

2002

Lori McCoy and Labor Commission of Utah v. Utah Disaster Kleenup and the Workers Compensation Fund : Reply Brief of Petitioners

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Marcia S. Atkin; Atkin & Associates; Attorney for Applicant/Respondent Lori McCoy; Alan Hennebold; Labor Commission of Utah; Attorneys for Respondent Labor Commission of Utah; Eugene C. Miller, Jr.; Workers Compensation Fund; Attorney for Petitioners.

Recommended Citation

Reply Brief, *Lori McCoy and Labor Commission of Utah v. Utah Disaster Kleenup and the Workers Compensation Fund*, No. 20020234 (Utah Court of Appeals, 2002).

https://digitalcommons.law.byu.edu/byu_ca2/3747

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LORI MCCOY and the LABOR COMMISSION
OF UTAH

Respondents,

v.

UTAH DISASTER KLEENUP
and THE WORKERS COMPENSATION FUND

Petitioners

COURT OF APPEALS

Case No.: 20020234-CA

REPLY BRIEF OF PETITIONERS

PETITION FOR REVIEW FROM A DECISION
OF THE LABOR COMMISSION
STATE OF UTAH

EUGENE C. MILLER, JR., ESQ.
Workers Compensation Fund
392 East 6400 South
Salt Lake City, Utah 84107
Telephone: (801) 288-8184
ATTORNEY FOR PETITIONERS

MARCIA S. ATKIN, ESQ.
ATKIN & ASSOCIATES
311 South State Street, Suite 380
Salt Lake City, Utah 84111
ATTORNEY FOR APPLICANT/ RESPONDENT LORI MCCOY

ALAN HENNEBOLD, ESQ.
Labor Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
ATTORNEY FOR RESPONDENT LABOR COMMISSION OF UTAH

FILED
Utah Court of Appeals

REQUEST ORAL ARGUMENT

OCT 18 2002

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

LORI MCCOY and the LABOR COMMISSION)
OF UTAH)

Respondents,)

v.)

UTAH DISASTER KLEENUP)
and THE WORKERS COMPENSATION FUND)

Petitioners)

COURT OF APPEALS

Case No.: 20020234-CA

REPLY BRIEF OF PETITIONERS

PETITION FOR REVIEW FROM A DECISION
OF THE LABOR COMMISSION
STATE OF UTAH

EUGENE C. MILLER, JR., ESQ.
Workers Compensation Fund
392 East 6400 South
Salt Lake City, Utah 84107
Telephone: (801) 288-8184
ATTORNEY FOR PETITIONERS

MARCIA S. ATKIN, ESQ.
ATKIN & ASSOCIATES
311 South State Street, Suite 380
Salt Lake City, Utah 84111
ATTORNEY FOR APPLICANT/ RESPONDENT LORI MCCOY

ALAN HENNEBOLD, ESQ.
Labor Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
ATTORNEY FOR RESPONDENT LABOR COMMISSION OF UTAH

REQUEST ORAL ARGUMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
TABLE OF APPENDICES	iii
I. KLEENUP'S PETITION FOR WRIT OF REVIEW WAS TIMELY FILED WITHIN THE PARAMETERS OF THE UTAH ADMINISTRATIVE PROCEDURES ACT	1
II. KLEENUP MARSHALED EVIDENCE THAT WAS PROPERLY BEFORE THE LABOR COMMISSION AND MCCOY'S RELIANCE ON <i>MAVERIK</i> IS MISPLACED	2
III. KLEENUP HAS NOT WAIVED ITS RIGHT TO ASSERT THAT MCCOY'S HEARSAY STATEMENTS CANNOT BE RELIED UPON AS FOUNDATION FOR FINDINGS OF FACT	4
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

<i>49th Street Galleria v. Tax Comm’n</i> , 860 P.2d 996, 999 (Utah App. 1993)	1
<i>Esquivel v. Labor Commission</i> , 2000 UT 66 ¶ 34, 7 P.3d 782.¶ 21-23, 973 P.2d 440 (Utah App. 1999)	2
<i>Harper Investments, Inc. v. Auditing Division</i> , 868 P.2d 813, 815-16 (Utah 1994)	1
<i>Hoskings v. Industrial Comm’n</i> , 918 P.2d 150, 155 (Utah App. 1996)	4
<i>King v. Industrial Comm’n</i> , 850 P.2d 1281 (Utah App. 1993)	3
<i>Maverik Country Stores Inc. v. Industrial Comm’n</i> , 860 P.2d 944 (Utah App. 1993)	1, 2
<i>Virgin v. Board of Review</i> , 803 P.2d 1284, 1287 (Utah App. 1990)	2

STATUTORY PROVISIONS

Utah Code Ann. § 63-46b-13(3)	1
Utah Code Ann. § 63-46b-14(3)	1
Utah Code Ann. § 34A-2-802	2

RULES

Utah R. Evid. 801	4
Utah R. Evid. 803	4

TABLE OF APPENDICES

A. Text of Judicial Decisions

49th Street Galleria v. Tax Comm'n, 860 P.2d 996 (Utah App. 1993)

Harper Investments, Inc. v. Auditing Division, 868 P.2d 813 (Utah 1994)

Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah App. 1993)

Virgin v. Board of Review, 803 P.2d 1284 (Utah App. 1990)

Esquivel v. Labor Comm'n, 973 P.2d 440 (Utah App. 1999)

King v. Industrial Comm'n, 850 P.2d 1281 (Utah App. 1993)

Hoskings v. industrial Comm'n, 918 P.2d 150 (Utah App. 1996)

B. Index Transmitted by the Labor Commission to the Court of Appeals

I. KLEENUP'S PETITION FOR WRIT OF REVIEW WAS TIMELY FILED WITHIN THE PARAMETERS OF THE UTAH ADMINISTRATIVE PROCEDURES ACT

Kleenup's Petition for Writ of Review was timely filed within the thirty-day period following the deemed denial date of its Motion for Reconsideration under the parameters of Utah Code Ann. § 63-46b-13(3) and -14(3). Kleenup filed a Motion for Reconsideration on February 20, 2002, and filed a Petition for Writ of Review on March 27, 2002. According to this Court's interpretation of section 13(3) and -14(3), a party petitioning for judicial review of an administrative order has two choices: file the petition within thirty days after the twenty-day deemed denied period in section 63-46b-13(3) or file the petition within thirty days after the agency issued its order denying the Motion for Reconsideration. *49th Street Galleria v. Tax Comm'n*, 860 P.2d 996, 999 (Utah App. 1993). Appendix A. *See also Harper Investments, Inc. v. Auditing Division*, 868 P.2d 813, 815-16 (Utah 1994) ("... section 63-46b-14(3)(a) allows a party to file a petition for judicial review within thirty days after the date on which an order was issued or was considered to have been issued."). Appendix A.

The fact that in the instant case the Labor Commission purported to extend its response time for issuing an order to March 31, 2002 does not remove Kleenup's option to file the Petition after the twenty-day deemed denied date of March 12, 2002. As noted by the Utah Supreme Court in *Harper Investments*, a potential petitioner who does not file within thirty days of the deemed denial date assumes the risk of missing the deadline if the agency does not issue a final order. *Id.* at 816. The Commission's purported extension did not establish a new deemed denied date upon which Kleenup could rely in the event that the Commission failed to issue its order.

Moreover, McCoy's reliance on *Maverik Country Stores Inc. v. Industrial Comm'n*, 860

P.2d 944 (Utah App. 1993) is misplaced. Appendix A. The facts, circumstances and pertinent statutory review of the *Maverik* case are neither analogous nor relevant to the instant case. In *Maverik*, the petitioners filed a Writ of Review with this Court on the ALJ's order without first seeking the agency review required by statute, and subsequently filed a Motion for Review for agency review with the Industrial Commission while the Writ of Review was pending so that there were simultaneous judicial review and agency review proceedings on the same order. *Id.* at 947. There was no Motion for Reconsideration filed; indeed, at the time the petitioner filed the Writ of Review there was not even a Motion for Review before the Commission.

II. KLEENUP MARSHALED EVIDENCE THAT WAS PROPERLY BEFORE THE LABOR COMMISSION AND MCCOY'S RELIANCE ON *MAVERIK* IS MISPLACED.

McCoy assails Kleenup for marshaling evidence that she asserts is not properly before the Court, specifically McCoy's deposition and an affidavit from Dr. Tarbet. However, her claims are without merit. "It is important to note that the [Labor] Commission, not the ALJ, is the ultimate finder of fact. *Virgin v. Board of Review*, 803 P.2d 1284, 1287 (Utah App. 1990). Appendix A. Thus, it is not "new evidence" before the Court insofar as this same evidence was submitted to the ultimate finder of fact, the Labor Commission, and available pursuant to its review of the ALJ's order. Of note, the statutory provision for admission of evidence in Utah Code Ann. § 34A-2-802 states, in part, with our emphasis, "The commission may received as evidence and use as proof of any fact in dispute all evidence deemed material and relevant" The deposition was included in Kleenup's Motion for Review submitted to the Commission as the ultimate fact finder, and thus is properly part of the record in this case. Moreover, McCoy did not object to the deposition's inclusion in the record at the time she responded to Kleenup's

Motion for Review; any ensuing objection on appeal before this Court is waived. *See Esquivel v. Labor Commission*, 2000 UT 66 ¶ 34, 7 P.3d 782.¶ 21-23, 973 P.2d 440 (Utah App. 1999)

Likewise, Dr. Tarbet's affidavit was included in the record by the Labor Commission, as indicated by the index transmitted by the Commission to this Court. Appendix B. Kleenup submitted this affidavit to the Labor Commission after the hearing before the ALJ. Because the Labor Commission included the affidavit in the record of this case, presumably the Commission considered it as evidence during its review of the record.

Petitioner relies on the *King v. Industrial Comm'n*, 850 P.2d 1281 (Utah App. 1993) in stating that temporary total disability benefits are owed even if the control of the situation is out of the hands of the employer. However, *King* is easily distinguishable from this case. In *King*, the Petitioner was awarded temporary total disability benefits because he was not medically stable. King was given a light duty release. King was scheduled for surgery and just prior to the surgery, was incarcerated in jail and the temporary total disability benefits had to continue being paid because he was still completely and totally disabled. It did not matter if King was in or out of jail, his doctor said that he could not work. Conversely, in this case, no temporary total disability benefits had been awarded when Petitioner quit her job. In fact, there is no concurrent medical evidence that supports Petitioner's claim that she should have been on light duty restrictions. The only concurrent evidence that supports her claim for light duty was her own self-serving testimony. The big difference between *King* and this case is that the employer could have provided light duty employment had Petitioner been able to produce a medical release giving her light duty.

III. KLEENUP HAS NOT WAIVED ITS RIGHT TO ASSERT THAT MCCOY'S HEARSAY STATEMENTS CANNOT BE RELIED UPON AS FOUNDATION FOR FINDINGS OF FACT.

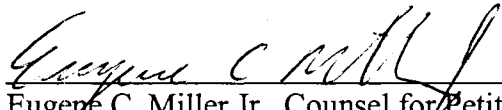
McCoy incorrectly contends that Kleenup waived its right to deem evidence as hearsay by failing to object to her hearsay statements in the evidentiary hearing. However, her statements and ensuing analysis are flawed. As we have previously stated, hearsay statements are admissible evidence in administrative proceedings. *Hoskings v. Industrial Comm'n*, 918 P.2d 150, 155 (Utah App. 1996) Petitioner's Brief Appendix J. Further, "hearsay statements are admissible even if objected to during the course of an administrative hearing. *Id.* Thus, whether or not a party objects to a hearsay statement in an administrative proceeding is of no consequence because such an objection has no force or effect on the statement's admissibility.

The matter of hearsay in the administrative forum requires some clarification. There are two types of hearsay evidence that may be introduced in an administrative hearing: hearsay statements that fall under the array of exceptions to Utah R. Evid. 803 and thus are admissible in a court of law, i.e., the judicial forum, and pure hearsay statements as defined by Utah R. Evid. 801 which are not admissible in a court of law. Although pure hearsay may be properly introduced in the hearing, the ALJ is precluded from solely relying on such evidence in promulgating his or her findings of fact. *Hoskings*, 918 P.2d at 155. As was shown in the defendant's brief, Judge Hann relied solely on the claimant's testimony that she needed light duty when she quit her job with Kleenup. Petitioner stated that she told several medical providers about her alleged condition; yet, not one of the concurrent medical records supports her testimony. Consequently, Judge Hann erred when she accepted the hearsay testimony as fact when the medical records did not support this claim.

CONCLUSION

Because the defendants' brief was timely filed and the defendants properly marshaled the evidence, the petitioner's claims are without merit. Moreover, the defendants raised their objection to Judge Hann's reliance on hearsay evidence, which was in violation of the residuum rule, when they filed their motion for review. Consequently, defendants ask this Court to reverse the Labor Commission's decision in its award of retroactive temporary disability benefits.

DATED this 18th day of October, 2002


Eugene C. Miller Jr., Counsel for Petitioners
Utah Disaster Kleenup and Workers
Compensation Fund

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF PETITIONERS, in case # 20020234-CA were mailed, postage prepaid, on this 18th day of October, 2002 to the following:

Marsha S. Atkin, Attorney at Law
Atkin & Associates
311 South State Street # 380
Salt Lake City, UT 84111

Alan Hennebold
Labor Commission of Utah
P.O. Box 146600
Salt Lake City, UT 84114

A handwritten signature in black ink, appearing to read "Kaye J. Starn", is written over a horizontal line.

TABLE OF APPENDICES

A. Text of Judicial Decisions

49th Street Galleria v. Tax Comm'n, 860 P.2d 996 (Utah App. 1993)
Harper Investments, Inc. v. Auditing Division, 868 P.2d 813 (Utah 1994)
Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah App. 1993)
Virgin v. Board of Review, 803 P.2d 1284 (Utah App. 1990)
Esquivel v. Labor Comm'n, 973 P.2d 440 (Utah App. 1999)
King v. Industrial Comm'n, 850 P.2d 1281 (Utah App. 1993)
Hoskings v. industrial Comm'n, 918 P.2d 150 (Utah App. 1996)

B. Index Transmitted by the Labor Commission to the Court of Appeals

Appendix A

*996 860 P.2d 996

Court of Appeals of Utah.

The 49TH STREET GALLERIA, Petitioner,
v.
TAX COMMISSION, AUDITING DIVISION,
State of Utah, Respondent.
Alan V. Funk, Coopers & Lybrand, Intervenor.
 No. 930053-CA.
 Oct. 7, 1993.

Amusement arcade sought review of decision by state Tax Commission requiring collection of sales tax on fees collected for alleged "admission" to batting cages, laser tag game, and roller skating rink. The Court of Appeals, Orme, J., held that fee charged was for use of particular games and not for admission to particular place, and, thus, sales tax could not be imposed.

Reversed.

West Headnotes

[1] Taxation ☞ 493.3

371 ----

371V Levy and Assessment

371V(G) Review, Correction, or Setting Aside of Assessment

371V(G)2 Proceedings Before Board or Officer

371k493 Review by Courts

371k493.3 Time of Taking Proceedings.

Party may file petition for judicial review of Tax Commission's finding within 30 days after order constituting final agency action "or" within 30 days after "deemed denied" date so that, where Tax Commission denied motion for reconsideration more than 30 days after its final action, petition for review of denial filed within 30 days of disposition was timely. U.C.A.1953, 63-46b-13(3)(a, b).

[2] Administrative Law and Procedure ☞ 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

[See headnote text below]

[2] Taxation ☞ 1319

371 ----

371XVI Sales, Use, Service, and Gross Receipts Taxes

371XVI(C) Assessment, Payment, and Enforcement

371XVI(C)1 Levy and Assessment

371k1319 Judicial Review and Relief Against Assessments.

Because Tax Commission does not have explicit grant of discretion, its action in interpreting scope of sales tax on "admissions" had to be reviewed without deference and for correctness. U.C.A.1953, 59-1-610, 59-12-103, 59-12-103(1)(f).

[3] Taxation ☞ 1231.1

371 ----

371XVI Sales, Use, Service, and Gross Receipts Taxes

371XVI(B) Tax Liability and Exemptions

371XVI(B)1 Transactions Taxable in General

371k1231 Subjects and Exemptions in General

371k1231.1 In General.

Tax Commission could not require sales tax to be charged for "admissions" based on fees charged for use of batting cages, roller rink, and laser tag absent showing that fee was charged for right to enter place rather than being charged for right to use facilities or equipment within the place; use of laser tag or roller skating areas was no different from use of bowling lanes and batting cages, for which no sales tax was applied.

[4] Taxation ☞ 1231.1

371 ----

371XVI Sales, Use, Service, and Gross Receipts Taxes

371XVI(B) Tax Liability and Exemptions

371XVI(B)1 Transactions Taxable in General

371k1231 Subjects and Exemptions in General

371k1231.1 In General.

Amusement arcade was not liable for admission tax on activities such as roller skating, use of batting cages, and laser tag in light of showing that no fee was charged by arcade for admission to any place but rather fee was charged only to perform particular activities. U.C.A.1953, 59-1-610, 59-1-610(1)(b), (2), 63-46b-1 et seq., 63-46b-13(3)(b), 63-46b-16(4)(h)(ii).

LaVar F. Christensen, Midvale, for petitioner.

Jan Graham and John C. McCarrey, Salt Lake City, for respondent.

Stephen W. Rupp, Salt Lake City, for intervenor.

Before BENCH, JACKSON and ORME, JJ.

OPINION

ORME, Judge:

The 49th Street Galleria seeks our review of a decision by the Utah State Tax Commission requiring the collection of a sales tax by the Galleria on fees collected for "admission" to its batting cages, laser tag game, and roller skating rink under Utah Code Ann. § 59-12-103 (1992). (FN1) We reverse *997 on the basis that no admission fee, of the sort contemplated in the statute, is charged by the Galleria.

FACTS

In 1984, the Galleria opened for business as an indoor entertainment mall in Murray, Utah. The mall houses arcade games, video machines, a bowling alley, a miniature golf course, amusement rides, roller skating, batting and pitching cages, food concessions, and laser tag. (FN2) The public may enter the Galleria without charge, and tables and seats are placed throughout the mall for the public to use free of charge. Fees are assessed only when an individual decides to participate in one of the many available activities.

Turning to the activities at issue in this case, a batting cage consists of a fenced area containing a machine that pitches baseballs or softballs to customers standing within the cage. The machine is operated either by tokens or by cash payment to an attendant. An individual pays to have the ball delivered by the machine. A fee is not charged for simply entering the batting cage and, indeed, coaches are allowed to stand in the cage and advise the batter without paying an admission charge.

The record contains a less detailed description of laser tag, but indicates it is operated in a manner similar to the batting cages. The Tax Commission's findings state that "[u]pon payment of a cash fee, customers were provided laser guns and sensing devices and engaged in mock combat in an enclosed area." In the roller skating operation, an individual is allowed to "skate for a period of time upon payment of cash," while parents and other onlookers may enter the skating facility and observe without charge.

In the spring of 1984, the Galleria requested the Auditing Division of the Utah State Tax Commission to determine whether the Galleria's activities would be subject to Utah sales tax. Kenneth Cook of the Auditing Division informed the Galleria that receipts from the batting cages and roller skating rink would be subject to tax, while, apparently, fees for bowling and miniature golf would not be. The Galleria then sought additional review. In August of 1984, George M. Loertscher of the Auditing Division informed the Galleria that roller skating, batting cages, miniature

golf, and bowling were not subject to sales tax. Relying on Loertscher's letter, the Galleria did not collect sales tax on the activities identified. (FN3) When the Galleria subsequently added laser tag to its repertoire of amusements, it continued its consistent practice of not collecting sales tax on these activities.

Some years later, the Auditing Division undertook a routine compliance audit. This time it was determined that the Galleria was required to collect an admission tax on fees collected for use of its batting cages, roller skating rink, and laser tag amusement, but not on the corresponding fees for bowling and miniature golf. The Galleria sought agency review of the assessment and the Tax Commission, in a decision dated November 20, 1991, held that fees for use of the batting cages, roller skating, and *998 laser game were payments for "admission" subject to sales tax. (FN4) The Galleria then sought reconsideration, and the Tax Commission denied that request by decision dated March 10, 1992. (FN5) The Galleria now seeks judicial review of the Tax Commission's determination that fees for the use of the batting cages, roller skating rink, and laser tag game are subject to Utah sales tax under Utah Code Ann. § 59-12-103(1)(f) (1992).

JURISDICTION

Before addressing the merits of this case, we must first determine whether the petition for judicial review was timely filed. The Tax Commission issued its final decision on November 20, 1991, and the Galleria petitioned the Commission for reconsideration on December 10. The Auditing Division filed its brief in opposition to reconsideration on January 3, 1992, and the Galleria replied on January 21. The Tax Commission issued its order denying the petition for reconsideration on March 10, 1992, and the Galleria filed its petition for judicial review within thirty days of that disposition.

Pursuant to Utah Code Ann. § 63-46b-13(3)(b) (1989), a request for administrative reconsideration is "deemed denied" if an order is not issued by the agency within twenty days after the filing of the request. (FN6) The Tax Commission did not issue its order denying reconsideration within twenty days of December 10, 1991, but rather some three months later, on March 10, 1992. Despite its own delay in disposing of the reconsideration request, the Tax Commission now argues that, under section 63-46b-13(3)(b), its order is deemed to have been issued on December 30, 1991, and the Galleria's petition for review is untimely because it was not filed within thirty days of that date, as required by Utah Code Ann. § 63-46b-14(3)(a)

(1989). That provision states:

A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

Id. (emphasis added). The Tax Commission simply ignores the disjunctive term "or" found in section 63-46b-14(3)(a) and interprets the statute to mean that if an order is not issued within the twenty day "deemed denied" period, the thirty-day jurisdictional clock for judicial review begins irretrievably to run. (FN7)

*999 [1] We disagree. A plain reading of the statute indicates that a party may file a petition for judicial review within thirty days after the order constituting the final agency action, in this case the order denying reconsideration issued on March 10, 1992, "or" within thirty days after the "deemed denied" date established by section 63-46b-13(3)(b). In the instant case, the Galleria filed its petition for review within thirty days of the Tax Commission's March 10 final order and this court therefore has jurisdiction to hear the case. (FN8)

STANDARD OF REVIEW

[2] Our analysis of tax cases is guided by the standards of review announced in Utah Code Ann. § 59-1-610 (Supp.1993). *OSI Indus., Inc. v. State Tax Comm'n*, 860 P.2d 381, 383 (Utah App.1993) (because section 59-1-610 is procedural, it applies retroactively). *See Miller Welding Supply, Inc. v. State Tax Comm'n*, 860 P.2d 361 (Utah App.1993) (applying section 59-1-610 to a sales tax case involving an audit conducted between 1987 and 1989). *But see Thorup Bros. Constr., Inc. v. State Tax Comm'n*, 860 P.2d 324 (Utah 1993). (FN9) Section 59-1-610 directs this court to

grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an *explicit* grant of discretion contained in a statute at issue before the appellate court.

Utah Code Ann. § 59-1-610(1)(b) (Supp.1993) (emphasis added). This statute supersedes the Utah Administrative Procedures Act insofar as it pertains to judicial review of formal adjudicative proceedings. *Id.* § 59-1-610(2). Prior to the recent enactment of section 59-1-610, it was the mandate of this court to determine whether the Legislature had, either explicitly or implicitly, granted an agency discretion and, if so, to

review the agency action for reasonableness. *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 587-88 (Utah 1991). *See, e.g., SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1173 (Utah 1993) (Durham, J., dissenting); *Nucor Corp. v. State Tax Comm'n*, 832 P.2d 1294, 1296 (Utah 1992). Section 59-1-610 requires this court to depart from its prior practice and, in the case of the Tax Commission, to refrain from reviewing agency action under a deferential standard unless there is an *explicit* grant of discretion. Since the statute at issue, section 59-12-103, does not contain language which would even arguably constitute an *explicit* grant of discretion to the Tax Commission, (FN10) the commission's action in interpreting the scope of the sales tax on "admissions" must be reviewed without deference and for correctness.

*1000 UTAH'S ADMISSION TAX

Utah imposes a sales tax on the amount paid or charged by a purchaser for

admission to any place of amusement, entertainment, or recreation, including seats and tables reserved or otherwise, and other similar accommodations[.]

Utah Code Ann. § 59-12-103(1)(f) (1992) (emphasis added).

The Tax Commission has adopted rules interpreting the key language of the admission tax. Utah Administrative Code R865-19-33S(A) (1993) (FN11) specifically states in pertinent part:

A. "Admission" means the right or privilege to enter into a place. Admission includes the amount paid for the right to use a reserved seat or any seat in an auditorium, theater, circus, stadium, schoolhouse, meeting house, or gymnasium to view any type of entertainment. Admission also includes the right to use a table at a night club, hotel, or roof garden whether such charge is designated as a cover charge, minimum charge, or any such similar charge.

Aside from its elaboration on seats and tables, not applicable here, this rule speaks in terms of the right to enter a place and not in terms of a fee charged to use facilities or equipment within a place. As such, the rule merely incorporates the plain and settled meaning of "admission." *See, e.g., Webster's Third New International Dictionary* 28 (1976) (defining admission as, *inter alia*, "an act of admitting ...; permission or right to enter").

[3][4] Neither the existence nor the content of the interpretive rule defining "admission" is meaningfully challenged in the instant proceeding. The single issue for us, then, is this: Assuming the rule reflects the correct interpretation of the statute, as seems inarguable, did the Tax Commission decide correctly that sales tax on admissions should be assessed on the fees charged by the Galleria for the use of batting cages, the roller rink, and laser tag? While the Tax Commission "recognizes that distinctions between [bowling and batting cages] are difficult to draw," (FN12) we hold no meaningful distinction can be drawn for purposes of the admissions tax, given the Tax Commission's own interpretation of "admission."

Not only does the record indicate no fee is charged for the right or privilege to enter the Galleria, but individuals such as coaches may enter the batting cage without paying an admission fee. The situation is apparently no different for laser tag or roller skating. Consequently, the Tax Commission erred in departing from its traditional application of the rule. The rule states that admission means the "right to enter a place." There is simply no fee charged by the Galleria for admission to any place; there are only fees charged to do particular things. (FN13) Thus, given the Tax Commission's own interpretation of the statute, as memorialized in its rule, its decision in this case is incorrect.

*1001. CONCLUSION

The Tax Commission's decision that the Galleria is liable for an admission tax on the activities of roller skating, batting cages, and laser tag is therefore reversed.

BENCH and JACKSON, JJ., concur.

(FN1.) The applicable statute provides, in pertinent part, as follows:

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

....

(f) admission to any place of amusement, entertainment, or recreation, including seats and tables reserved or otherwise, and other similar accommodations[.]

Utah Code Ann. § 59-12-103(1)(f) (1992).

The audit that resulted in the imposition of tax

liability was for the period of July 1, 1986, through June 30, 1989. The substantive law then in effect governs this dispute. *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303, 306 (Utah 1992). Nonetheless, both parties cite to the 1992 version of the Utah Code Annotated. That version is identical to the law in effect for the period from January 1, 1987, to the present. However, between July 1, 1986, and January 1, 1987, the statutory language was more succinct and simply stated that the tax was due on any "amount paid for admission to any place of amusement, entertainment, or recreation." Utah Code Ann. § 59-15-4(1)(d) (Supp.1986). Since the instant case does not involve facts contemplated by the statutory language added as of January 1, 1987, we follow the parties' lead in citing the current version of the code.

(FN2.) Laser tag was not offered when the Galleria first opened and has since been discontinued, but it was offered during the period of the audit.

(FN3.) Equipment rental is a separate matter. The Galleria has routinely collected sales tax on the rental of bowling shoes and roller skates by those patrons who do not provide their own equipment. The taxability of such transactions is not in issue.

(FN4.) Because of the conflicting advice provided by the Auditing Division, the Tax Commission held that the Galleria would not be liable for the tax due on the roller skating and batting cage receipts during the period of the audit, but only prospectively.

The Tax Commission now argues that because the tax is not being assessed against roller skating and batting cage receipts for the audit period, the issue is moot and any decision on the future taxability of those receipts is simply an advisory opinion. We disagree. "A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989). A determination by this court will affect the rights of the litigants. Furthermore, the issue has been fully briefed and is squarely before us. It is clear the real dispute has always been whether the tax is applicable to these activities, not simply whether the tax is due for any particular period.

(FN5.) In its order denying reconsideration, the Commission explicitly recognized that the distinction between taxing batting cages and bowling was difficult to draw and that the disparate treatment might not exist if a new look at the bowling issue were undertaken. In a letter dated August 7, 1986,

Jim Roger, then Director of the Auditing Division, recognized that "[t]he Auditing Division has for quite some time had some questions about which activities come under the definition of an admission."

(FN6.) The "deemed denied" provision states in its entirety:

If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Utah Code Ann. § 63-46b-13(3)(b) (1989).

(FN7.) In the Tax Commission's view, the parties' briefs filed with and accepted by the commission in January of 1992 were for naught, although accepted by the commission when tendered, because they were filed more than twenty days after December 10, and the commission's multiple page order of denial, issued weeks later, was a completely meaningless gesture.

(FN8.) We note that *Lopez v. Career Services Review Board*, 834 P.2d 568, 571-72 (Utah App.), *cert. denied*, 843 P.2d 1042 (Utah 1992), relied on by the Tax Commission, does not support its position. The *Lopez* court was concerned with the legal significance of a letter issued *within* the twenty day "deemed denied" period of § 63-46b-13(3)(b) and whether it qualified as an order so as to start the thirty-day jurisdictional time then, rather than upon the elapse of twenty days. The instant case presents a completely different question because the agency's final order was issued well beyond the twenty-day period.

*1001_ (FN9.) In *Thorup*, decided after both *OSI* and *Miller Welding*, the Supreme Court reviewed whether the Tax Commission's action was contrary to one of the commission's rules under a reasonableness and rationality standard, citing the Utah Administrative Procedure Act. Utah Code Ann. § 63-46b-16(4)(h)(ii) (1989). It is unclear from the decision, since Utah Code Ann. § 59-1-610 was not mentioned, whether the new statute was simply not considered by the Court or whether the Court decided it was inapplicable, either by its terms or because the Court does not subscribe to the retroactivity conclusion of *OSI* and *Miller Welding*. In the face of such

ambiguity, it is prudent to follow the clear holdings of the previous decisions of this court. See *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993).

(FN10.) The case law indicates that where the Tax Commission has been held to have discretion in the interpretation and application of the sales tax statute, that delegation is implicit. Compare *Union Pac. R.R. v. State Tax Comm'n*, 842 P.2d 876, 884-85 (Utah 1992) (decided before the adoption of § 59-1-610 and finding a grant of discretion without stating whether it is explicit or implicit) with *SEMECO Indus., Inc. v. State Tax Comm'n*, 849 P.2d 1167, 1175-76 (Utah 1993) (Durham, J., dissenting) (finding implicit delegation to interpret terms within Utah's sales tax statute). See also *Morton Int'l, Inc. v. State Tax Comm'n*, 814 P.2d 581, 588 (Utah 1991).

(FN11.) We cite to the most recent version of the Utah Administrative Code as a convenience to the reader. The portions of the rules quoted in this opinion were the same, in all material respects, throughout the audit period.

(FN12.) The Tax Commission, as admitted in the order denying the petition for reconsideration in this case, has consistently taken the position that bowling is not subject to the sales tax on admission fees. Nor have fees for golfing, tennis, racquetball, miniature golf, or driving ranges been subject to the tax. The Tax Commission's application of its rule vis-a-vis bowling and these other activities appears to be correct because no admission fee is customarily charged for the "right or privilege to enter," for instance, a bowling alley.

(FN13.) Language in another rule, which rule is vigorously challenged by the Galleria, defines "place of amusement." That rule has verbiage consistent with the Tax Commission's position. See Utah Admin.Code R865-19-34S (1993) ("sale of a ticket for a ride upon a mechanical or self-operated device is an admission to a place of amusement"). However, given the scheme of § 59-12-103(1)(f), the meaning of the terms "place of amusement, entertainment, or recreation" becomes relevant only if the threshold determination of an "admission" had been shown. Thus, because we hold the fees charged by the Galleria for use of the batting cages, etc., are not for *admission*, we need not go on to decide whether those venues qualify as "place[s] of amusement, entertainment, or recreation."

*813 868 P.2d 813

Supreme Court of Utah.

**HARPER INVESTMENTS, INC., Harper Sand
and Gravel, Inc.,
Harper Excavating, Inc., and Harper Contracting,
Inc., Petitioners,**

v.

**AUDITING DIVISION, UTAH STATE TAX
COMMISSION, Respondent.**

No. 920310.

Feb. 2, 1994.

Sand and gravel companies appealed decision of State Tax Commission assessing sales taxes. The Supreme Court, Zimmerman, C.J., held that: (1) fact that companies filed request for judicial review of decision more than 30 days from date of decision did not compel finding that request was not timely, where Commission had granted extension of time for petitioning for reconsideration of decision and taxpayers had petitioned for judicial review within 30 days of granting of extension; (2) fact that Commission took no action for over 20 days on companies' petition for reconsideration of decision did not compel finding that 30-day period for seeking judicial review of decision began 20 days after petition was filed, where Commission ultimately issued order denying petition for reconsideration; and (3) sales taxes were improperly assessed for purported sale of sand and gravel between companies, since purported sales existed in accounting records but had no basis in reality, and resulted from good faith error in accounting methods.

Reversed.

Howe, J., dissented and filed opinion.

West Headnotes

[1] Taxation ☞ 1319

371 ---

371XVI Sales, Use, Service, and Gross Receipts
Taxes371XVI(C) Assessment, Payment, and Enforcement
371XVI(C)1 Levy and Assessment371k1319 Judicial Review and Relief Against
Assessments.

Fact that taxpayers filed request for judicial review of State Tax Commission decision assessing sales taxes more than 30 days from date of Commission's decision did not compel finding that request was not timely, where Commission had granted extension of time for

petitioning for reconsideration of decision and taxpayers petitioned for judicial review within 30 days after Commission issued order denying petition for reconsideration; granting of extension operated to extend date on which agency decision became "final" by tolling 30-day period for seeking judicial review. U.C.A.1953, 59-1-610, 63-46b-1(9), 63-46b-13(1)(a), b), 63-46b-14, 63-46b-14(3)(a).

[2] Taxation ☞ 1318

371 ---

371XVI Sales, Use, Service, and Gross Receipts
Taxes

371XVI(C) Assessment, Payment, and Enforcement

371XVI(C)1 Levy and Assessment

371k1318 Administrative Review.

Fact that State Tax Commission took no action for over 20 days on taxpayers' petition for reconsideration of decision assessing sales taxes did not compel finding, under statute providing that such petition is deemed denied if no action is taken by Commission within 20 days, that 30-day period for seeking judicial review of decision assessing sales taxes began 20 days after petition was filed, where Commission ultimately issued order denying petition for reconsideration; actual date of issuance of order marked beginning of 30-day period. U.C.A.1953, 63-46b-13(3)(b), 63-46b-14(3)(a).

[3] Taxation ☞ 1234

371 ---

371XVI Sales, Use, Service, and Gross Receipts
Taxes

371XVI(B) Tax Liability and Exemptions

371XVI(B)1 Transactions Taxable in General

371k1234 Nature of Transaction in General.

Sales taxes were improperly assessed for purported sales of sand and gravel which existed in accounting records but had no basis in reality; following parent company's restructuring in which its assets were transferred to three wholly owned subsidiaries, good faith accounting error resulted in a sale being erroneously reflected every time material was transferred from one subsidiary to another.

*814 Robert A. Peterson, Richard C. Skeen, and Robert W. Payne, Salt Lake City, for petitioners.

Jan Graham, Atty. Gen. and Clark L. Snelson, Asst. Atty. Gen., Salt Lake City, for respondent.

ZIMMERMAN, Chief Justice:

Harper Investments, Inc., Harper Sand and Gravel, Inc., Harper Excavating, Inc., and Harper Contracting,

Inc. (collectively referred to as "Harper Companies"), appeal from a decision of the Utah State Tax Commission ("Commission") that assessed them \$582,273.93 in sales taxes arising from the sale of sand and gravel. The Harper Companies argue that this assessment was in error because it did not arise from actual sales, but from an erroneous in-house accounting treatment of the transactions in question. We agree and reverse.

The material facts are not in dispute. Harper Excavating, Inc., operated a business involving excavating, cleaning, hauling, and distributing sand, gravel, and other materials. In 1986, for reasons not relevant here, Harper Excavating restructured by transferring its assets to three new wholly owned subsidiaries--Harper Sand and Gravel, Harper Investments, (FN1) and Harper Contracting. Harper Excavating, the new parent corporation, later changed its name to Harper Investments.

These corporate changes required a restructuring of the manner in which the new group of companies accounted for transactions with third parties and among themselves. Controller Steven Goddard, who was solely responsible for setting up the new accounting procedures, distributed on the books the various assets owned by the former Harper Excavating to the three subsidiaries. Goddard thought he was distributing these assets in accordance with underlying legal and physical realities. However, he erred. He accounted one of those assets, a group of sand and gravel sales agreements, as property of Harper Sand and Gravel. In fact, the sales contracts had already been assigned to Harper Contracting. As a result of this error, every time material covered by those contracts was delivered by Harper Contracting, the books reflected a sale from Harper Sand and Gravel to Harper Contracting. The Harper Companies did not discover Goddard's error until the Commission reviewed the companies' books in 1988 and assessed liability for unpaid taxes on "intra-unit" sales.

The Commission gave notice of the tax deficiencies on September 28, 1990. On October 26, 1990, the Harper Companies petitioned for redetermination, and a hearing was held on July 30, 1991. On January 9, 1992, the Commission issued findings of fact, conclusions of law, and a final decision affirming the original sales tax assessment. Although the decision affected each individual company, a copy was mailed only to Harper Investments in care of its counsel, Van Cott, Bagley, Cornwall and McCarthy. None of the four individual petitioners or their counsel received a copy of the decision until February 20th, forty-two

days after it was issued. As a result, the twenty-day period provided in the Code for filing a petition for reconsideration had expired. See Utah Code Ann. § 63-46b-13(1)(a). The Harper Companies then sought an extension *815 of time within which to file their petition for reconsideration. That extension was granted under authority of section 63-46b-1(9), and the Harper Companies filed a petition for reconsideration on May 4, 1992. The Commission, however, denied the petition in a final order dated June 3, 1992. The Harper Companies filed a petition for review of agency action with this court on July 1, 1992, claiming that the Commission erred in assessing sales taxes that were based solely on a good faith error in an accounting procedure.

We first address the standard of review. The Commission's decision raises questions of law. "We grant the Commission no deference concerning its conclusions of law, applying a correction-of-error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court." Utah Code Ann. § 59-1-610(1)(b) (Supp.1993) ; see also *Board of Equalization v. State Tax Comm'n ex rel. Benchmark, Inc.*, 864 P.2d 882, 884 (1993) (holding that section 59-1-610 applies to actions commenced before its effective date). The statutes at issue do not grant the Commission any discretion in their interpretation. See *49th Street Galleria v. Tax Comm'n*, 860 P.2d 996, 999 (Utah Ct.App.1993) ("[S]ection 59-12-103[] does not contain language which would even arguably constitute an *explicit* grant of discretion to the Tax Commission...."). Therefore, the no-deference standard applies.

[1] The Commission asserts that the Harper Companies missed the statutory deadline for obtaining judicial review under section 63-46b-14. That provision requires a request for review to be made within thirty days from the date the agency decision is issued or deemed to have been issued. Utah Code Ann. § 63-46b-14(3)(a). Because the final decision was dated January 9, 1992, and review was not sought until July 1, 1992, the Commission claims that section 63-46b-14 bars our consideration of the matter. The Commission further argues that it did not extend the time limit for seeking judicial review when it granted an extension of time for filing a petition for reconsideration. For this argument, the Commission relies on section 63-46b-1(9), which provides, "Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review." Utah Code Ann. § 63-46b-1(9).

We do not agree with the Commission's position. The Commission did not purport to extend the thirty-day limit for seeking judicial review. Rather, it extended the time for petitioning for reconsideration. The Code allows a petitioner to seek reconsideration of an agency decision within twenty days or to seek immediate judicial review within thirty days of a final decision and forego any further agency action. Utah Code Ann. §§ 63-46b-13(1)(a)-(b), -14(3)(a). In this case, the Harper Companies sought a "good cause" extension of time to seek reconsideration, which the Commission granted. This extension operated to extend the date on which the agency decision became "final" by tolling the thirty-day period for seeking judicial review. Because the Commission did not deny the petition for reconsideration until June 3, 1992, we conclude that the July 1st filing for judicial review was timely.

[2] In the alternative, the Commission argues that the Harper Companies were tardy in seeking judicial review because the Code provides that a petition for reconsideration is "deemed denied" if no action is taken by the agency within twenty days of the petition. See Utah Code Ann. § 63-46b-13(3)(b). The Commission claims that the thirty-day period for seeking judicial review began to run on May 25, 1992, twenty days from the day on which the Harper Companies petitioned for reconsideration. As a result, the Commission argues, the July 1st filing for judicial review was past the thirty-day period.

This issue was specifically addressed in *49th Street Galleria*, 860 P.2d at 998-99. There, the court of appeals held that a petition for judicial review was timely filed because the agency involved had issued an order denying reconsideration after the twenty-day "deemed denied" period. *Id.* at 999. The court noted that section 63-46b-14(3)(a) allows a party to file a petition for judicial review within thirty days *after the date on which an order was issued or was considered to have been issued*. *Id.* The court found that if an agency chooses to issue an order denying a petition for reconsideration after the twenty-day presumptive denial period, the actual date of issuance would mark the beginning of the thirty-day time period. *Id.*

We agree with the court of appeals' interpretation of section 63-46b-14(3)(a). When the Harper Companies chose not to file their petition for review within the twenty-day period, they assumed the risk that there would be no order from the Commission. They would have missed the deadline if the Commission had never issued its final decision of June 3, 1992. However,

because the Commission chose to consider the petition for reconsideration and to act on it by issuing an order, the period for seeking review did not begin to run until the date of that final opinion. As a result, once the order was issued, the Harper Companies had an additional thirty days to file, and they did so.

[3] We now turn to the Harper Companies' argument that the Commission wrongly assessed a sales tax on transactions that were reflected in the accounting records but did not have any legal reality. The Harper Companies argue that the underlying facts of ownership should govern, not the manner in which the transactions were accounted for, at least when, as here, the accounting was a result of an indisputably good faith error by the accountant. We agree. As the United States Supreme Court has observed, accounting records "are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts." *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 187, 38 S.Ct. 467, 470, 62 L.Ed. 1054 (1918). In apparent recognition of this principle, even the Commission's final decision found that the sand and gravel sales contracts had been "mistakenly assigned" to Harper Sand and Gravel. Therefore, there is no dispute on the record that the accounting records were prepared in good faith but reflected a transaction that did not exist. We therefore hold that the Commission cannot assess a sales tax on those nonexistent transactions.

Reversed.

STEWART, Associate C.J., and DURHAM, J., and RUSSELL W. BENCH, Court of Appeals Judge, concur.

HALL, J., does not participate herein; BENCH, Court of Appeals Judge, sat.

HOWE, Justice, dissenting:

I dissent. The majority has misinterpreted the legislative intent as to the deadline for filing a petition for judicial review of the Tax Commission's final action.

Section 63-46b-13 provides that any party may timely request reconsideration of an agency's order. I agree with the majority that Harper did that here. If reconsideration is not granted, the party may seek judicial review. In order to move along the reconsideration process, the legislature provided in section 63-46b-13(3)(b) that "if the agency head or the person designated for that purpose does not issue an

order within twenty days after the filing of the request, the request for reconsideration shall be considered to be denied." Thus, if no agency action has been taken on the request for reconsideration within twenty days, the statute automatically makes the request denied.

The next step for an aggrieved party would be to file a petition for judicial review of the agency action. Section 63-46b-14(3)(a) provides that this filing must be done "within thirty days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b)." The majority misconstrues the intent of this statute. It erroneously interprets the statute as starting the thirty days' appeal time to run from either the date on which the agency denies the request for reconsideration or the date on which it is considered denied under subsection 63-46b-13(3)(b), *whichever is later*. This interpretation makes no sense and defeats the legislative intent of expediting the administrative process. The reasonable interpretation is that the thirty days for filing a petition for judicial review begin to run when the agency denies the request for reconsideration, *817. but if the agency has not done so within twenty days, the request is considered denied at that time and the appeal time starts running.

The majority's interpretation produces the anomalous result that when an agency does not act on a request for reconsideration within twenty days, it is considered to be denied, but at any time thereafter (and apparently without any outside limit) the agency may act on the request, thereby breathing life into the case, and start running again the thirty days to seek judicial review. I submit that this interpretation is without parallel anywhere in our statutes or rules of practice in any other context. The majority cites no authority for its interpretation. On the other hand, the Supreme Court of Iowa in *Ford Motor Co. v. Iowa Department of Transportation Regulations Board*, 282 N.W.2d 701 (Iowa 1979), was presented with the identical question. There, the Administrative Procedure Act provided that an application for rehearing shall be "deemed to have been denied" unless the agency grants the application within twenty days after its filing. *Id.* at 702-03. A further rule provided that a petition for judicial review must be filed within thirty days after the application for rehearing has been denied or deemed denied. The court held that the agency must act on the application for rehearing, if at all, within twenty days. If it has not done so, the application for rehearing is deemed denied and the appeal time starts to run and cannot be restarted by a subsequent denial of the application by the agency. In its opinion, the court wrote:

Parties to the proceedings have a need for and a right to a prompt disposition of a dispute. We are confident that the legislature was fully aware that administrative agencies might meet irregularly. Hence, in the interest of a prompt disposition of disputes, the legislature superimposed an automatic denial of any application not ruled upon within the prescribed period.

Regrettable hardships may well result to litigants who are unaware of the "deemed denied" provisions of the statute. But it is in the overall interest of litigants and the public at large that administrative proceedings move to a prompt conclusion. The legislature obviously had the broader public interest in mind in adopting the statute.

Id. at 703. The same result was reached in *Davis v. Alabama Medicaid Agency*, 519 So.2d 538 (Ala.Civ.App.1987). There, a statute provided that an aggrieved party may file an application for rehearing with an agency within fifteen days after entry of its order. It was further provided that if the agency enters no order regarding the application within thirty days, the application shall be deemed denied. A petition for judicial review was required to be filed within thirty days after the decision on the request for rehearing is rendered. The court held that once the thirty days had run from the filing of the application for rehearing, the time to appeal began to run and could not be altered or extended by the agency's subsequent denial of the application for rehearing. *Id.* at 539.

The majority creates a dilemma for an aggrieved party who desires to seek judicial review. If the party has requested reconsideration by the administrative agency but no action has been taken on the request by the end of twenty days, an appeal must then be filed. If, however, the agency later (and there is no limitation as to how much later) acts on the request and denies it, the appeal which has been taken turns out to be premature and must be dismissed. The party must then file a second appeal, supposedly pay another filing fee, and continue pursuit of the appeal. In no other context in our appellate system do we tolerate such uncertainty as to when an order is final and appealable and subject a party seeking review to such a duplicative and hazardous procedure.

I would dismiss the appeal as having been filed untimely.

(FN1.) Harper Investments later changed its name to Harper Excavating.

*944 860 P.2d 944

Court of Appeals of Utah.

MAVERIK COUNTRY STORES, INC., Petitioner,
v.
The INDUSTRIAL COMMISSION OF UTAH and
Vicky Ann McCord, Respondents.
 Nos. 920206-CA, 910413-CA.
 Sept. 7, 1993.

Employer petitioned for review of decisions of the Industrial Commission in an antidiscrimination hearing. The Court of Appeals, Billings, P.J., held that: (1) the employer's failure to petition the Industrial Commission for review of ALJ's decision barred judicial review; (2) the initial petition for judicial review did not divest the Commission of continuing jurisdiction over the case; (3) the employer's petitions for administrative review were not timely; and (4) the employer failed to show good cause needed to obtain extensions of the time for seeking administrative review.

Appeal dismissed in part; affirmed in part; and remanded.

West Headnotes

[1] Appeal and Error ☞ 782
 30 ----

30XIII Dismissal, Withdrawal, or Abandonment
 30k779 Grounds for Dismissal
 30k782 Want of Jurisdiction.

Court of Appeals must dismiss case if it does not have jurisdiction, regardless of which party raises issue.

[2] Administrative Law and Procedure ☞ 229

15A ----

15AIII Separation of Administrative and Other Powers
 15AIII(B) Judicial Powers
 15Ak228 Primary Jurisdiction; Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 Exhaustion of Administrative Remedies.

Basic purpose underlying doctrine of exhaustion of administrative remedies is to allow agency to perform functions within its special competence--to make factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. U.C.A.1953, 63-46b-14(2).

[3] Administrative Law and Procedure ☞ 229

15A ----

15AIII Separation of Administrative and Other Powers

15AIII(B) Judicial Powers

15Ak228 Primary Jurisdiction; Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 Exhaustion of Administrative Remedies.

Exceptions to doctrine of exhaustion of administrative remedies exist if there is chance that irreparable injury would occur as result of requiring exhaustion or if exhaustion would serve no useful purpose. U.C.A.1953, 63-46b-14(2)(a, b).

[4] Administrative Law and Procedure ☞ 229

15A ----

15AIII Separation of Administrative and Other Powers

15AIII(B) Judicial Powers

15Ak228 Primary Jurisdiction; Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 Exhaustion of Administrative Remedies.

[See headnote text below]

[4] Civil Rights ☞ 444

78 ----

78III State Remedies

78k442 State or Local Administrative Agencies and Proceedings

78k444 Exhaustion of Administrative Remedies Before Resort to Courts.

Under principle of exhaustion of administrative remedies, employer's failure to petition Industrial Commission for review of ALJ's decision in antidiscrimination hearing barred judicial review. U.C.A.1953, 34-35-7.1(11), (11)(a, b), (12), 63-46b-14(2)(a, b).

[5] Administrative Law and Procedure ☞ 229

15A ----

15AIII Separation of Administrative and Other Powers

15AIII(B) Judicial Powers

15Ak228 Primary Jurisdiction; Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 Exhaustion of Administrative Remedies.

[See headnote text below]

[5] Civil Rights ☞ 443

78 ----

78III State Remedies

78k442 State or Local Administrative Agencies and Proceedings

78k443 Jurisdiction and Authority.

Employer's initial appeal taken before it exhausted administrative remedies by petitioning Industrial Commission for review of ALJ's decision in antidiscrimination hearing did not divest Commission of continuing jurisdiction over employee's case. U.C.A.1953, 34-35-7.1(11), (11)(a, b), (12), 63-46b-14(2)(a, b).

[6] Administrative Law and Procedure 722.1

15A ----

15AV Judicial Review of Administrative Decisions

15AV(C) Proceedings for Review

15Ak722 Time for Proceedings

15Ak722.1 In General.

Civil rule giving three-day extension of time to take action if notice of required action has been served by mail does not apply to Administrative Procedure Act's (APA) deadlines for seeking administrative review. U.C.A.1953, 63-46b-12(1)(a), (1)(b)(iv); Rules Civ.Proc., Rule 6(e).

[7] Administrative Law and Procedure 722.1

15A ----

15AV Judicial Review of Administrative Decisions

15AV(C) Proceedings for Review

15Ak722 Time for Proceedings

15Ak722.1 In General.

"Filing," as used in Administrative Procedure Act's (APA) deadlines for seeking administrative review, requires actual delivery of necessary documents to agency within 30-day time limit; mailing within that time limit is insufficient. U.C.A.1953, 63-46b-12(1)(b)(iv); Rules Civ.Proc., Rule 6(e).

[8] Administrative Law and Procedure 723

15A ----

15AV Judicial Review of Administrative Decisions

15AV(C) Proceedings for Review

15Ak722 Time for Proceedings

15Ak723 Effect of Delay.

[See headnote text below]

[8] Civil Rights 447

78 ----

78III State Remedies

78k442 State or Local Administrative Agencies and Proceedings

78k447 Judicial Review and Enforcement of Administrative Decisions.

Industrial Commission did not act unreasonably in denying extension of time for employer to petition for review of ALJ's decision in antidiscrimination hearing,

absent any articulation by employer of facts upon which to determine good cause for failure to comply with deadline for administrative review. U.C.A.1953, 63-46b-1(9), 63-46b-16(4), (4)(h)(iv).

[9] Administrative Law and Procedure 481

15A ----

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(D) Hearings and Adjudications

15Ak480 Rehearing

15Ak481 Necessity and Purpose.

[See headnote text below]

[9] Civil Rights 446

78 ----

78III State Remedies

78k442 State or Local Administrative Agencies and Proceedings

78k446 Hearing, Determination, and Relief; Costs and Fees.

Administrative Procedure Act (APA) did not authorize employer to file more than one request for reconsideration of decision of Industrial Commission to deny extension of time for employer to petition for review of ALJ's decision in antidiscrimination hearing. U.C.A.1953, 63-46b-1(9), 63-46b-16(4), (4)(h)(iv).

[10] Civil Rights 446

78 ----

78III State Remedies

78k442 State or Local Administrative Agencies and Proceedings

78k446 Hearing, Determination, and Relief; Costs and Fees.

Employee was entitled to recover attorney fees she incurred on employer's unsuccessful appeals from ALJ's decision in antidiscrimination hearing; employer attempted to obtain judicial review without exhausting administrative remedies and sought to obtain reversal of decisions denying extensions of time to meet filing deadlines. U.C.A.1953, 34-35-7.1(9).

***945** Ronald C. Barker, Mitchell R. Barker, David G. Cundick, Salt Lake City, for petitioner.

Benjamin A. Sims, Gen. Counsel, Sharon J. Eblen, Indus. Com'n of Utah, Salt Lake City, for respondent Indus. Com'n of Utah.

James W. Stewart, Lisa A. Jones, Jones, Waldo, Holbrook & McDonough, Salt Lake City, for respondent McCord.

Before BILLINGS, JACKSON and RUSSON, JJ.

BILLINGS, Presiding Judge:

AMENDED OPINION (FN1)

Maverik Country Stores brings separate appeals from two decisions of the Industrial Commission of Utah. The first appeal is from the Industrial Commission's determination that Maverik violated Utah Code Ann. § 34-35-1 to -8 (1988 & Supp.1993), the Utah Anti-Discrimination Act, in its treatment of Vicky Ann McCord. The second appeal is from the Industrial Commission's ruling that Maverik's request for agency review was untimely. We dismiss the first appeal and affirm the ruling in the second. We remand for assessment of attorney fees.

FACTS

Ms. Jones, a Maverik store manager, hired Ms. McCord as a convenience store clerk on September 30, 1988. (FN2) McCord worked six hour shifts, four days a week at \$3.35 per hour during her two weeks of part-time employment. While at work on October 14, 1988, McCord experienced tightness in her chest and asked Jones if she could go to the hospital. The doctor at the hospital indicated McCord's heart was fine. McCord subsequently called Jones and offered to finish her shift. Jones told her to stay home and rest. While talking to McCord later that day, Jones stated her mother had died from heart problems and her son had recently had open heart surgery. She expressed concern over the seriousness of McCord's heart problems and indicated she would be afraid to leave McCord in the store alone. Jones then terminated McCord's employment.

McCord had answered "no" to an inquiry on the employment application regarding whether she had any heart problems which would limit her ability to perform the job. She did have a condition known as mitral *946 valve prolapse which the parties stipulated was a "usually benign condition." A doctor examined McCord after she was terminated and found employment posed no risk to her.

Jones subsequently filled out a company form, a Record of Employee Counseling, describing the event and indicating she was very concerned McCord's heart problem would reoccur if she continued her job with Maverik. In a later letter to the Utah Anti-Discrimination Division (UADD), Jones again focused on her concern about a stress related reoccurrence. At the hearing before the administrative law judge (ALJ)

on the discrimination claim, Jones mentioned some additional factors for the termination. These were McCord's difficulty in reading the gas pump meters and allegations that McCord smelled of alcohol at work. These factors, however, were never discussed in the termination interview nor noted on the termination form.

McCord subsequently sought employment at numerous locations from 1989 to 1991. She worked for a short time as a janitor at an elementary school but was forced to quit due to an unrelated illness.

McCord filed a complaint alleging a violation of the Utah Anti-Discrimination Act with the UADD on October 24, 1988. The UADD found for McCord in an Order issued January 24, 1991. Maverik requested a formal hearing before an ALJ. The hearing was held on May 15, 1991. The ALJ issued findings of fact and conclusions of law on June 26, 1991. The ALJ's June 26, 1991 decision included a specific reservation of the issue of appropriate attorney fees. On September 10, 1991, the ALJ issued a Supplemental Order disposing of the issue of attorney fees.

On July 26, 1991, Maverik filed a Writ of Review with this court (first appeal). The first appeal is from the ALJ's Order of June 26, 1991. On August 26, 1991, McCord and the Industrial Commission filed motions to dismiss the first appeal based on Maverik's failure to exhaust administrative remedies and lack of a final order. On September 16, 1991, this court ordered those motions deferred, and requested the parties include arguments on those issues in their briefs on the merits.

Despite its pending appeal, Maverik then filed a Request for Review by the Industrial Commission of the ALJ's June 26, 1991 and September 10, 1991 Orders. The date the request was filed is unclear. Counsel for Maverik signed and dated the request October 10, 1991. The request has two received dates stamped on it, October 11, 1991 and October 15, 1991. In later orders referring to the request, the Industrial Commission refers to both dates as the day it received the request. For the purposes of our review, we assume the request was received October 11, 1991.

On February 28, 1992, the Industrial Commission denied Maverik's Request for Review based on its untimeliness. (FN3) On March 19, 1992, Maverik filed a request with the Industrial Commission to reconsider its denial of the Request for Review. On March 30, 1992, the Industrial Commission denied Maverik's Request for Reconsideration. In this denial,

the Industrial Commission recognized it could have allowed the late Request for Review if Maverik had shown good cause for extension of the time period. The Industrial Commission ruled, however, that Maverik had failed to show good cause for the extension.

On April 3, 1992, Maverik filed a "Limited Request for Reconsideration" in which it finally attempted to show good cause for its late filing of the original Request for Review. The Industrial Commission did not respond to this unique motion. On April 7, 1992, Maverik filed a Writ of Review with this court (second appeal). The second appeal is from the Industrial Commission's Order Denying Review and Order Denying Request For Reconsideration.

***947 I. THE FIRST APPEAL--EXHAUSTION OF ADMINISTRATIVE REMEDIES**

[1] As a threshold matter, we must determine whether we have jurisdiction over the first appeal. Regardless of who raises the issue, we must dismiss a case if we determine we do not have jurisdiction. *Silva v. Department of Employment Sec.*, 786 P.2d 246, 247 (Utah App.1990) (per curiam); see also *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App.1987) (per curiam). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App.1989).

[2][3] The basic purpose underlying the doctrine of exhaustion of administrative remedies "is to allow an administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 818, 31 L.Ed.2d 17 (1972); see also *Pacific Intermountain Express Co. v. Tax Comm'n*, 316 P.2d 549, 551 (Utah 1957) (recognizing correction rationale). Exceptions to the doctrine exist. For example, in instances where there is a chance that irreparable injury would occur if exhaustion was required or where requiring exhaustion would serve no useful purpose, the doctrine will not be applied. See *Tax Comm'n v. Iverson*, 782 P.2d 519, 524 (Utah 1989); see also Utah Code Ann. § 63-46b-14(2)(a) & (b) (1989).

In this case, Maverik appealed directly to this court thirty days after the ALJ's ruling. The Utah Anti-Discrimination Act provides that following the issuance of an order after a formal hearing pursuant to the Act "either party may file a written request for

review of the order ... in accordance with Section 63-46b-12." Utah Code Ann. § 34-35-7.1(11)(a) (Supp.1993). This allows parties to an anti-discrimination hearing to take advantage of the general UAPA agency review process. If no timely review is filed "the order by the presiding officer becomes the final order of the commission." *Id.* § 34-35-7.1(11)(b). This section provides that the Industrial Commission need not act on the ALJ's order in any way for that order to take effect. Thus, on the day Maverik filed its petition for review the ALJ's order was a final enforceable order of the Industrial Commission.

[4] The next subsection of the Anti-Discrimination Act, however, requires an aggrieved party to file for agency review under subsection 11(a) or lose the opportunity for judicial review. (FN4) That subsection provides: "An order of the commission under *Subsection (11)(a)* is subject to judicial review as provided in Section 63-46b-16." *Id.* § 34-35-7.1(12) (emphasis added). Subsection 12 could have easily provided that a final order under *Subsection 11* was subject to judicial review under UAPA. The clear import of the legislature's omission of orders final under subsection 11(b) is that they are not subject to judicial review. Subsection 12 simply embodies the general principle that a party must exhaust its administrative remedies prior to obtaining judicial review. Therefore, a party adversely affected by an order of an ALJ in an anti-discrimination hearing cannot obtain judicial review of that order until it has been subject to administrative review. *Cf. Hi-Country Homeowners Inc. v. Public Serv. Comm'n*, 779 P.2d 682 (Utah 1989) (holding Utah Code Ann. § 54-7-15(2)(b) required application for rehearing prior to judicial appeal).

Furthermore, the principle of exhaustion of administrative remedies is apparently embodied in the general provisions of UAPA. One section provides: "A party may seek judicial review *only* after exhausting *all* administrative remedies available...." Utah Code Ann. § 63-46b-14(2) (1989) (emphasis added). This provides additional *948 support for our decision. (FN5) We have no jurisdiction over the first appeal and have no choice but to dismiss it. (FN6)

II. THE SECOND APPEAL

A. Industrial Commission's Jurisdiction

[5] Maverik contends the filing of the first appeal, regardless of its timeliness, divested the Industrial Commission of jurisdiction to continue to act in the case. Thus, according to Maverik, every action taken

by the Industrial Commission after the ALJ's June 26 Order is a nullity. Maverik would have us remand to the Industrial Commission for entry of the Supplemental Order on attorney fees and the agency appeals process. Maverik does not provide any relevant authority supporting this contention.

Other courts have consistently recognized an appeal from a non-final order does not divest the administrative tribunal of jurisdiction. For example, in *Fiebig v. Wheat Ridge Regional Center*, 782 P.2d 814 (Colo.App.), cert. denied, (Colo. Oct. 2, 1989), the court held an untimely petition for judicial review did not divest the agency of jurisdiction to act. *Id.* at 816. In *Fiebig*, an employee appealed his termination to the State Personnel Board. The Board referred the complaint to a hearing officer who ruled the allegations of sexual misconduct against the employee were without merit. The hearing officer, however, upheld the termination on the grounds the employee could no longer perform his job due to the allegations. Both parties appealed the decision to the Board. The Board ruled the hearing officer's findings were insufficient and remanded the case to the officer for a new hearing. The employer appealed the Board's ruling to the court of appeals. Subsequently, the hearing the Board ordered was held and the hearing officer ruled in favor of the employee. The employer filed a motion with the Board to declare the hearing officer's order invalid on the grounds the appeal to the court eliminated the agency's jurisdiction. The Board denied the motion. The court of appeals upheld the Board's ruling because "an appeal to a court without jurisdiction does not divest the agency of jurisdiction to proceed with the action on the merits." *Id.* at 816. *Accord Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 241 Kan. 165, 735 P.2d 241 (1987).

Similarly, we have recognized a notice of appeal filed while a trial court is considering a proper post-judgment motion does not confer jurisdiction on this court. *DeBry v. Fidelity Nat. Title Ins. Co.*, 828 P.2d 520, 523 (Utah App.1992), cert. denied, 857 P.2d 948 (Utah May 14, 1993). We reasoned "to permit an appeal would be an affront to judicial economy" because allowing the trial ~~*949~~ court to dispose of the motion might eliminate needless appeals and discourage pointless delay. *Id.* See also *Williams v. City of Valdez*, 603 P.2d 483, 488 (Alaska 1979) (holding appeal brought from non-final order of a trial court does not divest court of jurisdiction); *Knox v. Dick*, 99 Nev. 514, 665 P.2d 267, 269 (Nev.1983) (holding "appeal from a non-appealable order does not divest the trial court of jurisdiction"). Likewise here, allowing an untimely appeal to divest the agency of

jurisdiction creates the possibility of multiple appeals and needless delays.

Under the rule for which Maverik argues, a party who prematurely appeals an agency decision could unjustly delay further agency action. The rationale behind allowing continuing jurisdiction in the agency following an appeal from a non-final order applies with equal force to allow continuing jurisdiction where the action is subject to further administrative review. We thus follow our sister jurisdictions and conclude appeals from agency orders subject to further administrative review do not divest the agency of jurisdiction. Therefore, the Industrial Commission had jurisdiction to act after the first appeal was filed.

B. Timeliness

McCord and the Industrial Commission argue we should dismiss the second appeal because Maverik's Request for Review of the Final Order of the ALJ was untimely. Maverik responds its request was timely because either (1) Utah Rule of Civil Procedure 6(e) gives it three extra days to file the appeal, (2) the filing date is the date of mailing or, (3) the Industrial Commission abused its discretion in failing to extend the filing deadline by one day. The Final Order was issued September 10, 1991 and Maverik filed its Request for Review October 11, 1991. Whether URCP 6(e) is applicable or whether the crucial date is the mailing date are questions that involve the agency's application or interpretation of general law which we review under section 63-46b-16(4)(d) for correction of error. *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 587-89 (Utah 1991); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285-86 (Utah App.1993). See also *SEMECO v. Auditing Div.*, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting).

1. Date of Filing

[6] UAPA provides a request for review must be filed "within 30 days after the issuance of the order...." Utah Code Ann. § 63-46b-12(1)(a) (1989). The request must also "be sent by mail to the presiding officer and to each party." *Id.* § 63-46b-12(1)(b)(iv). The parties agree the order was dated and issued September 10, 1991. See *Dusty's Inc. v. Auditing Div.*, 842 P.2d 868, 870 (Utah 1992) (holding administrative order is issued on date on face of order).

Maverik first argues that Utah Rule of Civil Procedure 6(e) gives it a three day extension on the thirty day filing deadline. That rule provides: "Whenever a party ... is required to do some act ...

within a prescribed period after the service of a notice ... upon him and the notice ... is served by mail, 3 days shall be added to the prescribed period." Utah R.Civ.P. 6(e) (emphasis added). That rule must be read in light of section 63-46b-12(1)(a) of UAPA which requires a party to appeal thirty days after the issuance of the administrative ruling. Thus, Rule 6(e) does not apply because under section 63-46b-12(1)(a) of UAPA the time for appeal runs from the issuance of an order not from the service of an order on a party.

2. Filing Requirement

[7] Maverik next argues Utah Rule of Civil Procedure 5 (FN7) somehow supports its contention the date of mailing is the relevant date. Rule 5(d) explicitly recognizes a distinction between the filing of documents and the service of documents on a party. See Utah R.Civ.P. 5(d). (FN8) All the language *950 of Rule 5 relied on by Maverik relates to service on a party not to the filing of documents necessary to start an appeal and is, thus, inapposite. Likewise, Maverik's attempted reliance on the language of section 63-46b-12(1)(b)(iv) is unpersuasive. The requirement that requests for review be sent to the presiding officer and the opposing party is a requirement of service, not of filing.

Further, it is clear that under the procedural rules which govern our courts, filing requires actual delivery to the court. For example, in *Silva v. Department of Employment Sec.*, 786 P.2d 246 (Utah App.1990) (per curiam), we dismissed, for lack of jurisdiction, a claim of a petitioner whose petition for review to this court arrived one day late in the mail. The petition had been mailed two days prior to the day the petition was due. We noted: "The argument that an appeal is filed when mailed has been consistently rejected in the past and we reject it here." *Id.* at 247 (citing *Isaacson v. Dorius*, 669 P.2d 849 (Utah 1983); *State v. Palmer*, 777 P.2d 521 (Utah App.1989)). In *Isaacson*, the supreme court noted that interpreting filing as mailing could lead to chaos in appellate procedure. *Isaacson*, 669 P.2d at 851.

Maverik provides no reason why we should interpret the term filing as used in UAPA inconsistently with how we interpret it under the procedural rules used in courts. Thus, absent a showing of good cause for an extension, the term filing as used in section 63-46b-12 requires, as a prerequisite to the agency taking jurisdiction over a review, actual delivery of the necessary documents to the agency within the thirty day time limit.

3. Extension of Filing Deadline

Maverik next argues the Industrial Commission abused its discretion by failing to grant a one day extension of the filing deadline. Maverik does not identify the portion of 63-46b-16(4) under which it asks us to review this claim. See *King v. Industrial Comm'n*, 850 P.2d 1281, 1286 n. 6 (Utah App.1993) (encouraging counsel to clearly identify the portion of 63-46b-16(4) under which review is sought). Because the authority to grant an extension in a filing deadline is not in an agency-specific statute, but rather a general provision of UAPA, and because Maverik is arguing an abuse of discretion standard, it appears Maverik is necessarily seeking review under Utah Code Ann. § 63-46b-16(4)(h)(iv) (1988). That catch-all portion of section 63-46b-16(4) provides we can grant relief if the agency action is "arbitrary or capricious." *Id.* We review agency action under this section for reasonableness. *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992). See also *SEMECO v. Auditing Div.*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting).

a. The Original Request for Reconsideration

[8] For an agency to extend any deadline established under UAPA the petitioner must show good cause. See Utah Code Ann. § 63-46b-1(9) (1988). In its Request for Reconsideration, Maverik made no attempt to show good cause. The Industrial Commission, in its Order denying the Request for Reconsideration, specifically notes Maverik's failure to show good cause. Thus, the Industrial Commission's decision denying Maverik a one day extension is not unreasonable in light of Maverik's complete failure to articulate any facts on which to base a good cause determination.

b. The Second Request for Reconsideration

[9] In a document captioned "Limited Request for Reconsideration" filed April 3, 1992, six days after the original Request for Reconsideration was denied and four days before the second appeal was filed, *951 Maverik finally attempts to show good cause. There is no authorization for a "Limited Request for Reconsideration" in UAPA. Counsel's failure to comply with the rules which set forth the requirements for getting an extension of the filing deadline does not give him the right to create another layer of administrative appeal. (FN9) No section of UAPA provides a petitioner with the right to file more than one request for reconsideration. (FN10) Endorsing such a procedure would allow mischievous counsel to use the right to reconsideration as a tool for needless,

and in some cases, harmful delay. Thus, this filing was appropriately disregarded by the Industrial Commission. (FN11)

ATTORNEY FEES

[10] Because we reject both appeals, we necessarily affirm the award of costs and attorney fees and the award of damages *952. authorized by the ALJ. The ALJ awarded legal costs of \$1536.26 to McCord. She awarded \$19,731 in legal fees to McCord. She also awarded \$11,832.80 in back pay to McCord. (FN12) These awards are authorized by Utah Code Ann. § 34-35-7.1(9) (1988). We also award McCord attorney fees on appeal under the same statute. Thus, we remand the case to the Industrial Commission for the sole purpose of assessing the appropriate amount of attorney fees for this appeal.

CONCLUSION

Maverik brought the first appeal prior to exhausting the available administrative remedies. Maverik brought the second appeal from a reasonable ruling of the Industrial Commission that Maverik's Request for Review was untimely. Thus, we dismiss case number 910413-CA and affirm the Order of the Industrial Commission in case number 920206-CA. We remand the case to the Industrial Commission for the sole purpose of assessing attorney fees on appeal.

JACKSON and RUSSON, JJ., concur.

(FN1.) This opinion replaces the earlier opinion in cases No. 920206-CA and No. 910413-CA, issued June 3, 1993, pursuant to cross-petitions for rehearing granted August 28, 1993.

(FN2.) Because Appellant does not challenge the factual findings of the Industrial Commission, we recite the facts in accord with those findings. See *King v. Industrial Comm'n*, 850 P.2d 1281, 1285 (Utah App.1993).

(FN3.) In the Order denying the Request for Review, the Industrial Commission also addressed and rejected Maverik's claims on the merits. Because of our ultimate conclusion, we need not and do not comment on the propriety of the Industrial Commission's disposition on the merits.

(FN4.) We note our concern that despite the inordinate amount of briefing and conflict in this case, no party to either of these appeals directed us to the determinative statute.

(FN5.) Because we find the Anti-Discrimination Act required Maverik to petition for review by the Industrial Commission, we do not directly address, but merely acknowledge, some conflict between our decision and *Heinecke v. Department of Commerce*, 810 P.2d 459 (Utah App.1991). Although the Industrial Commission asks us to revisit that decision, we find it unnecessary at this time. In *Heinecke*, we focused on the language of Utah Code Ann. § 63-46b-12(1)(a) (1989) and held a petitioner need not avail himself of a review permitted by agency rule prior to filing an appeal to this court. We distinguished such permissive review from review which is statutorily mandated. *Id.* at 462. See also *Hi-Country Homeowners Assoc. v. Public Service Comm'n*, 779 P.2d 682, 684 (Utah 1989) (holding review pursuant Utah Code Ann. § 54-7-15(2)(b) must be exhausted prior to judicial appeal).

In *Heinecke*, however, we did not address the impact of Utah Code Ann. § 63-46b-14(2) (1989) which provides: "A party may seek judicial review only after exhausting all administrative remedies available...." *Id.* See also *Tax Comm'n v. Iverson*, 782 P.2d 519, 524 n. 3 (Utah 1989) (citing section 63-46b-14 for proposition petitioner must exhaust administrative remedies prior to judicial review). According to the Industrial Commission section 63-46b-14(2) requires a party to utilize every possible agency review prior to filing an administrative appeal. We note *Heinecke* was rendered without the benefit of briefing by counsel. *Heinecke*, 810 P.2d at 462. Further, we specifically recognized we might revisit *Heinecke* at an appropriate point in the future. *Id.* at 464 n. 6. That day still awaits.

(FN6.) Regardless of the premature nature of its appeal, Maverik asks us to apply Utah Rule of Appellate Procedure 4(c) and find the appeal procedurally proper. Maverik fails to note, however, that Rule 4(c) does not apply to petitions for review of administrative actions. See Utah R.App.P. 18.

(FN7.) Rule 5 relates to the service and filing of papers. See Utah R.Civ.P. 5.

(FN8.) That section provides:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories,

requests for documents, requests for admissions and answers and responses thereto not be *filed* unless on order of the court or for use in the proceeding.

Utah R.Civ.P. 5(d) (emphasis added).

*952_ (FN9.) As our supreme court has noted in a different setting, if we allow a second motion for reconsideration or "re-reconsideration" what is to prevent another motion for re-re-reconsideration? "Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically [this could go on] *ad infinitum*." *Watkiss & Campbell v. FOA & Sons*, 808 P.2d 1061, 1064 (Utah 1991) (quoting *Drury v. Lanceford*, 18 Utah 2d 74, 415 P.2d 662, 663 (1966)) (alteration added).

(FN10.) Likewise, under the administrative law scheme in place prior to UAPA we noted that a petitioner could not file successive motions for review. See *Ring v. Industrial Comm'n*, 744 P.2d 602, 603 (Utah App.1987) (per curiam). Under that scheme filing material which purports to supplement an already denied motion did not revive the motion. *Id.* As we explicitly noted in *Ring*, a petitioner is only "entitled to 'one bite of the apple' on review before the Industrial Commission." *Id.* at 604. Under UAPA, the same reasoning applies to requests for reconsideration, a petitioner has only one opportunity to apply for reconsideration. See also *Utility Trailer Sales of Salt Lake, Inc. v. Fake*, 740 P.2d 1327, 1329 (Utah 1987) (recognizing rule against repetitive adjudications in arbitration setting); *Tuom v. Duane Hall Trucking*, 675 P.2d 1200, 1202 (Utah 1984) (recognizing rule against repetitive challenges to Industrial Commission determinations of spousal dependency); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah App.1989) (recognizing rule against successive post-judgment motions).

(FN11.) Even if we were to treat the second Request for Reconsideration as procedurally proper, we would dismiss the second appeal. The request would reinvoke the jurisdiction of the Industrial Commission. Under UAPA, because the Industrial Commission did not respond to the request it would be deemed denied April 23, 1992 by operation of law. See Utah Code Ann. § 63-46b-13(3)(b) (1989); *Lopez v. Career Serv. Review Bd.*, 834 P.2d 568, 572 (Utah App.1992), *cert. denied*, 843 P.2d 1042 (Utah 1992). Therefore no "final agency action" for this court to review existed until after April 23, 1992.

UAPA provides:

Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order *would otherwise constitute final agency action*, any party may file a written request for reconsideration with the agency.... Utah Code Ann. § 63-46b-13(1)(a) (1989) (emphasis added).

This section provides a petitioner with the option of applying to the agency for reconsideration or appealing to the courts. It does not provide a petitioner the opportunity to pursue both routes concurrently. The emphasized language indicates a petitioner who decides to file a request for reconsideration no longer has a "final agency action" from which to appeal. The petitioner must wait until the request is either responded to in writing or denied by operation of law. Section 63-46b-13(1)(a) provides a request for reconsideration is not a mandatory step in exhausting administrative remedies or reaching "finality" to give the courts jurisdiction over an appeal. Under UAPA, a request for reconsideration asks the highest level of administrative decision maker to reassess a claim they have previously examined. A request for review, on the other hand, asks a higher level decision maker to evaluate the claim. Compare Utah Code Ann. § 63-46b-12 (1989) (agency review procedures) with *id.* § 63-46b-13 (requests for reconsideration). Petitioners who choose to take advantage of the statutory provision that allows them to request reconsideration must thereafter accept the consequences, one of which is that an appeal to the judicial system cannot be made until the agency acts on the request.

Thus, the second request for reconsideration would have given the Industrial Commission another opportunity to address the merits. Therefore, as of April 7, 1992, Maverik would have no final order from which to appeal. Under this analysis, the second appeal would be brought from a non-final order over which we have no jurisdiction and we would dismiss it.

Further, the window for Maverik to file an appeal from the Industrial Commission's denial of the second request would have been from April 23, 1992 to May 23, 1992. Thus, regardless of the analysis we apply, Maverik is left without judicial review of the merits.

*952_ (FN12.) Counsel for Maverik has consistently complained no actual damages amount was set in the ALJ's order. He apparently is unwilling to do the

math using the formula established in the ALJ's original order. To eliminate any confusion and reduce future conflict in this unnecessarily contentious litigation, we set forth the back pay calculation using the formula established in the ALJ's original order.

Oct 15, 1988 to March 31, 1990

\$3.35 per hr for 24 hrs a week

\$80.40 per week for 76 weeks

6,110.40

April 1, 1990 to March 31, 1991

\$3.80 per hr for 24 hrs a week

\$91.20 per week for 52 weeks

4,742.40

April 1, 1991 to June 26, 1991

\$4.25 per hr for 24 hrs a week

\$102.00 per week for 12.5 weeks

1,275.00

Subtotal

12,127.80

Minus earnings at Ashley Elementary

295.00

Back Pay award equals

\$11,832.80

*1284 803 P.2d 1284

Court of Appeals of Utah.

Kenneth L. VIRGIN, Petitioner,

v.

**BOARD OF REVIEW OF the INDUSTRIAL
COMMISSION OF UTAH,
Stateline Chevron, Workers' Compensation Fund,
and
Employers' Reinsurance Fund, Respondents.**
No. 900167-CA.
Dec. 18, 1990.

Claimant sought review of Industrial Commission's order denying his claim for workers' compensation benefits for hip replacement surgery. The Court of Appeals, Billings, J., held that substantial evidence supported finding that claimant's disability and surgery were caused solely by preexisting hip disease.

Affirmed.

Bench, J., concurred in the result.

West Headnotes

[1] Administrative Law and Procedure ☞ 791

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 Substantial Evidence.

[See headnote text below]

[1] Workers' Compensation ☞ 1939.4(4)

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12A Questions of Law or Fact,
Findings, and Verdict413k1939 Review of Decision of Department,
Commission, Board, Officer, or
Arbitrator

413k1939.4 Sufficiency of Evidence in Support

413k1939.4(4) Substantial Evidence.

Standard of review of Industrial Commission's decision on workers' compensation claim is whether findings are supported by substantial evidence on record as whole. U.C.A.1953, 63-46b-1 to 63-46b-22.

[2] Workers' Compensation ☞ 552

413 ----

413VIII Injuries for Which Compensation May Be

Had

413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired
Condition

413k552 In General.

Industrial injuries that aggravate or "light up" preexisting conditions and are causally connected to subsequent onset of symptoms of disease or condition are compensable if subsequent disability is medical result of exertion or injury that occurred during work-related activity and is not solely result of preexisting condition. U.C.A.1953, 35-1-69; U.C.A.1953, 35-1-69 (Repealed).

[3] Workers' Compensation ☞ 552

413 ----

413VIII Injuries for Which Compensation May Be
Had

413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired
Condition

413k552 In General.

Ratable permanent aggravation of preexisting condition, rather than temporary aggravation or nonratable acceleration of symptoms, must be present to justify award of workers' compensation benefits if industrial injury results in permanent impairment that aggravates preexisting permanent impairment to any degree. U.C.A.1953, 35-1-69; U.C.A.1953, 35-1-69 (Repealed).

[4] Workers' Compensation ☞ 1542

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)7 Accident or Injury and Consequences
Thereof

413k1542 Aggravation or Acceleration of Disease
or Impaired Condition in General.

Substantial evidence supported finding by Industrial Commission that claimant's entire ratable impairment from avascular necrosis of hip that required hip replacement surgery preexisted industrial accident in which auto body struck claimant's hip and that accident did not contribute to the claimant's impairment and, thus, that claimant was not entitled to disability benefits; claimant's doctor testified that preexisting disease was sole cause of claimant's disability and subsequent hip replacement surgery and that while perhaps surgery had happened sooner than it would have without industrial accident, ultimately surgery would have been necessary. U.C.A.1953, 35-1-69; U.C.A.1953, 35-1-69 (Repealed).

*1285 LeRoy K. Johnson (argued), Salt Lake City,

for petitioner.

Richard Sumsion, Mark Dean (argued), Salt Lake City, for Workers' Comp. Fund of Utah.

Erie V. Boorman, Administrator (argued), Salt Lake City, for Employers' Reinsurance Fund.

James E. Harward, Director, Salt Lake City, for Div. of Legal Affairs, Industrial Com'n of Utah.

Before BENCH, BILLINGS and GREENWOOD, JJ.

OPINION

BILLINGS, Judge:

Kenneth L. Virgin ("Virgin") seeks review of the Industrial Commission's ("Commission") order denying his claim for workers' compensation benefits. The Commission concluded there was not a causal connection between Virgin's industrial injury and his subsequent hip replacement surgery and thus denied disability benefits. We affirm.

On June 15, 1986, Virgin was injured on the job when an automobile engine on which he was working, snapped a supporting chain and hit Virgin in the area of his left hip and knocked him down. Virgin did not seek medical attention until three days later when he was examined by a physician's assistant who found bruising and tenderness in the left hip area, but no fractures. Virgin reported the industrial accident immediately, but made no claim for compensation at that time and did not miss any work as a result of this industrial accident.

Virgin claimed to have trouble with his left hip two to three months after the accident. Virgin did not seek further medical treatment, however, until nearly fourteen months after the industrial accident, when he was seen in the emergency room of a local hospital. Virgin was then referred to an orthopedic surgeon who examined him in September 1987. The orthopedic surgeon concluded Virgin had severe aseptic necrosis of the left hip and aseptic necrosis to a lesser degree of the right hip "probably on the basis of alcoholism," and recommended a total hip replacement when symptoms warranted, but suggested Virgin wait as long as possible.

***1286** In February 1988, Virgin was examined by another orthopedic surgeon. Virgin had a left total hip replacement on May 25, 1988 and returned to work on June 15, 1988. He claimed he was entitled to medical

expenses, temporary total disability and permanent partial disability as a result of his surgery, claiming his hip replacement surgery was caused in part by his 1986 industrial accident. Virgin requested a hearing to review his entitlement to compensation. After the initial hearing, the administrative law judge ("A.L.J.") appointed a medical panel consisting of one orthopedic surgeon, Dr. Craig McQueen. Dr. McQueen examined Virgin and thereafter prepared and submitted the following medical findings.

[T]he patient did suffer an injury to his hip during the June 15, 1986 accident which aggravated his pre-existing avascular necrosis. So I do not feel that his May 25, 1988 surgery was necessitated by the industrial accident. I think perhaps it happened sooner than it would have had he not had an injury, but I feel he would have ultimately had needed surgery on this inspite of any industrial injury.... I do not feel that the disability following his surgery was due to the industrial accident.... Since I do not feel that he had an industrial injury that caused his hip problems, I do not think he had any permanent physical impairment directly caused by the industrial accident. The percentage of permanent physical impairment directly attributable to the pre-existing conditions would be approximately a 40% permanent partial impairment of the left hip. He would have the same on the right hip, but these would be pre-existing. I do agree that the industrial accident ... did aggravate his pre-existing condition, but was not causally related to his avascular necrosis.

At a subsequent hearing, both parties examined Dr. McQueen in an attempt to clarify whether Virgin's earlier industrial accident was causally related to his hip replacement surgery. Dr. McQueen maintained his position that all of Virgin's ratable impairment was caused by his pre-existing avascular necrosis. He did testify that the industrial injury may have necessitated surgery sooner, but he was unable to speculate as to how much sooner. At the hearing, the A.L.J. questioned Dr. McQueen about the 40% permanent partial impairment he had assigned to Virgin. The A.L.J. asked whether it could be "reasonable to reach the conclusion that of that 40%, 5% was caused by the industrial contribution?" Dr. McQueen responded that this "might be reasonable, because that's a small amount of what his total disability is, because certainly, in my initial opinion, the whole major cause for his problem is the avascular necrosis and I think there is no question about that. I think there is a small contribution from his industrial injury." In answer to a subsequent question however, Dr. McQueen reiterated his opinion that all of Virgin's ratable impairment was

due to the pre-existing avascular necrosis.

Based on the testimony of the medical panel, the A.L.J. found the industrial accident directly and permanently aggravated Virgin's pre-existing avascular necrosis and thus had a causal relationship to his hip replacement, and awarded Virgin medical expenses associated with the hip replacement and temporary total and permanent partial workers' compensation benefits.

The Commission reviewed the case, concluded Virgin was not entitled to benefits and revoked the A.L.J.'s order and findings. The Commission found:

The Medical Panel report dated January 29, 1989, stated that while the industrial accident may have aggravated Applicant's pre-existing asymptomatic avascular necrosis, it was not causally related. It further stated that no permanent physical impairment was directly caused by the industrial accident and that the period of disability following the surgery was not due to the industrial accident....

Because the Commission finds that no industrial benefits are due on account of *1287 Applicant's injury, the Commission hereby adopts the report of the Medical Panel that Applicant's entire ratable impairment pre-existed the industrial accident of June 15, 1986, and that the accident did not contribute to Applicant's impairment.

STANDARD OF REVIEW

[1] At the outset, it is important to note that the Commission, not the A.L.J., is the ultimate finder of fact. *U.S. Steel Corp. v. Industrial Comm'n*, 607 P.2d 807, 811 (Utah 1980); see Utah Code Ann. § 63-46b-12(6)(c) (1989). Medical causation, including whether an industrial accident aggravated a pre-existing condition, is a factual matter. (FN1) Proceedings in this case were commenced after January 1, 1988, thus the Utah Administrative Procedure Act ("UAPA") controls. Utah Code Ann. §§ 63-46b-1 to -22 (1989). This court clearly articulated the standard for reviewing factual findings under the UAPA in *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct.App.1989). "[I]t is clear that the Board's findings of fact will be affirmed only if they are 'supported by substantial evidence when viewed in light of the whole record before the court.'" *Id.* at 67. "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.*

The party challenging the Commission's findings of fact "must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Id.* at 68. In *Grace Drilling*, this court also noted that in applying the substantial evidence test when reviewing findings of fact, the court should not substitute its own judgment as between two reasonably conflicting views, even though it may have come to a different conclusion. "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." *Id.*

MEDICAL CAUSATION

The Commission concedes that Virgin suffered an industrial accident when he was struck by the swinging engine while at work. Thus, legal causation is not at issue. (FN2) Rather, this case centers on whether Virgin's industrial accident was the medical cause of his hip replacement surgery and subsequent disability. (FN3)

Virgin argues that because the medical panel stated his 1986 industrial injury *aggravated* his pre-existing avascular necrosis and may have necessitated surgery sooner, his hip replacement should be compensable, regardless of the fact that the doctor was unable to clearly assign any degree of permanent or temporary impairment to his 1986 industrial accident. The Commission contends there was no medical *1288 causation because the "aggravating" industrial injury did not result in a medically measurable permanent impairment. The Commission claims there can be no liability where as a result of an industrial accident, a worker suffers only temporary aggravation or pain or a nonratable, speculative acceleration of symptoms of a pre-existing condition.

Virgin has the burden to prove a causal connection between his 1986 industrial injury and his subsequent hip surgery and disability by a preponderance of the evidence. See *Ortiz v. Industrial Comm'n*, 766 P.2d 1092, 1095 (Utah Ct.App.1989); *Large v. Industrial Comm'n*, 758 P.2d 954, 956 (Utah Ct.App.1988) (citing *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986)). If Virgin cannot demonstrate this link, he cannot recover. *Allen*, 729 P.2d at 27.

[2] Generally, industrial injuries that aggravate or "light up" pre-existing conditions and are causally connected to the subsequent onset of symptoms of the

disease or condition, are compensable. *Id.* at 25 (citing *Powers v. Industrial Comm'n*, 19 Utah 2d 140, 143-44, 427 P.2d 740, 743 (Utah 1967)). However, a claimant must prove the subsequent disability is "medically the result of an exertion or injury that occurred during a work-related activity," *id.* at 27, and not solely the result of a pre-existing condition. (FN4)

Recently, this court addressed a similar pre-existing condition-medical causation issue in *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127 (Utah Ct.App.1989). In *Zimmerman*, the applicant claimed an industrial injury to his back aggravated his previously asymptomatic Reiter's syndrome and spinal stenosis, and thus he should have been granted benefits for the pre-existing disease under Utah Code Ann. § 35-1-69, (FN5) much as Virgin claims in this case. The medical panel in *1289 *Zimmerman* stated: "The industrial injury aggravated the pre-existing condition since we are unable to find any evidence of pain before the industrial injury." *Zimmerman*, 785 P.2d at 1129 (emphasis added).

Nevertheless, the medical panel concluded that all of Zimmerman's residual back problems were caused by his pre-existing conditions. Based upon the medical evidence in *Zimmerman*, this court acknowledged that compensation must be awarded "if the industrial injury results in a permanent impairment that is aggravated by or aggravates a pre-existing permanent impairment to any degree." *Id.* at 1131 (quoting *Second Injury Fund v. Streater Chevrolet*, 709 P.2d 1176, 1181 (Utah 1985)). However, we denied recovery in *Zimmerman* because we found the medical panel report as a whole indicated the "aggravation" referred to was due solely to temporary pain. We stated: "No permanent impairment was found to have resulted from the industrial injury itself or in combination with the prior existing conditions. Because the industrial accident did not result in a permanent impairment, the Board correctly denied benefits." *Id.*

[3] Virgin relies heavily on the "aggravation to any degree" language in *Zimmerman* to support his claim for benefits. However, this language does not refer to temporary aggravation or nonratable acceleration of symptoms, but to a ratable permanent aggravation of a pre-existing condition. (FN6)

[4] In this case, the medical panel report indicated that while the industrial injury "aggravated his pre-existing avascular necrosis," Virgin's left hip surgery and subsequent temporary and 40% permanent disability were not caused by the industrial injury. In its report, the medical panel speculated that *perhaps*

the surgery happened sooner than it would have without the industrial accident, but could not quantify the time. The panel also speculated as a result of the A.L.J.'s questions, that it "might be reasonable" to assign 5% of Virgin's disability to his industrial accident, but later the panel clearly rejected any allocation to the industrial accident. The medical panel stated that ultimately, Virgin would have needed the surgery in any event.

Although Dr. McQueen's testimony is confusing at times, ultimately, the doctor firmly states that the sole cause of Virgin's disability and consequent surgery was his pre-existing avascular necrosis.

The Commission entered specific findings regarding medical causation stating that, "[B]ecause the Commission finds that no industrial benefits are due on account of Applicant's injury, the Commission hereby adopts the report of the Medical Panel that Applicant's entire ratable impairment pre-existed the industrial accident of June 15, 1986, and that the accident did not contribute to Applicant's impairment."

As we have previously recognized, the Commission is the ultimate fact finder in workers' compensation cases. As the fact finder, the Commission may choose to give certain evidence more weight than other evidence. See *Mollerup Van Lines v. Adams*, 16 Utah 2d 235, 398 P.2d 882 (1965). In *Mollerup*, the court noted that "[i]t was both the duty and the prerogative of the Commission to view [the doctor's] entire testimony together and it could believe those statements which impressed it as being true, even though there may have been some seeming contradictions in other parts of his testimony." 398 P.2d at 885 (citations omitted).

More recently, this court has held that the Commission will not be reversed simply *1290. because it has chosen to rely on one portion of a medical panel report and to reject other inconsistent portions. See *USX Corp. v. Industrial Commission*, 781 P.2d 883, 887 (Utah Ct.App.1989).

We conclude there is substantial evidence in the medical panel report to support the Commission's finding that "the applicant's entire ratable impairment pre-existed the industrial accident of June 15, 1986, and that the accident did not contribute to the applicant's impairment." Therefore, we affirm the Commission's order denying Virgin benefits.

GREENWOOD, J., concurs.

BENCH, J., concurs in the result.

(FN1.) See, e.g., *Anderson v. Dominic Elec.*, 660 P.2d 241, 242 (Utah 1983) (whether industrial accident aggravated pre-existing injury is factual matter best left to Commission); *Frenchik v. Industrial Comm'n*, 22 Utah 2d 123, 449 P.2d 649, 650 (1969) (Commission's factual findings that medical panel unable to relate present difficulty to industrial injury conclusive); *Large v. Industrial Comm'n*, 758 P.2d 954, 957 (Utah Ct.App.1988) (factual finding that industrial injury was not medical cause of claimant's permanent disability upheld).

(FN2.) In *Allen v. Industrial Comm'n*, 729 P.2d 15, 18 (Utah 1986), the Utah Supreme Court held that a claimant must prove both "legal" and "medical" causation in order to recover workers' compensation benefits. "Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment' ... [then] the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury]." *Id.* at 25 (quoting *Larson, Workmen's Compensation* § 38.83(a), at 7-276 to 277).

(FN3.) In this case, it is important to note that Virgin did not claim any temporary disability immediately following the accident, but instead made claims only for the temporary and permanent disability associated with the hip replacement.

(FN4.) Utah's appellate courts have denied benefits in each of the following cases as the court found the disability was solely the result of a pre-existing condition. In *Lancaster v. Gilbert Dev.*, 736 P.2d 237 (Utah 1987), the Utah Supreme Court upheld the Commission's denial of benefits for aggravation of a pre-existing condition where the medical evidence was conflicting and inconclusive. The court in *Lancaster* noted that "although the medical evidence was conflicting, it is the responsibility of the administrative law judge to resolve factual conflicts." *Id.* at 241. In *Olsen v. Industrial Comm'n*, 776 P.2d 937, 939 (Utah Ct.App.1989) *aff'd*, 797 P.2d 1098 (Utah 1990), this court upheld denial of benefits where the Commission discounted opinions of claimant's experts and adopted the opinion of the medical panel that disability was due entirely to a pre-existing condition. In *Large v. Industrial Comm'n*, 758 P.2d 954 (Utah Ct.App.1988), this court upheld the Commission's denial of benefits where there was "substantial evidence in the record to support a finding that the 1985 injury was not the medical cause of [claimant's] permanent total disability," as claimant's disability resulted from pre-existing conditions. *Id.* at 957.

(FN5.) Utah Code Ann. § 35-1-69(1) (1986), as in effect at the time the events in this case occurred, generally provides for apportionment of liability for disability benefits where an industrial accident aggravates a pre-existing disease. The statute sets out a procedure for apportionment of compensation between the employer or its insurance carrier and the Second Injury Fund. The statute specifically provides:

(1) If any employee who has previously incurred a permanent incapacity by incidental injury, disease, or congenital causes, sustained an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund....

In 1988, section 35-1-69 was repealed and a new section 35-1-69 was reenacted. Under the current version, the test for apportioning liability for compensation requires at least a ten percent pre-existing whole person permanent impairment with additional impairment caused by accident from employment resulting in permanent total disability before liability for compensation is apportioned.

This court has noted that the statute itself does not entitle anyone to benefits for aggravation of a pre-existing injury. "Entitlement to benefits is a prerequisite to consideration of apportionment. Where the disability is the result of pre-existing conditions and not an industrial accident, a claimant is not entitled to disability benefits." *Large*, 758 P.2d at 957.

*1290_ (FN6.) When the medical panel cannot assign a measurable percentage of responsibility to the industrial injury, it would seem absurd to conclude that the Second Injury Fund must assume complete responsibility for a disability caused solely by a pre-existing condition. The purpose of section 35-1-69 is to apportion liability only where an industrial injury measurably contributes to a permanent disability caused in part by a pre-existing condition, not to simply impose liability on the Second Injury Fund

(now Employer's Reinsurance Fund) anytime a worker's disability is caused by a pre-existing condition.

*440 973 P.2d 440

361 Utah Adv. Rep. 9, 1999 UT App 9

Court of Appeals of Utah.

**Edward ESQUIVEL, deceased; Norma Esquivel;
Richard****Esquivel; Angel Esquivel; Edica Esquivel; and
Ofelia Herrera, Petitioners,**

v.

**LABOR COMMISSION, Redd Roofing &
Construction Co., and CNA****Co., Respondents.**

No. 981084-CA.

Jan. 22, 1999.

Deceased worker's dependents appealed Labor Commission Appeals Board determination that workers' compensation carrier was entitled to offset against its future obligations to dependents of full net amount of dependents' third-party recovery from equipment manufacturer. The Court of Appeals, Greenwood, Associate P.J., held that: (1) Board's method of determining offset comported with statutory scheme, and (2) dependents waived issue of use of discounting in calculating present value of carrier's future obligation.

Affirmed.

West Headnotes

[1] Workers' Compensation ⚡ 1939.1

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12A Questions of Law or Fact,
Findings, and Verdict413k1939 Review of Decision of Department,
Commission, Board, Officer, or
Arbitrator413k1939.1 In General; Questions of Law or
Fact.

Court of Appeals will affirm Labor Commission Appeal Board's application of the law so long as it is reasonable. U.C.A.1953, 34A-1-301.

[2] Workers' Compensation ⚡ 2247

413 ----

413XX Effect of Act on Other Statutory or
Common-Law Rights of Action and
Defenses413XX(C) Action Against Third Persons in General
for Employee's Injury or Death

413XX(C)6 Amount and Items of Recovery

413k2244 Action by or on Behalf of Employer or
Insurer413k2247 Expenses of Investigation and
Litigation (Attorney's Fees).

Deduction, from dependents' recovery against third-party equipment manufacturer for death of worker, of attorney fees and costs chargeable to workers' compensation carrier, followed by reduction of carrier's future obligation to dependents by full amount of net recovery, comported with statutory scheme for disbursement of proceeds of third-party tort actions. U.C.A.1953, 34A-2-106(5)(a-c).

[3] Workers' Compensation ⚡ 1856

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)5 Presentation and Reservation Below
of Grounds of Review

413k1845 Necessity

413k1856 Award or Judgment.

[See headnote text below]

[3] Workers' Compensation ⚡ 1907

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)10 Assignments of Error and Briefs

413k1907 Briefs.

Deceased worker's dependents waived issue of whether workers' compensation carrier could use discounting to calculate present value of future payment obligation to dependents, by failing to directly address issue either before Labor Commission Appeals Board or in brief on appeal.

Robert B. Sykes and Ron J. Kramer, Salt Lake City,
for Petitioners.

Theodore E. Kannell and Stephen P. Horvat, Salt
Lake City, for Respondents Redd Roofing &
Construction Co. and CNA Company.

Alan Hennebold, Salt Lake City, for Respondent
Labor Commission.

Before Judges GREENWOOD, BENCH and
GARFF. (FN1)

OPINION

GREENWOOD, Associate Presiding Judge:

¶ 1 The dependents of Edward Esquivel petition this court for review of an order of *441 the Utah Labor Commission's Appeals Board (the Board), holding that respondents Redd Roofing & Construction Co. (Redd Roofing) and CNA Insurance Co. (CNA) were entitled to an offset against their future workers' compensation payment obligation to the dependents because the dependents had obtained a third-party tort judgment for the death of Esquivel. We affirm the Board's order.

BACKGROUND

¶ 2 On April 26, 1993, Esquivel was fatally injured when he fell through a warehouse roof at the Freeport Center in Clearfield, Utah, while working as a roofer for Redd Roofing. At the time of the accident, Esquivel was sweeping gravel from the roof with a Gravely International (Gravely) brand sweeping machine.

¶ 3 Redd Roofing's workers' compensation insurance carrier, CNA, began paying the statutorily required workers' compensation benefits to the dependents in 1993. In March 1994, the dependents settled a negligence lawsuit against the Freeport Center, the owner of the building where the accident occurred, and received \$375,000. The dependents and CNA entered into an agreement, approved by the Utah Labor Commission (Commission), requiring CNA to pay \$205 per week for as long as the dependents were entitled to benefits under the Workers' Compensation Act.

¶ 4 The dependents filed a product liability suit in federal court against Gravely, the manufacturer of the sweeping machine Esquivel was using at the time of the industrial accident. The dependents obtained a judgment in the amount of \$203,507.25. Upon learning of this judgment, CNA discontinued its weekly payments to the dependents. CNA asserted that because the dependents had received third-party tort compensation, it was no longer required, under Utah's third-party tort compensation statute, to continue making workers' compensation payments. See Utah Code Ann. § 34A-2-106(5) (1997). (FN2)

¶ 5 On July 10, 1996, the dependents filed an Application for Hearing before the Commission, contending that CNA had wrongfully discontinued workers' compensation payments. CNA countered that it was entitled to an offset against future payments because of the third-party tort recovery. CNA waived any right to reimbursement for payments already made. After a hearing before an Administrative Law Judge (ALJ), the ALJ ordered CNA to resume weekly

compensation payments to the dependents.

¶ 6 In his Findings of Fact and Conclusions of Law and Order, the ALJ found that attorney fees in the Gravely suit were \$81,402.90 and costs were \$53,596.38, for a total case "expense" of \$134,999.28. After deducting this expense from the \$203,507.25 judgment, a net recovery of \$68,507.97 remained. The ALJ found that because CNA's future obligation exceeded the net judgment, it was responsible for 100% of the attorney fees and costs. The ALJ also determined that CNA's lien amount must be reduced by those fees and costs, thus eliminating that lien. Finally, the ALJ held that the dependents could retain the entire net judgment of \$68,507.97, and that no amount would be credited against future payments owed by CNA.

¶ 7 CNA and Redd Roofing filed a Motion for Review with the Board, claiming the ALJ had mistakenly subtracted fees and costs twice, effectively denying CNA its offset. In its Order Granting Motion for Review, the Board reversed the ALJ and determined CNA was entitled to an offset of the \$68,507.97 net judgment against its future obligations.

¶ 8 Relying on Utah Administrative Code Rule 612-1-4, (FN3) the Board also ruled that *442 CNA could "determine the extent of its offset by using an 8% discount rate to comput[e] the present value of its future liability," and determined that "[t]he *present value* of Redd Roofing's liability for future dependents' benefits, to be offset by the [Gravely suit] award [of \$68,507.97], is \$83,000."

¶ 9 The dependents filed a Petition for Review with this court.

ISSUES

¶ 10 Two issues must be resolved on appeal: First, whether the Board erroneously held that CNA was entitled to offset the full balance of the net proceeds from the third-party tort recovery against its future compensation liability to the dependents; and second, whether the Board erroneously permitted CNA to apply Utah Administrative Code Rule 612-1-4 and discount its future obligation for workers' compensation benefits by eight percent to arrive at a present value.

STANDARD OF REVIEW

[1] ¶ 11 We will not disturb an agency's ruling unless petitioners can establish they have been "substantially prejudiced" by the agency's erroneous interpretation or application of the law. See Utah Code Ann. §

63-46b-16(4)(d) (1997 & Supp.1998). In addition, the Legislature has granted the Commission broad discretion to determine the facts and apply the law. See Utah Code Ann. § 34A-1-301 (1997) ("The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers."). We have previously held that the statute's "grant of discretion to the Commission to apply the law requires that we apply an intermediate standard of review to its determinations." *Osman Home Improvement v. Industrial Comm'n*, 958 P.2d 240, 243 (Utah Ct.App.1998) (citing *Caporoz v. Labor Comm'n*, 945 P.2d 141, 143 (Utah Ct.App.1997)). Thus, we will affirm the Board's application of the law so long as it is reasonable. See *Caporoz*, 945 P.2d at 143.

ANALYSIS

I. Entitlement to Offset

[2] ¶ 12 The dependents contend that the Board improperly determined that Redd Roofing and CNA have a "priority first right of reimbursement" in the third-party tort recovery that "takes precedence over the claimant's interest." CNA argues the Board properly applied the governing statute.

¶ 13 Distribution of proceeds of a third-party tort action under Utah's Workers' Compensation Act is addressed in section 34A-2-106(5), which states:

(5) If any recovery is obtained against a third person, it shall be disbursed in accordance with Subsections (5)(a) through (c).

(a) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(b) The person liable for compensation payments shall be reimbursed, less the proportionate share of costs and attorneys' fees ... for [workers' compensation] payments made as follows:

....

(c) The balance shall be paid to the injured employee, or the employee's heirs in case of death,

to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

Utah Code Ann. § 34A-2-106(5).

¶ 14 In the dependents' lawsuit against Gravely, the jury returned a judgment in favor of the dependents in the amount of \$814,029. However, the jury found Gravely only 25% at fault. The jury apportioned 25% *443 of the fault to Esquivel and 50% to Redd Roofing. (FN4) Thus, the dependents were awarded a gross judgment of only 25% of the total damages; that is, they were awarded damages of \$203,507.25.

¶ 15 The ALJ determined that attorney costs and fees totaled \$134,999.28. After these fees and costs were deducted, the dependents' net award, or "balance" remaining, from the Gravely suit was \$68,507.97. In apportioning the attorney fees between the dependents and Redd Roofing, the Board recognized that section 34A-2-106(5)(a) requires that fees and costs must be allocated between the parties "as their interests may appear." The Board stated that in determining the parties' interests, "it [was] important to note" that section 34A-2-106(5)(b) and (c) "grant the first right of reimbursement and offset to the insurance carrier." Thus, the Board reasoned, Redd Roofing's share of attorney fees and costs necessarily had to be determined first. Only thereafter could the dependents' share be determined, and, the Board held, would "then be limited to the amount of the award that remains after Redd Roofing's share has been deducted." The Board's order accordingly apportioned the parties' shares of attorney fees and costs as follows:

In this case, the amount of the third party judgment actually available for allocation is \$68,507.97, which represents the amount of the third party judgment after attorney fees and costs have been deducted. The present value of Redd Roofing's liability for future dependents' benefits, to be offset by the third party award, is \$83,000. Because Redd Roofing's interest in the award is more than the net amount of the award itself, Redd Roofing holds the entire interest in the award. Consequently, all attorneys fees and costs must be allocated to Redd Roofing.

¶ 16 The Board then concluded that because the statute required that the "balance" be "applied to reduce" the insurer's future obligation, CNA was entitled to "use the third party award to offset its obligation to make weekly payments to the dependents until such time as the award has been exhausted."

¶ 17 The dependents contend the Board's order failed to properly allocate costs and fees to Redd Roofing/CNA. The dependents argue that because the entire \$68,507.97 net judgment was offset against future workers' compensation benefits, the order is "manifestly unjust and contrary to the letter and spirit of [section] 106(5)." (FN5)

¶ 18 According to the dependents' interpretation of section 34A-2-106(5), the statute requires a "three-step sequence for disbursement." First, the attorney fees and costs are to be paid, *see* Utah Code Ann. § 34A-2-106(5)(a) (1997), with the responsibility for this amount apportioned among the parties "as their interests may appear." The injured person receives "credit" against their share *444 of attorney fees and costs for the amount apportionable to the employer/issuer. *See id.* Second, the insurer is to be reimbursed for amounts already paid to the injured party. *See id.* § 34A-2-106(5)(b). Third, the dependents assert, the insurer is to receive an "offset" against future benefits only *after* deducting the employee's "credit" for attorney fees and costs already paid by the carrier. This analysis requires that attorney fees and costs be deducted a second time from the "net judgment"--that is, from the amount remaining after attorney fees and costs have been deducted to arrive at the amount that should be "offset" against future workers' compensation payments. We do not agree with the dependents' description of this last step.

¶ 19 "Because we assume that the legislature used each term in the statute advisedly, we read the statute's words literally 'unless such a reading is unreasonably confused or inoperable.'" *Olsen v. McIntyre Inv. Co.*, 956 P.2d 257, 259 (Utah 1998) (citation omitted). Our supreme court has stated:

The basic purpose of [the third party recovery] statute is that of making an equitable arrangement between an injured employee, and an insurer (or employer) who pays him workmen's compensation, with respect to a cause of action against a third party who injures the employee. It preserves the action to the employee, but it prevents him from having double recovery by requiring him to reimburse the insurer. It also gives the insurer the right to bring the action, but allows it only to reimburse itself and then pay any balance to the employee.

Worthen v. Shurtleff & Andrews, Inc., 19 Utah 2d 80, 426 P.2d 223, 225 (1967). Consistent with this reasoning, the Board determined that subsections (b) and (c) of section 34A-2-106(5) require that any balance, after attorney fees and costs have been

deducted, must either be used to compensate the insurer for payments already made, or be applied as an offset against future obligations. Because the \$68,507.97 amounted to less than the total future benefits owed by CNA to the dependents, it merely "reduced" any future obligation by that amount. The Board determined that "[a]fter the amount of \$68,507.97 has been [paid to the dependents and] fully offset against such future benefits, Redd Roofing must then resume payment" of the workers' compensation benefits.

¶ 20 We believe the Board reasonably applied the statutory scheme in determining the order in which the third party recovery is to be disbursed. Under *Worthen*, the statute's subsections are to be read as a whole, and the sequence in which the statute allocates funds should be regarded as "having some significance":

If we do as the statute says and make the allocation provided for in paragraph [a] *first*, that is, charging the recovery [of] the costs and attorney's fees in proportion to the interests of the parties, the disbursement stated first is made first, and has priority over the provision for disbursement which follows it in paragraph [b]. *Then the reimbursement to the insurer is made from the funds remaining* and to the extent possible after the first requirement for disbursement is complied with.

Id. at 226. (Emphasis added.) We do not find any support in the statutory language or case law for the dependents' argument, and indeed, find that the case law sets forth the steps that must be taken when distributing third-party tort recoveries under section 34A-2-106(5). *See, e.g., Graham v. Industrial Comm'n*, 26 Utah 2d 424, 491 P.2d 223, 224 (1971) (holding statute requires each party bear its share of attorney fees and expenses before making distribution of funds); *Worthen*, 426 P.2d at 225. Therefore, we reject the distribution "formula" proposed by the dependents. (FN6)

II. Discounting of Future Benefits to Present Value

[3] ¶ 21 Finally, the dependents argue the Board erred in discounting future benefits to present value under Utah Administrative Rule 612-1-4. CNA counters that because *445. the dependents failed to oppose CNA's request for discounting when it was presented to the Board, they have waived their right to challenge this portion of the Board's order.

¶ 22 "[I]ssues not raised in proceedings before

administrative agencies are not subject to judicial review except in exceptional circumstances." *Brown & Root Indus. v. Industrial Comm'n*, 947 P.2d 671, 677 (Utah 1997); see also *Werner-Jacobsen v. Bednarik*, 946 P.2d 744, 748 (Utah Ct.App.1997) (denying consideration of issues first raised on appeal); *Alvin G. Rhodes Pump Sales v. Industrial Comm'n*, 681 P.2d 1244, 1249 (Utah 1984) (precluding party who failed to raise issue before administrative agency from raising issue on appeal).

¶ 23 Although CNA requested present-value discounting of its future payment obligation to the dependents, the dependents' response did not directly address the issue. Because the transcript was not included in the record on appeal, it is impossible for us to determine whether there was any discussion at the hearing regarding this issue. Additionally, the dependents' brief has failed to address how this issue was preserved for appeal. See Utah R.App. P. 24(a)(5)(A) ("The brief of the appellant shall contain ... a statement of the issues presented for review ... and citation to the record showing that the issue was preserved in the trial court."). Because the issue was not raised before the Board, and because the dependents' brief on this issue does not conform to our Rules of Appellate Procedure, the dependents have waived their right to appeal this issue.

CONCLUSION

¶ 24 We conclude that the Board reasonably determined that Redd Roofing/CNA was responsible for 100% of the attorney fees and costs, and that the remaining "net" judgment of \$68,507.97 would offset future workers' compensation amounts owed by CNA. Additionally, the dependents waived the issue of whether the Board should have permitted CNA to discount its future obligation for workers' compensation payments to the dependents by eight percent under Utah Administrative Code Rule 612-1-4. The order of the Appeals Board of the Utah Labor Commission is therefore affirmed.

¶ 25 BENCH, Judge and GARFF, Senior Judge, concur.

(FN1.) Senior Judge Regnal W. Garff sitting by special appointment pursuant to Utah Code Ann. § 78-2-4(2)(1996); Utah Code Jud. Admin. R3-108(4).

(FN2.) This statute was previously numbered § 35-1-62 (1993). In 1997, the Utah Legislature revised Title 35, created Title 34A, and replaced the

Industrial Commission with the Labor Commission. See Utah Code Ann. § 34A-1-103 (1997). This revision resulted in the renumbering of many of the sections on workers' compensation. However, because the sections in effect at the time of the hearing below do not differ materially from current statutory provisions, we cite to the most recent statutes in this opinion.

(FN3.) Rule 612-1-4 provides that

[e]ight percent shall be used for any discounting or present value calculations. Lump sums ordered by the Commission or for any attorney fees paid in a single up-front amount, or of any other sum being paid earlier than normally paid under a weekly benefit method shall be subject to the 8% discounting.

Utah Admin. Code 612-1-4 (1998).

(FN4.) Redd Roofing and CNA claim the dependents did not notify them of the Gravely action, nor of Gravely's attempt to attribute fault to Redd Roofing, in violation Utah Code Ann. § 34A-2-106(3) (1997) (requiring that "before proceeding against a third party ..., the employee's heirs, shall give written notice of the intention to bring an action against the third party to: (i) the carrier; and (ii) any other person obligated for the compensation payments.")

(FN5.) Although the dependents assert that the Board's application of the governing statute is "unfair" because it gives the insurer priority over the employee in distributing third-party tort proceeds even when it is the employee who brings the action, we do not believe the application is unfair when viewed in the context of the entire workers' compensation scheme. Under our Workers' Compensation Act, the insurer guarantees compensation to all injured employees covered under its insurance, regardless of fault. See Utah Code Ann. § 34A-2-401(2) (1997) (responsibility for payment of compensation for employment-related injury rests with employer); see *id.* § 34A-2-207(1)(a) (1997) (failure to obtain workers' compensation insurance subjects employer to liability in civil action brought against it by injured employee). The insurer is required to pay compensation even if the accident is entirely the fault of the employee or of an unrelated third party. In exchange, however, the insurer receives priority in the distribution of any third-party tort proceeds. See *id.* § 34A-2-106(5)(b). Thus, the statutory scheme ensures that the injured employee receives

compensation in some form, which reduces the risk the employee might face if forced to file a civil liability action against the employer and/or third parties. In addition, we agree with CNA that the risk of filing an action and ending up with no net benefit is the same encountered in every civil action.

*445_ (FN6.) We note that the formula proposed by the dependents is taken from *Breen v. Caesars Palace*, 102 Nev. 79, 715 P.2d 1070 (Nev.1986), and was adopted under a different third-party tort recovery statutory scheme than Utah's.

*1281 850 P.2d 1281

Court of Appeals of Utah.

Mark KING, Petitioner,

v.

The INDUSTRIAL COMMISSION OF UTAH;
Workers Compensation
Fund; and Superior Roofing Company,
Respondents.

No. 920464-CA.

March 18, 1993.

Workers' compensation claimant sought reversal of Industrial Commission's order denying him temporary total disability compensation during specified period. The Court of Appeals, Billings, P.J., held that: (1) portion of Workers' Compensation Act providing for compensation to injured employees does not explicitly or implicitly grant discretion to Industrial Commission and, thus, Court of Appeals reviews Commission's action under that section under Uniform Administrative Procedures Act (UAPA) section providing for less deferential correction-of-error standard of review, and (2) temporary total disability benefits must be paid to incarcerated claimant until claimant's medical condition has stabilized, absent specific language in workers' compensation statutes limiting benefit for incarcerated recipients.

Reversed and remanded.

Russon, Associate P.J., filed opinion concurring in result.

West Headnotes

[1] Administrative Law and Procedure ☞ 676

15A ----

15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak676 Record.

Under Utah Administrative Procedures Act (UAPA), Court of Appeals, when reviewing factual findings, examines entire record available to court, not simply that which supports findings of administrative law judge. U.C.A.1953, 63-46b-16(4)(g).

[2] Administrative Law and Procedure ☞ 754.1

15A ----

15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak754.1 In General.

[See headnote text below]

[2] Administrative Law and Procedure ☞ 786

15A ----

15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak786 Conflicting Evidence.

[See headnote text below]

[2] Administrative Law and Procedure ☞ 788

15A ----

15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak788 Determination Supported by Evidence in General.

Court of Appeals' review of factual findings under Utah Administrative Procedures Act (UAPA), is not as strict as de novo review of proceedings, nor as lenient as review for "any competent evidence" to support findings, but rather, it simply accords deference to agency where two reasonable, yet conflicting, conclusions could have been reached. U.C.A.1953, 63-46b-16(4)(g).

[3] Administrative Law and Procedure ☞ 676

15A ----

15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak676 Record.

Appellant must provide transcript of proceedings if he is going to challenge factual findings under Utah Administrative Procedures Act (UAPA). U.C.A.1953, 63-46b-16(4)(g); Rules App.Proc., Rule 11(e)(2).

[4] Administrative Law and Procedure ☞ 676

15A ----

15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak676 Record.

Petitioner must provide transcript if he argues that legal conclusion is unsupported by evidence in case. Rules App.Proc., Rule 11(e)(2).

[5] Administrative Law and Procedure ☞ 800

15A ----

15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak800 Statutory Questions.

Where grant of discretion exists, Court of Appeals will not disturb agency's interpretation or application of agency-specific law unless its determination exceeds bounds of reasonableness and rationality. U.C.A.1953,

63-46b-16(4)(h)(ii).

[6] Administrative Law and Procedure ☞ 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

Court of Appeals reviews agency interpretation or application of agency-specific statutes where no grant of discretion exists under correction-of-error standard. U.C.A.1953, 63-46b-16(4)(d).

[7] Administrative Law and Procedure ☞ 741

15A ----

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak741 In General.

Standard of review under Utah Administrative Procedures Act (UAPA) will vary based on subsection claim is brought under and, thus, counsel is strongly encouraged to clearly identify under what section review is being sought and to identify appropriate standard of review under that section. U.C.A.1953, 63-46b-16(4).

[8] Administrative Law and Procedure ☞ 330

15A ----

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak330 Statutes, Construction and Application Of.

Explicit grant of discretion to agency to interpret or apply agency-specific statutory law, which warrants more deferential standard of review, can be found when statute specifically authorizes agency to interpret or apply statutory language. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[9] Administrative Law and Procedure ☞ 330

15A ----

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak330 Statutes, Construction and Application Of.

Court of Appeals can find implicit grants of discretion to agency to interpret or apply agency-specific statutory law, warranting more deferential standard of review, in broad and generalized statutory language, as such language indicates legislative intent to delegate interpretative powers to agency. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[10] Statutes ☞ 219(2)

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(2) Existence of Ambiguity.

If Court of Appeals finds that there are multiple permissible interpretations of language in agency-specific statute, it must defer to agency's policy choice. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[11] Statutes ☞ 219(1)

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(1) In General.

Consideration of agency's expertise and experience is relevant in determining whether agency should make necessary policy choice and thus be granted deference by reviewing court regarding interpretation or application of agency-specific statutory law. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[12] Administrative Law and Procedure ☞ 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

In determining whether agency has been granted discretion to interpret or apply agency-specific statutory law, so as to warrant more deferential standard of review under Utah Administrative Procedures Act (UAPA), Court of Appeals first determines whether legislature explicitly granted discretion to agency and, if explicit grant is not found, Court examines language of statute and statutory framework for implicit grant of discretion. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[13] Administrative Law and Procedure ☞ 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

Court of Appeals can find explicit grant of discretion to agency to interpret or apply agency-specific statutory law, warranting more deferential standard of review under Utah Administrative Procedures Act (UAPA), in specific statutory language directing agency to define statutory term by regulation and, additionally, statute directing agency to interpret or apply specific statutory language should be interpreted as explicit grant of discretion. U.C.A.1953,

63-46b-16(4)(d), (h)(i).

[14] Administrative *1281 Law and Procedure 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

If statutory language is broad and expansive or subject to numerous interpretations, Court of Appeals will assume that legislature has chosen to defer to policy-making expertise of agency and will find implicit grant of discretion to agency to interpret or apply statutory law, warranting more deferential standard of review under Utah Administrative Procedures Act. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[15] Administrative Law and Procedure 800

15A ----

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak800 Statutory Questions.

Court of Appeals reviews agency action under Utah Administrative Procedures Act's (UAPA's) less deferential correction of error standard if statutory language is unambiguous and court can interpret and apply statutory language by traditional methods of statutory construction, utilizing its own expertise to define legislative intent. U.C.A.1953, 63-46b-16(4)(d), (h)(i).

[16] Workers' Compensation 1910

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12 Scope and Extent of Review in General

413k1910 In General.

Portion of Workers' Compensation Act providing for compensation to injured employees does not explicitly or implicitly grant discretion to Industrial Commission and, thus, Court of Appeals reviews Commission's action under that section under Uniform Administrative Procedures Act (UAPA) section providing for less deferential correction-of-error standard of review. U.C.A.1953, 35-1-45, 63-46b-16(4)(d).

[17] Workers' Compensation 865

413 ----

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)4 Temporary and Permanent Disability

413k864 Temporary Disability Followed by Permanent Disability

413k865 In General.

"Medical stabilization" for purposes of requirement that temporary total workers' compensation benefits continue until claimant's condition has stabilized, is independent of ability of claimant to return to work. U.C.A.1953, 35-1-45.

[18] Workers' Compensation 839

413 ----

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)1 In General

413k839 Duration and Termination of Period.

Temporary total disability benefits must be paid to incarcerated claimant until claimant's medical condition has stabilized, absent specific language in workers' compensation statutes limiting benefits for incarcerated recipients. U.C.A.1953, 35-1-45.

[19] Workers' Compensation 45

413 ----

413I Nature and Grounds of Master's Liability

413k44 Construction and Operation of Statutes in General

413k45 In General.

Omissions in Workers' Compensation Act are significant and statute should be applied according to its literal wording. U.C.A.1953, 35-1- to 35-1-107.

[20] Workers' Compensation 1

413 ----

413I Nature and Grounds of Master's Liability

413k1 In General.

[See headnote text below]

[20] Workers' Compensation 511

413 ----

413VIII Injuries for Which Compensation May Be Had

413VIII(A) Nature and Character of Physical Harm

413VIII(A)1 In General

413k511 In General.

Workers' Compensation Act is based on contract principles and employee's right to benefits arises when he suffers work-related injury. U.C.A.1953, 35-1- to 35-1-107.

[21] Workers' Compensation 801

413 ----

413IX Amount and Period of Compensation

413IX(A) Basis for Determination of Amount

413k801 In General.

Absent explicit statutory provision, Industrial Commission is not free to reduce statutorily created workers' compensation benefits. U.C.A.1953, 35-1- to

35-1-107.

***1283** Robert Breeze (argued), Salt Lake City, for petitioner.

Richard G. Sumsion (argued), Salt Lake City, for respondents.

Before BILLINGS and GREENWOOD, JJ., and RUSSON, Associate P.J.

OPINION

BILLINGS, Presiding Judge:

Petitioner Mark King seeks reversal of an Order of the Industrial Commission of Utah denying him temporary total disability compensation for the period of his incarceration at the Utah State Prison and for the period after his release until corrective surgery was performed. We reverse and remand for the calculation and payment of benefits.

FACTS

King suffered an on-the-job injury to his wrist on November 20, 1989, while working for Superior Roofing Company. King received temporary total disability benefits from the Utah Workers' Compensation Fund from November 21, 1989 through May 22, 1990. The Fund also paid medical expenses.

King was scheduled for surgery to correct his wrist injury on May 30, 1990. However, on May 22, 1990, King was incarcerated at the Utah State Prison for a parole violation. Because of his incarceration, surgery was postponed. Temporary total disability compensation was terminated during the period of King's incarceration and for the period after his release until corrective surgery was performed. King was released from prison on October 13, 1990. King was admitted for surgery on January 29, 1991 and surgery was performed on January 30, 1991. Temporary total disability compensation resumed on January 29, 1991 and continued through July 14, 1991, covering the period of King's surgery and recovery.

On July 9, 1991 an Administrative Law Judge (ALJ) denied King's claim for temporary total disability benefits during the period from May 22, 1990 through January 28, 1991. The ALJ further ordered that the Workers' Compensation Fund was entitled to a credit for all temporary total compensation paid to King after May 22, 1990 and before January 29, 1991. The ALJ determined King's "loss of wages for the claimed

period was not related to the industrial accident whatsoever, but, rather, was solely due to the actions or conduct of the applicant which resulted in his being ***1284** incarcerated." The Industrial Commission affirmed the order of the ALJ. This appeal followed.

STANDARD OF REVIEW

On appeal, King seeks temporary total disability compensation for the period between May 22, 1990 and January 28, 1991, the period of his incarceration and the period after his release until corrective surgery was performed. King contends the Industrial Commission erroneously interpreted and applied the workers' compensation statutes in denying him compensation.

Because the proceedings in this case began after January 1, 1988, we review them under the Utah Administrative Procedures Act (UAPA). See Utah Code Ann. §§ 63-46b-0.5 to -22 (1989 & Supp.1992). Judicial review of agency action under UAPA is controlled by Utah Code Ann. § 63-46b-16 (1989). Section 4 of that statute enumerates the situations under which a court can grant relief. (FN1) Because the controlling precedent from the Utah Supreme Court is less than clear (FN2) and because of divergence in recent opinions of this court over how we discern the appropriate standard of review under UAPA, we take the opportunity today to discuss the issue in depth. Compare *Putvin v. Tax Comm'n*, 837 P.2d 589 (Utah App.1992) (FN3) (finding grant of discretion in broad statutory language without identifying whether it was explicit or implicit) with *Chevron U.S.A., Inc. v. Tax Comm'n*, 847 P.2d 418, 420, n. 6, (Utah App.1993) (FN4) (finding no explicit grant of discretion because no statutory directive to interpret a term). We feel compelled to take this approach due to the admonitions this court recently received from the supreme court in *State v. Thurman*, 846 P.2d 1256 (Utah 1993). In that case, which resolved a conflict in this court regarding the standard of review applicable in certain criminal matters, the supreme court noted its

uneasiness with the persistence of the division in the court of appeals on this [standard of review] issue. To the extent that this disagreement simply represents an evolution of two conflicting interpretations of the same legal doctrine by different panels of judges, its persistence is contrary to the doctrine of stare decisis....

... It is one thing to admit that differences among judges on a particular legal question can exist; it is quite another to ***1285** sanction variability in the

rule of law depending solely on which of several judges of an appellate court sit on a given case.

Id. at 1271. Thus, to eliminate any confusion as to the analytical model this court is following to determine the appropriate standard of review under UAPA, we engage in a rather laborious discussion of the standard of review.

A. Issues of Fact

[1][2] Under UAPA, the standard we apply when reviewing factual findings is clear. The only subsection under which factual findings can be challenged is 63-46b-16(4)(g). Under that subsection, we will change a factual finding only if it "is not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1989). *Accord Zissi v. Tax Comm'n*, 842 P.2d 848, 852-54 (Utah 1992). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" "Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App.1992) (quoting *Merriam v. Board of Review*, 812 P.2d 447, 450 (Utah App.1991) (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App.1989))). To reach our conclusion we examine the entire record available to the court, not simply that which supports the findings of the ALJ. *Id.* Thus, Petitioner necessarily has the burden of marshaling "all of the evidence supporting the findings and show[ing] that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling*, 776 P.2d at 68. *Accord Hales Sand & Gravel Inc. v. Tax Comm'n*, 842 P.2d 887, 890 (Utah 1992). This review is not as strict as a de novo review of the proceedings, nor as lenient as a review for "any competent evidence" to support the findings, it simply accords deference to the agency where two reasonable, yet conflicting, conclusions could have been reached. *See Grace Drilling*, 776 P.2d at 68 & n. 7.

[3][4] Additionally, the Utah Rules of Appellate Procedure govern how we review agency actions. *See* Utah Code Ann. § 63-46b-16(2)(b) (1989). Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Utah R.App.P. 11(e)(2). Rule 11 requires counsel provide the appellate court with *all evidence* pertinent to the issues on appeal. *See Sampson v. Richins*, 770 P.2d 998, 1102 (Utah App.),

cert. denied, 776 P.2d 916 (Utah 1989). Thus, our procedural rules specifically require a petitioner to provide a transcript of the proceedings if he is going to challenge factual findings under subsection 63-46b-16(4)(g). A petitioner must also provide a transcript if he argues a legal conclusion is unsupported by the evidence in the case. Otherwise we have no basis on which to evaluate the findings and conclusions.

B. Issues of General Law

The standard we apply when an agency interprets or applies general law such as case law, constitutional law, or non-agency specific legislative acts is also clear. Our review in this area is guided by section 63-46b-16(4)(d). As we did prior to UAPA, we review agency interpretations of general law "under a correction of error standard, giving no deference to the agency's decision." *Questar Pipeline Co. v. Tax Comm'n*, 817 P.2d 316, 318 (Utah 1991). *See also Zissi v. Tax Comm'n*, 842 P.2d 848, 852-54 (Utah 1992) (holding issues of law are reviewed for correctness under § 63-46b-16(4)(d)); *Savage Indus., Inc. v. Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991) (finding agency's erroneous interpretation of law is grounds for relief under § 63-46b-16(4)(d)). In *Morton International, Inc. v. Auditing Division*, 814 P.2d 581 (Utah 1991), the supreme court articulated the reason for the correction of error *1286 standard is not simply because the court characterizes an issue as one of general law but because the agency has no special experience or expertise placing it in a better position than the courts to construe the law. *Id.* at 586.

C. Issues of Agency-Specific Law

[5][6] We are faced with a far more difficult task in deciding the amount of deference to grant an agency's interpretation or application of agency-specific statutory law. In that instance, we grant deference only "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." *Id.* at 589. (FN5) If there is a grant of discretion we review the agency action under Utah Code Ann § 63-46b-16(4)(h)(i) (1989). *See Chicago Bridge & Iron Co. v. Tax Comm'n*, 839 P.2d 303 (Utah 1992). Where a grant exists, we will not disturb the agency's interpretation or application of the law unless its determination exceeds the bounds of reasonableness and rationality. *Morton*, 814 P.2d at 586-87, 589, 592; *Cross v. Board of Review*, 824 P.2d 1202, 1204 (Utah App.1992). "[A]bsent a grant of discretion, a correction-of-error standard is used in reviewing an

agency's interpretation or application of a statutory term." *Morton*, 814 P.2d at 588. See also *Mor-Flo Indus., Inc. v. Board of Review*, 817 P.2d 328, 330 (Utah App.1991), cert. denied, 843 P.2d 516 (Utah 1992). In other words, we review agency interpretation or application of agency-specific statutes where no grant of discretion exists under Utah Code Ann. § 63-46b-16(4)(d). See *Bennion v. Graham Resources, Inc.*, 849 P.2d 569, 570 (Utah 1993).

[7][8] The difficulty arises in determining whether an agency has been granted discretion and thus whether our review is governed by section 63-46b-16(4)(h)(i). In *Morton* the supreme court reviewed the impact of UAPA on the standard of review an appellate court should utilize when an agency interprets or applies an agency-specific statute. *Morton* indicates that review under section 63-46b-16(4)(h)(i) represents a "break from prior law." *Morton*, 814 P.2d at 588. (FN6) It held "an agency's statutory *1287 construction should be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." *Id.* at 589. However, *Morton* does not detail what the term explicit grant of discretion means. In *Morton*, the example of an explicit grant of discretion to an agency relates to the Tax Commission deciding whether a piece of equipment qualifies for an exemption from the sales and use tax. *Id.* at 588 n. 40. The statute allows the exemption if the equipment is a "normal operating replacement ... as determined by the commission." Utah Code Ann. § 59-12-104(15) (1992) (emphasis added). Thus, an explicit grant of discretion can be found when a statute specifically authorizes an agency to interpret or apply statutory language.

[9][10] *Morton* also discusses when an implicit grant of discretion is present. We can find implicit grants of discretion in "broad and generalized" statutory language because such language indicates a legislative intent to delegate interpretative powers to the agency. *Morton*, 814 P.2d at 588. Articulated somewhat differently, if we find there are multiple permissible interpretations of statutory language we must defer to the agency's policy choice. *Id.* at 589. However, if we can derive the legislative intent in the statute by "traditional methods of statutory construction, [there is no implicit grant of discretion and] the agency's interpretation will be granted no deference and the statute will be interpreted in accord with its legislative intent." *Id.* at 589.

[11] In one of its more confusing sections, *Morton* tells us "to the extent that our cases can be read as

granting deference to an agency's decisions based solely on the agency's expertise," they are inconsistent with UAPA's command that we defer only on the basis of a statutory grant of authority. *Morton*, 814 P.2d at 587 (emphasis added). The court then immediately responds to this statement by recognizing the changes it discusses in standard of review "may not have significant effect." *Id.* We take this to mean that consideration of an agency's expertise and experience is relevant in determining whether the agency should make the necessary policy choice and thus be granted deference by the reviewing court. (FN7) *Morton* specifically states it should not be read as holding the ways of finding grants of discretion which it discusses "are the only methods of determining whether the legislature has granted the agency discretion in dealing with an issue." *Morton*, 814 P.2d at 589.

Morton's directive that we seek out grants of discretion before applying the *1288 deferential standard of review under 63-46b-16(4)(h)(i) has led this court to expend significant judicial resources on ascertaining the appropriate standard of review in appeals from executive agency decisions. Two somewhat different approaches have arisen in this court following *Morton*. Given the emerging nature of the law, this result is not surprising.

The approach this court originally took is exemplified by *Tasters Ltd. v. Department of Employment Security*, 819 P.2d 361 (Utah App.1991). (FN8) In *Tasters*, the issue was the Department's interpretation and application of Utah Code Ann. § 35-4-22(j)(5) (Supp.1989) (current version at *id.* § 35-4-22.3 (Supp.1992)). That statute directs the Department to consider twenty factors in determining if an individual is an employee or an independent contractor. We found the language of the statute directing the agency to apply the statute "indicates an explicit grant of discretion" to the agency to determine whether an individual is an employee or an independent contractor. *Tasters*, 819 P.2d at 364. The language the court relied on provided: "unless it is shown to the satisfaction of the commission," the "[commission determines that the] weight of the evidence supports the finding" and "considered [by the commission] if applicable." *Id.* (quoting Utah Code Ann. § 35-4-22(j)(5) (Supp.1989)). Thus, the statute in which we found an explicit grant of discretion authorized the commission to apply specific statutory language.

Other panels have followed the analysis used in *Tasters*. Recently, in *Putvin v. Tax Commission*, 837 P.2d 589 (Utah App.1992), (FN9) the case turned on whether the petitioner met the statutory definition of

nonresident for Tax Code purposes. We held the Tax Commission's determination was entitled to deference. In doing so, we recognized a general grant of authority to the Tax Commission to administer the statutes under which it operates and that the Tax Commission often makes determinations of residency status. *Id.* at 590. Thus, it could be argued we found an explicit grant of discretion. We also, however, recognized factors that would support a conclusion an implicit grant of discretion had been given. First, we acknowledged neither the statutory context nor normal statutory construction were helpful in determining what the legislature intended. *Id.* at 591. Second, we recognized the statutory term was subject to several possible interpretations and had been defined by detailed administrative regulations. *Id.* Thus, interpretation of the statute was better left to the policy expertise of the Commission. (FN10)

While we have not always articulated why we have found a grant of discretion or whether the discretion should be characterized as explicit or implicit, the result has been consistent with *Morton*. In each case the language of the statute and the statutory scheme support a finding of at least an implicit grant of discretion. For example, in *Johnson-Bowles Co. v. Department of Commerce*, 829 P.2d 101 (Utah App.), (FN11) *cert. denied*, 843 P.2d 516 (Utah 1992), we granted deference to the agency where its statutory scheme provided the executive director could penalize a broker "if he finds that" the broker has "engaged in dishonest or unethical" practices. *Id.* at 114 (quoting Utah Code Ann. § 61-1-6(1) (1989)). We held such language "bespeaks a legislative intent to delegate the interpretation of what constitutes dishonest and unethical practices in the securities industry...." *1289 *Id.* Hence, although we did not articulate it, what we did under *Morton* was find the statutory language "broad and expansive" and capable of multiple interpretations thus indicating an implicit grant of discretion by the legislature.

Likewise, in *Department of Air Force v. Swider*, 824 P.2d 448 (Utah App.1991), (FN12) we did not articulate the exact step under the *Morton* analysis where we found the agency had been granted discretion by the legislature. In *Swider*, an aircraft mechanic had been discharged from employment at Hill Air Force Base for drug use. He applied for unemployment benefits and after a hearing by an ALJ was granted them. The Board of Review upheld the ALJ's decision. The Air Force challenged the Board's conclusion the defendant was not "'culpable' for the purposes of establishing a 'just cause' termination." *Id.* at 450. We found statutory language permitting a denial of benefits

if a termination was for " 'just cause ... if so found by the commission' " constituted the requisite grant of discretion. *Id.* at 451 (emphasis in original) (quoting Utah Code Ann § 35-4-5(b)(1) (Supp.1991)). Under *Morton*, this was the appropriate result because the operative language authorized the Board to interpret and apply specific statutory language. As the supreme court noted would often be the case, the standard of review is the same as that we would have applied under the prior approach where we granted deference based on agency expertise. *Morton*, 814 P.2d at 588. See also *Bhatia v. Department of Employment Sec.*, 834 P.2d 574, 577 (Utah App.1992) (FN13) (following *Swider*); *Robinson v. Department of Employment Sec.*, 827 P.2d 250, 252 (Utah App.1992) (FN14) (finding explicit grant of discretion based on statutory language authorizing agency to determine issue of "voluntariness" and "good cause"). See also *Valgardson Housing Sys. Inc. v. Tax Comm'n*, 849 P.2d 618, 620-21 (Utah App.1993) (finding implicit grant of discretion in Utah Code Ann. § 59-12-102(13) (1987)).

Recently, Judge Bench has articulated a slightly different view of the appropriate analysis mandated by *Morton*. Under his reading, the first question is whether there is an explicit grant of discretion to the agency. (FN15) *Ferro v. Department of Commerce*, 828 P.2d 507, 510 & n. 5 (Utah App.1992) (FN16) (citing *Morton*, 814 P.2d at 589). If there is an explicit grant of discretion *1290 the court applies a deferential standard of review. *Bhatia*, 834 P.2d at 581 (Bench, P.J., concurring). As one of the keys to this analysis, Judge Bench has indicated what he thinks the supreme court meant when it spoke of "explicit grants of discretion." In his view, that term means the "legislature must direct or authorize the agency to define the statutory term by rule." *Id.* (FN17) If no explicit grant exists then the court determines whether the statute is ambiguous. *Ferro*, 828 P.2d at 510. If not, the court "applies the statute according to its plain meaning." *Id.* If the statute is ambiguous the court attempts to apply the traditional rules of statutory construction. *Id.* If it can do so, and divine the intent of the legislature, it applies a correction of error standard. *Id.* If traditional statutory construction does not produce a legislative intent the court will then assume the legislature intended for the agency to make a judgment concerning the appropriate policy and find an implicit grant of discretion. *Id.* at 510-11.

There are two major distinctions between the analysis Judge Bench has recently advocated and that applied in some earlier cases. First, opinions applying the earlier analysis have found explicit legislative grants of

discretion in statutory language which is much broader than simply a legislative directive to define a term by rule. Second, rather than applying plain meaning and other statutory construction methods as independent steps in the analysis, the earlier opinions use statutory construction as a tool in deciding whether the statute contains an implicit grant of discretion.

We turn now to Utah Supreme Court cases to determine whether they have applied the analysis articulated by Judge Bench or the broader one used in the earlier opinions issued by this court. *Morton* itself provides the answer. In footnote 40, the court gives the following example of an explicit grant of discretion by the legislature.

For example, section 59-12-104(16) provides for "sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements ... *as determined by the commission*)." (Emphasis added.)

Morton, 814 P.2d at 589 n. 40. This illustration does not show a specific legislative directive to define a statutory term by rule as Judge Bench would require. Rather, it is a grant of authority to the commission to interpret or apply statutory language. This language constitutes the explicit grant of discretion that requires a reviewing court to apply an intermediate standard of review to agency action under the statute.

Additionally, *Morton* twice states the question the court is reviewing is one of "statutory construction *or application*, and absent a grant of discretion, the Commission's decision will be reviewed" for correctness. *Id.* at 589 & 592 (emphasis added). Thus, it is not simply interpretation or definition of statutory language we review under section 63-46b-16(4)(h)(i), but application of that language as well. Moreover, *Morton* discusses agency actions in terms of "dealing with statutory terms" and "dealing with an issue," not "interpreting" or "defining" statutory terms. *See id.* at 588 & 589. Likewise, nothing in the language of section 63-46b-16(4)(h)(i) supports the limitation Judge Bench proposes. Consequently, *Morton* refutes a cornerstone of Judge Bench's analysis, that an explicit grant of discretion can only be found in language directing the agency to define a statutory term by rule.

Furthermore, in *Union Pacific Railroad Co. v. Tax Commission*, 842 P.2d 876 (Utah 1992), a post *Morton* opinion, the Utah Supreme Court applies the broader analysis. In that case the railroad challenged *1291

some determinations of the Tax Commission. The court, without identifying whether it found an explicit or implicit grant of discretion, held the Commission had discretion to interpret the statutory terms "repairs" and "renovations." *Id.* at 883-84. Regardless of whether the supreme court found an explicit grant or an implicit grant, it looked for a grant of discretion prior to construing the statute on its own, as have our earlier opinions.

In addition, the court has frequently found implicit grants of discretion and has not applied statutory construction as a separate step in its analysis. *See, e.g., B.J.-Titan Serv. v. Tax Comm'n*, 842 P.2d 822, 827-28, (Utah 1992) (holding Utah Code Ann. § 59-15-4(1) (Supp.1986) (current version at *id.* § 59-12-103(1)(a) (1992)) contains implicit grant of discretion); *Chicago Bridge & Iron Co. v. Tax Comm'n*, 839 P.2d 303, 306-08 (Utah 1992) (applying reasonableness review to Tax Commission's determination individual is a "real property contractor" because such determination is based in part on law and in part on fact). As with our earlier opinions, the supreme court uses statutory construction as a tool in ascertaining whether an implicit grant of discretion exists. *See, e.g., Nucor Corp. v. Tax Comm'n*, 832 P.2d 1294 (Utah 1992) (applying reasonableness review to agency's interpretation of statutory language based on implicit grant because language subject to multiple interpretations).

[12][13] We now articulate the analytical model we have derived from *Morton* for determining if the more deferential standard of 63-46b-16(4)(h)(i) is to be utilized in reviewing an agency action. This model applies in all UAPA cases dealing with either the interpretation or application of agency-specific law by an agency. First, we determine whether the legislature explicitly granted discretion to the agency to interpret or apply statutory language at issue. As Judge Bench has rightly noted, we can find an explicit grant of discretion in specific statutory language directing the agency to define a statutory term by regulation. Additionally, a statute directing the agency to interpret or apply specific statutory language should be interpreted as an explicit grant of discretion. If we find such a grant, we review under section 63-46b-16(4)(h)(i) for abuse of discretion. That is, we afford the agency some deference and assess whether its action is within the bounds of reasonableness.

[14][15] Second, if we do not find an explicit grant of discretion, we examine the language of the statute and the statutory framework for an implicit grant of discretion. (FN18) If the statutory language is broad

and expansive or subject to numerous interpretations we will assume the legislature has chosen to defer to the policy making expertise of the agency and we will find an implicit grant of discretion and review the action under section 63-46b-16(4)(h)(i) for abuse of discretion. If, on the other hand, the language is unambiguous and we can interpret and apply the statutory language by the traditional methods of statutory construction, utilizing our own expertise to divine the legislative intent, we review the agency action under section 63-46b-16(4)(d) for correction of error.

[16] Utah Code Ann. § 35-1-45 (1988) is the portion of the Utah Workers' Compensation Act at issue here. Without articulating the analysis we have set out above, we have previously held "section 35-1-45 does not expressly or impliedly grant discretion to the Industrial Commission...." *Cross v. Board of Review*, 824 P.2d 1202, 1204 (Utah App.1992). *Accord Stokes v. Board of Review*, 832 P.2d 56, 58 (Utah App.1992). This holding is in harmony with the analysis we explain today.

Section 35-1-45 does not contain a directive to interpret or apply a statutory *1292 term. Thus, it does not contain an explicit grant of discretion. Further, because the language is not broad and expansive but is narrow and mandatory and is subject to construction by traditional rules of statutory construction, the statute does not contain an implicit grant of discretion. We, therefore, review the Industrial Commission's action under section 35-1-45 under UAPA section 63-46b-16(4)(d) for correctness. *Accord Stokes*, 832 P.2d at 58; *Cross*, 824 P.2d at 1204.

TEMPORARY TOTAL DISABILITY COMPENSATION

On appeal, King claims he has been denied his statutory right to temporary total disability compensation. The Industrial Commission argues King was appropriately denied benefits because the extended period of his disability was due to his "incarceration and the unavailability of medical care, circumstances over which the defendants had no control." The Industrial Commission concedes that workers' compensation benefits should not be terminated merely as a result of incarceration. Instead, the Commission, in denying benefits, focuses on the extension of the period of King's disability as a result of his incarceration.

Workers' compensation is a statutorily-created benefit. See Utah Code Ann. §§ 35-1-1 to -107 (1988 & Supp.1992). Section 35-1-45 is the provision of the Utah Workers' Compensation Act relevant in the instant case. It provides:

Each employee ... who is injured ... by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, *shall be paid compensation* for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines.... The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Id. § 35-1-45 (1988) (emphasis added).

[17] Once awarded, temporary total workers' compensation benefits "are to continue 'until [the claimant's] condition has *stabilized*.'" *Booms v. Rapp Constr. Co.*, 720 P.2d 1363, 1366 (Utah 1986) (quoting *Entwistle v. Wilkins*, 626 P.2d 495, 497 (Utah 1981)). Medical stabilization is the time when " 'the period of healing has ended and the condition of the claimant will not materially improve.' " *Reddish v. Sentinel Consumer Prod.*, 771 P.2d 1103, 1104 (Utah App.1989) (quoting *Booms*, 720 P.2d at 1366). "When a claimant reaches medical stabilization, he is no longer eligible for temporary benefits and his status must be reassessed." *Griffith v. Industrial Comm'n*, 754 P.2d 981, 983 (Utah App.1988). Medical stabilization is independent of the ability of the claimant to return to work. *Reddish*, 771 P.2d at 1104. Thus, "temporary disability benefits are properly discontinued as soon as the point of medical stabilization is reached, regardless of whether the claimant is actually able to return to work." *Id.*

King's injury did not achieve medical stabilization until corrective surgery was performed. During the period of his incarceration he was not medically stabilized. Therefore, unless an exception is applied, under the Utah workers' compensation scheme, King qualifies for benefits for the period of his incarceration and the period after his release until corrective surgery was performed.

B. Incarceration

A. Workers' Compensation Act

[18] Whether a claimant who is not medically

stabilized may be denied temporary total disability compensation while incarcerated is an issue of first impression in Utah. Other jurisdictions are split on the issue of whether one receiving workers' compensation benefits loses those benefits *1293 upon incarceration. However, many courts which have considered the issue have concluded disability benefits should be paid to an incarcerated claimant. (FN19) A review of the reasoning articulated by some of the courts awarding benefits is helpful in our resolution of this first impression issue.

In re Spera, 713 P.2d 1155 (Wyo.1986), is a particularly well-reasoned decision. In *Spera*, the claimant received temporary total disability payments until January 21, 1985, the date the district court learned he had been incarcerated. The court ordered the suspension of further payments while the claimant remained in jail. The district judge reasoned incarceration, rather than the work-related injury, was the legal intervening cause of his lost wages. (FN20) In reversing the district court's suspension of payments, the Wyoming Supreme Court held a worker's incarceration does not require a suspension of temporary total disability payments. *Id.* at 1158.

Stressing that workers' compensation law is based on "contract" rather than tort principles, the *Spera* court held the worker's right to benefits arises when he suffers a work-related injury. *See id.* at 1156-57. The court explained the Wyoming workers' compensation scheme "is based on a concept of industrial insurance," which means "it is based on contract rather than tort principles." *Id.* at 1156. Under contract principles the worker should not be denied benefits unless a provision in the statutory contract between the worker, the state, and the employer explicitly suspends the benefits. The court explains:

Instead of suing his employer for negligence and having to prove duty, breach, proximate cause, and damages, the worker in our state must file for worker's compensation benefits for which his employer is ultimately liable. Essentially, the system provides disability insurance coverage for the worker. His right to benefits arises when certain conditions precedent occur, primarily, when he suffers a disabling work-related injury. Under contract principles, the worker should not be denied his benefits after the contingency arises, unless a provision in the statutory contract between the worker, on the one hand, and the State and employer, on the other, explicitly suspends the benefits.

... Benefits under the statute terminate only when

the worker recovers because only then does he regain his earning power. Incarceration has no effect upon benefits which are in the nature of insurance which has become payable as a covered loss....

*1294

... The worker's disability payments cannot be characterized as mere governmental largesse that can be eliminated when the worker's needs are fulfilled from another governmental source. Rather, the worker's statutory right to disability payments is akin to a contract right. Nobody would argue, in the private insurance context, that an insurer could withhold payments due under an insurance contract just because the insured had a second policy which covered the same disability....

We believe this same principle should apply to industrial insurance created by statute. Because there is no statutory exception which eliminates benefits when a worker is jailed, the benefits are due the worker even if his needs are fulfilled from another governmental source. The state legislature can change our statute to suspend payments during periods of incarceration, much like a private insurer might place conditions on his coverage. *But in the absence of legislation, we decline the State's invitation to make that policy shift ourselves.*

Id. at 1157-58 (citation omitted) (emphasis added).

Similarly, in *Bearden v. Industrial Commission*, 14 Ariz.App. 336, 483 P.2d 568 (1971), the claimant was awarded temporary disability for a compensable industrial injury and then incarcerated in the Arizona State Prison following a felony conviction. The Arizona Court of Appeals reversed the denial of benefits and held the right to workers' compensation was not forfeited or suspended during a period of incarceration. *See id.*, 14 Ariz.App. at 343, 483 P.2d at 575. In reaching this conclusion, the *Bearden* court reviewed relevant provisions of Arizona's workers' compensation statutes. Arizona's statutes simply provided that benefits "shall be paid." *Id.* at 341, 483 P.2d at 573. The court enumerated provisions of the statutes which suspended or reduced workers' compensation under specified circumstances. As with Utah's statutes, Arizona's statutes contained no provision for the forfeiture or suspension of workers' compensation benefits based on incarceration. The court stated "the Arizona Legislature has not provided for the forfeiture or suspension of compensation and accident benefits during the period of the prison confinement of a claimant serving a sentence less than

life." *Id.* The *Bearden* court concluded:

No constitutional or statutory provision relating directly to workmen's compensation has been brought to our attention which declares that a person whose civil rights are suspended ... thereby forfeits his right to compensation.... Whether that should be the law is a matter of public policy which should be determined by the Legislature.

Id. at 341-42, 483 P.2d at 573-74.

Likewise, in *Forshee & Langley Logging v. Peckham*, 100 Or.App. 717, 788 P.2d 487 (1990), the claimant was awarded temporary total disability compensation prior to incarceration. Like King, the claimant in *Forshee* was neither medically stabilized nor released for regular work during the period of his incarceration. In affirming the award of benefits, the absence of legislation specifically terminating benefits upon incarceration was significant to the *Forshee* court. "It is the legislature's province to restrict the ability of incarcerated individuals to collect workers' compensation and, in some situations, it has done so. We decline employer's suggestion that we create additional exceptions that have no basis in the statute." *Id.* 788 P.2d at 488 (citation & footnote omitted).

Thus, the absence of a provision in the state's workers' compensation statutes specifically denying disability benefits to claimants during periods of incarceration is a significant factor in the analysis of many courts when awarding benefits to incarcerated claimants. (FN21) As with numerous other jurisdictions, Utah's Workers' Compensation *1295 Act has no provision terminating benefits because of a claimant's incarceration.

[19] Omissions in the Workers' Compensation Act are significant and the "statute should be applied according to its literal wording." *Traylor Bros., Inc./Frunin-Colnon v. Overton*, 736 P.2d 1048, 1052 (Utah App.1987). Significantly, as noted in their caselaw, several states have enacted legislation which specifically terminates workers' compensation benefits after a claimant has been incarcerated. (FN22)

Furthermore, the Utah Legislature has chosen to restrict workers' compensation benefits under certain circumstances. For example, section 35-1-14 provides for a fifteen percent reduction in compensation for an employee's failure to use safety devices, failure to obey employer's safety rule, or employee's intoxication. See Utah Code Ann. § 35-1-14 (1988). Similarly, section 35-1-45 suspends benefits when the accident was

"purposely self-inflicted." *Id.* § 35-1-45. Thus, it is clear the Utah Legislature knows how to limit workers' compensation benefits, and does so when it so desires.

[20][21] We therefore hold the absence of a statutory provision limiting workers' compensation benefits upon a claimant's incarceration mandates a conclusion that temporary total benefits should be awarded to King. Moreover, the Utah Workers' Compensation Act is based on contract principles and an employee's right to benefits arises when he suffers a work-related injury. Absent an explicit statutory provision, the Industrial Commission is not free to reduce statutorily-created benefits. "The Industrial Commission is not free to 'legislate' in areas apparently overlooked by our lawmakers or to exercise power not expressly or impliedly granted to it by the legislature, even in the name of fairness." *Bevans v. Industrial Comm'n*, 790 P.2d 573, 578 (Utah App.1990).

In Utah, workers' compensation is the employee's exclusive remedy against an employer for an industrial injury, a fact which further supports an award of benefits to King. See Utah Code Ann. § 35-1-60 (1988). Under our statutory scheme, King relinquished his right to sue his employer for his industrial injury in exchange for workers' compensation benefits. King's incarceration would not have cost him the right to sue his employer under the common law. Absent legislative action, that incarceration should not cost him his right to workers' compensation.

The Workers' Compensation Fund contends *Griffith v. Industrial Commission*, *1296 754 P.2d 981 (Utah App.1988), supports the denial of benefits in this case. In *Griffith*, we affirmed a denial of benefits where the claimant's disability was prolonged due to a delay in corrective surgery for reasons unrelated to the industrial accident. However, the Industrial Commission's reliance on *Griffith* is misplaced.

In *Griffith*, the claimant received temporary total disability benefits for an industrial injury to his ankle. An orthopedic surgeon evaluated his ankle and recommended surgical reconstruction. The Commission concluded the healing period had ended and the claimant's medical condition had stabilized. An internist who evaluated the claimant's hypertension and asthma advised that ankle surgery be postponed until the hypertension and asthma were treated. The Industrial Commission determined the employer was not liable for temporary total disability for the period which the claimant's hypertension and asthma had to be controlled so surgery could be safely performed. The Commission reasoned that surgical repair had to be

delayed because of other medical problems, not for further treatment of claimant's ankle. In affirming the Commission's denial of temporary total disability, we found "that the Commission's conclusion that plaintiff's ankle injury had reached medical stability on May 2, 1985 ... [was] not arbitrary and capricious because ... [it was] supported by substantial evidence on the record." *Id.* at 984.

Unlike King, in *Griffith* the claimant's condition had reached stabilization, a prerequisite for termination of temporary total disability payments. See *Booms v. Rapp Constr. Co.*, 720 P.2d 1363, 1366 (Utah 1986). *Accord Greyhound Lines, Inc. v. Wallace*, 728 P.2d 1021, 1022 (Utah 1986); *Reddish v. Sentinel Consumer Prod.*, 771 P.2d 1103, 1104 (Utah App.1989). In *Griffith*, workers' compensation benefits were properly discontinued. Thus, *Griffith* provides no support for the Industrial Commission's argument.

Counsel for the Workers' Compensation Fund also suggests we should adopt a rule that as long as circumstances which delay the claimant's surgery are beyond the control of the insurer, the insurer should not be required to pay temporary total disability compensation. Such a rule, however, makes no sense. It would permit the insurer to terminate benefits whenever they deem the claimant's surgery to be sufficiently "delayed," resulting in subjective and arbitrary determinations. (FN23) Would the Industrial Commission terminate benefits if King's surgery was delayed only eight days instead of eight months? Indeed, at oral argument counsel for the Industrial Commission indicated that if King's disability had been prolonged for a shorter period the Commission would not have challenged the payment of disability benefits.

CONCLUSION

Because Utah's Workers' Compensation statutes do not have specific language limiting benefits for incarcerated recipients of temporary total disability payments, such benefits must be paid until the claimant's medical condition has stabilized. The termination of benefits is a policy matter which must be addressed by the Utah Legislature, not by this court or by the Industrial Commission. Accordingly, we reverse the Industrial Commission's ruling and remand this matter for determination of benefits.

GREENWOOD, J., concurring.

RUSSON, Associate Presiding Judge (concurring in result):

I concur in the result. We have previously set forth the proper standard of review *1297. for appeals from the Industrial Commission's denial of compensation under Utah Code Ann. § 35-1-45 (1988) in *Cross v. Board of Review*, 824 P.2d 1202, 1203-04 (Utah App.1992). At the time of that decision, the proper post-UAPA standard of review for appeals under section 35-1-45 was an issue of first impression in Utah. In *Cross*, we determined that section 35-1-45 contained no express or implied grant of discretion to the Industrial Commission. *Id.* at 1204. That decision stands unchallenged as the correct law on the very point raised in this case, and the majority expressly acknowledges this in its opinion. Thus, in light of *Cross*, and the doctrine of stare decisis as enunciated in *State v. Thurman*, 846 P.2d 1256, 1268-71 (Utah 1993), I find the majority's protracted examination of the appropriate standard of review in this case unwarranted.

(FN1.) That section provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency

by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Utah Code Ann. § 63-46b-16 (1989).

(FN2.) *Cf. State v. Thurman*, 846 P.2d 1256, 1267-71 (Utah 1993) (acknowledging supreme court's failure to clearly articulate standards of review).

(FN3.) Opinion by Judge Billings with Judges Jackson and Russon concurring.

(FN4.) Opinion by Judge Bench with Judge Garff concurring and Judge Russon concurring in the result only.

(FN5.) Prior to UAPA we reviewed agency determinations under three distinct categories. While the standards for factual determinations and interpretations of general law remain the same, it is this intermediate area of scrutiny that has changed. Formerly

agency decisions involving mixed questions of law and fact or the application of specific factual situations to the legislative enactments under which the agency operates were to be given deference by the courts and were to be upheld so long as they fell within the bounds of reasonableness and rationality.

Savage Indus., Inc. v. Tax Comm'n., 811 P.2d 664, 667 (Utah 1991). We spent far less time grappling with the standard of review under this relatively simple analysis. The complexities involved in the new analysis seem not, in the end, to make a significant enough difference for the amount of energy we expend.

(FN6.) Appeals under the various subsections of 63-46b-16(4) are subject to various standards of review. For example, in *Union Pacific Railroad Co. v. Tax Commission*, 842 P.2d 876 (Utah 1992), the railroad challenged some determinations of the Tax Commission. One challenge was to a rule of the Commission under section 63-46b-16(4)(h)(ii). Citing a pre-UAPA case the court held that rules promulgated by the agency and departures from those

rules will be upheld if they are reasonable and rational. *Id.* at 878-80. The court engaged in no discussion of explicit or implicit grants of discretion. The court also held the railroad's challenge to the constitutionality of a sales tax under section 63-46b-16(4)(a) would be reviewed for correctness. *Id.* at 880-81.

Thus, *Morton* applies only when we are ascertaining whether an appeals is brought under section 63-46b-16(4)(h)(i) or 63-46b-16(4)(d). *See also Nucor Corp. v. Tax Comm'n.*, 832 P.2d 1294 (Utah 1992) (noting review for abuse of agency discretion was under section 63-46b-16(4)(h)(i)); *Anderson v. Public Service Comm'n.*, 839 P.2d 822 (Utah 1992) (noting review of claims that agency action was arbitrary and capricious under section 63-46b-16(4)(h)(iv) is for reasonableness). Because the standard of review under UAPA will vary based on the subsection the claim is brought under, we strongly encourage counsel to clearly identify under what section review is being sought and to make certain they identify the appropriate standard of review under that section. *Cf. Bhatia v. Department of Employment Sec.*, 834 P.2d 574, 581-82 (Utah App.1992) (Bench, P.J., concurring) (encouraging counsel to present an appropriate statutory construction in UAPA cases).

*1297_ (FN7.) This conclusion that agency expertise and experience remain appropriate considerations when assessing whether to grant deference is supported by *Sanders Brine Shrimp v. Tax Commission*, 846 P.2d 1304 (Utah 1993) and *Board of Equalization v. Tax Commission*, 846 P.2d 1292 (Utah 1993). In both cases, the supreme court cites a pre-*Morton* non-UAPA case, *Chris & Dick's Lumber & Hardware v. Tax Commission*, 791 P.2d 511 (Utah 1990), for the proposition that "[w]e give no deference to an administrative agency's interpretation of a statute absent certain circumstances, none of which exist here." *Sanders*, at 1305; *Board of Equalization*, at 1295-96. The circumstances referenced in *Chris & Dick's* are those instances where the agency's expertise should be deferred to. *Chris & Dick's*, 791 P.2d at 513-14.

Further, a footnote in *Zissi v. Tax Commission*, 842 P.2d 848 (Utah 1992), a post-*Morton* UAPA case, also supports this conclusion. In that footnote the supreme court rejects applying an intermediate standard of review based in part on the rationale that "the issues are questions of constitutional law and statutory construction on which the Commission's experience and expertise will be of no real

assistance." *Id.* at 860 n. 2. The Zissi footnote relies on *Silver v. Tax Commission*, 820 P.2d 912 (Utah 1991), and *Sandy City v. Salt Lake County*, 827 P.2d 212 (Utah 1992), to support this proposition. *Silver* is a pre-UAPA case and *Sandy City* did not involve an agency of the state, thus, UAPA would not apply even if that case arose today.

Sanders, *Board of Equalization*, and *Zissi* all indicate agency experience and expertise are still relevant considerations in deciding whether there is a grant of discretion in cases arising under UAPA.

(FN8.) Opinion by Judge Jackson with Judges Garff and Greenwood concurring.

(FN9.) Opinion by Judge Billings with Judges Jackson and Russon concurring.

(FN10.) Judge Bench has expressed a concern that what we did in *Putvin* was find an explicit grant of discretion to the Tax Commission by virtue of Utah Code Ann. § 59-12-118 (1992). See *Belnorth Petroleum Corp. v. Tax Comm'n*, 845 P.2d 266, 268-69 n. 5 (Utah App.1993). We agree the discretion we found in *Putvin* is better characterized as an implicit grant under *Morton*.

(FN11.) Opinion by Judge Russon with Judges Jackson and Orme concurring.

(FN12.) Opinion by Judge Orme with Judges Jackson and Russon concurring.

(FN13.) Opinion by Judge Billings with Judge Garff concurring and Judge Bench concurring with opinion.

(FN14.) Opinion by Judge Garff with Judges Greenwood and Russon concurring.

(FN15.) Creative counsel might read Judge Bench's dissent in *Luckau v. Board of Review*, 840 P.2d 811 (Utah App.1992) and his concurrence in *Bhatia* as indicating we must look to see if the statute is unambiguous before we look for an explicit grant of discretion. See *Luckau*, 840 P.2d at 817 (Bench, P.J., dissenting); *Bhatia*, 834 P.2d at 581 n. 4 (Bench, P.J., concurring).

The *Luckau* dissent cites language from *Ferro v. Department of Commerce*, 828 P.2d 507 (Utah App.1992) regarding implicit grants of discretion in its assertion that ambiguity is the first step. See *Luckau*, 840 P.2d at 817 (Bench, P.J., dissenting). In *Ferro*, the language cited in *Luckau* came after Judge

Bench's discussion of explicit grants of discretion and before his discussion of implicit grants of discretion. See *Ferro*, 828 P.2d at 510. The *Bhatia* footnote cites *Mor-Flo Industries, Inc. v. Board of Review*, 817 P.2d 328 (Utah App.1991) to support the assertion: "We may not defer to an agency's interpretation until we know the legislature itself did not render its own discernable statutory interpretation." *Bhatia*, 834 P.2d at 581 n. 4 (Bench, P.J., concurring). While this language could be interpreted as requiring an assessment of ambiguity first, it does not appear to be what was intended. If we followed that analysis, we would attempt to interpret the statute whether there was a grant of discretion to the agency or not.

Thus, we believe there is agreement that the court's first task is to look for an explicit grant of discretion. If we were to ignore an explicit grant of discretion and apply a plain language test first, we would ignore the legislature's intent to grant the agency discretion. Therefore, counsel should not read *Luckau*, *Bhatia*, and *Mor-Flo* as requiring this court to assess ambiguity prior to assessing whether a grant of discretion exists.

*1297_ (FN16.) Opinion by Judge Bench with Judge Russon concurring and Judge Billings concurring in the result only.

(FN17.) See also *Chevron U.S.A., Inc. v. Tax Comm'n*, 847 P.2d 418, 420, n. 6 (Utah App.1993) (Opinion by Bench, J.; Garff, J., concurring; Russon, J., concurring in the result) (finding no explicit grant under Judge Bench's definition); *Belnorth Petroleum Corp. v. Tax Comm'n*, 845 P.2d 266, 267-69 (Utah App.1993) (Opinion by Bench, J.; Garff and Russon, JJ., concurring) (same).

(FN18.) We note, as the court did in *Morton*, the ways we articulate of finding a legislative grant of discretion are not exhaustive. In the appropriate circumstances we could find a grant of discretion via an analysis yet unarticulated. See *Morton*, 814 P.2d at 589 (noting other methods of finding deference might arise).

(FN19.) See, e.g., *United Riggers Erectors v. Industrial Comm'n*, 131 Ariz. 258, 640 P.2d 189 (App.1981) (awarding benefits because incarceration was not voluntary removal from job market and there was no legislation taking away these benefits); *Bearden v. Industrial Comm'n*, 14 Ariz.App. 336, 483 P.2d 568 (1971) (holding right to workers' compensation not forfeited during incarceration if

sentence less than life because no statute so provides and this is an issue which should be determined by the legislature); *Crawford v. Midwest Steel Co.*, 517 So.2d 918 (La.App.1987) (holding claimant entitled to benefits despite incarceration because statute does not provide otherwise); *DeMars v. Roadway Express, Inc.*, 99 Mich.App. 842, 298 N.W.2d 645, 647 (1980) (affirming total disability compensation despite felony conviction because denial of benefits under such a situation "is not the province of the Board or the judicial branch"); *Forshee & Langley Logging v. Peckham*, 100 Or.App. 717, 788 P.2d 487 (1990) (holding claimant entitled to temporary total disability during incarceration because he was never medically stationary nor released for work during incarceration); *Last v. MSI Constr. Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991) (awarding incarcerated claimant temporary total disability benefits); *In re Spera*, 713 P.2d 1155 (Wyo.1986) (holding under contract principles incarcerated claimant should not be denied temporary total benefits, which under the statute terminate only when the worker recovers and regains his earning power). *But see State ex rel. Grennan v. Barry*, 71 Ohio App.3d 385, 594 N.E.2d 51 (1991) (holding employee not entitled to compensation during period of incarceration); *State ex rel. Ashcraft v. Industrial Comm'n*, 34 Ohio St.3d 42, 517 N.E.2d 533 (1987) (denying temporary total disability compensation because incarceration was "voluntary" act removing claimant from work force).

(FN20.) Similarly, the ALJ denied King benefits on the basis his incarceration was an intervening cause.

(FN21.) The absence of specific legislation providing for suspension of workers' compensation benefits upon a claimant's incarceration is a significant factor to courts from other jurisdictions awarding benefits to temporarily disabled incarcerated claimants. *See Bearden*, 14 Ariz.App. at 341-42, 483 P.2d at 573-74 (deciding terminating temporary total benefits was matter of public policy which should be determined by legislature); *Forshee*, 788 P.2d at 488 (reasoning legislature's province to restrict ability of incarcerated

individuals to collect workers' compensation); *In re Spera*, 713 P.2d 1155 (Wyo.1986) (holding determination of when payments should be suspended is matter that should be left to legislature).

Likewise, the absence of legislation providing for suspension of workers' compensation benefits during incarceration is also important in the analysis of courts which awarded benefits to permanently disabled claimants who were incarcerated. *See United Riggers*, 640 P.2d at 193 (awarding benefits because incarceration was not voluntary removal from job market and there was no legislation taking away these benefits); *Crawford v. Midwest Steel Co.*, 517 So.2d 918 (La.App.1987) (holding claimant entitled to benefits despite incarceration because statute does not provide otherwise). *See also DeMars*, 298 N.W.2d at 647 (affirming total disability compensation despite felony conviction because denial of benefits under such a situation "is not the province of the Board or the judicial branch"). *But see Packard v. Donald Sperry & Sons*, 331 N.Y.S.2d 126, 39 A.D.2d 622 (N.Y.App.Div.1972) (holding claimant not entitled to compensation during incarceration); *White v. Industrial Comm'n*, No. L-92-040, 1992 WL 348158 (Ohio App. Nov. 27, 1992) (suspending permanent total disability benefits because incarceration amounted to a voluntary abandonment of work).

*1297_ (FN22.) *See, e.g., White v. Industrial Comm'n*, No. L-92-040, 1992 WL 348158 (Ohio App. Nov. 27, 1992); *Wood v. Beatrice Foods Co.*, 813 P.2d 821 (Colo.App.1991); *Jones v. Department of Corrections*, 185 Mich.App. 65, 460 N.W.2d 229 (1990).

(FN23.) For example, under such a rule, an insurer could terminate a claimant's temporary total disability compensation if only one surgeon had the skill to perform corrective surgery but was unable to schedule surgery for three months or was unavailable because he was called to active service as a member of the military reserves.

*150 918 P.2d 150

Court of Appeals of Utah.

Warren HOSKINGS, Petitioner,

v.

INDUSTRIAL COMMISSION OF UTAH and Salt

Lake City

Corporation, Respondents.

No. 950236-CA.

May 31, 1996.

Certiorari Denied Oct. 17, 1996.

Claim for workers' compensation benefits was filed. Industrial Commission reversed administrative law judge's (ALJ) award of permanent total disability benefits. Claimant sought judicial review. The Court of Appeals, Orme, P.J., held that: (1) Commission's finding, under odd lot doctrine, that claimant could be rehabilitated was not supported by residuum of nonhearsay evidence, and (2) employer failed to meet its burden, under odd lot doctrine, of proving existence of regular, steady work that claimant could perform.

Reversed and remanded with instructions.

Billings, J., concurred in result.

West Headnotes

[1] Workers' Compensation ☞ 1820

413 ----

413XVI Proceedings to Secure Compensation

413XVI(S) Review by Board or Commission

413k1820 Questions of Law or Fact and Findings.

Although administrative law judge (ALJ) initially hears evidence, Industrial Commission is ultimate fact finder in workers' compensation proceeding.

[2] Workers' Compensation ☞ 847

413 ----

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)2 Total Incapacity

413k847 Incapacity for Work or Employment Generally.

Under "odd lot doctrine," Industrial Commission may find permanent total disability when relatively small percentage of impairment caused by industrial accident is combined with other factors to render workers' compensation claimant unable to obtain suitable employment.

[3] Workers' Compensation ☞ 847

413 ----

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)2 Total Incapacity

413k847 Incapacity for Work or Employment Generally.

[See headnote text below]

[3] Workers' Compensation ☞ 1375

413 ----

413XVI Proceedings to Secure Compensation

413XVI(L) Presumptions and Burden of Proof

413XVI(L)2 Particular Matters

413k1373 Amount and Period of Compensation

413k1375 Extent and Duration of Injury or Disability.

In workers' compensation proceeding, finding of permanent total disability under odd lot doctrine requires following: (1) employee must prove that he or she cannot perform duties required in his or her occupation, (2) after being referred to Division of Rehabilitation Services (DRS) by Industrial Commission, employee, with assistance of DRS, must prove that he or she cannot be rehabilitated, (3) if employee meets first two requirements, burden then shifts to employer to prove existence of regular, steady work employee can nonetheless perform, taking into account such factors as employee's age, mental capacity, and education.

[4] Workers' Compensation ☞ 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in General

413k1639 Permanent Disability.

In meeting its burden under odd lot doctrine, for purposes of avoiding finding of permanent total disability in workers' compensation proceeding, it is insufficient for employer to simply show that employee is generally capable of performing some type of work; rather, in order to prove existence of regular and steady work employee can perform, employer must prove that regular, dependable work is available to employee.

[5] Workers' Compensation ☞ 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in General

413k1639 Permanent Disability.

In order to prove existence of regular and steady

work employee can perform, for purposes of satisfying its burden under odd lot doctrine and thereby avoiding finding of permanent total disability in workers' compensation proceeding, employer must introduce evidence of actual job within reasonable distance from employee's home which he or she is able to perform or for which he or she can be trained, and employer must also show that employee has reasonable opportunity to be employed at that job.

[6] Workers' Compensation ☞ 1385

413 ----

413XVI Proceedings to Secure Compensation

413XVI(M) Admissibility of Evidence

413k1385 Hearsay.

Hearsay evidence, even if objected to, is admissible in administrative hearing before Industrial Commission; however, Commission's findings of fact cannot be based exclusively on hearsay evidence. U.C.A.1953, 35-1-88.

[7] Workers' Compensation ☞ 1939.4(3)

413 ----

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12A Questions of Law or Fact, Findings, and Verdict

413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator

413k1939.4 Sufficiency of Evidence in Support

413k1939.4(3) Competent Evidence.

To support Industrial Commission's findings in workers' compensation proceeding, under residuum rule, there must be residuum of evidence, legal and competent in court of law.

[8] Administrative Law and Procedure ☞ 462

15A ----

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(D) Hearings and Adjudications

15Ak458 Evidence

15Ak462 Weight and Sufficiency.

Residuum rule requires that each finding of fact made by administrative agency be supported by residuum of legally competent evidence.

[9] Workers' Compensation ☞ 1385

413 ----

413XVI Proceedings to Secure Compensation

413XVI(M) Admissibility of Evidence

413k1385 Hearsay.

[See headnote text below]

[9] Workers' Compensation ☞ 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in General

413k1639 Permanent Disability.

Report prepared by private rehabilitation firm concerning whether workers' compensation claimant could be rehabilitated was hearsay evidence, and therefore, under residuum rule, could not form sole basis for Industrial Commission's factual finding regarding claimant's potential for rehabilitation, where author of report never testified at hearing before administrative law judge (ALJ) or Industrial Commission. U.C.A.1953, 35-1-67 (Repealed); Rules of Evid., Rule 801.

[10] Workers' Compensation ☞ 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in General

413k1639 Permanent Disability.

Industrial Commission's finding, under odd lot doctrine, that workers' compensation claimant, a former city firefighter, could be rehabilitated was not supported by residuum of nonhearsay evidence, where only supporting nonhearsay evidence was that claimant had been able to work for few months during two summers as fire marshall in national park located hundreds of miles away from claimant's permanent residence. Industrial Commission. U.C.A.1953, 35-1-67 (Repealed).

[11] Workers' Compensation ☞ 1791

413 ----

413XVI Proceedings to Secure Compensation

413XVI(Q) Award or Judgment

413k1788 Conclusiveness and Effect

413k1791 Matters Concluded.

Under former workers' compensation statute governing award of permanent total disability benefits, once Division of Rehabilitation Services (DRS) certified to Industrial Commission *150 in writing that claimant could not be rehabilitated, Commission was unable to revisit issue of rehabilitation or consider other evidence regarding claimant's rehabilitation. U.C.A.1953, 35-1-67 (Repealed).

[12] Workers' Compensation ☞ 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in
General

413k1639 Permanent Disability.

For purposes of determining whether workers' compensation claimant suffered permanent total disability, employer failed to meet its burden, under odd lot doctrine, of proving existence of regular, steady work that claimant could perform, though report prepared by private rehabilitation firm identified several job titles which existed in region of claimant's residence, as there was no evidence in report that such jobs were actually available to claimant or that claimant had reasonable opportunity to be employed in such jobs.

[13] Workers' Compensation § 1639

413 ----

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)9 Amount and Period of Compensation

413k1635 Compensation for Total Disability in
General

413k1639 Permanent Disability.

In order to sustain its burden under odd lot doctrine, for purposes of avoiding finding of permanent total disability, employer must prove that actual job is regularly and continuously available to workers' compensation applicant, within reasonable proximity of his or her usual residence or residences, and that applicant has reasonable opportunity to be employed in particular job.

*152 James R. Black, Salt Lake City, for Petitioner.

Alan L. Hennebold, Frank Nakamura, and Erie V. Boorman, Salt Lake City, for Respondents.

Before ORME, DAVIS and BILLINGS, JJ.

OPINION

ORME, Presiding Judge:

Petitioner Warren Hoskings seeks review of an Industrial Commission order that overturned an administrative law judge's decision granting him permanent total disability benefits. We reverse the Commission's order and remand with instructions to reinstate the administrative law judge's decision.

FACTS

[1] We recite the facts as found by the Commission. (FN1) In 1966, Hoskings began work as a fireman for Salt Lake City Corporation. He was promoted to lieutenant in 1974, and then to captain in the early 1980's.

In 1980, Hoskings injured his left ankle while fighting a fire. As a result of this injury, he underwent surgery but continued to experience pain. In April 1986, Hoskings reinjured his left ankle in the course of his employment. The next day, he sought medical attention and was diagnosed with an acute left ankle sprain and calcaneous/cuboid joint problem. He was later diagnosed with the additional condition of traumatic osteoarthritis.

Hoskings did not miss any time from work as a result of this injury. However, after the injury, he experienced chronic pain and difficulty in walking. Various physicians examined him and attempted to treat his injuries with conservative remedies. However, none of these treatments produced any significant improvement in Hoskings's left ankle.

In 1988, Hoskings took early retirement from Salt Lake City Corporation, apparently to take advantage of an attractive early retirement package. At the time of his retirement, Hoskings did not inform Salt Lake City Corporation that his decision to retire was related in any manner to his left ankle injury. However, he testified before an administrative law judge in this proceeding that his injury did contribute to his decision to retire early. There is no evidence that his work performance was unsatisfactory prior to his retirement.

During the summers of 1990 and 1991, after his retirement, Hoskings worked for Hamilton Stores as a fire marshall in Yellowstone National Park. A significant portion of his work day consisted of driving in a vehicle from one store to another, making inspections and teaching fire safety procedures. Hoskings reported no difficulties in performing the duties of this job. However, when the job was changed to a year-round position, he chose to resign because he believed the cold winter temperatures might aggravate his ankle pain.

INDUSTRIAL COMMISSION PROCEEDINGS

In 1990, Hoskings filed an Application for Hearing with the Industrial Commission. In his Application for Hearing, he claimed that Salt Lake City Corporation had refused to *153 pay him medical expenses, temporary total disability benefits, permanent partial

disability benefits, and permanent total disability benefits due him by reason of his ankle injury. An evidentiary hearing before an administrative law judge was held on January 8, 1992. After the hearing, the ALJ referred the matter to a medical panel. The medical panel found that Hoskings's foremost orthopedic problem was the calcaneus/cuboid arthritis of his left ankle. The medical panel opined that the origin of this problem was definitely industrial and that it had worsened since the 1986 industrial accident.

The ALJ then made a tentative finding of permanent total disability and, as required by statute, referred the case to the Division of Rehabilitation Services (DRS) for an evaluation of Hoskings's susceptibility to rehabilitation. (FN2) According to the testimony of Frank Miera, the rehabilitation counselor assigned to evaluate Hoskings's case, DRS performed a one-week work evaluation during November 1992. Mr. Miera testified that Hoskings fully cooperated with the DRS during the evaluation and was very truthful and honest about his condition throughout the process. The evaluation was conducted by DRS rehabilitation counselors trained to administer such evaluations. Mr. Miera testified that in the regular course of his work as a DRS rehabilitation counselor, he refers applicants to trained DRS personnel and relies on their written reports in assessing an applicant's potential for rehabilitation. After the evaluation, Mr. Miera requested Hoskings to update him periodically on his condition. Mr. Miera testified that Hoskings did update him on his condition and reported that he was having the same problems with his left ankle. Mr. Miera concluded that it was not feasible for Hoskings to enter into a rehabilitation program.

Salt Lake City Corporation then requested that Hoskings undergo a vocational evaluation to be performed by Intracorp, a private rehabilitation firm, which evaluation was completed during December 1993. Salt Lake City Corporation submitted the Intracorp report to the ALJ.

The Intracorp report concluded that Hoskings could be rehabilitated. The Intracorp evaluator, Jim Floyd, found that Hoskings demonstrated the capacity to learn and would be successful in formal training to prepare for more challenging and higher paying jobs. In his report, Mr. Floyd noted that Hoskings had improved physical stamina and that DRS's finding of poor physical stamina was no longer accurate. In addition, Mr. Floyd identified several jobs that Hoskings would qualify for given some limited training or schooling. Finally, the Intracorp report identified the regions of Utah that would provide the greatest opportunity for

employment in the identified jobs.

After receiving the DRS letter, Miera's testimony, and the Intracorp report, the ALJ entered her Findings of Fact, Conclusions of Law and Order. Applying the "odd lot" doctrine, the ALJ first found that Hoskings had met his burden of proving that the 1986 industrial accident caused his ankle injury and that he could not return to work as a fire fighter. Next, the ALJ found that Hoskings met his burden of proving he could not be rehabilitated. The ALJ then concluded that Salt Lake City Corporation had not met its burden to show that regular steady work was nonetheless available to Hoskings. Accordingly, the ALJ held that Hoskings was entitled to an award of permanent total disability benefits.

Salt Lake City Corporation filed a Motion for Review with the Commission. The Commission ***154** reversed the ALJ's decision and held that Hoskings was not entitled to permanent total disability benefits. In reaching its decision, the Commission found that Hoskings could be rehabilitated and that regular, dependable employment was available to him in other branches of the labor market.

On appeal, Hoskings argues that the Commission misinterpreted the "odd lot" doctrine by failing to apply the correct burdens of proof to the evidence introduced by the parties. In addition, he argues that the Commission's findings are not supported by competent legal evidence. Before turning to the specific claims, we review the legal principles applicable to this case, i.e., the "odd lot" doctrine and the residuum rule.

"ODD LOT" DOCTRINE

[2][3] Under the "odd lot" doctrine, (FN3) the Commission may find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render the claimant unable to obtain suitable employment. See *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1326 (Utah 1986); *Marshall v. Industrial Comm'n*, 681 P.2d 208, 212 (Utah 1984). A finding of permanent total disability under the odd lot doctrine requires the following: (1) the employee must prove that he or she cannot perform the duties required in his or her occupation; (2) after being referred to the Division of Rehabilitation Services by the Industrial Commission, the employee, with the assistance of the DRS, must prove that he or she cannot be rehabilitated; (3) if the employee meets the first two requirements, the burden then shifts to the employer to prove the

existence of regular, steady work the employee can nonetheless perform, taking into account such factors as the employee's age, mental capacity, and education. *Hardman*, 725 P.2d at 1326-27.

[4][5] In meeting its burden, it is insufficient for the employer to simply show that the employee is generally capable of performing some type of work. Rather, in order to prove the existence of regular and steady work the employee can perform, the employer must prove that "regular, dependable work [is] available" to the employee. *Marshall*, 681 P.2d at 212 (emphasis added). This requires the employer to introduce evidence of "an actual job within a reasonable distance from [the employee's] home which he is able to perform or for which he can be trained." *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977) (construing Idaho statute). See *ARA Servs., Inc. v. Industrial Comm'n*, 226 Ill.App.3d 225, 168 Ill.Dec. 756, 761-62, 590 N.E.2d 78, 83-84 (1992) (holding burden shifts to employer to show some kind of suitable work is available to claimant); *Durbin v. State Farm Fire & Cas. Co.*, 558 So.2d 1257, 1260 (La.App.1990) (requiring employer to prove some form of gainful occupation is regularly and continuously available to employee within reasonable proximity of his residence). Moreover, the employer must also show that the employee "has a reasonable opportunity to be employed at that job." *Lyons*, 565 P.2d at 1364. (FN4)

*155 RESIDUUM RULE

[6][7] Utah Code Ann. § 35-1-88 (1994) provides that "[n]either the Commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence." Therefore, hearsay evidence, even if objected to, is admissible in an administrative hearing before the Commission. *Industrial Power Contractors v. Industrial Comm'n*, 832 P.2d 477, 478 (Utah App.1992). However, the Commission's findings of fact "cannot be based exclusively on hearsay evidence." *Yacht Club v. Utah Liquor Control Comm'n*, 681 P.2d 1224, 1226 (Utah 1984) (emphasis in original). To support the Commission's findings, "there must be a residuum of evidence, legal and competent in a court of law." *Hackford v. Industrial Comm'n*, 11 Utah 2d 312, 315, 358 P.2d 899, 901 (1961).

[8] The residuum rule requires that each finding of fact made by an administrative agency be supported by a residuum of legally competent evidence. See *Yacht Club*, 681 P.2d at 1227; *Industrial Power*, 832 P.2d at 479; *Wagstaff v. Department of Employment Sec.*, 826

P.2d 1069, 1072 (Utah App.1992); *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 32-33 (Utah App.1991). For example, in *Wagstaff*, a former Air Force civilian employee, discharged for drug use, challenged a decision of the Board of Review of the Industrial Commission denying him unemployment compensation benefits. The employee claimed that since the Air Force disciplinary regulations in effect at the time of his drug use did not sanction discharge for first-time drug offenders, he was not terminated for just cause. 826 P.2d at 1070-71.

In evaluating whether the employee was discharged for just cause, the Commission made a factual finding that he had used cocaine during his lunch break on one occasion. *Id.* at 1072. The Commission based its finding on an internal Air Force investigation report, as well as on the employee's own admission in testimony to the one-time drug use. *Id.* at 1071. The report contained the employee's admission to the one-time drug use, obtained in the course of investigation, as well as his coworkers' statements concerning the incident. *Id.* However, the report also contained statements from co-workers regarding the employee's drug use on other occasions. *Id.* In finding that the employee had engaged in drug use on one occasion, the Commission also made reference to the fact that the majority of the Board was not entirely persuaded that he had used drugs only on the one occasion. *Id.* at 1072 n. 3.

This court held that the Commission's finding of a single incident of drug use was supported by the employee's own admissions, and thus was supported by a residuum of competent, non-hearsay evidence. *Id.* at 1072. See Utah R. Evid. 801(d)(2). However, although no actual finding of additional drug use was made by the Commission, this court was concerned that even the subtle reference to additional drug use contained in the Commission's written opinion, which could only be supported by the co-workers' hearsay statements not buttressed by a residuum of competent legal evidence, tainted its decision. *Id.* Therefore, in reviewing whether the employee's termination was for just cause, we evaluated the Board's decision solely with reference to the employee's single admitted instance of drug use. *Id.*

Similarly, in this case, we must determine whether the Commission's findings of fact regarding rehabilitation and job availability are supported by a residuum of competent, nonhearsay evidence. If the Commission's findings of fact are not supported by a residuum of such evidence, Hoskings is entitled to appropriate relief.

ANALYSIS

Under the odd lot doctrine, as explained above, the employee has the initial burden to prove he or she cannot perform the duties required in his or her occupation and that he or she cannot be rehabilitated. If the employee fails in meeting these burdens, the employer's burden to prove the existence of actual work the employee can perform is not *156 triggered and we need not evaluate whether that burden was actually met.

In its order, the Commission reversed the ALJ's decision and found that Hoskings could be rehabilitated. Therefore, we first review the Commission's finding regarding Hoskings's potential for rehabilitation. (FN5)

A. Rehabilitation

[9][10] In finding that Hoskings could be rehabilitated, the Commission relied on the conclusion to that effect in the Intracorp report. However, this report clearly meets the definition of hearsay under Rule 801, Utah Rules of Evidence. (FN6) The author of the report, Jim Floyd, never testified at a hearing before the ALJ or the Commission. Therefore, although the Intracorp report was admissible in the Commission's proceedings, it could not form the sole basis for the Commission's factual finding regarding Hoskings's potential for rehabilitation. Consequently, the Commission's factual finding that Hoskings could be rehabilitated cannot be sustained unless there is some other, non-hearsay evidence to support it.

In its order, the Commission stated that "Intracorp's conclusion [regarding rehabilitation] is corroborated by the fact that Hoskings found other work at Hamilton Stores and successfully performed his employment duties there." Salt Lake City Corporation argues that this fact supports the Commission's decision and provides the requisite residuum of competent legal evidence. However, this fact is essentially irrelevant to the issue of whether Hoskings could be rehabilitated into a well-known branch of the labor market.

Hoskings testified at the evidentiary hearing that Hamilton Stores was seeking someone to work year round, including the winter months. Hoskings testified he was unable to work during the winter months because he could not stand the pain in his foot and ankle caused by the cold weather. Salt Lake City Corporation presented no contradicting evidence on this point. The mere fact that Hoskings was able to work for a few months during the summers of 1990 and

1991 as a fire marshall in Yellowstone National Park, hundreds of miles from Salt Lake City and his permanent residences in Ivins and Vernal, Utah, does not support a finding that he can be successfully rehabilitated into any well-known branch of the labor market. (FN7)

[11] Although we base our decision regarding rehabilitation on the residuum rule, which the parties have addressed in their briefs, there is an additional basis on which our decision could be premised. The applicable law regarding permanent total disability at the time of Hoskings's April 16, 1986, injury read, in pertinent part, as follows:

If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the [Division of Rehabilitation Services] for rehabilitation training.... If the division ... certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division ... in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission *shall* order that there be paid to the employee weekly benefits....

Utah Code Ann. § 35-1-67 (1974)(repealed 1988 Utah Laws, ch.116, § 4) (emphasis added). *157 A plain reading of this statute suggests the determination of rehabilitation is vested in DRS, with no discretion left with the Commission to revisit the question and decide it anew. Therefore, it would appear that once DRS certified to the Commission in writing that Hoskings could not be rehabilitated, all inquiry into the issue of rehabilitation--a question delegated by the Legislature not to the Commission, but to DRS--should have ended. As we read the statute, the Commission was unable to revisit the issue of rehabilitation or to consider other evidence, such as the Intracorp report presented by Salt Lake City Corporation. (FN8)

B. Job Availability

Once it is determined that an employee cannot be rehabilitated--and such is the conclusion that must be drawn about Hoskings on the record before us--the burden then shifts to the employer to prove, notwithstanding the employee's general inability to be rehabilitated, the "existence of regular, steady work the employee can perform, taking into account such factors as the employee's age, mental capacity and education." *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323, 1326-27 (Utah 1986). However, as indicated above, the employer must introduce evidence of "an

actual job within a reasonable distance from [the employee's] home which he is able to perform or for which he can be trained." *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977). In addition, the employer must also show that the employee "has a reasonable opportunity to be employed at that job." *Id.*

[12] In this case, the Commission relied exclusively on the Intracorp report to find that regular, dependable work was available to Hoskings. However, and totally aside from residuum rule concerns, a review of the substance of the Intracorp report reveals that it fails to prove that an actual job was available to Hoskings. Moreover, the Intracorp report fails to provide any analysis regarding whether or not Hoskings had a reasonable opportunity to be employed at any particular job, due regard being had for his age, mental capacity, and education.

In assessing Hoskings's employability, Mr. Floyd, the author of the Intracorp report, ran three computer searches and two manual searches. In the first computer search, for occupations with skills that are directly transferrable from those of a firefighter, only one occupation emerged: surveillance-system monitor. The second computer search revealed three occupations that Hoskings could allegedly perform given some limited schooling or short term training. Finally, a third computer search was conducted which considered less closely related occupations using the same tools and machinery that Hoskings had used in his previous jobs. Two job titles emerged from this final computer search.

After the computer searches were finished, the report indicates that two manual searches were conducted. The first search considered Hoskings's entire work history, including his military experience. In this search, three occupations emerged. Finally, using the Utah Department of Employment Security publication, "Occupations in Demand," for the period of January-June, 1993, four job titles were identified.

Although the searches contained in the report identified several job titles that existed *158. in the Wasatch Front region, no evidence shows that these jobs were actually available to Hoskings. First, nowhere in the report is there a meaningful discussion of the duties required in the occupations described. The report lacks any analysis of whether Hoskings could actually perform the duties required in these occupations given his disabilities. Furthermore, the report fails to show that these particular occupations are actually available, i.e., that the demand for such

jobs has not been fully met by the workforce. Moreover, no evidence is contained in the report that would indicate Hoskings himself had a reasonable opportunity to be employed in these jobs, i.e., assuming some of these positions are available in general, what is the realistic prospect that an employer will choose a man in his mid-fifties with a bad ankle and other health problems to fill one of them?

[13] Although the report claims to have considered "job availability" in the computer searches, no discussion as to what is meant by this term is contained in the report. In describing the second manual search, the report alleges that the four occupations found are "reasonably available in southwestern or northeastern regions of Utah." However, the report contains no evidence that these particular jobs are actually available to a person with the same disabilities as Hoskings. It is insufficient for Salt Lake City Corporation to allege that a particular occupation is generally available to the public at large, without providing further evidence that the particular occupation is actually available to Hoskings. In other words, in order to sustain its burden under the odd lot doctrine, an employer must prove that an actual job is regularly and continuously available to the applicant, within a reasonable proximity of his or her usual residence or residences, and that the applicant has a reasonable opportunity to be employed in the particular job. (FN9)

Although we conclude that Salt Lake City Corporation failed in a more general way to meet its burden in this regard under the odd lot doctrine, we also conclude that the Commission's finding as to job availability was, at a more technical level, not based on a residuum of competent legal evidence.

The Commission based its finding that other work was available to Hoskings exclusively on the Intracorp report. However, as we indicated above, the Intracorp report is hearsay. Thus, although this report was admissible during the administrative proceedings held before the Commission, it cannot be the sole basis for the Commission's finding. Rather, the Commission must base its findings on legally competent evidence--a finding cannot be based solely on hearsay.

CONCLUSION

In view of the statute regarding permanent total disability in effect at the time of Hoskings's injury, it may have been improper for the Commission to consider the Intracorp report on the issue of rehabilitation. If not, the Commission nonetheless

erred, given the residuum rule, in finding that Hoskings could be rehabilitated. Further, Salt Lake City Corporation failed to sustain its burden under the odd lot doctrine to prove the existence of a regular, steady job that was actually available to Hoskings. Alternatively, in light of the residuum rule, the Commission erred in finding that Salt Lake City Corporation had met this burden.

Accordingly, we reverse the Commission's order and remand with instructions to reinstate the administrative law judge's decision.

DAVIS, Associate P.J., concurs.

BILLINGS, J., concurs in result.

(FN1.) Although an administrative law judge initially hears the evidence, the Commission is the ultimate fact finder. *Virgin v. Board of Review*, 803 P.2d 1284, 1287 (Utah App.1990).

(FN2.) The applicable law regarding permanent total disability, in effect at the time of Hoskings's second injury, read, in pertinent part, as follows:

If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation [since renamed the Division of Rehabilitation Services] under the state board of education for rehabilitation training.... If the division of vocational rehabilitation ... certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits....

Utah Code Ann. § 35-1-67 (1974)(repealed 1988 Utah Laws, ch.116, § 4).

(FN3.) The term "odd lot" was first used by Judge Moulton in the case of *Cardiff Corp. v. Hall*, 1 K.B. 1009 (1911):

[T]here are cases in which the onus of sh[o]wing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market--if in other words

the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market, I think it is incumbent upon the employer to sh[o]w that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must sh[o]w that a customer can be found who will take it.

Id. at 1020-21 (quoted in 1C Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 57.51(b), at 10-330 (1995)).

*158_ (FN4.) After his retirement, Hoskings moved from Salt Lake City, Utah. He now has homes in Ivins and Vernal, Utah. As the Idaho Supreme Court stated, "[a] claimant should not be permitted to achieve permanent disability by changing his place of residence." *Lyons*, 565 P.2d at 1364 n. 3. Therefore, in this case, in considering whether Salt Lake City Corporation met its burden, evidence of job availability in Salt Lake City, Ivins, and Vernal, Utah, would all be germane. *See id.*

(FN5.) The first prong of the odd lot doctrine, whether the employee can perform the duties required in his or her occupation, is not at issue in this appeal.

(FN6.) Utah R. Evid. 801 provides in pertinent part:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

* * *

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(FN7.) One of the motives behind the "odd lot" doctrine is a desire to encourage efforts by a claimant to rehabilitate himself. *See* 1C Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 57.51(f), at 10-357 to -359 (1995). Therefore, courts are careful to avoid penalizing or discouraging a claimant from attempting to rehabilitate himself in some type of special work setting. *Id.* *See also* note 4.

(FN8.) To the extent this interpretation raises a possible due process concern, as suggested by Salt

Lake City Corporation at oral argument, we note that the Legislature has amended this statute to allow for a mandatory hearing regarding the issue of rehabilitation. Utah Code Ann. § 35-1-67 (1994) currently reads, in pertinent part, as follows:

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

...

(iii) the commission, after notice to the parties, holds

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

(FN9.) Of course, the employer does not become an employment agency for the applicant. The employer is not required to find a particular position for an applicant, much less arrange for an interview. Rather, the employer must only prove that an actual job does exist in the usual residence or residences of the applicant and that he or she has a reasonable opportunity to be employed in that job.

Appendix B



LABOR COMMISSION

Michael O. Leavitt
Governor

R. Lee Ellertson
Commissioner

160 East 300 South, 3rd Floor
PO Box 146600
Salt Lake City, Utah 84114-6600
(801) 530-6880
(800) 530-5090
(801) 530-6390 (FAX)
(801) 530-7685 (TDD)

April 11, 2002

UTAH COURT OF APPEALS
450 SOUTH STATE
P O BOX 140230
SALT LAKE CITY UT 84114-0230

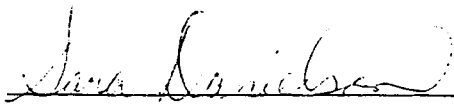
RE: Utah Disaster Kleenup and Workers Compensation Fund v. Lori McCoy and The
Labor Commission of Utah

Labor Commission Case No. 00-0511
Court of Appeals Case No. 20020234-CA

Clerk of the Court:

We are transmitting to you the index of the complete file in the above entitled claim now
pending on Petition For Review before the Utah Court of Appeals.

The Utah Labor Commission


Sara Danielson
The Utah Labor Commission
Legal Support Specialist

Enclosure

CERTIFICATE OF RECORD

Re: Utah Disaster Kleenup and Workers Compensation Fund v. Lori McCoy and The Labor Commission of Utah

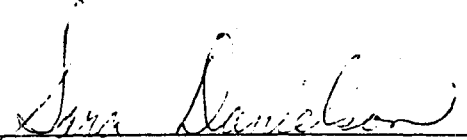
Labor Commission Case No. 00-0511
Court of Appeals Case No. 20020234-CA

I, Sara Danielson, Legal Support Specialist for the Utah Labor Commission, do hereby certify that the foregoing instruments numbered 00001 through 00263 inclusive, contain the original documents in the above-entitled cause, including true and correct copies of the original Orders made in the proceedings at the Labor Commission. These documents constitute the whole record of the proceedings as the same appear of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Labor Commission this 11th day of April, 2002.

The Utah Labor Commission




Sara Danielson
The Utah Labor Commission
Legal Support Specialist

Utah Disaster Kleenup and Workers Compensation Fund

v.

Lori McCoy and The Labor Commission of Utah

Labor Commission Case No. 00-0511

Court of Appeals Case No. 20020234-CA

Record Index

Application for Hearing (6/12/00)	1 - 6a
Request for Answer (6/23/00)	7 - 8
Answer (7/17/00)	9 - 10
Notice of Deposition (7/31/00)	11 - 12
Notice of Hearing (8/22/00)	13
Change of Address (10/4/00)	14
Notice of Cancellation (11/8/00)	15
Notice of Hearing (11/20/00)	16
Hearing Exhibit	17
Letter to ALJ from Atkin (3/13/01)	18 - 20
Letter to ALJ from Miller (3/21/01)	21 - 30
Letter to ALJ from Miller (3/26/01)	31 - 40
Letter to ALJ from Atkin (3/30/01)	41 - 43
Letter to ALJ from Atkin (5/17/01)	44 - 52
Letter to ALJ from Miller (5/18/01)	53 - 54
Letter to Atkin from ALJ (5/30/01)	55
Findings of Fact, Conclusions of Law and Order (7/17/01)	56 - 65

Request for Extension to file Motion for Review (6/4/01)	66
Order Granting Extension (8/2/01)	67 - 68
Letter to ALJ from Atkin (8/2/01)	69
Motion for Review (9/17/01)	70 - 198
Change of Address (9/28/01)	199
Petitioner's Response to Motion for Review (10/9/01)	200 - 233
Memorandum to General Counsel from ALJ (10/12/01)	234
Order Denying Motion for Review (1/31/02)	235 - 240
Motion for Reconsideration (2/20/02)	241 - 247
Order Extending Time for Reconsideration (2/25/02)	248 - 249
Letter to ALJ from Miller (2/28/02)	250 - 252
Petitioner's Response to Motion for Reconsideration (3/11/02)	253 - 257
Order Denying Request for Reconsideration (3/28/02)	258 - 259
Petition for Writ of Review (3/26/02)	260 - 262
Medical Records Exhibit	263
Separately bound and paginated	