

2007

Lori Jill Leavitt v. Labor Commission, Sinclair Oil Corp., Ace American Insurance Co., Petroleum Wholesale and American Home Insurance : Brief of Appellant

Utah Court of Appeals

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David H. Tolk; Richards, Brandt, Miller and Nelson; Attorney for Appellees.

Mark D. Dean; Blackburn and Stoll; Jay L. Kessler.

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IN THE UTAH COURT OF APPEALS

LORI JILL LEAVITT,
Appellant,

APPELLANT BRIEF

v.

LABOR COMMISSION, SINCLAIR OIL
CORP., ACE AMERICAN INSURANCE
CO., PETROLEUM WHOLESALE and
AMERICAN HOME INSURANCE
Appellees.

Appellate Case No. 20070646-CA

APPELLANT BRIEF

Appeal from the July 12, 2007, final decision
of the Workforce Appeals Board denying
Appellant Worker's Compensation
benefits
(All parties contained in caption)

David H. Tolk
Attorney for Appellees
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110-2465

Jay L. Kessler
Kessler Law Office
9087 West 2700 South
Suite 9
Magna, Utah 84044

Mark D. Dean
BLACKBURN & STOLL, LC
257 East 200 South
Suite 800
Salt Lake City, Utah 84111

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UTAH APPELLATE COURTS

MAR 19 2008

Mark D. Dean
BLACKBURN & STOLL, LLP
257 East 200 South
Suite 800
Salt Lake City, Utah 84111

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LORI JILL LEAVITT,
Appellant,

**LABOR COMMISSION, SINCLAIR OIL
CORP., ACE AMERICAN INSURANCE
CO., PETROLEUM WHOLESALE and
AMERICAN HOME INSURANCE
Appellees.**

Appellate Case No. 20070646-CA

JURISDICTIONAL STATEMENT

ISSUES FOR REVIEW

1

Leavitt's injuries were not work-related, and as such was not entitled to Worker's Compensation benefits including: temporary total and temporary partial disability for both injuries; and permanent partial and permanent total disability for the December 7, 2005 injury.

The issues have been reserved for appeal because a final judgment against the Appellant by the Administrative Law Judge, and then the Utah Workforce Appeals Board took effect on July 12, 2007. A proper appeal was filed within 30 days. (See Addendum A).

STANDARDS OF REVIEW

The standard of review regarding the Board's finding of facts "is limited to determining whether they are supported by substantial evidence. Salt Lake Corp. v. Department of Employment Sec., 653 P.2d 1312 (Utah 1984).

Whether petitioner was injured in the scope and course of her employment presents a question of law which, absent a grant of discretion, this court reviews for correctness. See Morton Int'l, Inc. v. State Tax Comm'n., 588 (Utah 1991); Walls v. Industrial Comm'n., 966 (Utah App.1993).

"[F]indings of fact will be affirmed if they are 'supported by substantial evidence when viewed in light of the whole record before the court.'" Merriam v. Board of Review, , 450 (Utah App.1991) (quoting Nelson v. Department of Employment Sec., , 161 (Utah App.1990)). "Substantial evidence is that which a reasonable person 'might accept as adequate to

support a conclusion.'" *Id.* (quoting Grace Drilling Co. v. Board of Review, , 68 (Utah App.1989)). In conducting this review, we examine both sides of the record, and not simply that part of the record which supports the ALJ's findings. Tasters Ltd. v. Department of Employment Sec., , 365 (Utah App.1991).

"A question of law is reviewed by this court under a 'correction of error' standard." Brown & Root Indus. Serv. v. Industrial Comm'n, , 675 (Utah 1997) (quoting State v. Harmon, , 1199 (Utah 1995)).

STATUTORY PROVISIONS

34A-2-407. Reporting of industrial injuries -- Regulation of health care providers -- Funeral expenses.

(1) As used in this section, "physician" is as defined in Section **34A-2-111**.

(2) (a) Any employee sustaining an injury arising out of and in the course of employment shall provide notification to the employee's employer promptly of the injury.

(b) If the employee is unable to provide the notification required by Subsection (2)(a), the following may provide notification of the injury to the employee's employer:

(i) the employee's next-of-kin; or

(ii) the employee's attorney.

(c) An employee claiming benefits under this chapter, or Chapter 3, Utah Occupational Disease Act, shall comply with rules adopted by the commission regarding disclosure of medical records of the employee

medically relevant to the industrial accident or occupational disease claim.

(3) (a) An employee is barred for any claim of benefits arising from an injury if the employee fails to notify within the time period described in Subsection (3)(b):

- (i) the employee's employer in accordance with Subsection (2); or
- (ii) the division.

(b) The notice required by Subsection (3)(a) shall be made within:

- (i) 180 days of the day on which the injury occurs; or
- (ii) in the case of an occupational hearing loss, the time period specified in Section **34A-2-506**.

(4) The following constitute notification of injury required by Subsection (2):

(a) an employer's or physician's injury report filed with:

- (i) the division;
- (ii) the employer; or
- (iii) the employer's insurance carrier; or

(b) the payment of any medical or disability benefits by:

- (i) the employer; or
- (ii) the employer's insurance carrier.

(5) (a) In the form prescribed by the division, each employer shall file a report with the division of any:

- (i) work-related fatality; or
- (ii) work-related injury resulting in:
 - (A) medical treatment;

(B) loss of consciousness;

(C) loss of work;

(D) restriction of work; or

(E) transfer to another job.

(b) The employer shall file the report required by Subsection (5)(a) within seven days after:

(i) the occurrence of a fatality or injury;

(ii) the employer's first knowledge of the fatality or injury; or

(iii) the employee's notification of the fatality or injury.

(c) (i) An employer shall file a subsequent report with the division of any previously reported injury that later results in death.

(ii) The subsequent report required by this Subsection (5)(c) shall be filed with the division within seven days following:

(A) the death; or

(B) the employer's first knowledge or notification of the death.

(d) A report is not required to be filed under this Subsection (5) for minor injuries, such as cuts or scratches that require first-aid treatment only, unless:

(i) a treating physician files a report with the division in accordance with Subsection (9); or

(ii) a treating physician is required to file a report with the division in accordance with Subsection (9).

(6) An employer required to file a report under Subsection (5) shall provide the employee with:

(a) a copy of the report submitted to the division; and

(b) a statement, as prepared by the division, of the employee's rights and responsibilities related to the industrial injury.

(7) Each employer shall maintain a record in a manner prescribed by the division of all:

(a) work-related fatalities; or

(b) work-related injuries resulting in:

(i) medical treatment;

(ii) loss of consciousness;

(iii) loss of work;

(iv) restriction of work; or

(v) transfer to another job.

(8) (a) Except as provided in Subsection (8)(b), an employer who refuses or neglects to make reports, to maintain records, or to file reports with the division as required by this section is:

(i) guilty of a class C misdemeanor; and

(ii) subject to a civil assessment:

(A) imposed by the division, subject to the requirements of Title 63, Chapter 46b, Administrative Procedures Act; and

(B) that may not exceed \$500.

(b) An employer is not subject to the civil assessment or guilty of a class C misdemeanor under this Subsection (8) if:

(i) the employer submits a report later than required by this section; and

(ii) the division finds that the employer has shown good cause for submitting a report later than required by this section.

(c) A civil assessment collected under this Subsection (8) shall be deposited into the Uninsured Employers' Fund created in Section **34A-2-704**.

(9) (a) A physician attending an injured employee shall comply with rules established by the commission regarding:

(i) fees for physician's services;

(ii) disclosure of medical records of the employee medically relevant to the employee's industrial accident or occupational disease claim; and

(iii) reports to the division regarding:

(A) the condition and treatment of an injured employee; or

(B) any other matter concerning industrial cases that the physician is treating.

(b) A physician who is associated with, employed by, or bills through a hospital is subject to Subsection (9)(a).

(c) A hospital providing services for an injured employee is not subject to the requirements of Subsection (9)(a) except for rules made by the commission that are described in Subsection (9)(a)(ii) or (iii).

(d) The commission's schedule of fees may reasonably differentiate remuneration to be paid to providers of health services based on:

(i) the severity of the employee's condition;

(ii) the nature of the treatment necessary; and

(iii) the facilities or equipment specially required to deliver that treatment.

(e) This Subsection (9) does not prohibit a contract with a provider of health services relating to the pricing of goods and services.

(10) A copy of the initial report filed under Subsection (9)(a)(iii) shall be furnished to:

- (a) the division;
- (b) the employee; and
- (c) (i) the employer; or
- (ii) the employer's insurance carrier.

(11) (a) Except as provided in Subsection (11)(b), a person subject to Subsection (9)(a)(iii) who fails to comply with Subsection (9)(a)(iii) is guilty of a class C misdemeanor for each offense.

(b) A person subject to Subsection (9)(a)(iii) is not guilty of a class C misdemeanor under this Subsection (11), if:

- (i) the person files a late report; and
- (ii) the division finds that there is good cause for submitting a late report.

(12) (a) Subject to appellate review under Section **34A-1-303**, the commission has exclusive jurisdiction to hear and determine:

(i) whether goods provided to or services rendered to an employee are compensable pursuant to this chapter or Chapter 3, Utah Occupational Disease Act, including:

- (A) medical, nurse, or hospital services;
- (B) medicines; and
- (C) artificial means, appliances, or prosthesis;

(ii) the reasonableness of the amounts charged or paid for a good or service described in Subsection (12)(a)(i); and

(iii) collection issues related to a good or service described in Subsection (12)(a)(i). (b) Except as provided in Subsection (12)(a), Subsection **34A-2-211(7)**, or Section **34A-2-212**, a person may not maintain a cause of action in any forum within this state other than the commission for collection or payment for goods or services described in Subsection (12)(a) that are compensable under this chapter or Chapter 3, Utah Occupational Disease Act.

34A-2-401. Compensation for industrial accidents to be paid.

(1) An employee described in Section **34A-2-104** who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:

(a) compensation for loss sustained on account of the injury or death;

(b) the amount provided in this chapter for:

(i) medical, nurse, and hospital services;

(ii) medicines; and

(iii) in case of death, the amount of funeral expenses.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:

(a) on the employer and the employer's insurance carrier; and

(b) not on the employee.

(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission.

STATEMENT OF THE CASE

The Appellant was denied worker's compensation benefits by the Appellee, upon which said claims were adjudicated and denied by the Administrative Law Judge. (See Volume 1 Exhibit 153-164). Upon Appeal to the Workforce Appeals Board, the decision of the ALJ was affirmed. (See Volume 1 Exhibit 184-185).

The administrative agency denied benefits based on the Appellant's reporting of her first industrial injury beyond the 180 days statute of limitations; and that her injury was not work related. (See Volume 1 Exhibit 157-158).

The administrative agency denied benefits based on the Appellant's second industrial injury, by stating that the second injury represented a recurrence of pre-existing conditions. Further, the court held that the second injury was not legally caused by lifting product at work because "carrying a 39 pound tote did not amount to an atypical nonemployment activity." (See Volume 1 Exhibit 160).

The Appellant contends that the Appellees were given notice sufficient to extend benefits for the first work-related incident; and that the second work-related injury is compensable whether or not there were

pre-existing conditions due to medical and legal causation and the decisions of the Utah Supreme Court.

STATEMENT OF THE FACTS

1. On approximately October 4, 2004, the Appellant was working for Sinclair Oil as the store manager in Fillmore, Utah, when she injured her back, putting away store product from a delivery. (See Transcript-Page 120).
2. The product Ms. Leavitt was putting away were cases filled with six gallons of water in each box. She testified that she normally has to put away 10 to 15 cases of water with each delivery. (See Transcript-Page 118).
3. This was the first time that Ms. Leavitt had hurt her back since an automobile accident that occurred in 1991. (See Transcript-Page 116).
4. There was no medical evidence whatsoever that Ms. Leavitt had to have any medical treatment on her back from 1993 until her work-related injury in October, 2004. (Id. at 117).
5. The day after the October, 2004 incident, Ms. Leavitt went to a Sinclair manager's meeting in Salt Lake City. (Id. at 121). Because of this accident, Ms. Leavitt walked into the meeting using two canes. The canes belonged to her brother and her grandfather. (Id. at 123).
6. The people at the meeting were surprised to see Ms. Leavitt in such pain and using the canes for walking. (Id. at 124). Ms. Leavitt stated in her

previous deposition and at trial that she told the supervisors at the manager's meeting that she did not know what happened, but she was "working so much". (Id at 199).

7. The morning of the meeting, Ms. Leavitt talked to her supervisor, Robby Curry, and told him of her pain, and that something happened the night before to cause her pain. (Id.).

8. At this point, Ms. Leavitt honestly thought that her back was flaring up over the car accident injury she suffered 12 years previous, even though she felt a pull in her back when she was putting the cases of water away. (Id. at 125.).

9. Not long after the meeting, Ms. Leavitt went to her medical professional, Dr. Jaffe, and she told him that she thought the injury may have been because of the car accident. Dr. Jaffe instructed her to take an MRI, and then he could give her his opinion. (Transcript at 126).

10. At some time in December, 2004 or January, 2005, after Dr. Jaffe looked at the MRI, he told Ms. Leavitt that her back problem was a new injury. (Id. at 126 and 127).

11. Dr. Jaffe eventually wrote a letter stating that both the October, 2004 and the December 2005, injuries were work related. (See Exhibit Volume 2-page 194).

12. Notwithstanding not knowing for sure how her back was injured until a month or two later, Ms. Leavitt told her supervisor, Mr. Curry, on the day of the accident, in October, 2004, that she pulled something in her back

while putting away a water delivery. (Transcript at 128). She also told him that it may have been because of her car accident injury some 12 years previous. (Id.)

13. In direct examination Robby Curry stated that Ms. Leavitt told him that she hurt her back in October, 2004, but he didn't recall how she said it. (Transcript at page 27, 31, and 202).

14. Mr. Curry testified that she did not have back problems before this incident. (Id. at 26).

15. Mr. Curry reasoned that he did not believe the October, 2004 accident was work-related because he did not remember formally reporting it. (Id. at 27).

16. Mr. Curry testified that after the incident, Ms. Leavitt took some time off of work (about 18 days- Transcript at 164), and received treatment for her back injury. (Id at 28 and 29).

17. After taking 18 days off, Ms. Leavitt was back at work and performed her duties, including working much overtime until her second accident at work in December, 2005.

18. Ms. Leavitt had no limitations or restrictions put upon her from her employment from October, 2004 through December 6, 2005. (Id. at 29).

19. Ms. Leavitt did receive five epidural injections for her back between the time of the two injuries. (Volume 2 Exhibit 193).

20. A few days before the December, 2005 accident, Dr. Jaffe did send in a note to Ms. Leavitt's work with lifting restrictions of 30 pounds

infrequent and 15 pounds repeated. (Id. at 175). This was due to her being forced to work too quickly after receiving a shot of pain medication. (Id at 173, 174, and 175).

21. In approximately November, 2005, the Sinclair station was sold to Petroleum Wholesale, and Ms. Leavitt stayed on as the manager of the Fillmore store. (Id at 34). Ms. Leavitt's new supervisor was Dave Inlay. (Id. at 38).

22. Dave Inlay testified that he was not aware of the October, 2004 incident, but he knew (testified that he knew) that she was in a car accident that hurt her back two years previous to September, 2005. (Id at 39).

23. Ms. Leavitt testified that her car accident was in 1991, and there are absolutely no medical records related to her back from 1993 until October, 2004. (Id.)

24. Mr. Inlay testified that Ms. Leavitt did not have any back related impairments from September, 2005 until the incident in December, 2005. (Transcript at 40).

25. Mr. Inlay said that Ms. Leavitt called him in early December, 2005 and said that she hurt her back, but did not tell him how she hurt it. (Id. at 44).

26. Evidence was presented that between October, 2004 and December, 2005, Ms. Leavitt worked numerous hours of overtime each week as the store manager. (Volume 1 Exhibit 135-139).

27. Evidence was presented that Ms. Leavitt had a good quality of life between October, 2004, and December, 2005, in that she went 4-wheeling, worked numerous hours, and was a happy person. (See transcript pages 182, 226, 261).

28. Ms. Leavitt testified that on December 7, 2005, as she was putting away another delivery order with cases weighing between 30-40 pounds, she felt a crunch and a snap in her back, and then had excruciating pain. (Id. at 136, 177 and 178).

29. Ms. Leavitt testified that the following morning (December 8, 2005) she was in great pain and that she told Mr. Inlay that she hurt her back putting away the delivery order the previous day, and that she was going to go see her doctor. (Id. at 141).

30. Mr. Inlay told her to make the store deposits, sign a document in Scipio, and return her keys. (Id.). Ms. Leavitt protested because of her pain, and because her doctor was in Salt Lake which was a long drive for her. (Id.)

31. Nevertheless, Ms. Leavitt made the deposit (Volume 1 Exhibit 134), called the store headquarters to make sure she did not have to sign the Scipio paperwork right then, and drove to her doctor's office. (Transcript at 142).

32. The doctor had her go into an emergency surgery for her back. (Id. at 146).

33. Mr. Inlay testified that he did not know that a report of the injury was made to his company shortly after the accident on December 8, 2005. (Id. at 44). The Petitioner asserts she made said notification (volume 2 Exhibit 199), and Ms. Leavitt testified that the hospital faxed it to store headquarters and to Mr. Inlay. (Transcript at 147).

34. Mr. Inlay denied ever receiving Ms. Leavitt's notification of injury. (Id. at 45).

35. Mr. Inlay does remember on December 11, 2005, receiving a facsimile from the hospital where Ms. Leavitt was receiving treatment for her back. He did not remember what it said, because he or someone sent it right out to the HR Department. (Id. at 45).

36. Nevertheless, after Ms. Leavitt was denied worker's compensation benefits for the December, 2005 accident, on December 21, 2005, she filed an Application for Hearing with the Labor Commission who in turn notified the employer/Respondent. (Volume 1 Exhibit 1).

37. After the surgery Ms. Leavitt called Mr. Inlay to update him on the details of what had happened. (Volume 1 Exhibit 133).

38. Mr. Inlay told her she was fired for not making the store deposit. Ms. Leavitt called store headquarters in Houston who told her that Mr. Inlay told them that she was fired for not making the deposit. (Transcript at 147 and 148). Ms. Leavitt made the deposit before she went to see Dr. Jaffe on December 8, 2005. (Volume 1 Exhibit 134).

39. Before the injury on December 7, 2005, Mr. Inlay stated that he had never seen Ms. Leavitt use a cane or have back problems. (Id. at 46). He stated that Ms. Leavitt told him that she hurt her back because of a bad mattress. (Transcript at 46).

40. Mr. Inlay testified that on or about December 7, 2005, (after the accident), that Ms. Leavitt called him and told him that she had to go to the doctor. (Id. at 47).

41. On December 8, 2005 Ms. Leavitt was admitted and had emergency surgery. (Volume 4 Exhibit 67).

42. Mr. Inlay testified that Ms. Leavitt was fired for leaving work without reporting it. (Transcript at 47-48).

43. Mr. Inlay also testified that Ms. Leavitt's mother called him to tell him that she was "in with the doctor", yet she was still fired. (Id. at 49).

44. Mr. Inlay eventually admitted that Ms. Leavitt's mother called more than once, and that another person called him and told him that Ms. Leavitt was in surgery or going into surgery. (Id at 51 and 52.).

45. Ms. Leavitt produced her phone records evidencing the calls made to Mr. Inlay on December 8, 2005 and December 12, 2005. (Volume 1 Exhibit 133). Nevertheless, Ms. Leavitt was still fired, and denied workers compensation benefits.

SUMMARY OF ARGUMENT

The Appellant had two work-related incidents, one in October, 2004, and one in December, 2005. The evidence showed that she timely

reported both accidents as work-related, although the first one was not in written form until early 2006. Both accidents were medically and legally caused by her employment.

The evidence shows that the October, 2004, injury is not a bar as a pre-existing condition to the December, 2005 case for benefits pursuant to Allen. Also, the 1991 auto accident which injured Ms. Leavitt's back does not bar benefits to her because she was able to perform her duties and have a good quality of life until October, 2004, and which became much worse due to the incident in December, 2005.

Given the facts and law surrounding this matter, Ms. Leavitt is entitled to benefits.

ARGUMENT

POINT I-A

THE OCTOBER, 2004 INJURY WAS TIMELY REPORTED

The Worker's Compensation statute specifically states that^{3/4/2008}

(2) (a) Any employee sustaining an injury arising out of and in the course of employment shall provide notification to the employee's employer promptly of the injury. §34A-2-407.
Reporting of industrial injuries

The Utah Supreme Court has held on numerous occasions that this Court has long recognized that a claim for compensation need not bear any particular formality. (footnote omitted) In fact, "great liberality as to form and substance of an application for compensation is to be indulged." (footnote omitted) (Utah State Insurance Fund v. Dutson, 646 P.2d at 709 (Utah 1982), quoting Palle v. Indus. Comm'n., 79 Utah 47, 52, 286 (1932)).

Guidance as to what constitutes proper notification to the employer is not very clear. During the time of the Dutson case, you had three years to file a written notice to the Labor commission. The previous and present statute does not mention what form of notice is required to the employer.

The Utah Supreme Court has held that

The plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language to legislative history or policy considerations. See Olsen v. Samuel McIntyre Inv. Co., , 259 (Utah 1998) (citing Stephens v. Bonneville Travel, Inc., , 520 (Utah 1997); World Peace Movement v. Newspaper Agency Corp., , 259 (Utah 1994)). We also "construe[] workers' compensation statutes liberally in favor of finding employee coverage." Olsen, 956 P.2d at 259 (citing Heaton v. Second Injury Fund, , 679 (Utah 1990). Vigos v. Mountainland Builders, 993 P.2d 207, 210 (Utah 2000).

Ms. Leavitt testified that many of the supervisors in the manager's meeting were told the day after the October, 2004 accident that she said her back hurt because of work. (Trial Transcript page 199). She also testified that she told Mr. Curry in October, 2004, that she pulled something in her back while putting away a water delivery. (Id. at 128).

Ms. Leavitt asserts that these two communications with her supervisors was sufficient notice as per the statute. Further, Mr. Curry admits that he did not remember what Ms. Leavitt told him in October, 2004 after the accident. (Id. at 27, 31, 202.) It is telling that the only reason

he believes that it was not work-related is because he did not file a report. (Id. 27). Utah Appellate Courts have held that an “employer’s failure to file the required report could not be asserted as a defense to a later claim on the ground that the claim was not timely filed.” Kennecott Corp. v. Indus. Comm’n, 740 P.2d 305, 309 (Utah Ct.App. 1987).

In fact if Mr. Curry did file a report he would have assumed liability for the company for Ms. Leavitt’s injuries. It is clear that he and the company benefited from not filing a report, and that he has not provided any other evidence that Ms. Leavitt did not tell him how she got hurt. He can only state, “I don’t recall how she said it.” (Transcript at 27); “That morning I don’t recall”. (Id. at 31); and “I cannot recall. I don’t remember specifically what she said. (Id. at 202).

Given that Ms. Leavitt does remember what she told him (that her injury was due to putting away a delivery); proper notice was given. The new statute does not state that the employer’s notice need be in writing, just that they are notified. As such, notice was given.

Further, the Utah Supreme Court has stated

We also "construe[] workers' **compensation** statutes liberally in favor of finding employee coverage." Olsen, 956 P.2d at 259 (citing Heaton v. Second Injury Fund., 796 P.2d 676, 679 (Utah 1990).

We believe that because worker’s compensation statutes should be liberally interpreted in favor of finding employee coverage, that the verbal notification given for the work-related injury was proper in October, 2004.

MARSHALING THE EVIDENCE

In direct and cross examination at the trial of this matter, Ms. Leavitt stated that right after the October, 2004 accident she did not tell anyone at the store she got hurt. (Transcript at 121).

At the outset Ms. Leavitt thought that her injury was the result of her car accident 12 years earlier. (Id. at 122). She said that she did not tell anyone other than her mother that she got hurt at work. (Id.).

On direct questioning, Ms. Leavitt stated that she went to the manager's meeting the following day and walked in with two canes. (Id. at 123). Ms. Leavitt testified that before the meeting she told her supervisor, Robby Curry that she was hurt, and that she thought it was due to her car accident. (Id. at 124-125).

Ms. Leavitt testified that at the manager's meeting she talked to Scott in management who told her to go home because he saw she was in great pain. Ms. Leavitt was asked in direct questioning, "Did you tell him it was because you were moving boxes at work?" She replied, "No." (Id. at 125).

Ms. Leavitt further testified that she went right from the meeting to see Dr. Jaffe, and also told him that she thought she was injured because of the car accident 12 years earlier. (Id. at 125-126).

She further testified that the pains she felt were "from the car accident that I always had pains, like arthritis, 'cause they always told me I'd have arthritis in my back." (Id. at 126).

Ms. Leavitt gave conflicting testimony as to what she told Mr. Curry; in that she states she told him the accident was work-related and then states that she told him it was from the car accident of 12 years earlier. (Id. at 128-129).

Further, none of Dr. Jaffe's notes state that the October, 2004 incident was work-related until Dr. Jaffe's Interim Evaluation dated January 6, 2006 (Although mis-dated 1/6/2005), and his letter dated March 3, 2006. (Volume 3 Exhibits- 60 and at 57). The physical therapy notes also state that she had back surgery 12 years previous to October, 2004, and there is no mention that the October, 2004 incident was work-related. (See Volume 2 Exhibit- at 212-218).

Even though Ms. Leavitt was the store manager, and filed incident reports in the past, and kept incident reports in her book, she stated that she did not know how to file a worker's compensation claim for herself. (Transcript at 264). Erica Knosh, another employee, stated that Ms. Leavitt was her manager and taught her how to file an injury report. (Transcript at 250).

Reply to Marshaled Evidence

There are explanations as to the conflicting trial testimony of Ms. Leavitt regarding the reporting or non-reporting of the October, 2004 accident. She was on heavy doses of medications before and during the trial. She stated that she takes seven Lortabs daily, and that she was on Lortab when she testified. Transcript at 115-116).

Ms. Leavitt testified that normally she was on numerous other medications besides the Lortabs, but she did not take them the morning of trial because she wanted to "be crystal clear today". (Id. at 115). She said that normally besides the Lortab, that she took Neproxin, Larica, Quinine, and Cymbalta, and that the only medication she took that morning was Lortab (twice). (Id.).

Many months before the trial, Ms. Leavitt's deposition was taken. When she was reminded of her deposition, she stated that when she went to the manager's meeting the morning after the October, 2004 incident using two canes, that she was asked what happened to her. In her deposition, and when remembered at trial she agreed that she told the supervisors "I've been working so much I don't know what happened." (Transcript at 198-199).

She also testified that the morning of the manager's meeting Ms. Leavitt told Mr. Curry she hurt her back the night before, but did not know how she did it. She thought that when she hurt her back at work that it was related to her car accident from 12 years previous. Later in the afternoon after the manager's meeting, Ms. Leavitt testified that she told Robby Curry she hurt her "back from doing all the lifting and stuff" at work. (Id. at 129).

It clearly appears as though she told Mr. Curry that she hurt her back lifting boxes, but thought she was hurt due to her car accident injury 12 years previous.

Given that Mr. Curry testified that he did not recall what Ms. Leavitt said (Transcript at page 27, 31, and 202), and that Ms. Leavitt told her direct supervisor and the managers at the meeting that her injury happened because of work, the court should reverse the ALJ's ruling and determine that the Respondent was properly notified of the October, 2004 work-related accident, and that worker's compensation benefits are due.

Regarding Ms. Knosh's testimony about Ms. Leavitt training her how to file an injury report; although the court held that she was trained by Ms. Leavitt as how to file a "worker's compensation report", (Volume 1 Exhibit 158), Ms. Knosh clearly testified differently. The question was posed,

"Did she ever train you in the procedures of worker's compensation?" [Her answer was]

"There's (inaudible) if that's what you mean?"

The reply and new question was then posed by Claimant's counsel.

"No. Did she tell you what you had to do if somebody had an injury, how to report it, what to do?"

Ms. Knosh's answer was

"Yes". (Transcript at 250).

There does not appear to be a connection between writing up an injury report, and how you file for worker's compensation, which is consistent with how Ms. Leavitt testified; in that she did not know how to file for worker's compensation, and that she did not train Ms. Knosh in worker's compensation procedures. (Transcript at 262-264).

POINT I-B
**THE OCTOBER, 2004 INJURY WAS THE MEDICAL AND LEGAL
CAUSE TO AWARD HER BENEFITS**

The Court held that "The preponderance of the evidence in this case demonstrated that Ms. Leavitt did not suffer a low back injury event arising out of and in the course of her employment with Sinclair in October, 2004. (Volume 1 Exhibit 158).

The Utah Supreme Court held that to determine causation in worker's compensation cases that first legal causation must be met and then medical causation should be met. Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986).

A. Legal causation for the October 2004 injury.

The Court stated:

To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work. (Allen at 26).

Ms. Leavitt had a pre-existing condition, albeit the previous back problem which occurred thirteen years previous from the car accident. After Ms. Leavitt recovered fully from her car accident of 1991, she had no back problems nor medical needs with regard to her back from 1993-2004.

If it is assumed that the 1991 car accident injury is a pre-existing condition, then it must be shown that Ms. Leavitt's employment contributed something substantial to increase her risk of injury that she did not face in everyday life.

Testimony was given that Ms. Leavitt injured her back by lifting cases of water weighing between 40-50 pounds at her job in October, 2004. Evidence was presented that although Ms. Leavitt injured her back in the 1991 car accident, that she did not receive or need any further medical treatment for this injury from 1993 until her injury on October, 2004. There are no medical records for her back during this time, although she had other various ailments that were not found to be related to her back.

Much testimony was given regarding Ms. Leavitt working for Chevron on the cash register, sweeping, and stocking orders for many years without any back pain. (Transcript at 117). Also that Ms. Leavitt worked for Sinclair, the Respondent, from March 2002 to October, 2005, without any back problems until the incident in October, 2004. (Id. at 119).

In Allen the court found that Mr. Allen had prior back problems and a pre-existing condition, even though he did not complain about his previous back problems. (Allen at 27-28).

Further, the court held that

Typical activities and exertions expected of men and women in the latter part of the 20th century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. (Allen 26).

The question is whether or not Ms. Leavitt exceeded a typical person's activity and/or exertion by putting away cases of water that exceeded 50 pounds of weight. Ms. Leavitt is asserting that she did.

Ms. Leavitt testified that usually she had to put away 10 to 15 cases of water. (Transcript at 118).

Taking out the trash, changing a tire, or lifting baggage for a flight is much different than lifting numerous heavy cases of water, twisting, and putting them away. As such, Ms. Leavitt's work exertion was above and beyond what a normal person would be doing in everyday life, and the incident would meet the legal cause of her injury.

Marshaling the Evidence on Legal Causation

It was established that Ms. Leavitt had a pre-existing back condition prior to October, 2004, which was the 1991 car accident. (Transcript at 122). Ms. Leavitt thought that her October, 2004 injury at work was from the 1991 car accident, and told her supervisor that she thought it was from the 1991 accident. (Id. at 125 and 128-129).

Ms. Leavitt did not file a worker's compensation claim in writing on behalf of her October, 2004 injury until the Labor Commission received a Request for Hearing in June, 2006. (See Volume 1 Exhibit 81).

The first time any medical professional stated in writing that the October, 2004 injury was work-related, was Dr. Jaffe's letter dated March 3, 2006. (Volume 1 Exhibit 86).

Ms. Leavitt's 1992 CT scan stated that "disc tissue herniation is seen central and to the left of center resulting in moderate compression upon adjacent thecal sac." (See Volume 4 Exhibit 11).

On October 5, 2004, Dr. Hebdon interpreted Ms. Leavitt's new MRI as a "large disk protrusion on the left, which effaces the anterolateral sac and the left neural foramen and lateral recess. The disk protrusion measures approximately 1.2 cm across its base, an approximate 1 cm in AP diameter. This could easily be impinging the left L5 nerve root and possibly the left S1 nerve root. Associated facet degeneration is seen. I do not see significant enhancement of the disk fragment or surrounding soft tissue." (See Volume 4 Exhibit 4-5). It appears as though the same injury in the same place has taken place.

Reply to Marshaled Evidence

The pre-existing car accident injury from 1991 was surgically repaired in 1992, not 2002 as stated in the ALJ's Finding's of Fact. (See Findings Volume 1 Exhibit 157; and Volume 4 Exhibit 160).

Twelve years had passed since her physical therapy ended in 1993. Ms. Leavitt had no further treatment on her back during those twelve years, and worked at Chevron and Sinclair doing the same type of work. When the October, 2004 accident took place, Ms. Leavitt just assumed that it was due to the 1991 car accident, but she did tell her supervisor, Mr. Curry (Transcript at 128) and the managers that it was work-related, (Transcript at 198-199) ; and indeed it was.

The ALJ held that the injury was not legally caused by the October, 2004 accident. The ALJ determined that because Ms. Leavitt used her own insurance, and never formally filed a *written* claim, and because the store and her supervisor never filed a claim, that her injury was not legally caused by the October 2004 accident. (See Volume 1 Exhibit 158).

The ALJ nor any of the medical professionals determined that the October 2004 injury was legally caused by anything other than the October, 2004 accident.

Further, the fact that Ms. Leavitt stated that she did not know how to fill out a worker's compensation claim is explained in that she had in the manager's book "incident reports", and not worker's compensation reports. Ms. Leavitt understood how to fill them out, and had employees who were hurt filled them out, but she never filled out one for herself because she thought her supervisor was supposed to do that for her, as she did for those under her. (Transcript at 263-264).

Ms. Leavitt told her supervisor about the injury and he had her take FMLA and vacation time instead of filing an incident report. She also had her own insurance pay for the medical injuries because she thought that is what she had to do. (Transcript at 131 and 134).

Lastly, because Ms. Leavitt did not have any medical problems with her back from 1993 until the incident in October, 2004; the October, 2004 injury contributed significantly to the disability and internal failure that she previously had. As such, there is legal causation.

B. Medical Causation for the October 2004 injury.

Although the ALJ did not address medical causation, we will do so.

The Utah Supreme Court held that

Under the medical cause test, the claimant must show by evidence, opinion, or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability. Allen at 27.

As Ms. Leavitt had no problems with her back at all from 1993 until October, 2004, and she testified that she had new back pain due to a pulling in her back because of lifting crates of water at work in October, 2004, she has met the medical causation burden required by Allen.

There is no other evidence propounded by either party as to what happened to Ms. Leavitt's back in October, 2004 other than the workplace injury.

Although the letter came in retrospect, Ms. Leavitt's treating physician, Dr. Jaffe, clearly opined that:

In terms of causation, it appears that 65% of her current symptoms are related to the work-related injury on October 4, 2004, where there was no claim filed and 35% of her injury was from the exacerbation on December 7, 2005. (See Volume 2 Exhibits- page 194).

Dr. Jaffe further explained in his latest letter that

Causation certainly seems like things were worse following her work-related injury just before her surgery in 2005. (Volume 2 Exhibit 197).

Dr. Jaffe then stated that the December 2005 accident may be responsible for up to 50% of Ms. Leavitt's disk herniation. (Id.).

Without any evidence to the contrary, and with no findings of fact regarding medical causation by the ALJ; the October, 2004 injury was work-related, and not as a result of her 1991 auto accident. Without Findings of fact, it is not necessary to marshal evidence on this point.

POINT II-A

THE DECEMBER, 2005 INJURY WAS TIMELY REPORTED

The evidence shows that Ms. Leavitt was denied worker's compensation benefits for her December, 2005 work-related injury, and as such, filed a timely application for hearing on December 21, 2005, only two weeks after the second injury. Further, a Worker's Compensation Employer's First Report of Injury was filed with the Respondent's Administrator on December 8, 2005. (Volume 2 Exhibit 199). As such, the Respondent was timely notified of the work-related accident, and benefits are due.

POINT I-B

THE OCTOBER, 2004 INJURY WAS THE MEDICAL AND LEGAL CAUSE TO AWARD HER BENEFITS

A. Legal causation for the December 2005 injury.

It is not disputed that by December, 2005 Ms. Leavitt had a pre-existing condition with her back, namely the October, 2004 accident.

As stated previously

To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. Allen at 26.

Once again, the question posed by Allen is, was this exertion at work greater than that undertaken in normal, everyday life, and did the employment contribute something substantial to increase the risk that Ms. Leavitt posed in everyday life. (Allen at 26). The answer is yes on both counts.

Evidence was taken regarding what caused Ms. Leavitt's back to go "snap" and "crunch". It was determined that it was caused by Ms. Leavitt putting away another delivery order, this time with crates filled with candy and other product. (Transcript at 136).

Ms. Leavitt's new supervisor, Mr. Inlay testified that the boxes of candy that went into the crates weighed approximately two to three pounds. (Transcript at 59). It was also testified that each crate that had to be put away weighed two pounds, and that anywhere from 10 to 15 boxes of candy were in each crate. (Transcript at 23).

This means that the crates that Ms. Leavitt had to put away weighed between 22 and 45 pounds. Ms. Leavitt testified the crates weighed approximately 30-40 pounds. (Id. at 136). The Court found that the crates with product in them could only have weighed as much as 39 pounds, and that "Men and women typically and routinely carry loads of 39 pounds." The Court then found that there was not legal causation for the December, 2005 injury because putting away the delivery order was not significantly different than what an ordinary person would be doing in the routine of life. (Volume 1 Exhibit 160).

Ms. Leavitt asserts that the employment (putting away the stock crates) contributed something significant that would not normally happen in everyday life, and that was the legal cause of her aggravated back injuries in December, 2005.

Ms. Leavitt asserts that this type of activity (putting away multiple crates weighing 40 pounds) is a greater exertion than is undertaken in normal everyday life. Taking out the trash, carrying travel bags, carrying groceries, is not nearly as intense an activity as putting away multiple crates of product by lifting and twisting, as Ms. Leavitt testified. (Transcript at 136).

Clearly something happened at her work on December 7, 2005, that significantly changed the pain level in Ms. Leavitt's back. The December, 2005 accident also significantly changed Ms. Leavitt's ability to work and to enjoy life.

Much testimony was given regarding Ms. Leavitt working long hours and enjoying 4-wheeling between October, 2004 and December, 2005. After the December, 2005 accident, Ms. Leavitt could not work, 4-wheel, walk without assistance, or in many instances even take care of herself.

Dr. Jaffe stated that now Ms. Leavitt's "future is bleak", that "I don't think she will be returning to work.", and "I think she is an excellent candidate for social security benefits". (Volume 2 Exhibit 197). Surely the accident that occurred on December 7, 2005, significantly impaired Ms.

Leavitt's pre-existing back condition, and her employment was the reason for the impairment.

Therefore the work activity legally caused Ms. Leavitt's injury.

Marshaling the Evidence

Two MRI's were taken of Ms. Leavitt's back. The first was taken on October 5, 2004, and the second took place on December 8, 2005. (Volume 4 Exhibit 003).

The second MRI was interpreted by Dr. Peggy Ensign as such
Left lateral recess disc herniation at L4-L5 was noted in
previous exam and is not significantly changed in size. (Id.)

It appeared that the MRI's were not much different from the first injury in October, 2004.

It also appeared as though Ms. Leavitt was having increasing problems with her back before the incident on December 7, 2005. The notes of Dr. Jaffe and Dr. Timothy state that on December 5, 2005, Ms. Leavitt called the doctor's office and stated that her left leg had gone numb. (Volume 4 Exhibit 68).

An entry on December 6, 2005 (Although Ms. Leavitt did not appear at his office) stated that Ms. Leavitt should not lift more than 30 pounds infrequently and 15 pounds frequently. At this time Dr. Jaffe recommended a new MRI. (Id. at 68) This was requested before the December 7, 2005 accident. We also know that at the most the crates Ms. Leavitt put away on December 7, 2005 weighed no more than 45 pounds.

Dr. Bauman states in his December 8, 2005 report that Ms. Leavitt had severe increase of pain going down her left leg and was found on MRI scan to have a recurrent disk herniation of the left L4-L5 level. (Volume 2 Exhibit 200).

It is possible that Ms. Leavitt needed the surgery in October, 2004. Her physical therapy notes of October 7, 2004, stated that "She wants to avoid surgery". (Volume 2 Exhibit 212).

After the October, 2004 accident, Ms. Leavitt began receiving epidural cortisone injections. She had five of them from the October 2004 injury through the end of November 2005. (Volume 2 Exhibit 193).

Reply to Marshaled Evidence

Although the MRIs performed in October, 2004 and December 2005 appeared to be similar, Dr. Bauman stated in December 2005:

Current exam demonstrates increased signal intensity on the T2-weighted images raising the question of interval hemorrhage.

and

Increased T2 signal intensity raises the question of recent hemorrhage into the disc. (Volume 4 Exhibit 3).

Although the doctors stated that Ms. Leavitt's injury on December 7, 2005 was a "recurrent" back injury, that would not negate legal causation if the employment itself (putting away these crates) was unusual or extraordinary exertion as compared to everyday life. Not that the exertion at work was unusual or extraordinary as compared to her work activities, but compared to an ordinary person's daily living activities.

As stated previously, it is unlikely that persons in ordinary life will regularly be lifting numerous 45 pound crates of product and turning with them to put them on counters or on shelves. Contrary to what the Court stated, it was atypical activity. Taking out the trash, carrying groceries, and carrying luggage is not as demanding as what Ms. Leavitt was doing, and as such benefits should be granted.

It is also highly unlikely that 5 epidural cortisone shots over a year's time would allow Ms. Leavitt to work overtime each week right up to the day of the accident, and to go 4-wheeling numerous times, just to avoid surgery. When Ms. Leavitt was rushed in for emergency surgery, she could barely walk, and can barely walk now.

B. Medical causation for the December 2005 injury.

According to Allen, the question is did the stress, strain, or exertion required by Ms. Leavitt's occupation lead to the December, 2005 injury; and would the injury have occurred otherwise? As stated previously, Dr. Jaffe said in his letter that Ms. Leavitt's injury was 65% caused by the October, 2004, injury and 35% caused by the December, 2005, injury. (See Volume 2 Exhibit 194).

At a later date Dr. Jaffe amended his apportionment for the accident by stating that "no more than 50% causation can be assigned to the second injury." (Volume 2 Exhibit 197).

Although there was testimony that Ms. Leavitt did some 4-wheeling between the two accidents, there was absolutely no evidence whatsoever

that the December 2005, injury was anything but work-related, and properly reported. Further, the fact that Ms. Leavitt had a good quality of life after the October 2004 injury, is evidence that the December 2005 injury medically caused her disability.

There are no other reasons propounded by any party, person, or doctor that the December, 2005 injury was caused by anything other than through Ms. Leavitt's employment, in putting away multiple crates of heavy stock items. Because the Court did not address medical causation, and did not make findings of fact, marshaling the evidence is not necessary.

POINT III

THE OCTOBER, 2004 INJURY DOES NOT BAR RELIEF AS A "PRE-EXISTING INJURY" FOR BENEFITS FOR THE DECEMBER, 2005 INJURY

As in Allen, the question that arises is "whether the claimant, who had suffered preexisting back problems and was injured as the result of an exertion usual and typical for his job, was injured ""by accident arising out of or in the course of employment"". (Allen at 18).

Allen then goes through the different types of incidents and weighs whether or not the case could be defined as an accident. The Court defined "by accident" to include "internal failures resulting from both usual and unusual exertions." Id. at 19. And the Court also held that "an accident is an unexpected or unintended occurrence that may be *either* the cause or the result of an injury." (Id. at 22).

In the present case, it is not disputed that Ms. Leavitt was injured at work in December, 2005, and severely hurt her back. She was denied benefits because she was told that she had a pre-existing back problem.

The pre-existing condition is alleged because of either her car accident from 1991, or her work-related injury in October, 2004. It has already been discussed that the car accident occurred in 1991 (13 years previous), and that there were no back problems or medical problems with Ms. Leavitt's back from 1993 until October 2004. Thus the 1991 car accident does not weigh heavily against the Claimant as a pre-existing condition to deny benefits. Even if the court considers the 1991 accident as a pre-existing condition, it should not prejudice the claimant because of the lack of medical problems with Ms. Leavitt's back from 1993 until October, 2004.

The October 2004 injury is another matter. It clearly is a pre-existing injury relative to the December 2005 accident. The Respondents claim that if the October, 2004 injury was not reported, then it was a not work-related injury, and not compensable. The Respondents claim that if the October, 2004 was not compensable, then the December, 2005 injury relates back to a non-compensable injury, and the Claimant should not get benefits.

The Utah Supreme Court held

Workmen's compensation must be paid by the Fund under U.C.A., 1953, § 35--1--69(1) when an employee with a previous permanent incapacity sustains an industrial injury "that results in permanent incapacity which is substantially greater than he would have incurred had he not had the pre-existing incapacity." Chavez v. Industrial Commission, 709 P.2d 1168, 1170 (Utah 1985)

In Chavez, a non work related pre-existing condition, (degenerative arthritis) led to an appeal of the ALJ ruling which determined that a subsequent injury did not substantially disable the person greater than the original disability. Id. at 1170.

The Chavez court held that

liability is imposed, not when the second injury itself causes a "substantially greater" incapacity, but when the worker's total incapacity following the second injury is "substantially greater" than it would have been but for the preexisting incapacity. (Id.)

Much evidence was presented showing that between the October, 2004 accident and the December, 2005 accident that Ms. Leavitt worked long hours for the Respondent company. Often she would work overtime. (See Exhibit Time Cards-pages 135-139). It is important to note that the week before Ms. Leavitt had her accident on December 7, 2005, she worked 50.25 hours. (Id. at page 139).

Not only was Ms. Leavitt's second injury "substantially greater", but she became permanently disabled after December, 2005, and is going through the process of obtaining social security disability as per Dr. Jaffe's recommendations. (Volume 2 Exhibit-page 197).

Dr. Jaffe further stated "On December 7, 2005, she became significantly worse, putting away boxes while at work.... Since that time, she has been majorly functionally impaired, unable to work, and complaining of severe pain." (*Id.*) Further, he states "Her ability to work is none... Her ability to perform regular activities of regular living is impaired...the depression is likely magnified by the pain as is the anxiety." Finally, Dr. Jaffe gave her a whole-body impairment of 10%. (*Id.*).

In the present case, Ms. Leavitt was not permanently incapacitated from the October, 2004 injury. As previously mentioned there were numerous statements regarding her going 4-wheeling between October 2004, and December 2005, and of working long hours up to and right before the second accident.

The Respondents and the Court took note of the two MRI's taken of Ms. Leavitt's back; the first taken after the first accident in October, 2004, and the second taken after the second accident in December, 2005. The ALJ stated that

Although a dispute existed between Dr. Jaffe and Dr. Knoebel concerning apportionment of medical causation, all of the medical professionals agreed that Ms. Leavitt's L4-5 disc herniation surgically addressed on December 9, 2005, represented a recurrence of her low back problems prior to December 7, 2005." (Volume 1 Exhibit-Page 160).

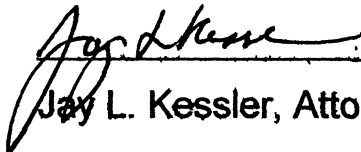
It appears that the court did not properly analyze or take into consideration Dr. Jaffee's apportionment letters (65%-35% causation) (Volume 2 Exhibit 194), and his final letter giving up to a 50% causation

CONCLUSION

At the very least, the Appellant has cast doubt upon why the October, 2004 accident was not reported by her supervisors, and that she should not be barred from benefits from both accidents. This Court has held that, "Further, we resolve all doubts regarding an employee's right to compensation in favor of the employee." McKesson Corp. v. Labor Comm., 41 P.3d 468, 471 (Ut Ct App 2002). Therefore the Appellant respectfully requests that the Labor Commission ruling be reversed; and Worker's Compensation benefits be granted to the Appellant for the October, 2004 injury and the December 2005 injury.

RESPECTFULLY SUBMITTED this 17th day of March, 2008.

KESSLER LAW OFFICE



Jay L. Kessler, Attorney for Appellant

for the December, 2005 accident and a 10% whole-body impairment rating. (Volume 2 Exhibit 197). The Court did not note that Ms. Leavitt had a good quality of life between October, 2004 and December 2005.

Given that the December, 2005 injury significantly incapacitated Ms. Leavitt to a greater degree than the first injury, and that it does not matter whether the first injury was work-related or not to obtain benefits, this court should reverse the ALJ and Labor Commission's ruling and award benefits for the December, 2005 injury.

Even if this court rules that Ms. Leavitt did not properly notify her employer within 180 days of the October, 2004 injury and cannot receive compensation for that injury; that should not prejudice her from receiving benefits for the December, 2005, injury, as held in Chavez, which completely incapacitated her.

Further, just because the October, 2004 injury was not reported, does not on its face make that a non work-related injury. It could be a work-related injury that was not timely reported due to either a misunderstanding or her supervisors intentionally not writing it up.

As such, even if the October, 2004, injury was time-barred, it does not bar worker's compensation benefits for the December, 2005 injury.

CERTIFICATE OF SERVICE

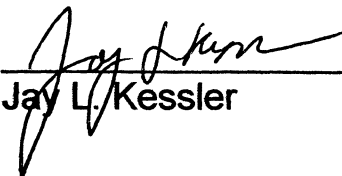
I hereby certify that on this 18 day of March, 2008, I

hand-delivered the foregoing Appellant Brief to the following:

Department of Workforce Services
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114

Mark D. Dean, Esq.
BLACKBURN & STOLL, LC
257 East 200 South
Suite 800
Salt Lake City, Utah 84111

David H. Tolk, Esq.
RICHARDS, BRANDT, MILLER & NELSON
Wells Fargo Building
299 South Main Street
Suite 1500
Salt Lake City, Utah 84111



Jay L. Kessler

ADDENDUM

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
Heber M. Wells Building, 3rd Floor
P O Box 146615
Salt Lake City UT 84114
(801) 530-6800

LORI JILL LEAVITT,

Petitioner,

vs.

**SINCLAIR OIL CORPORATION and/or
ACE AMERICAN INSURANCE
COMPANY; PETROLEUM WHOLESALE
and/or AMERICAN HOME ASSURANCE,**

Respondents,

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case Nos. 05-1108 and 06-0583

Judge Richard M. La Jeunesse

HEARING: Room 332 Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on January 10, 2007 at 8:30 a.m. Said Hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Lori Jill Leavitt, was present and represented by her
attorney Jay L. Kessler Esq.

The respondents, Sinclair Oil Corporation and Ace American Insurance
Company, were represented by attorney Mark D. Dean Esq.

The respondents, Petroleum Wholesale and American Home Assurance,
were represented by attorney David H. Tolk Esq.

I. STATEMENT OF THE CASE.

The petitioner, Lori Jill Leavitt, filed two Applications for Hearing with the Utah Labor Commission. Ms. Leavitt filed her first Application for Hearing on December 21, 2005 against Petroleum Wholesale and American Home Assurance in Case No. 05-1108. In case No. 05-1108 Ms. Leavitt claimed entitlement to permanent total disability compensation. On March 24, 2005 Ms. Leavitt filed an Amended Application for Hearing adding claims for the following workers' compensation benefits: (1) medical expenses; (2) recommended medical care; (3) temporary total disability compensation; (4) temporary partial disability compensation; (5) permanent partial disability compensation, and; (6) travel expense reimbursement. At the hearing on January 10, 2007 Ms. Leavitt withdrew her claim for permanent total disability compensation. Ms. Leavitt's claim for workers' compensation benefits in case No. 05-1108 arose out of an industrial accident that allegedly occurred on December 7, 2005.¹

The respondents in Case No. 05-1108, Petroleum Wholesale and American Home Assurance, denied that Ms. Leavitt suffered an industrial accident on December 7, 2005. The respondents in Case No. 05-1108 repudiated a medically causal relationship between Ms. Leavitt's low back problems at issue and the events of December 7, 2005. The respondents in Case No. 05-1108 argued that Ms. Leavitt suffered preexisting low back problems that caused any disability endured by her. The respondents in Case No. 05-1108 contended that no legal causation existed between Ms. Leavitt's low back injuries and her employment on December 7, 2005 as required by the Utah Supreme Court in *Allen v. Industrial Commission*, 729 P.2d 15, 24-25 (Utah 1986). Finally, respondents in Case No. 05-1108 claimed that Utah Code §34-A-2-407(2) barred Leavitt's workers' compensation claims related to the alleged industrial accident on December 7, 2005 for failure to report the incident within 180 days.

Ms. Leavitt filed her second claim on June 21, 2006 in Case No. 06-0583. In Case No. 06-0583 Ms. Leavitt claimed entitlement to payment of the following workers' compensation benefits: (1) medical expenses; (2) recommended medical care; (3) temporary total disability compensation; (4) temporary partial disability compensation; (5) permanent partial disability compensation; (6) permanent total disability compensation, and; (7) travel expenses. Ms. Leavitt's second claim for workers' compensation benefits arose out of an industrial accident that allegedly occurred on October 12, 2004.²

¹ Ms. Leavitt in her Amended Application for Hearing filed on March 24, 2006 claimed to add an occupational disease claim. However, the evidence presented by Ms. Leavitt at the hearing on January 10, 2007 pointedly focused on two discreet injury events dated October 12, 2004 and December 7, 2005.

² At the hearing on January 10, 2007 Ms. Leavitt changed the injury date to October 3, 2004 in conformance with medical records that showed treatment to her low back on earlier dates in October 2004.

The respondents in Case No. 06-0583, Sinclair Oil Corporation and Ace American Insurance Company, denied that Ms. Leavitt suffered an industrial accident on October 12, 2004 or October 3, 2004. The respondents in Case No. 06-0583 refuted any medical causal connection between Ms. Leavitt's low back problems and her employment at Sinclair Oil on either October 12, 2004 or October 3, 2004. The respondents in Case No. 06-0583 argued that Ms. Leavitt suffered preexisting low back problems that caused any disability endured by her. The respondents in Case No. 06-0583 contended that Ms. Leavitt suffered no real periods of disability as a result of any incident on either October 3, 2004 or October 12, 2004. The respondents in case No. 06-0583 maintained that no legal causation existed between Ms. Leavitt's low back problems and her employment on October 3, 2004 or October 12, 2004 as required by the Utah Supreme Court in *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986). Finally, the respondents in Case No. 06-0583 claimed that Utah Code §34-A-2-407(2) barred Ms. Leavitt's workers' compensation claim for failure to report the industrial accident within 180 days.

II. ISSUES.

1. Did Lori Jill Leavitt's employment activities at Sinclair Oil Corporation on October 3, 2004 or October 12, 2004 medically cause her low back problems at issue in this case?
2. Did Lori Jill Leavitt's employment activities at Sinclair Oil Corporation on October 3, 2004 or October 12, 2004 legally cause her low back problems at issue in this case?
3. Did Lori Jill Leavitt's employment activities at Petroleum Wholesale on December 7, 2005 medically cause her low back problems at issue in this case?
4. Did Lori Jill Leavitt's employment activities at Petroleum Wholesale on December 7, 2005 legally cause her low back problems at issue in this case?
5. Did Lori Jill Leavitt's employment activities at Sinclair Oil Corporation on October 3, 2004 or October 12, 2004 cause her to suffer any periods of temporary total or temporary partial disability?
6. Did Lori Jill Leavitt's employment activities at Petroleum Wholesale on December 7, 2005 cause her to suffer any periods of temporary total or temporary partial disability?
7. Did Lori Jill Leavitt's employment activities at Sinclair Oil Corporation on October 3, 2004 or October 12, 2004 cause her to suffer any permanent partial disability?
8. Did Lori Jill Leavitt's employment activities at Petroleum Wholesale on December 7, 2005 cause her to suffer any permanent partial disability?

9. Did Lori Jill Leavitt report an industrial accident with respect her employment at Sinclair Oil Corporation on either October 3, 2004 or October 12, 2004 within 180 days as required by Utah Code §34-A-2-407(2)?
10. Did Lori Jill Leavitt report an industrial accident with respect her employment at Petroleum Wholesale December 7, 2005 within 180 days as required by Utah Code §34-A-2-407(2)?

III. FINDINGS OF FACT.

A. Employment at Sinclair Oil Corporation Case No. 06-0583.

Ms. Leavitt began work for Sinclair Oil Corporation (Sinclair) in March of 2002 as an assistant manager for Sinclair's retail store. Management at Sinclair promoted Ms. Leavitt to store manager at the Fillmore, Utah location where she worked until Petroleum Wholesale purchased the operation on October 19, 2005.

B. Employment at Petroleum Wholesale Case No. 05-1108.

On October 19, 2005 when Petroleum Wholesale took ownership of Sinclair's retail store in Fillmore, Utah, Ms. Leavitt remained employed as the store manager until terminated on December 10, 2005

C. Compensation Rates While Employed at Sinclair Oil Corporation and Petroleum Wholesale Case Nos. 05-1108 and 06-0583.

During the relevant time periods at issue Ms. Leavitt remained unmarried with no dependent children. Ms. Leavitt's testimony stood un rebutted as to her compensation with Sinclair and Petroleum Wholesale. As a store manager for the Fillmore Store Ms. Leavitt earned \$24,000.00 per year salary plus \$600.00 per month in bonuses for a total wage of \$31,000.00 per year. Ms. Leavitt's wages at Sinclair entitled her a temporary total disability compensation rate of \$400.00 per week. [$\$31,000.00/\text{year} \div 52 \text{ weeks/year} = \$600.00/\text{month} \times 2/3 = \$400.00/\text{week}$]. The maximum rate for permanent partial disability compensation in October 2004 equaled \$392.00/week. In December of 2005 Ms. Leavitt became entitled to a permanent partial disability compensation rate of \$400.00 per week.

D. Low Back Problems Suffered by Lori Jill Leavitt Prior to October 2004.

Ms. Leavitt acknowledged her involvement in a motor vehicle accident (MVA) on November 24, 1991. On January 15, 1992 Dr. Farrell Fosberg M.D. took a CT scan of Ms. Leavitt's lumbar spine that revealed:

L4-L5 Disc level: focal disc tissue herniation is seen central and to the left of center resulting in moderate compression upon adjacent thecal sac. Normal neural foramina. [Exhibit "J-1" at 11].

In a surgical consult with Ms. Leavitt on July 8, 1992 Dr. Richard Schwartz M.D. diagnosed her with a: "Herniated nucleus pulposus L4-L5 left." [Id. at 160]. On November 17, 2002 Dr. Schwartz operated on Ms. Leavitt performing a: Left microsurgical hemi-laminectomy and discectomy" at L4-5. [Id. at 187]. Dr. Schwartz postoperatively confirmed his original diagnosis of a: "Herniated nucleus pulposus L4-L5 left." [Id.]. The unrefuted medical evidence in this case established that before October 1984 Ms. Leavitt suffered from a surgically treated herniated disc at the L4-5 level of her lumbar spine.

E. The Events of October 2004 in Case No. 06-0583.

Ms. Leavitt claimed that on October 12, 2004 she worked at Sinclair's retail store in Fillmore, Utah stacking cardboard boxes containing six plastic one gallon containers of water. I took notice of the fact that one gallon of water equals 8.34 pounds at 60 degrees Fahrenheit³. Therefore, a box containing six gallons of water weighed approximately 50.05 pounds each. Ms. Leavitt also testified that she stacked boxes containing 24 plastic 24 ounce bottles of water. The boxes containing 24 ounce bottles of water weighed approximately 36 pounds each. Ms. Leavitt recounted that as she stacked the various bottles of water she felt a pull in her low back corresponding with her prior MVA injury so she went home.

Jean Leavitt, Lori Leavitt's mother, testified that Lori Leavitt said she hurt her back stacking water on October 12, 2004. When confronted with medical records and date inconsistencies during the hearing Lorrie Leavitt altered the date of the water stacking activity to October 3, 2004.⁴

Ms. Leavitt recalled that the Monday following the water stacking incident at the Fillmore store she went to a managers meeting for Sinclair employees held in Salt Lake City, Utah. Ms. Leavitt stated that at the managers meeting she used two canes because of her low back pain. Ms. Leavitt admitted that while at the managers meeting she told her immediate supervisor Robbie Curry she did not know how she hurt her back. Twice Ms. Leavitt testified that she told Robbie Curry she thought her back problems stemmed from her MVA in 1991. Ms. Leavitt recalled that a number of people at the managers meeting asked her how she hurt her back and she replied with "I don't know." Jean Leavitt testified that she never talked to Robbie Curry about how Lori Leavitt hurt her back in October of 2004.

³ Washington State Department of Transportation Metric Conversion Tables.

⁴ On October 4, 2004 Dr. Pilar Dechet M.D. documented that: "The patient presents today complaining of severe low back pain. She states she woke up with symptoms without any acute or repetitive trauma." [Exhibit "J-1" at 137].

Robbie Curry, Ms. Leavitt's supervisor in October 2004, testified that he knew Ms. Leavitt complained of back problems, but she never related them to an industrial accident until filing her Application for Hearing on June 21, 2006. In fact all parties including Ms. Leavitt agreed that she never filed an industrial accident report or a workers' compensation claim related to the events of October 2004 until filing an Application for Hearing on June 21, 2006. Ms. Leavitt acknowledged that after experiencing back pain in October 2004 she took 18 days off as sick leave submitting her medical bills through her private insurance. Ms. Leavitt agreed that until February 2006 no one considered her back problems experienced in 2004 as a workers' compensation claim.

Ms. Leavitt unconvincingly argued that as a store manager for Sinclair she did not know how to report a work injury or a workers' compensation claim. To the contrary, Robbie Curry testified that he trained Ms. Leavitt on filing workers' compensation claims as part of her manager's training. More damning evidence to Ms. Leavitt's professed ignorance concerning the filing of workers' compensation claims came in the form of her admission that she carried incident reports and workers' compensation claim forms in her manger's binder. Furthermore, Erika Knosh who worked for Ms. Leavitt as an assistant manager in the Fillmore store testified that Ms. Leavitt trained her on how to file a workers' compensation claim.

The preponderance of the evidence in this case demonstrated that Ms. Leavitt did not suffer a low back injury event arising out of and in the course of her employment with Sinclair in October 2004. In any event, the preponderance of the evidence in this case firmly established that Ms. Leavitt never reported an October 2004 low back industrial injury to Sinclair until she filed her Application for Hearing on June 21, 2006 well beyond the 180 days required by Utah Code §34-A-2-407(2). Therefore, Ms. Leavitt's claim for workers' compensation benefits against Sinclair in Case No. 06-0583 must be dismissed with prejudice.

F. Low Back Problems Suffered by Lori Jill Leavitt Prior to December 7, 2004.

As found in Section III. D., prior to October 1984 Ms. Leavitt suffered from a surgically treated herniated disc at the L4-5 level of her lumbar spine. On October 5, 2004 Dr. Bruce Hebdon M.D. took an MRI scan of Ms. Leavitt's lumbar spine that disclosed:

L4-5 shows a large disc protrusion on the left, which effaces the anetrolateral sac and the left neural foramen and lateral recess. The disk protrusion measures approximately 1.2 cm across at its base, and approximately 1 cm in Ap diameter. This could easily be impinging the left nerve root and possibly the left S1 nerve root. Associated facet degeneration is seen. I do not see significant enhancement of the disk fragment or surrounding soft tissue. [Exhibit "J-1" at 4-5].

On October 12, 2004 Dr. Michael Jaffe M.D. diagnosed Ms. Leavitt with a: "Large L4-5 disc herniation." [Id. at 81]. Dr. Jaffe then began to give Ms. Leavitt a series of epidural cortisone injections at the L4-5 level of her lumbar spine. [See Gen: Id. at 73]. On December 5, 2005 Ms. Leavitt called Dr. Jaffe M.D. for a surgical consult because her left leg went numb. [Id. at 68]. The undisputed evidence in this case confirmed that prior to December 7, 2005 Ms. Leavitt suffered a recurrent herniation of her L4-5 disc.

G. The Events of December 7, 2005.

Ms. Leavitt stated that on December 7, 2005 she worked at the Fillmore store now owned by Petroleum Wholesale. Ms. Leavitt claimed that at 4:45 p.m. her work activities involved putting away candy delivered to the store in plastic totes. Ms. Leavitt testified that she picked up a plastic tote filled with boxes of candy and as she carried it around the counter she felt a "snap" and "crunch" in her low back. Ms. Leavitt claimed she moved six or seven totes of candy prior to the one that caused her low back to "snap" and "crunch."

Ms. Leavitt asserted that the plastic totes filled with boxes of candy weighed between 30 and 40 pounds. However, Ms. Leavitt then recalled in more detail that the 24 ounce boxes of candy came 10 to 12 boxes per tote for a total weight of 21 pounds per full tote. $[24 \text{ ounces/box} \times 12 \text{ boxes/tote} = 288 \text{ ounces/tote} \div 16 \text{ oz/lb} = 18 \text{ pounds/tote} + 3 \text{ pounds for the tote itself (see infra)} = 21 \text{ pounds per tote}]$. Dawn Christensen who also worked with Ms. Leavitt estimated the weight of a tote filled candy at 25-25 pounds. Robbie Curry testified that full totes of candy weighed 15-20 pounds plus 2 pounds for the weight of the tote itself resulting in a total maximum weight of 22 pounds. Finally, Dave Inlay testified that candy boxes weighed between 2 and 3 pounds and came 10 to 12 boxes per tote plus three pounds for the weight of the tote itself. Mr. Inlay's observations yielded a maximum weight of 39 pounds per full tote of candy. $[3 \text{ lbs/box} \times 12 \text{ boxes/tote} + 3 \text{ lbs for the weight of the tote} = 39 \text{ lbs/tote}]$.

After the incident of December 7, 2005 at 4:45 p.m. Ms. Leavitt continued to work until 5:45 p.m. then went home. Ms. Leavitt went to see Dr. Jaffe the next day on December 8, 2005. Ms. Leavitt underwent emergency surgery to her lumbar spine on December 9, 2005.

In summary, the preponderance of the evidence in this case established that as Ms. Leavitt carried a tote full of candy weighing no more than 39 pounds she experienced a snap and crunch in her low back accompanied by extreme discomfort.

H. Low Back Problems after December 7, 2005.

Dr. Peggy Ensign M.D. took an MRI scan of Ms. Leavitt's lumbar spine on December 8, 2005 that demonstrated:

IMPRESSION: Persistent left lateral recess disc herniation at L4-L5 *without significant change in size* (compared with the October 5, 2004 MRI). Increased T2 signal intensity raises the question of recent hemorrhage into the disc. [Exhibit "J-1" at 3][*emphasis added*].

On reviewing the MRI scan on December 8, 2005 Dr. Jaffe diagnosed Ms. Leavitt with:

Left L4-5 recurrent disc herniation in paracentral location causing severe left lumbar radiculopathy. [Id. at 163][*emphasis added*].

On December 9, 2005 Ms. Leavitt underwent surgery at the hands of Dr. Thomas Bauman M.D. who performed a: "Left laminectomy and excision of recurrent disk, L4-L5." [Id. at 165]. Postoperatively Dr. Bauman diagnosed Ms. Leavitt with: "Recurrent left L4-5 disk herniation." [Id.]. On March 6, 2006 Dr. Jaffe related 35% of her then low back problems to the December 7, 2005 incident and 65% of the problems to conditions before then. [Id. at 48 and 57]. Dr. Richard Knoebel M.D. causally related all of Ms. Leavitt's low back problems to conditions preceding the incident on December 7, 2005 and none to the incident itself. [Id. at 100].

Although a dispute existed between Dr. Jaffe and Dr. Knoebel concerning apportionment of medical causation, all of the medical professionals agreed that Ms. Leavitt's L4-5 disc herniation surgically addressed on December 9, 2005 represented a recurrence of her low back problems prior to December 7, 2005.

I. Legal Causation of Lori Leavitt's Low Back problems After December 7, 2005.

As found in Section III.H. *supra* Ms. Leavitt's L4-5 disc herniation surgically treated on December 9, 2005 merely represented the recurrence of a problem that existed prior to December 7, 2005. The injury event of December 7, 2005 involved Ms. Leavitt carrying a tote filled with candy that at most weighed 39 pounds when she experienced a snap and crunch in her low back accompanied by extreme discomfort that led her to seek surgery. [See Gen: Section III.G.]. Ms. Leavitt's exertions in carrying a 39 pound tote did not amount to an atypical nonemployment activity. Men and women in nonemployment life typically and routinely carry loads of 39 pounds. Therefore, the incident on December 5, 2005 did not meet the requirements of legal causation required under the standards set forth in *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986). Therefore, Ms. Leavitt's workers' compensation claim in Case No. 05-1108 based on the December 7, 2005 incident must be dismissed with prejudice for failure to meet the requirements of legal causation.⁵

⁵ Because I found no legal causation with respect to the December 7, 2005 incident I stopped my analysis of the claim without considering the other defenses raised concerning notice and medical causation.

IV. CONCLUSIONS OF LAW.

A. Employment at Sinclair Oil Corporation Case No. 06-0583.

Ms. Leavitt began work for Sinclair in March of 2002 as an assistant manager for Sinclair's retail store. Management at Sinclair promoted Ms. Leavitt to store manager at the Fillmore, Utah location where she worked until Petroleum Wholesale purchased the operation on October 19, 2005.

B. Employment at Petroleum Wholesale Case No. 05-1108.

On October 19, 2005 when Petroleum Wholesale took ownership of Sinclair's retail store in Fillmore, Utah, Ms. Leavitt remained employed as the store manager until terminated on December 10, 2005

C. Compensation Rates While Employed at Sinclair Oil Corporation and Petroleum Wholesale Case Nos. 05-1108 and 06-0583.

During the relevant time periods at issue Ms. Leavitt remained unmarried with no dependent children. As a store manager for the Fillmore Store Ms. Leavitt earned \$24,000.00 per year salary plus \$600.00 per month in bonuses for a total wage of \$31,000.00 per year. Ms. Leavitt's wages at Sinclair entitled her a temporary total disability compensation rate of \$400.00 per week. [$\$31,000.00/\text{year} \div 52 \text{ weeks/year} = \$600.00/\text{month} \times 2/3 = \$400.00/\text{week}$]. The maximum rate for permanent partial disability compensation in October 2004 equaled \$392.00/week. In December of 2005 Ms. Leavitt became entitled to a permanent partial disability compensation rate of \$400.00 per week.

D. Low Back Problems Suffered by Lori Jill Leavitt Prior to October 2004.

Before October 1984 Ms. Leavitt suffered from a surgically treated herniated disc at the L4-5 level of her lumbar spine.

E. The Events of October 2004 in Case No. 06-0583.

Utah Code Ann. §34A-2-401 (1) states in relevant part that:

Each employee ...who is injured...by accident arising out of and in the course of the employee's employment...shall be paid compensation for loss sustained on account of the injury...as provided in this chapter.

Ms. Leavitt did not suffer a low back injury event arising out of and in the course of her employment with Sinclair in October 2004.

Utah Code §34A-2-407(2) provides:

Any employee who fails to notify the employee's employer or the division within 180 days of an injury is barred for any claim of benefits arising from the injury.

Ms. Leavitt never reported an October 2004 low back industrial injury to Sinclair until she filed her Application for Hearing on June 21, 2006 well beyond the 180 days required by Utah Code §34-A-2-407(2). Therefore, Ms. Leavitt's claim for workers' compensation benefits against Sinclair in Case No. 06-0583 must be dismissed with prejudice.

F. Low Back Problems Suffered by Lori Jill Leavitt Prior to December 7, 2004.

Prior to October 1984 Ms. Leavitt suffered from a surgically treated herniated disc at the L4-5 level of her lumbar spine that continued to recurrently trouble her up to December 7, 2005.

G. The Events of December 7, 2005.

On December 7, 2005 while working at Petroleum Wholesale's Fillmore store Ms. Leavitt carried a tote full of candy weighing no more than 39 pounds when she experienced a snap and crunch in her low back accompanied by extreme discomfort.

H. Low Back Problems after December 7, 2005.

Ms. Leavitt's L4-5 disc herniation surgically addressed on December 9, 2005 represented a recurrence of her low back problems prior to December 7, 2005.

I. Legal Causation of Lori Leavitt's Low Back problems After December 7, 2005.

The Utah Supreme Court has held that:

The language "arising out of or in the course of his employment"...was apparently intended to ensure that compensation is only awarded where there is sufficient causal connection between the disability and the working conditions. The causation requirement makes it necessary to distinguish those injuries which (a) coincidentally occur at work because a preexisting condition results in symptoms which appear during work hours without any enhancement from the workplace, and (b) those injuries which occur because some condition or exertion required by the employment increases the risk of injury which the worker normally faces in his everyday life. *Allen v. Industrial Commission*, 729 P. 2d 15, 24-25 (Utah 1986).

The Court in *Allen* then adopted an analysis that involved a two part causation test to establish both legal causation and medical causation. *Id.* at 25. With respect to legal causation the Court in *Allen* held that:

To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work.

Thus, where the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, a usual or ordinary exertion is sufficient. *Id.* at 25-26.

Findings of Fact, Conclusions of Law and Order

Lori Jill Leavitt vs. Sinclair Oil Corporation and/or Ace American Insurance Company;
Petroleum Wholesale and American Home Assurance

Case Nos. 05-1108 and 06-0583

Page 12

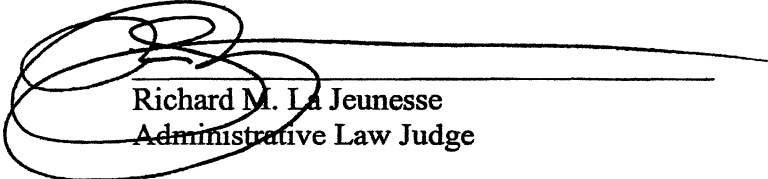
Ms. Leavitt's L4-5 disc herniation surgically treated on December 9, 2005 merely represented the recurrence of a problem that existed prior to December 7, 2005. The injury event of December 7, 2005 involved Ms. Leavitt carrying a tote filled with candy that at most weighed 39 pounds when she experienced a snap and crunch in her low back accompanied by extreme discomfort that led her to seek surgery. Ms. Leavitt's exertions in carrying a 39 pound tote did not amount to an atypical nonemployment activity. Men and women in nonemployment life typically and routinely carry loads of 39 pounds. Therefore, the incident on December 5, 2005 did not meet the requirements of legal causation required under the standards set forth in *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986). Therefore, Ms. Leavitt's workers' compensation claim in Case No. 05-1108 based on the December 7, 2005 incident must be dismissed with prejudice for failure to meet the requirements of legal causation.

V. ORDER.

IT IS THEREFORE ORDERED that Lori Jill Leavitt's Application for Hearing in Case No. 05-1108 is dismissed with prejudice.

IT IS FURTHER ORDERED that Lori Jill Leavitt's Application for Hearing in Case No. 06-0583 is dismissed with prejudice.

DATED THIS 6th day of April 2007.



Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

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

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

Lori Jill Leavitt, Case No. 06-0583

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on April 5, 2007, to the persons/parties at the following addresses:

Lori Jill Leavitt
906 W 400 N
Salt Lake City UT 84116

Sinclair Oil Corporation
550 E South Temple
Salt Lake City UT 84102

Ace American Insurance Company
Margie Simmons Designated Agent
P O Box 1260
West Jordan UT 84088

Jay L Kessler Esq
9117 W 2700 S #A
Magna UT 84044

Mark D Dean Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION


Clerk

Adjudication Division

**APPEALS BOARD
UTAH LABOR COMMISSION**

LORI JILL LEAVITT,

Petitioner,

vs.

**SINCLAIR OIL CORPORATION and
ACE AMERICAN INSURANCE CO.,
PETROLEUM WHOLESALE and
AMERICAN HOME ASSURANCE,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case Nos. 05-1108 and 06-0583

Lori Jill Leavitt asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's denial of her claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and Utah Code Ann. § 34A-2-801(3).

ISSUE PRESENTED

Ms. Leavitt's motion for review is limited to an itemization of her various disagreements with Judge La Jeunesse's findings of fact. The motion for review does not identify the legal significance of any of these factual issues.

FINDINGS OF FACT

The issues of fact identified in Ms. Leavitt's motion for review are inconsequential or represent her personal interpretation of disputed facts. The Appeals Board affirms and adopts the findings of fact set forth in Judge La Jeunesse's decision, recognizing that the minor inconsistencies referenced by Ms. Leavitt do not affect the outcome of this case.

DISCUSSION

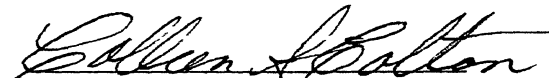
In light of Ms. Leavitt's failure to identify any meaningful issues for review, the Appeals Board has reviewed Judge La Jeunesse's decision for general conformity with the requirements of the Utah Workers' Compensation Act. Based on that review, the Appeals Board concludes that the decision is correct.

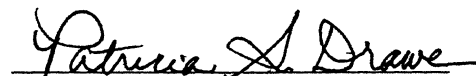
ORDER AFFIRMING ALJ'S DECISION
LORI JILL LEAVITT
PAGE 2 OF 3


ORDER

The Appeals Board affirms Judge La Jeunesse's decision. It is so ordered.

Dated this 12th day of July, 2007.


Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

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

ORDER AFFIRMING ALJ'S DECISION
LORI JILL LEAVITT
PAGE 3 OF 3

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Lori Jill Leavitt, Case Nos. 05-1108 and 06-0583, was mailed first class postage prepaid this 12th day of July, 2007, to the following:

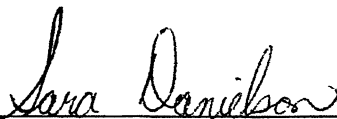
Lori Jill Leavitt
906 W 400 N
Salt Lake City UT 84116

Petroleum Wholesale
P O Box 4456
Houston TX 77210

American Home Assurance Company
Corp Service Co Designated Agent
2180 S 1300 E Ste 650
Salt Lake City UT 84106

Jay L Kessler Esq
9087 W 2700 S Ste 9
Magna UT 84044

David H Tolk Esq
50 S Main St Ste 700
Box 2465
Salt Lake City UT 84110



Sara Danielson
Utah Labor Commission

RECEIVED

AUG - 6 2007

LABOR COMMISSION

To Whom it may concern,

I am appealing the Finding of Fact,
Conclusions of Law + Order, Case Nos.
05-1108 and 06-0583 by Judge Richard
M. La Jeunesse in Room 332 Labor
Commission, 160 East 300 South, Salt Lake
City, Utah, on January 10, 2007 at 8:30 am
I Lori Jill Leavitt the petitioner, submit
to you this day August 6, 2007, a
request for transcripts for this case to
assist the appeal process.

At this time Jay Kessler, my council
up until this point is no longer willing to
assist me with this case. Any assistance
on your part will greatly help.

Thank You 00188

We will be happy to pick
this up please call @

Jori Jill Leavitt