

2006

Nathan H. Merrill v. Utah Labor Commission,
Vermax of Florida, Inc. dba Dakora Cabinets;
Workers Compensation Fund; and Wausau
Business Insurance : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

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NATHAN H. MERRILL :

Petitioner/Appellant, :

v. :

UTAH LABOR COMMISSION, VERMAX
OF FLORIDA, INC. dba DAKOTA
CABINETS; WORKERS
COMPENSATION FUND; and WAUSAU
BUSINESS INSURANCE, :

Respondents/Appellees. :

Court of Appeals
Case No 20060693 CA

Labor Commission Case No. 2003-0280
Priority No. 7

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REPLY BRIEF OF PETITIONER

**PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR
COMMISSION**

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IN THE COURT OF APPEALS, STATE OF UTAH

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	:	Court of Appeals
Petitioner/Appellant,	:	Case No 20060693 CA
v.	:	
UTAH LABOR COMMISSION, VERMAX	:	Labor Commission Case No. 2003-0280
OF FLORIDA, INC. dba DAKOTA	:	Priority No. 7
CABINETS; WORKERS	:	
COMPENSATION FUND; and WAUSAU	:	
BUSINESS INSURANCE,	:	
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42 U.S.C. 4023

ARGUMENT

The Respondents have argued that the constitutionality of Section 34A-2-413(5), U.C.A. should be upheld as having a rational basis or

legitimate state purpose because the purpose of federal old age benefits is wage replacement, and hence PTD benefits and Social Security old-age benefits are part of a coordinated program to accomplish that. They have cited Harrington v. Labor Commission, 942P.2d 961 (Ut. App. 1997) in support of this proposition. Harrington held that unemployment benefits cannot be received while a person is also receiving federal old-age benefits from Social Security because both are wage replacement programs.

They have also cited a United States Supreme Court decision from 1946, Social Security Board v. Nierotko, 327 U.S. 358, 364(1946) which states that the purpose of the federal old-age benefits system of the Social Security Act is to provide wage replacement.

While in times past the Courts have held this to be a correct assessment of the law, times, as well as the program, have changed. Formerly, once a person began receiving federal old-age benefits (often called Social Security retirement benefits) if the individual continued to work, monthly benefits to be paid would be reduced depending upon the amount of employment income paid monthly. 20 CFR 404.415 (1986), 20 CFR 404.428 (1986).

The law was changed in the year 2000 by the Senior Citizen's

Freedom to Work Act (42 U.S.C. 402) and now there is absolutely no longer any reduction in federal old-age benefits due to wages earned, regardless of amount, by individuals who have reached full retirement age.

A person who has reached full retirement age (as defined in 20 CFR 404.409(a) - currently age 66) can choose to begin to receive federal old-age benefits and can choose to work as well. Under the law, chronological age and corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment. There is now no double payment that needs to be reduced, as complained by the Respondents, once full retirement age has been reached.

Yet, an injured worker at age 66 sees the Social Security disability offset end (if there was an offset at all) and full federal old-age benefits begin, and he or she does not have the option of choosing to continue to work as well – but their PTD benefits are cut by half of their monthly federal check.

We submit there is no rational basis for such a system in Utah that hurts our senior population at a time that they can least afford it.

The Respondents cite three reasons in support of their arguments that a rational basis or legitimate state interest exists:

1. Reduction of PTD benefits is in accordance with a public wage replacement system. However, as discussed above, once Social Security retirement age is reached, PTD recipients are not involved in a public wage replacement system with respect to the receipt of federal old age benefits. Also, the law does not take into account receipt of disability or pension benefits from any other source once legal retirement age has been reached.
2. The State has a legitimate interest in maintaining the financial integrity of the Utah Workers' Compensation System. Yet, there are many better ways to save the insurance carriers money than to reduce benefits due senior citizens. These include such things as safety programs to help avoid injuries, more emphasis on return to work programs, more emphasis on vocational retraining, and so on.

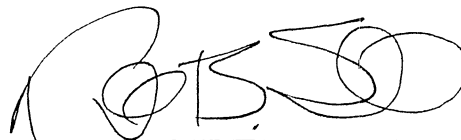
The reduction in PTD benefits is based on age alone and the purpose only serves to save the industry money – without any corresponding benefit to permanently disabled workers and their families.

We submit that under Section 34A-2-413(5), U.C.A., the disparate treatment of permanently totally disabled individuals, based upon their age alone, because they are receiving Social Security old-age benefits, is not rationally related to a legitimate government interest.

CONCLUSION

Section 34A-2-413(5) should be found to be unconstitutional as a violation of Article I, Section 14 of the Utah Constitution, Uniform Operation of Law and the 14th Amendment of the United States Constitution as it pertains to equal protection under the law. Full permanent total disability benefits, without offset, should be awarded to permanently injured workers regardless of age and receipt of federal old-age benefits.

Dated this 7th day of February, 2007.



Phillip B. Shell
Attorney for Petitioner/Appellant

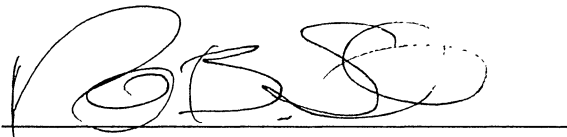
CERTIFICATE OF MAILING

I hereby certify that on the 7th day of February, 2007 I caused to be mailed by first class mail, postage pre-paid, two (2) copies of the foregoing
REPLY BRIEF OF PETITIONER to the following:

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A handwritten signature in black ink, appearing to read 'P. B. Shell', written over a horizontal line.

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