be remanded with directions that the Commission enter a Tentative Finding of Permanent Total Disability and enable Respondent's to proceed with a vocational rehabilitation plan, should they so desire.

DATED this 20th day of May, 2002.



#0795 For
Aaron J. Prisbrey
Counsel for Petitioner, Gordon Shearer

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2002, a copy of the foregoing BRIEF
OF APPELLANT was mailed, postage prepaid, to the following:

Utah Court of Appeals 450 South State Street- 5 TH Floor P.O. Box 140230 Salt Lake City, Utah 84111-0230	(1) original and (8) copies
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Mr. Allen L. Hennebold Utah Labor Commission Post Office Box 146600 Salt Lake City, Utah 84114-6600	(2 copies)
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Mr. Thomas C. Sturdy Blackburn & Stoll 77 West 200 South, Suite 400 Salt Lake City, UT 84101-1609	(2 copies)
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Mr. Gordon Shearer 155 South 100 West Hurricane UT 84737	(1 copy)
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File Copy	(1 copy)
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Randy H. Carl

Addendum A

Determinative Statutes

**-413. Permanent total disability - Amount of payments -
entitlement.**

(a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

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

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;

) the employee is permanently totally disabled; and

1) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

To find an employee permanently totally disabled, the commission must conclude that:

the employee is not gainfully employed;

) the employee has an impairment or combination of impairments that prevents the employee's ability to do basic work activities;

1) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the substantial 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; and

2) 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.

Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not controlling and creates no presumption of an entitlement under this chapter or Chapter 3, Utah Occupational Disease Act.

For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

compensation per week may not be less than the sum of \$45 per week plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) or exceeding the average weekly wage of the employee at the time of the injury; and

) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 2003:

) The employer or its insurance carrier is liable for the initial

12 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 34A-2-703.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(6) (a) A finding by the commission of permanent total disability is final, unless otherwise agreed to by the parties, until:

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

11) 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 useful 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

111) the administrative law judge, after notice to the parties, holds

ring, unless otherwise stipulated, to consider evidence regarding litigation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

Prior to the finding becoming final, the administrative law judge order:

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

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

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

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

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.

) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the litigation process.

1) The employer or its insurance carrier shall diligently pursue 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 a final decision of permanent total disability.

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

(a) The period of benefits commences on the date the employee is permanently totally disabled, as determined by a final order of commission based on the facts and evidence, and ends:

with the death of the employee; or

) when the employee is capable of returning to regular, steady

An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, time work in a job earning at least minimum wage provided that payment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

An employee shall fully cooperate in the placement and employment efforts and accept the reasonable, medically appropriate, part-time work.

In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain

medically appropriate, part-time work subject to the offset provisions contained in Subsection (1)(d).

(f) (1) The commission shall establish rules regarding the part-time work and offset.

(11) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(1) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(11) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered to the employee and the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings in the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or insurance carrier to allow more frequent reexaminations.

c) The reexamination may include:

i) the review of medical records;

ii) employee submission to reasonable medical evaluations;

iii) employee submission to reasonable rehabilitation evaluations and training efforts;

iv) employee disclosure of Federal Income Tax Returns;

v) employee certification of compliance with Section 34A-2-110; and

vi) employee completion of sworn affidavits or questionnaires

oved by the division.

The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule 133.03, reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(1) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Administrative Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

) If the petition under Subsection (11)(f)(1) demonstrates good cause, as determined by the Division of Administrative Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

1) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of an employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing. Other evidence relating to the employee's status and condition.

In accordance with Section 34A-1-309, the administrative law judge shall award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to the reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1,000. Attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

During the period of reexamination or adjudication if the employee cooperates, each insurer, self-insured employer, or the Employers' Compensation Fund shall continue to pay the permanent total disability compensation benefits due the employee.

) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or provisions.

Addendum B

Findings of Fact, Conclusions of Law and Order
Administrative Law Judge Sharon J. Eblen
January 10, 2000

Utah Labor Commission
Adjudication Division
Case No. 9865

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GORDON SHEARER,

Petitioner,

vs.

LIN'S MARKETPLACE and GREAT
AMERICAN INSURANCE.,

Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Judge Sharon J. Eblen

* * * * *

Hearing: October 20, 1999 at 9:00 a.m. by Order and Notice of the Labor
Commission.

Before: Sharon J. Eblen, Administrative Law Judge

Appearances: Petitioner Gordon Shearer was represented by Aaron
Prisbrey, Attorney at Law.

Respondents Lin's Market Place and Great American
Insurance represented by Thomas Sturdy, Attorney at Law.

STATEMENT OF THE CASE

Petitioner was injured in the course and scope of his employment with
Lin's Market Place on June 23, 1995. He now claims that he is permanently and
totally disabled as a result of his industrial accident. The parties dispute whether
there is work reasonably available to the Petitioner that is consistent with his
physical limitations.

At the hearing, the Petitioner objected to the testimony of Respondent's
vocational expert for lack of foundation under *State vs Rimmasch*, 775 P. 2 d
388 (Utah 1989). Petitioner also objected to certain hearsay in the vocational
expert's report. At the hearing, Petitioner objected to exhibit R-2, on the basis
that it may have been edited. By letter on November 4, 1999, Mr. Sturdy and
former Mr. Prisbrey that the videotape in question was not edited, but was a
duplicate of the original tape.

Although the Respondent's answer to the application for hearing raised the issue of medical causation, there is no medical evidence to show a medical dispute regarding the medical causal connection between the Petitioners industrial accident and his low back pain. The only issue argued at the hearing was whether there was work reasonably available to the Petitioner given his physical limitations, age, education and work experience.

FINDINGS OF FACT

1. The Petitioner, Gordon Shearer, was injured in the course and scope of his employment with Lin's Marketplace, a grocery store located in Hurricane, Utah. The Petitioner worked as the Frozen Food Manager for the market. He began working for Lin's Marketplace in May 1988 as the Frozen Food and Dairy Manager. His duties included ordering and stocking merchandise in the frozen food and dairy sections of the market. The Petitioner described the work as 90% stocking merchandise.
2. On the date of the accident, the Petitioner was earning an average weekly wage of \$337.25. He was a widower and had no dependent children under age eighteen. This translates to a compensation rate of \$225 per week.
3. The Petitioner had a history of prior back problems related to his employment with Lins as well as his prior employment with the National Park Service. In November 1987, the Petitioner injured his low back lifting tubs of apples at Pipe Springs National Monument. In September 1988, the Petitioner strained his low back again unloading trucks of frozen food at Lins Marketplace. In February 1989, the Petitioner again strained his low back lifting cases of milk at Lin's Market Place. In September 1989, the Petitioner again strained his back unloading at truck of milk and frozen foods lifting 40 to 50 cases weighing about 60 lbs. each. In August 1991, the Petitioner again injured his low back while unloading at truck at Lins Marketplace. On October 14, 1992, the Petitioner aggravated his low back while leaning over filling a case with 12 oz cans of juice. There were additional low back strains in December 1992 and May 1993. In May 1994, the Petitioner injured his left hip when he fell off his bicycle. Inactivity due to his hip fracture seemed to aggravate his low back pain. He returned to work from his hip injury in August 1994.
4. On June 23, 1995, the Petitioner was moving a pallet of frozen food on a pallet jack. Another pallet with three to four cases of juice, was in the way

and the Petitioner squatted and reached down to lift and drag the pallet out of the way. The Petitioner estimated that the pallet with the juice cans weighed between 10 and 15 lbs. he dragged the pallet 3 to 4 ft. and felt a pain in his low and mid back. He reported the accident and went home immediately after the accident.

5. After the accident, the Petitioner developed pain in his right hip and leg. He sought chiropractic care with Dr. Nile Kennedy on June 26, 1995 and received treatments from him until August 4, 1995. On August 1, 1995, the Petitioner was examined by Dr. Max Root, a physiatrist in St. George, Utah who released him to return to work with permanent light duty restrictions. (MR p. 120). Dr. Root also recommended a course of physical therapy.
6. The Petitioner received temporary total disability benefits until he attempted to return to work in August 1995 running the video rental counter at Lin's Marketplace. He operated a cash register, rented and filed video tapes. The video tapes were stored behind large glass or plastic doors, six to seven feet tall and four feet wide. The Petitioner aggravated his low back injury working at the video counter and was again taken off work, but continued with physical therapy.
7. On August 30, 1995, Petitioner received an MRI of the lumbar spine at Dixie Regional Medical Center. The M R I was read to show a " focal right paramidline herniated nucleus pulposus with possible free fragment at L 5-S 1 which displaces the right S1 nerve root " On September 2, 1995, Petitioner saw Dr. Muir for review of the M R I and treatment options. Dr. Muir diagnosed a herniated disk at L 5-S 1 with significant impingement of the S1 nerve root.
8. Dr. Muir performed a laminotomy, foraminotomy, discectomy on the right at L 5-S1 on September 8, 1995. In follow-up with Dr. Root on September 25, 1995, the Petitioner reported immediate relief from the surgery. Unfortunately, however, he had an aggravating episode while attempting to open the door of a bank which seemed to jar his low back, and then a tripping episode which also seemed to aggravate his back. The Petitioner was complaining of " periodic numbness and pain down his right leg as previously and is concerned that he may have re-herniated his disc. " Dr. Root recommended he follow up with Dr. Muir.
9. The Petitioner noted an intermittent severe pain that would happen on

occasion when jolts while walking or back movements would cause a sudden, pinching sensation and severe pain, 10 on a scale of 1 to 10, with 10 being the greatest pain.

10. In follow-up with Dr. Muir on September 30, 1995, Dr. Muir took a "wait and see" attitude regarding the setback to Petitioners progress. In November 1995 the Petitioner's condition continued to improve, and Dr. Muir recommended he begin physical therapy.
11. In January 1996 the Petitioner again attempted a return to work as a cashier in the 10 Items or Less Express Check Stand. The Petitioner testified that the bending, twisting, and standing for a full 8 hour shift associated with working at the check stand, aggravated his low back pain. After working for one week, the Petitioner told his employer that he couldn't do this work and returned to see his doctor.
12. On January 6, 1995, the Petitioner returned to Dr. Muir. Although he was not having the same amount of pain he had prior to surgery, he was complaining of back pain at work with bending to remove items from shopping carts. The Petitioner felt that he could not tolerate the repeated bending associated with his employment duties. Dr. Muir felt Petitioner's problems were in the facet joints. Rather than undergo another surgery, Dr. Muir recommended that the Petitioner take early-retirement.
13. The Petitioner has not worked for wages since January 5, 1996.
14. The Petitioner applied for Social Security Disability benefits in January 1996. He applied for S S I when his wife passed away, and had to wait six months before benefits started. When he got hurt again after he returned to work, the Petitioner decided to go ahead and apply for Social Security because of the waiting period. The Petitioner received an award of Security Disability benefits of \$665.20 per month effective in January 1996.
15. The Petitioner testified that he did not want to retire, but had planned to continue working until he was 70 years old, and then to work 12 to 18 antique shows a year until he reached age 75. At the time of the hearing, the Petitioner was 68 years old. In June 1995, he was 64 years old. At the time of his accident, the Petitioner had applied for employment at a convenience store and Shell gas station, and was waiting for a job opening.

16. The Petitioner testified that the exertion of setting up displays of merchandise and to standing and selling merchandise, aggravated his low back pain.
17. The Petitioner's pain starts in his low back and goes down into his right leg. The pain in his low back scares him and he feels like the doctors won't talk to him about it. The Petitioner explained that the best positions for relieving his pain were standing and laying down. It hurts him to sit, particularly if he has to lean forward in the chair. If he is working at a table or at the sink washing dishes, he likes to either kneel or stand, but is careful about leaning forward, because it causes a " spasm of pain . " However, he has good days and bad days, and he can, of course, do more on a good day.
18. On January 12, 1996, the Petitioner returned to see Dr. Root to discuss his back pain. The Petitioner was concerned that Dr. Muir recommended he take early retirement. He indicated to Dr. Root that he wanted to continue working at what ever capacity was safe for him. Dr. Root encouraged the Petitioner to obtain a functional capacity evaluation.
19. On January 16, 18, and 23, 1996, Petitioner was evaluated by physical therapist, Virgil Beck. Mr. Beck concluded that the Petitioner's physical abilities were inconsistent with the physical requirements of his employment as a Frozen Food Manager and suggested that he could not physically a return to that job without modification. Mr. Beck concluded that the Petitioner could perform sedentary work. Sedentary work was defined as exerting up to 10 lbs. of force occasionally, or up to one-third of the time, and exerting a negligible amount of force frequently, or one-third to two-thirds of the time. According to Mr. Beck, " 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. "
20. The functional capacity evaluation performed by Virgil Beck in January 1996 listed the Petitioners complaints as: 1 . constant central low back and bilateral sacroiliac pain, 2. right posterior thigh pain, and 3. Pain is neither getting better or worse, but staying static in its intensity. Mr. Beck ' s report notes that Mr. Shearer reported his symptoms were aggravated by lifting, sitting more than 30 minutes, driving his truck with a clutch, hiking and bending activities. His symptoms were eased somewhat by lying down and resting. Mr. Shearer reported that he can walk up to 1 mi.

or one hour a day and perform some exercises he learned from his physical therapist; he also reported that he lives with his son and has assistance with some household activities. In addition, the Petitioner reported being placed on a 30 lb. lifting restriction prior to his last release to return to work. All Waddell Symptom Magnification indicators were negative, and his low back pain Owestry and Disability scores were in the 52nd percentile and 56th percentile which correlates to "severe disability. "

21. Although Mr. Beck found the Petitioner generally cooperative, he felt the Petitioner limited himself unnecessarily by refusing to attempt forward bent work in standing and unweighted rotation in sitting. Petitioner lifted 45 lbs from floor to waist one time; lift a 23 lbs from waist to shoulder one time; carried 50 lbs at waist height a distance of 4 ft. 5 times; pushed a 200 lb. cart 30 ft. one time; pull a cart weighing 170 lbs. backwards 30 ft.; stand for 30 minutes; walk at a normal pace on a treadmill for eight minutes; squat 20 times; ascend and descend a flight of stairs for 100 steps; safely ascend and descend a stepladder for 30 steps in five trips; and ambulate and balance on a balance beam for three patterns with 5 errors.
22. Significant deficits identified by Mr. Beck were a nine minute sitting tolerance with increased pain down the right leg; hand coordination; the Petitioner's refusal to try forward bent work while standing and unweighted rotation in sitting. Mr. Beck concluded that the Petitioner was capable of performing sedentary work. Based upon his understanding that the Petitioner's employment at Lins Marketplace required lifting 50 lbs from floor to waist and 40 lbs. above the shoulder, sitting 45 minutes per week, standing constantly, kneeling squatting crouching climbing walking distances greater than one-quarter mile and working over to, Mr. Beck concluded that the Petitioner was not physically compatible with his employment at Lin's Marketplace. (MR Exhibit at Tab 17).
23. The Petitioner testified that the first functional capacity evaluation "put him down" for several weeks with the onset of low back pain shortly after the FCE.
24. During his first functional capacity evaluation, the Petitioner testified that walking and carrying weight caused his back to hurt, but standing did not hurt. Approximately one to three days after performing the functional capacity evaluation, the Petitioner's back pain increased. When his pain

increased, he started leaning to the left and his belly started sticking out towards the left. The Petitioner's understanding is that he has scoliosis of the spine. Petitioner found relief from the low back pain by sleeping on the floor.

25. In follow up with Dr. Root on February 9, 1996, it was noted that the facet injections recently administered by Dr. Root did not provide significant relief. Further, the functional capacity evaluation determined that Petitioner was unable to perform more than sedentary work. Dr. Root concurred in the Petitioner's decision to apply for Social Security Disability benefits.
26. On February 26, 1996, Dr. Root assigned a 10% whole person permanent impairment rating for the Petitioner's herniated disc, stabilized, with surgery, with or without persistent symptoms remaining, without signs of radiculopathy. This impairment rating was calculated based upon *Utah's 1997 Impairment Guides*.
27. In April 1996 the Petitioner continued to complain of low back pain, although he felt better than he did before his surgery. Dr. Root advised the Petitioner to discontinue exercises or activities that cause him pain or discomfort. Due to the Petitioner's concern that his condition was deteriorating, Dr. Root recommended additional X-rays. The X-rays showed no significant change from X-rays taken 9 to 10 months earlier.
28. On January 6, 1997, Dr. Tebbs referred the Petitioner to Dr. Gaufin for evaluation of his continuing pain complaints. Dr. Gaufin examined the Petitioner and reviewed his X-rays. His impression was chronic failed back syndrome. Dr. Gaufin recommended an M R I scan in an attempt to distinguish between a re-herniation and scar tissue.
29. On January 24, 1997 a lumbar spine M R I was performed at Dixie Regional Medical Center. The M R I was read to show " abnormal soft tissue . . . in a right paramidline location surrounding the right S1 nerve root . . . There is no evidence of a recurrent disc herniation. "
30. The Petitioner returned to see Dr. Gaufin with his new M R I. Dr. Gaufin felt the M R I showed either scarring or a recurrent disc fragment. Dr. Gaufin recommended that the Petitioner try to live with his symptoms and to avoid " real heavy lifting. " Dr. Gaufin also recommended that the Petitioner use anti-inflammatory medications.

31. The Petitioner's son, Doug, was a partner in an antique store located in downtown St. George, Utah. In the fall of 1997, the Petitioner tried to help his son at antique shows and at the store. At antique shows, the Petitioner was unable to help his son load and unload the merchandise, so he talked to customers. He found that the exertion of standing and selling at an antique show was similar to the exertion of operating a check stand, and aggravated his low back pain. However, the Petitioner was able to make himself a bed under the table, and could lay down when his back started to hurt. When his son and his partner opened a second antique store in Bloomington, Utah, the Petitioner agreed to watch the St. George store for them without pay. He sat at the antique shop six days a week, eight hours a day for two months, although he wasn't expected to clean or stock and could lay down or read most of the time. After one month, the Petitioner's back began to bother him more often. Business picked up and he was unable to rest and take naps as he had done before, so the Petitioner quit working for his son.
32. Prior to his 1995 accident, the Petitioner was physically active, he hiked, bicycled, rappelled, and used a metal detector. He also played the 12 string guitar, mountain dulcimer, and five string banjo. He recently began playing banjo again because he can do that while standing. Petitioner no longer rides a bicycle because he cannot safely twist his back to look for traffic behind him.
33. On May 14, 1999, the Respondents referred the Petitioner to Dell Felix for a functional capacity evaluation. Mr. Felix concluded that the Petitioner was capable of working in a medium physical demand work level, with frequent lifts of 50 lbs and occasional carrying up to 35 lbs.
34. A second functional capacity evaluation was performed by Dell Felix on May 14, 1999. Mr. Felix' report is contained in exhibit R-1. According to the report, the Petitioner described his current complaints as " occasional pain in his lower back and into his right hip. He describes that a simple incident such as catching his foot on a very small crack in the floor might cause him extreme pain for an instant. Trying to keep up with his boys on an arduous hike might also cause some discomfort for a few days. He reported that the needs to keep his hands in front of him while working and he needs to avoid twisting. "
35. Mr. Felix noted that the Petitioner sat for 30 minutes during his intake interview with two or three standing up breaks; he could stand for 12

minutes in one place or 60 minutes with repeated activities; he can walk for 1 mi. on the treadmill and 30 minutes and walked out side over varied terrain, jumping down a 3 ft. embankment without a problem; he walked up and down two flights of stairs, and had no problems even when carrying 25 lbs. up and down the stairs; he could reach over head and use his shoulders, he could stoop, bend, and kneel, although he avoids twisting.

36. There were inconsistencies seen in maximum and rapid grip strength testing, with rapid grip strength exceeding the maximum grip strength measured with the left hand. In Isometric lifting, the Petitioner was able to lift a 47.8 lbs. with his arms, 20.7 lbs. with the high far lift, 58 lbs. with the high near lift, and 132 lbs. with the leg left. Petitioner lifted 30 lbs. from the floor with his right and left arms, lifted a 50 lb. box from the floor 20 times in 20 minutes, carried 35 lb. dumbbell for 40 ft. then carried a 25 lb. dumbbell up and down stairs and 100 ft. Petitioner was able to push or pull a cart using 25 lbs. of force, was slower than average on manual dexterity tests, and completed an obstacle course involving lifting and lowering a 10 lb. dumbbell, lifting a 50 lb. box two times, pulling a cart 10 ft. and carrying a 10 lb. tray for 40 ft. the Petitioner's validity tests showed he gave a sincere effort with the exception of grip strength of his left hand.
37. **Based upon his evaluation, Mr. Felix concluded that the Petitioner meets the physical requirements of a medium physical demand work level with the ability to carry a maximum of 35 lbs and lift a maximum of 50 lbs. He was noted to use good body mechanics with lifting and carrying. He was never observed sitting for more than 30 minutes.**
38. The Petitioner testified that the second FCE, much like the first one, caused the onset of pain a few days after the evaluation. However, sleeping on the floor and decreasing his activity level did not provide relief in the same manner as before.
39. In May 1999, the Respondent retained Dirk Evertsen, a vocational rehabilitation provider, to assist the Petitioner in returning to gainful employment.
40. Mr. Evertsen has been a Rehabilitation counselor for almost 33 years. He received a bachelor's degree in history from the University of Utah in 1966, and a master's degree in educational psychology and rehabilitation

counseling, also from the University of Utah, in 1969. Mr. Evertsen worked as a rehabilitation counselor for the State of Utah Division of Rehabilitation Services from August 1966 to June of 1987. After leaving his employment with the State of Utah, Mr. Evertsen continued to work as a Rehabilitation consultant up until the present time. (Respondent's Exhibit # 3).

41. As part of the rehabilitation assistance provided to the Petitioner, Mr. Evertsen conducted a two-hour interview of Mr. Shearer, and two hours of testing designed to measure Mr. Shearer's aptitude, interests and susceptibility to retraining.
42. Mr. Evertsen reviewed Mr. Shearer's work history, which was also reviewed at the hearing. Prior to his employment with Lins Marketplace, the Petitioner worked for the U.S. Forest Service from 1971 to 1978. When he began working for the Forest Service he worked in the field then later transferred to an office position. His job title was Resource Assistant, and the job was clerical in nature. The Petitioner typed timber sale and land-use permits, and grazing leases.
43. The Petitioner also worked in maintenance for the National Park Service at Pipe National Monument in Arizona; the night shift at the Shell Minit Mart, which involved working as a cashier as well as stocking the walk in cooler; working as a bookkeeper for four businesses in Kamas, Utah; retail sales management with J.C. Penney Co.; banking; vending machine sales; light assembly; insurance sales; and working in dairy and frozen foods at grocery stores in Jackson, Wyoming and in Cedar City, Utah. The Petitioner was a scout, sniper and received radio training in the Army.
44. The Petitioner is a high-school graduate and completed two years at St. John Henniger Business College in accounting and management, but received no degree.
45. Mr. Evertsen testified that he reviewed the two functional capacity evaluations performed in May 1999 and January 1996, and spoke to Mr. Felix and Mr. Beck by telephone. Mr. Evertsen noted that in his opinion, Mr. Shearer was in good physical condition, noting that Mr. Shearer demonstrated a Karate kick with his leg fully extended above horizontal.
46. Mr. Evertsen contacted a number of local employers and the local Job

Service Office in the St. George and Hurricane, Utah area in southwestern Utah in May 1999. As a result of his inquiries, Mr. Evertsen concluded that employment for the Petitioner was available at Lins Marketplace, several convenience stores and motels in the area, and as a night watchman in a group home. Mr. Evertsen testified that based upon the results of the functional capacity evaluation performed by Mr. Felix, that Mr. Shearer was physically capable of performing medium duty work, which involves lifting more than 50 lbs, although he recognized that Mr. Shearer should probably limit his job search to sedentary to light duty jobs.

47. Mr. Evertsen acknowledged that Mr. Felix' FCE does not address Mr. Shearer's ability to stand for an 8 hour shift on a concrete floor, or his limitations in bending and twisting. However, Mr. Evertsen felt these problems could be addressed with accommodations by the employer.
48. Mr. Evertsen narrowed his job search based upon Mr. Shearer's education, transferable skills, and physical capabilities. Mr. Evertsen did not prepare a list of transferable job skills and he did not obtain specific job descriptions for the positions he identified. Mr. Evertsen reviewed the medical records of Dr. Muir, Dr. Root, and the two functional capacity evaluations. Mr. Evertsen did not review the records of Dr. Beck, Dr. Gaufin, Cottonwood Medical Center, Dixie Regional Medical Center or radiographs. Mr. Evertsen also talked to Mr. Shearer about his limitations that would affect his ability to return to work. With regard to job descriptions, Mr. Evertsen obtained information directly from each employer which is typical in the vocational rehabilitation industry. Mr. Evertsen then tried to tailor his job search to Mr. Shearer's abilities.
49. Of the several positions identified by Mr. Evertsen, only the night watchman position remained open as of the day of the hearing. Mr. Evertsen opined that Mr. Shearer's barriers to employment were his self perception of his abilities, and possibly his age and hearing deficits. Mr. Evertsen conceded that Mr. Shearer might require accommodations in order to perform some of the positions he has identified .
50. Lins Marketplace has not offered Mr. Shearer employment since he quit working as an express lane checker on January 5, 1996. According to Mr. Evertsen, the manager of Lin's Marketplace indicated that Mr. Shearer would have to reapply for positions at Lin's due to the length of time he has been unemployed.

51. Mr. Shearer was a credible witness.
52. As indicated in its answer, the Respondent has paid \$5,800 in temporary total disability benefits, \$6,240 in permanent partial disability benefits and \$14,182.88 in medical expenses. According to the Form 122 filed with the Labor Commission on July 25, 1995, benefits were paid based upon a compensation rate of \$200 per week.

PRINCIPLES OF LAW

Section 34A-2-401 provides that only those injuries which arise out of and in the course of employment are compensable under the Utah Workers' Compensation Act. The burden is on the Petitioner to establish by a preponderance of the evidence that he was injured in a compensable industrial accident. *Lipman v. Industrial Comm'n*, 592 P.2d 616 (Utah 1979).

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

- (a) depositions and sworn testimony presented in open hearings;
 - (b) reports of attending or examining physicians, or of pathologists;
 - (c) reports of investigators employed by the commission;
 - (d) reports of employers, including copies of time sheets, book accounts, or other records; or
 - (e) hospital records in the case of an injured or diseased employee.
- Section 34A-2-802(2) Utah Code.

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

- (1) he sustained a significant impairment or combination of impairments from the industrial accident; (2) he is permanently totally disabled; and (3) the industrial accident was the direct cause of his permanent total disability. To find an employee permanently totally disabled, the commission must conclude that: (1) the employee is not gainfully employed; (2) the employee has an impairment or combination of impairments that limits his ability to do basic work activities; (3) the industrial impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident; and (4) the employee cannot perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity and residual functional capacity. Although

entitlement to other disability benefits may be presented to the commission if relevant, it is not binding on the commission and creates no presumption of an entitlement to permanent total disability benefits under the Utah Workers' Compensation Act. See Section 34A-2-413(1), Utah Code Annotated (July 1, 1994).

ANALYSIS

Admissibility of Expert Testimony.

The Petitioner objected to the expert vocational rehabilitation testimony offered by the Respondent in support of its claim that work is available to the Petitioner in the community and therefore, he is not permanently and totally disabled. The Petitioner relies on the requirements set forth in *State vs Rimmasch*, 775 P. 2 d 388 (Utah 1989).

Rimmasch examines the foundational showing required to establish the reliability of the scientific principles upon which scientific evidence or opinion is based. 775 P. 2 d 398. Essentially, the Supreme Court noted and addressed the danger of admitting any evidence that can be labeled "scientific" without regard to its reliability. For example, if an expert witness were to testify that a whiplash injury cannot result from the forces placed on the body due to a rear end motor vehicle accident, he would need to provide evidence to show that his conclusion is reliable by showing it was developed based upon a systematic method in which a problem is identified, data is collected through unbiased observation and experimentation and that the hypotheses was developed and tested to show that it is accurate. This foundation requirement is meant to weed out unreliable junk science which is not helpful to the trier of fact.

The vocational expert testimony presented in this case, however, is not independently based upon "scientific" principles such as engineering, medicine or physics. Mr. Evertsen qualified as an expert witness based upon his education in vocational rehabilitation, and his 33 years of experience in vocational rehabilitation. Mr. Evertsen reviewed portions of Mr. Shearer's medical records, focusing on the two functional capacity evaluations. He administered the General Aptitude Test Battery or GATB, which was used to determine Mr. Shearer's aptitudes to identify occupations in which he is likely to succeed, and the Self Directed Search or S D S, which is used to help determine the types of work or endeavors that interest Mr. Shearer.

Mr. Evertsen interviewed and tested Mr. Shearer in the presence of his

attorney, Mr. Prisbrey, on August 11, 1998. Mr. Evertsen inquired about Mr. Shearer's current symptoms, current treatment, medications and modalities, and his functions of daily living. During the interview, Mr. Evertsen observed that Mr. Shearer sat for only 30 minutes out of a 3.2 hour evaluation. Mr. Evertsen observed Mr. Shearer kneel for approximately 43 minutes during testing.

Based upon his observations during the interview with Mr. Shearer and his partial review of the medical records, Mr. Evertsen concluded that Mr. Shearer is able to stand for considerable lengths of time without problem, he can walk up to 4 miles per day, and can lift but not carry.

As noted above, Mr. Evertsen was aware that Mr. Shearer is a high-school graduate and completed two years of Business College with an emphasis on accounting and management. Mr. Shearer has also received some training in solar technology and alternate energy sources.

Based upon the test results reflecting Mr. Shearer's aptitude, Mr. Evertsen concluded that Mr. Shearer is capable of learning new tasks. Based upon the results of the Self Directed Survey, Mr. Evertsen concluded that Mr. Shearer has a wide range of interests suggesting he would enjoy any occupation in the investigative, realistic, conventional or artistic areas. Accordingly, Mr. Evertsen concluded appropriate work would include artistic craftsman, pharmacy helper, security person, dispensing optician, desk clerk, foster parent, and a school crossing guard. Mr. Evertsen noted that some of these positions may require job modifications, but that all are classified as Sedentary to light duty. Although there were other types of employment suggested by Mr. Shearer's test results, Mr. Evertsen felt those positions would possibly require modifications that would make them unfeasible .

The Administrative Law Judge concludes that the role of a vocational rehabilitation expert is to assist an injured worker find employment by exploring options that the injured worker may not identify on his own because of his failure to recognize the transferability of his skills or the extent of his physical capabilities. Additionally, a vocational rehabilitation expert will have a network of contacts in various fields and knowledge of laws like the Americans With Disabilities Act which may enable him to open doors to employment that would remain closed to an unassisted job applicant. Thus, regardless of the testing performed by Mr. Evertsen, for which there is no scientific foundation, his testimony regarding his vocational rehabilitation efforts on behalf of Mr. Shearer is admissible, but doubts about the reliability of his conclusions will affect the weight given to his testimony.

Labor Market Research Information.

Mr. Evertsen next conducted a labor market survey to determine employment positions available in the Hurricane and St. George, Utah job market. Exhibit R-5 outlines the results of Mr. Evertsen's labor market survey. Mr. Evertsen testified that he checked with Jackie Lynn, the manager of a Maverick convenience store in Hurricane, Utah, an employee leasing company, Resource Management, regarding a night watchman position at a juvenile group home in LaVerkin, Utah, Shell Food Mart, Best Western motel, Super 8 motel and Zions Health Center, an adult care center.

At this point during the testimony, Petitioner objected to the hearsay evidence Mr. Evertsen relied upon in making his report. Although hearsay is generally inadmissible, Rule 703 of the Utah Rules Of Evidence provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Although the traditional rule limits an expert's opinion testimony to personal experience and observation, Utah now recognizes " it is within the discretion of the trial court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert. However, once the expert is qualified by the court, the witness may base his opinion on reports, writings or observations not in evidence which were made or compiled by others, so long as they are of a type reasonably relied upon by experts in that particular field. The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility. " *State vs Clayton*, 646 P . 2 d 723, 726 (Utah 1982).

Mr. Evertsen explained that the best way to find out what's involved in performing a particular job is to talk to the employer. Mr. Evertsen concluded that Mr. Shearer could perform work as a motel desk clerk or night auditor, which requires no physical labor; night watchman at the juvenile group home which requires no lifting and would not require subduing juveniles. Mr. Evertsen testified that both of these jobs were sedentary jobs within Mr. Shearer's physical limitations and capabilities in accordance with the conclusions of Virgil

Beck and Dr. Root.

The Administrative Law Judge agrees with Mr. Evertsen that the best way to find out about a particular job is to inquire with the employer, who is likely to know the job better than anyone else. Further, over the course of practicing workers' compensation law in this state for seven years, the Administrative Law Judge knows of other well-respected rehabilitation specialists who also rely on employers for specific job description information. Accordingly, the Administrative Law Judge concludes that Mr. Evertsen's reliance on hearsay job descriptions about the physical requirements of the positions he identified in Southern Utah is not fatal to his testimony. Under Rule 703 of the URE, an expert witness may rely on hearsay if it is of a type reasonably relied upon by experts in the particular field in forming opinions. It is clear that the hearsay relied upon by Mr. Evertsen is of a type reasonably relied upon by vocational rehabilitation experts. Therefore, his testimony is admissible.

Permanent Total Disability.

The Petitioner has the burden of proof to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his industrial accident. *Lipman v. Industrial Comm'n, supra*. In order to prove entitlement to permanent total disability benefits, the Petitioner must show he sustained a significant impairment or combination impairments as result of his accident, he is permanently and totally disabled, and that the industrial accident was the direct cause of his permanent total disability. Utah Code Section 34A-2-413(1)(b).

Before the Labor Commission can conclude the Petitioner is permanently and totally disabled, it must first conclude that he is not gainfully employed, he has an impairment that limits his ability to basic work activities, the industrial impairment prevents him from performing the essential functions of the work activities for which he has been qualified until the time of the industrial accident and that the Petitioner cannot perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity, and residual functional capacity. Utah Code Section 34A-2-413(1)(c).

The parties do not dispute that the Petitioner has a significant impairment as a result of his industrial accident at Lin's Marketplace in June 1995. However, the Respondent challenges the Petitioner's claim for permanent total disability, by asserting that there is other work reasonably available to the Petitioner in Southern Utah. Therefore, the analysis will focus on that portion of the statutory requirements.

Based upon the Petitioner's testimony, it is clear that he is not gainfully employed. He has not worked for remuneration since January 1996. The Petitioner has a 10% whole person permanent impairment of the low back as a result of his industrial accident and subsequent surgery. The results of the functional capacity evaluations performed by Mr. Beck and Mr. Felix, indicate that the Petitioner's residual low back impairment limits his ability to perform basic work activities. He is limited in his ability to sit, lift, twist, and work bent over a counter or chest type freezer. According to the functional capacity evaluation performed by Mr. Beck, the Petitioner cannot return to his prior employment as a Frozen Food Manager at Lin's Market Place. Even Mr. Evertsen, Respondent's vocational rehabilitation consultant, admits that the Petitioner should not return to the type of physical labor he performed in his prior job.

The parties disagree whether there is other work reasonably available for a man of the Petitioner's age, education, past work experience, medical capacity, and residual functional capacity. Mr. Evertsen asserts that the Petitioner can return to work in *some sort of light duty job where the employer is willing to provide accommodation for the Petitioner's physical limitations*. Mr. Evertsen has identified positions such as night clerk in a motel or night watchman at a juvenile group home as positions within the Petitioner's physical, mental and educational capabilities. Mr. Evertsen's conclusions regarding appropriate work is based upon two functional capacity evaluations, the first performed in 1996 and second performed in 1999. However, the Petitioner, who seems to be quite credible, complains that both functional capacity evaluations caused an increase in his pain complaints. Accordingly, he argues he cannot return to full time work.

The Petitioner, who was 65 years old on the date of his **accident** is now 68 years old. He is in reasonably good health and seems to take care of himself. He exercises regularly and watches his weight because he recognizes that he has a bad back and wants to be as active as he possibly can be. Despite the Petitioner's best efforts, he testified that he continues to suffer intermittent debilitating pain.

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, even of 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. Therefore, the Administrative Law Judge

concludes that the Petitioner meets the requirements of 34A-2-413 (c).

Finally, the Petitioner must show that his industrial injury was the "direct cause" of his permanent total disability. The Petitioner has suffered a number of injuries to his low back during the course of his employment with Lin's Marketplace. He continued to work despite those injuries until the injury of June 1995 removed him from the workplace.

After the accident, the Petitioner attempted return to work twice, but was unable to remain at work due to his inability to tolerate increased pain. The evidence in the record indicates the Petitioner's desire to return to work in early 1996 despite the recommendations of Dr. Gaufin and Dr. Root that he cease working. The Petitioner has no other physical problems which rise to the level of his lower back problems which limit his ability to work. Accordingly, the Administrative Law Judge concludes that the industrial accident of June 23, 1995 was the direct cause of the Petitioner's permanent total disability.

CONCLUSIONS OF LAW

The Administrative Law Judge concludes that the Petitioner, Gordon Shearer has been permanently and totally disabled as a result of his industrial accident of June 23, 1995, since he stopped working on January 6, 1996. Therefore, the Petitioner is entitled to receive subsistence benefits beginning on January 6, 1996.

ORDER

IT IS THEREFORE ORDERED that the Petitioner, Gordon Shearer is permanently totally disabled and entitled to receive permanent total disability benefits to provide for his subsistence, at the rate of \$225 per week for 312 weeks, less the dollar amount of temporary total disability and permanent partial disability previously paid, plus interest at 8% per annum.

IT IS FURTHER ORDERED that the Respondent shall notify the Administrative Law Judge within thirty days from the date of this Order whether it will or will not submit a re-employment plan pursuant to Utah Code Section 34A-2-413(6). If the Respondent will prepare a re-employment plan, said notice shall include an estimate of the time required to finalize and submit the re-employment plan.

IT IS FURTHER ORDERED that after the initial 312 weeks, weekly

benefits shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security Retirement benefits received by the Petitioner during that same period.

IT IS FURTHER ORDERED that the Respondent, Lin's Marketplace and Great American Insurance Company shall pay Aaron Prisbrey, Attorney at Law, an attorney's fee based upon a graduated contingency fee in accordance with R602-2-4, U.A.C, up to the maximum fee of \$9,100. Said attorney's fees are to be deducted from the compensation awarded and remitted directly to the office of Aaron Prisbrey, Attorney at Law.

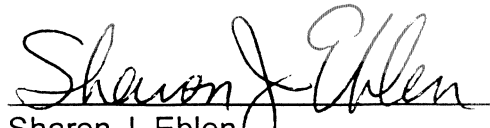
IT IS FURTHER ORDERED that any party aggrieved by this decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion For Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion For Review within 20 days of the date of the Motion For Review.

IT IS FURTHER ORDERED that any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion For Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED this 10 day of January, 2000.

LABOR COMMISSION

By:


Sharon J. Eblen
Administrative Law Judge

MAILING CERTIFICATE

I hereby certify that on the **10th day of January, ,2000** I mailed a copy of the attached **Findings of Fact, Conclusions of Law and Order**, in the matter of **Gordon Shearer vs. Lin's Marketplace and Great American Insurance**, postage prepaid to the following:

GORDON SHEARER
371 N STATE ST #39-3
HURRICANE UT 84737

LINS MARKETPLACE
1930 W SUNSET BLVD
ST GEORGE UT 84770

THOMAS STURDY ESQ
77 WEST 200 SOUTH #400
SALT LAKE CITY UT 84101

AARON J PRISBREY ESQ
1071 EAST 100 SOUTH
BLDG D STE 3S
ST GEORGE UT 84770

GREAT AMERICAN INSURANCE
PO BOX 45700
SALT LAKE CITY UT 84145-9904

UTAH LABOR COMMISSION


LORETTA WOODMANSEE
SUPPORT SPECIALIST

Addendum C

Order Granting Motion for Review
Utah Labor Commissioner R. Lee Ellertson
June 30, 2000

UTAH LABOR COMMISSION

GORDON SHEARER,

Applicant,

v.

LIN'S MARKETPLACE and GREAT
AMERICAN INSURANCE,

Defendants.

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ORDER GRANTING
MOTION FOR REVIEW

Case No. 98-0065

Lin's Marketplace and its workers compensation insurance carrier, Great American Insurance (referred to jointly as "Lin's"), ask the Utah Labor Commission to review the Administrative Law Judge's award of permanent total disability compensation to Gordon Shearer under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M..

BACKGROUND AND ISSUE

The parties agree that on June 23, 1995, Mr. Shearer injured his back in a work related accident. Lin's has accepted liability for benefits due Mr. Shearer under the Utah Worker's Compensation Act as a result of his work related injuries. However, Lin's contends Mr. Shearer is not entitled to permanent total disability compensation because he fails to meet the requirement set forth in §34A-2-413 (c)(iv) of the Act¹ that he "cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity."

After a formal evidentiary hearing, the ALJ concluded that Mr. Shearer's claim did satisfy §34A-2-413's criteria for permanent total disability compensation. Lin's then filed a motion for review with the Commission, renewing its contention that Mr. Shearer did not meet §413 (c)(iv)'s requirement. This is the sole issue now before the Commission.

¹ At the time of Mr. Shearer's work accident, the Act's provisions for permanent total disability compensation were codified as §35-1-67. Shortly thereafter, §35-1-67 was renumbered as §34A-2-413, without any substantive changes. For ease of reference, the Commission will refer to the Act as it is currently numbered.

**ORDER GRANTING MOTION FOR REVIEW
GORDON SHEARER
PAGE 2**

FINDINGS OF FACT

The Commission finds the following facts relevant to the issue now before it.

As noted above, on June 23, 1995, Mr. Shearer injured his back while working at Lin's. He has been rated with a 10% whole person impairment as a result of the injury.

Mr. Shearer was born in 1931 and is now 68 years old. 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.

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. 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 and as a cashier/stocker at Lin's.

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 work 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.

DISCUSSION AND CONCLUSION OF LAW

The Utah Workers' Compensation Act provides medical benefits and disability compensation to employees injured in work related accidents. See Utah Code Ann. §34A-2-401 of the Act. Among the types of disability compensation provided by the Act is permanent total disability compensation, subject to the specific conditions set forth in §34A-2-413. As previously noted, the parties agree Mr. Shearer injured his back in a work related accident while employed by Lin's and is, therefore, entitled to the benefits provided by the Act. The question before the Commission is whether Mr. Shearer meets §34A-2-413's requirements for permanent total disability compensation.

Section 34A-2-413 of the Act establishes several specific elements which must each be established before the Commission may award permanent total disability compensation to an injured

ORDER GRANTING MOTION FOR REVIEW
GORDON SHEARER
PAGE 3

worker. Among those elements is the requirement of §34A-2-413(c)(iv) that “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.

The Commission has carefully reviewed the evidence presented on each of the foregoing components of §34A-2-413(c)(iv). The Commission concludes that Mr. Shearer’s education in accounting and past work experience in accounting, handling government paperwork, and clerking experience fit very well with the various employment opportunities identified by Mr. Evertsen. The Commission further concludes such employment opportunities are within Mr. Shearer’s medical and functional capacity and that his age does not preclude him from such employment.

In light of the foregoing, the Commission concludes that Mr. Shearers’ circumstances do not satisfy the requirement of §34A-2-413(c)(iv). Since Mr. Shearer must meet each of the requirements of §34A-2-413, his failure to satisfy §34A-2-413(c)(iv) precludes an award of permanent total disability compensation to him. The Commission therefore sets aside the ALJ’s award of permanent total disability compensation to Mr. Shearer.

ORDER

The Commission grants Lin’s motion for review, reverses the decision of the ALJ and denies Mr. Shearer’s claim for permanent total disability compensation. It is so ordered.

Dated this 30th day of June, 2000.


R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**ORDER GRANTING MOTION FOR REVIEW
GORDON SHEARER
PAGE 4**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Gordon Shearer, Case No. 98-0065, was mailed first class postage prepaid this 31st day of June, 2000, to the following:

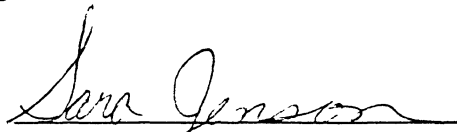
GORDON SHEARER
371 N STATE ST #39-3
HURRICANE UT 84737

LIN'S MARKETPLACE
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GREAT AMERICAN INSURANCE
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SALT LAKE CITY UT 84101

AARON J PRISBREY, ATTORNEY
1071 EAST 100 SOUTH, BLDG D, STE 3S
ST GEORGE UT 84770


Sara Jenson
Support Specialist
Utah Labor Commission

Addendum D

Order Denying Request for Reconsideration
Utah Labor Commissioner R. Lee Ellertson
August 27, 2001

UTAH LABOR COMMISSION

GORDON SHEARER,

Applicant,

vs.

**LIN'S MARKETPLACE and
GREAT AMERICAN INSURANCE,**

Defendants.

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**ORDER DENYING REQUEST
FOR RECONSIDERATION**

Case No. 98-0065

Gordon Shearer asks the Utah Labor Commission to reconsider its prior decision denying Mr. Shearer's claim for permanent total disability compensation under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND

The parties agree that on June 23, 1995, while Mr. Shearer was employed by Lin's Marketplace, he injured his back in a work-related accident. Lin's Marketplace and its workers' compensation insurance carrier, Great American Insurance, (referred to jointly as "Lin's" hereafter) accepted liability for any benefits which were due Mr. Shearer under the Utah Worker's Compensation Act as a result of his accident. However, Lin's rejected Mr. Shearer's claim for permanent total disability benefits under the Act on the grounds that Mr. Shearer had not met the Act's criteria for such benefits. More specifically, Lin's contended that Mr. Shearer had not shown that he "cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity" as is required by §34A-2-413 (c)(iv) of the Act.¹

In response to Lin's rejection of his claim for permanent total disability compensation, Mr. Shearer filed an Application for Hearing with the Commission to compel payment of the disputed benefits. After an evidentiary hearing, the ALJ ruled in Mr. Shearer's favor. Lin's appealed the

¹ At the time of Mr. Shearer's work accident, the Act's provisions for permanent total disability compensation were codified as §35-1-67. Shortly thereafter, §35-1-67 was renumbered as §34A-2-413, without any substantive changes. For ease of reference, the Commission will refer to the Act as it is currently numbered.

ORDER DENYING RECONSIDERATION
GORDON SHEARER
PAGE 2

ALJ's decision to the Commission. The Commission reversed the ALJ's decision and denied Mr. Shearer's claim on the grounds he had not proved he was unable to perform other reasonably available work, as required by §34A-2-413 (c)(iv) of the Act.

Mr. Shearer then asked the Commission to reconsider its decision. However, because part of Mr. Shearer's testimony was missing from the record, the Commission remanded the matter to the ALJ in order to obtain Mr. Shearer's testimony. That having been accomplished, the Commission will now address the merits of Mr. Shearer's request for reconsideration.

ISSUE PRESENTED

The Commission's initial decision concluded that Mr. Shearer's claim for permanent total disability benefits did not satisfy the requirement of §34A-2-413 (c)(iv) of the Act. Mr. Shearer asks the Commission to reconsider its decision on the grounds the Commission: (1) erred in relying on Mr. Felix's evaluation of Mr. Shearer's functional capacity; (2) erred in relying on Mr. Everton's vocational evaluation of Mr. Shearer; (3) made inadequate findings; and (4) incorrectly applied §34A-2-413(c)(iv) to Mr. Shearer's claim. Each of these points is discussed below.²

DISCUSSION

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 a negligible amount of force (frequently): activity or

² The Commission has reordered the points raised in Mr. Shearer's request for reconsideration to allow for more orderly consideration. Also, because the Commission previously granted Mr. Shearer's request that the hearing record be reopened to obtain Mr. Shearer's testimony, that point will not be addressed further.

ORDER DENYING RECONSIDERATION
GORDON SHEARER
PAGE 3

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 a 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 can tolerate 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 pickup 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(c)(iv).

Vocational evaluation. Mr. Shearer contends the Commission erred in relying on the testimony of Dirk Evertson, a rehabilitation specialist, regarding Mr. Shearer's ability to find work that was within his physical capabilities. In particular, Mr. Shearer contends Mr. Evertson lacked information about Mr. Shearer's medical condition as well as the specific requirements of the various employment possibilities identified by Mr. Evertson. The Commission does not agree.

Mr. Evertson's knowledge of Mr. Shearer's physical capacity was the product of time spent with Mr. Shearer, Mr. Shearer's own description of his abilities and Mr. Evertson's review of the two functional capacity evaluations. Mr. Evertson's knowledge of the specific requirements of various employment possibilities derived from Mr. Evertson's personal conversations with potential employers in the St. George area. Mr. Evertson also drew from more than 30 years of experience as a vocational rehabilitation specialist, working with 2,000 to 3,000 clients.

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Having once again reviewed Mr. Evertson's qualifications, expertise and knowledge of the circumstances relevant to Mr. Shearer's abilities, the Commission continues to find Mr. Evertson's vocational evaluation to be persuasive.

Adequacy of Commission's findings: Mr. Shearer contends the Commission made inadequate findings of fact in its prior decision. 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 discussed 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 actual 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 supplements and amplifies the first. The Commission believes that its two decisions, when taken together, adequately explain the basis for its decision.

Application of §34A-2-413(c)(iv) to Mr. Shearer. As noted in the Commission's prior decision, one of the statutory elements which Mr. Shearer must prove in order to qualify for permanent total disability compensation is set forth in §34A-2-413(c)(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." The Commission has concluded that Mr. Shearer has not proved the foregoing and that such failure is fatal to his claim for permanent total disability compensation.


In reaching this conclusion, the Commission notes that, although Mr. Shearer is 67 years old, his general health and vitality is remarkable. His educational history establishes his literacy and cognitive abilities. Likewise, 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. 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(c)(iv). His claim for permanent total disability compensation must, therefore, be denied.

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ORDER

The Commission reaffirms its prior decision, as clarified and amended by this decision, and denies Mr. Shearer's request for reconsideration. It is so ordered.

Dated this 27th day of August, 2001.

A handwritten signature in black ink, appearing to read 'R. Lee Ellertson', written over a horizontal line.

R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Request for Reconsideration in the matter of Gordon Shearer, Case No. 98-0065, was mailed, first class, postage prepaid this 22nd day of August, 2001, to the following:

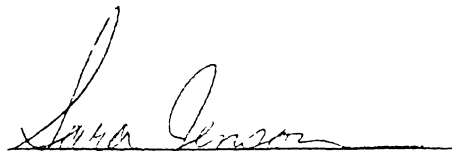
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