

2007

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

Utah Court of Appeals

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David H. Tolk; Michael K. Woolley; Richards, Brandt, Miller and Nelson; Mark D. Dean; Blackburn and Stoll; Alan Hennebold; Counsel Attorney for Respondents .

Jay L. Kessler; Kessler Law Office; Attorney for Petitioner.

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IN THE UTAH COURT OF APPEALS

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LORI JILL LEAVITT,

Petitioner,

vs.

SINCLAIR OIL CORP.; ACE  
AMERICAN INSURANCE CO.;  
PETROLEUM WHOLESALE;  
AMERICAN HOME ASSURANCE, and  
LABOR COMMISSION OF UTAH,

Respondents.

**BRIEF OF RESPONDENTS  
PETROLEUM WHOLESALE AND  
AMERICAN HOME ASSURANCE**

Case No. 20070646-CA

**(Oral Argument Requested)**

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**BRIEF OF RESPONDENTS PETROLEUM WHOLESALE AND  
AMERICAN HOME ASSURANCE**

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Jay L. Kessler  
Kessler Law Office  
9087 West 2700 South  
Suite 9  
Magna, UT 84044  
*Counsel for Petitioner*

Alan Hennebold  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615  
*Counsel for Respondent Labor  
Commission of Utah*

David H. Tolk [7650]  
Michael K. Woolley [8567]  
Richards, Brandt, Miller & Nelson  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465  
*Counsel for Respondents Petroleum  
Wholesale and American Home  
Assurance*

Mark D. Dean  
Blackburn & Stoll  
257 East 200 South, Suite 800  
Salt Lake City, UT 84111  
*Counsel for Sinclair Oil and Ace  
American Insurance Co.*

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UTAH APPELLATE COURTS

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Jay L. Kessler  
Kessler Law Office  
9087 West 2700 South  
Suite 9  
Magna, UT 84044  
*Counsel for Petitioner*

Alan Hennebold  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615  
*Counsel for Respondent Labor  
Commission of Utah*

David H. Tolk [7650]  
Michael K. Woolley [8567]  
Richards, Brandt, Miller & Nelson  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465  
*Counsel for Respondents Petroleum  
Wholesale and American Home  
Assurance*

Mark D. Dean  
Blackburn & Stoll  
257 East 200 South, Suite 800  
Salt Lake City, UT 84111  
*Counsel for Sinclair Oil and Ace  
American Insurance Co.*

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## **JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a)(2007), Utah Code Ann. § 63-46(b)-16, and Utah Code Ann. § 34A-2-801.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Did the Labor Commission properly dismiss Ms. Leavitt's claims for failure to prove legal causation under the Allen test where Ms. Leavitt had preexisting conditions which contributed to the injury and where the alleged December 2005 industrial incident did not constitute an unusual or extraordinary exertion?

Standard of Review: Discretionary reasonableness and rationality standard. The Utah Court of Appeals has stated that "the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts and this court will uphold the Commission's determination unless it exceeds the bounds of reasonableness and rationality." Acosta v. Labor Commission, 44 P.3d 819, 822 (Utah App. 2002).

2. Did the Labor Commission properly decline to address medical causation where Ms. Leavitt failed to meet her burden to prove legal causation?

Standard of Review: Discretionary reasonableness and rationality standard. The Utah Court of Appeals has stated that "the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts and this court will uphold the Commission's determination unless it exceeds the bounds of reasonableness and rationality." Acosta v. Labor Commission, 44 P.3d 819, 822 (Utah App. 2002).

3. Did the Labor Commission properly apply the two-part causation test under Allen to determine legal causation rather than an outdated an inapplicable standard based upon irrelevant statute, case law, and analysis?

Standard of Review: Discretionary reasonableness and rationality standard. The Utah Court of Appeals has stated that “[w]hether the Commission erroneously applied the Allen test is a mixed question of law and fact reviewed for reasonableness and rationality.” Acosta v. Labor Commission, 44 P.3d 819, 822 (Utah App. 2002).

### **STATEMENT OF FACTS**

Ms. Leavitt filed two Applications for Hearing with the Utah Labor Commission for alleged industrial injuries to her low back sustained on October 12, 2004 with Sinclair Oil and on December 7, 2005 with Petroleum Wholesale. (R. Vol. 1 pp.21,81). Ms. Leavitt’s claims were denied by Petroleum Wholesale based upon legal causation and medical causation. (R. Vol. 1 pp.33-40).

**a. The preexisting conditions from the automobile accident.**

Prior to the alleged industrial claims, Ms. Leavitt had extensive preexisting conditions at the L4-5 level of her low back related to an automobile accident in November of 1991. (R. Vol. 1: p.156-157). On January 15, 1992, Dr. Fosberg obtained a CT scan of Ms. Leavitt’s lumbar spine that revealed a focal disc tissue herniation at L4-5 resulting in compression upon the adjacent thecal sac. (R. Vol. 1: p.156-157). On July 8, 1992, Dr. Schwartz diagnosed Ms. Leavitt with “herniated nucleus pulposes L4-L5 on the

left.” (R. Vol. 1: p.157). On November 5, 1992, Dr. Schwartz performed a left L4-5 hemilaminectomy and discectomy. (R. Vol. 3: pp.187-88). Dr. Schwartz postoperatively confirmed his original diagnosis of “herniated nucleus pulposus L4-L5 left.” (R. Vol. 1: p.157). Based upon that evidence, the Labor Commission concluded that the unrefuted medical evidence in the case established a preexisting surgically treated herniated disc at the L4-5 level of the lumbar spine. (R. Vol. 1: p.157).

**b. The alleged October 2004 Sinclair event: “no injury”**

On October 5, 2004, Dr. Pilar Dechet indicated that Ms. Leavitt woke up on that date with severe low back pain “without any acute or repetitive trauma.” Ms. Leavitt also complained of radiation down her extremity and difficulty with mobility. Dr. Dechet noted that Ms. Leavitt had a previous L4-5 discectomy for a herniated disc. There is no mention in the medical records of any trauma or incident at work at that time. (R. Vol.3: p. 137). Ms. Leavitt was employed by Sinclair Oil at that time. (R. Vol. 1: p.156). On October 5, 2004, a lumbar MRI showed large disc protrusion on the left approximately 1.2 cm across its base. It was noted that the protrusion could be impinging the left L5 nerve root and possibly the left S1 nerve root. (R. Vol.3: pp. 4-5). On October 12, 2004, Ms. Leavitt alleges that she sustained an injury to her low back while stacking boxes of water bottles for Sinclair Oil. However, when confronted with medical records and date inconsistencies during the administrative hearing, she altered the date of the alleged industrial incident to October 3, 2004. (R. Vol.1: p.157).

On October 12, 2004, Dr. Jaffe noted that Ms. Leavitt had a large left L4-5 disc herniation for which Dr. Pilar Dechet had recommended the epidural steroid injections. (R. Vol.3: p.81). Injections were performed on that date and again on November 30, 2004, April 8, 2005, August 12, 2005, and November 22, 2005. (R. Vol.3: pp. 78, 75, 73, and 69). Ms. Leavitt testified during the administrative hearing that the November 22, 2005 injection did not work and that her condition declined as a result. (R. Vol. 5: p.173). She admitted during the hearing that she had to use a cane at work after that date. (R. Vol. 5: p.189). The undisputed evidence at the administrative hearing, including the testimony from Ms. Leavitt indicated that Ms. Leavitt never filed an industrial accident report or workers' compensation claim related to the events of October of 2004 until filing an Application for Hearing on June 21, 2006. (R. Vol.1, p.158).

Weighing the evidence presented at the hearing, the Labor Commission concluded that "[t]he 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." (R. Vol.1, p.158).

**c. The alleged December 2005 Petroleum Wholesale event: preexisting back problems meant no legal causation.**

On October 19, 2005, Ms. Leavitt became an employee of Petroleum Wholesale. (R. Vol. 1: p.156). On December 5, 2005, Ms. Leavitt called Dr. Jaffe for a surgical consult because her left leg went numb. (R. Vol.3, p.68).

**(1) The December 2005 incident: lifting 21-39 pounds is not an unusual exertion.**

On December 6, 2005, one day prior to the alleged December 7, 2005 industrial incident, Dr. Jaffe recommended a repeat MRI and follow-up appointment to evaluate for surgery. (R. Vol.3, p.68). On December 7, 2005, Ms. Leavitt was working for Petroleum Wholesale when she picked up a plastic tote filled with boxes of candy. As she carried it around the counter, she felt a “snap and crunch” in her low back. (R. Vol.1, p.159). Ms. Leavitt testified that she moved six or seven totes of candy prior to the one that caused her to feel a snap and crunch. Ms. Leavitt testified that the totes containing candy weighed approximately 21 pounds each. Dawn Christensen testified that the totes containing candy weighed approximately 25 pounds. Robbie Curry testified that the full totes of candy weighed approximately 22 pounds. Dave Inlay testified that the candy boxes weighed between two and three pounds and came 10 to 12 boxes per tote plus three pounds for the weight of the tote. Such observations would yield a minimum weight of 23 pounds and a maximum weight of 39 pounds per tote. (R. Vol.1, p.159). Based upon that evidence, the Labor Commission concluded that while carrying a tote weighing no more than 39 pounds, Ms. Leavitt experienced a “snap and crunch” in her low back accompanied by discomfort. (R. V.1, p.159).

**(2) The preexisting back problems: no new injury**

On December 8, 2005, Dr. Jaffe noted that Ms. Leavitt had undergone five L5 selective nerve root blocks. He indicated that “[a]ll previous injections allowed her to

walk and function but the last one was not beneficial.” “Yesterday, things became worse after bending over to put away an order at work.” (R. Vol.1, p.162). On that date, Dr. Peggy Ensign obtained an MRI scan of Ms. Leavitt’s lumbar spine which was read to show persistent left lateral recess disc herniation at L4-L5 without significant change in size compared with the October 5, 2004 MRI. (R. Vol.1, p.160); (R. Vol.3, p.3). Dr. Jaffe noted that the “MRI taken today shows a recurrent left paracentral L4-5 disc herniation.” (R. Vol.3, p.163). On December 8, 2005, Dr. Bauman indicated that “[a] repeat MRI scan shows once again, recurrent disk herniation at the L4-5 level on the left, **pretty much unchanged from MRI scan October of 2004.**” (R. Vol.3, p.164) (emphasis added).

**(3) The medical opinions that the incident was a continuation of the preexisting problems.**

On March 3, 2006, Dr. Jaffe reaffirmed that the MRI obtained on December 8, 2005 showed the disc at L4-5 was not dramatically different. Accordingly, Dr. Jaffe related 35% of Ms. Leavitt’s then current symptoms to a December 7, 2005 exacerbation and 65% to prior conditions and injuries. (R. Vol.3, p. 57). On April 3, 2006, Dr. Knoebel examined Ms. Leavitt and concluded that neither alleged industrial incident medically caused Ms. Leavitt’s recurrent disc herniation. Specifically, Dr. Knoebel concluded that “[t]he 12/7/05 incident was reasonably just a manifestation of the patient’s continued pre-existing problems.” (R. Vol.3, pp. 100-101). On October 31, 2006, Dr.

Mark Anderson examined Ms. Leavitt and concluded that neither alleged industrial incident medically caused the recurrent disc herniation. (R. Vol.3, p. 35).

**(4) The Labor Commission's decision: no legal causation because the preexisting conditions contributed and the December 2005 incident was not an unusual exertion.**

On January 10, 2007 an administrative hearing was held at the Utah Labor Commission. On April 6, 2007, the Administrative Law Judge denied Ms. Leavitt's claims against Petroleum Wholesale based upon the Finding of Fact that Ms. Leavitt failed to meet the requirements of legal causation. (R. Vol. 1 p.160). The Labor Commission concluded that Ms. Leavitt's preexisting conditions contributed to the alleged December 2005 incident and that such incident did not involve an unusual or extraordinary exertion. Because of this, Ms. Leavitt could not prove that her injuries were legally caused by the alleged December 2005 incident. On April 17, 2007, Ms. Leavitt filed a Motion for Review of the April 6, 2007 Findings of Fact, Conclusions of Law, and Order. (R. Vol. 1 pp.166-69). On July 12, 2007, the Labor Commission entered its Order Affirming ALJ's Decision. (R. Vol. 1 pp.184-85).

**SUMMARY OF ARGUMENTS**

Under Utah law, an injured worker has the burden to prove both medical and legal causation to establish a compensable workers' compensation claim. Nyrehn v. Industrial Comm'n of Utah, 800 P.2d 330, 334 (Utah App. 1990). The Labor Commission properly concluded that Ms. Leavitt failed to meet her burden to prove legal causation under Utah law. The Utah Supreme Court has stated that "where the claimant suffers from a

preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation.” Allen v. Industrial Comm’n, 729 P.2d 15, 26 (Utah 1986). The undisputed evidence presented at the administrative hearing clearly established that Ms. Leavitt had preexisting back conditions which contributed to her injury. Indeed, Ms. Leavitt does not dispute that her preexisting conditions contributed to the alleged December 2005 injury. Thus, the only disputed issue on appeal is whether the alleged industrial incident involved an unusual or extraordinary exertion under Utah law.

The Labor Commission made findings of fact that “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.” (R.Vol.1, p. 159). Based upon the evidence, the Labor Commission concluded that Ms. Leavitt’s exertions did not amount to an atypical, nonemployment activity. The Labor Commission specifically concluded that men and women in nonemployment life typically and routinely carry loads of 39 pounds. (R.Vol.1, p. 160). Based upon that analysis, the Labor Commission properly dismissed Ms. Leavitt’s claims for failure to meet the requirements of legal causation under Utah law.

In Allen, the Utah Supreme Court adopted a “two-part causation test” which requires an injured worker to prove both legal and medical causation. The Utah Supreme Court stated that “compensable injuries can best be identified by first considering the legal cause of the injury **and then** its medical cause.” Allen, 729 P.2d at 25 (emphasis added). Where the Labor Commission properly concluded that Ms. Leavitt failed to meet

her burden to prove legal causation under Utah law, there is no need to address the issue of whether Ms. Leavitt failed to meet her separate and distinct burden to prove medical causation under Utah law.

However, even if medical causation were still a viable issue on appeal, the evidence demonstrated that Ms. Leavitt could not meet her burden with respect to medical causation either. The Labor Commission found 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.” (R.Vol.1, p.160). Thus, in the absence of any medical evidence to demonstrate industrial medical causation, Ms. Leavitt failed to meet her burden to prove medical causation under Utah law. Accordingly, her claims were properly dismissed by the Utah Labor Commission.

In Point III of her brief, Ms. Leavitt argues that a legal standard from Utah Code Ann. § 35-1-69, which pertains to apportionment for the Second Injury Fund on compensable claims, should be utilized in lieu of the two-part causation test set forth in Allen. However, the Utah Court of Appeals has specifically stated that cases construing Utah Code Ann. § 35-1-69 are inapplicable to the issue of causation in that the statute and those cases “deal with apportionment of liability between the employer and the Employers’ Reinsurance Fund for benefits which are awarded when there is a preexisting condition. Such apportionment occurs subsequent to the determination that benefits will

be awarded and therefore is irrelevant to the inquiry of whether benefits will be awarded under Allen.” Fred Meyer v. Industrial Comm’n of Utah, 800 P.2d 825, 829 FN6 (Utah App. 1990). It is well established that the Allen test is to be used in Utah to determine whether an injured worker can meet his or her burden of proof to establish legal and medical causation. Ms. Leavitt’s argument to the contrary is contrary to Utah law.

### **ARGUMENT**

- I. Ms. Leavitt’s claims were properly denied and dismissed for her failure to meet the burden to prove legal causation where the evidence demonstrated that Ms. Leavitt had preexisting conditions which contributed to the subject injury and that the alleged December 7, 2005 industrial incident did not constitute an unusual or extraordinary exertion under Utah law.**

Ms. Leavitt cannot prevail because the Labor Commission did not abuse its discretion in concluding that the preexisting conditions contributed and that the alleged December 2005 incident of lifting from 21 to 39 pounds was not an unusual exertion. The Utah Supreme Court has stated that “where the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation.” Allen v. Industrial Comm’n, 729 P.2d 15, 26 (Utah 1986). The Utah Court of Appeals has clarified that:

The purpose behind the legal causation test for preexisting conditions announced in Allen was to distinguish between injuries that coincidentally occur at work because a preexisting condition results in symptoms which appear during work hours without any enhancement from the workplace, and those injuries which occur because some condition or exertion required by the employment increases the risk of injury which the worker normally faces in everyday life.

Acosta v. Labor Comm'n, 44 P.3d 819, 827 (Utah App. 2002). The findings of fact made by the Labor Commission demonstrate that Ms. Leavitt had preexisting conditions which contributed to her injury and that her exertion was not unusual or extraordinary under Utah law. The Labor Commission properly denied Ms. Leavitt's claims for failure to meet her burden to prove legal causation. The findings were not an abuse of discretion beyond the bounds of reasonableness or rationality.

**A. The medical evidence presented to the Labor Commission proved that Ms. Leavitt's extensive preexisting conditions contributed to her alleged December 7, 2005 industrial injury.**

The medical evidence presented at the administrative hearing chronicled a long history of preexisting conditions which contributed to the alleged industrial injury. In January of 1992, Dr. Fosberg obtained a CT scan of Ms. Leavitt's lumbar spine that revealed a focal disc tissue herniation at L4-5 resulting in compression upon the adjacent thecal sac. (R. Vol. 1: p.156-157). In July of 1992, Dr. Schwartz diagnosed Ms. Leavitt with "herniated nucleus pulposus L4-L5 on the left." (R. Vol. 1: p.157). On November 17, 2002, Dr. Schwartz performed a left L4-5 hemilaminectomy and discectomy. (R. Vol. 1: p.157). Dr. Schwartz postoperatively confirmed his original diagnosis of "herniated nucleus pulposus L4-L5 left." (R. Vol. 1: p.157). Based upon that evidence, the Labor Commission concluded that the unrefuted medical evidence in the case established a preexisting surgically treated herniated disc at the L4-5 level of the lumbar spine. (R. Vol. 1: p.157).

On October 5, 2004, Dr. Pilar Dechet indicated that Ms. Leavitt woke up on that date with severe low back pain “without any acute or repetitive trauma.” Ms. Leavitt also complained of radiation down her extremity and difficulty with mobility. Dr. Dechet noted that Ms. Leavitt had a previous L4-5 discectomy for a herniated disc. On October 5, 2004, a lumbar MRI showed large disc protrusion on the left approximately 1.2 cm across its base. It was noted that the protrusion could be impinging the left L5 nerve root and possibly the left S1 nerve root. (R. Vol.3: pp. 4-5).

On October 12, 2004, Dr. Jaffe noted that Ms. Leavitt had a large left L4-5 disc herniation for which Dr. Pilar Dechet had recommended the epidural steroid injections. (R. Vol.3: p.81). Injections were performed on that date and again in November 2004, April 2005, August 2005, and November 2005. (R. Vol.3: pp. 78, 75, 73, and 69). Ms. Leavitt testified during the administrative hearing that the November 22, 2005 injection did not work and that her condition worsened. She testified that she had to use a cane at work after that date.

On December 5, 2005, Ms. Leavitt called Dr. Jaffe for a surgical consult because her left leg went numb. (R. Vol.3, p.68). On December 6, 2005, one day prior to the alleged December 7, 2005 industrial incident, Dr. Jaffe recommended a repeat MRI and follow-up appointment to evaluate for surgery. (R. Vol.3, p.68).

On December 8, 2005, the day after the alleged industrial incident, Dr. Jaffe noted that Ms. Leavitt had undergone five L5 selective nerve root blocks on prior occasions. He indicated that “[a]ll previous injections allowed her to walk and function but the last

one was not beneficial.” (R. Vol.1, p.162). Dr. Peggy Ensign also obtained an MRI scan of Ms. Leavitt’s lumbar spine which was read to show persistent left lateral recess disc herniation at L4-L5 without significant change in size compared with the October 5, 2004 MRI. (R. Vol.1, p.160); (R. Vol.3, p.3). Dr. Jaffe noted that the “MRI taken today shows a recurrent left paracentral L4-5 disc herniation.” (R. Vol.3, p.163). On December 8, 2005, Dr. Bauman indicated that “[a] repeat MRI scan shows once again, recurrent disk herniation at the L4-5 level on the left, **pretty much unchanged from MRI scan October of 2004.**” (R. Vol.3, p.164) (emphasis added).

As outlined above, the medical evidence in this case demonstrated that Ms. Leavitt had extensive preexisting conditions including a large L4-5 disc herniation. Additionally, the objective medical evidence including the December 8, 2005 MRI scan confirmed that the large preexisting L4-5 herniation was not significantly different from the prior MRI scan. Accordingly, the evidence demonstrated that Ms. Leavitt’s lumbar condition as of December 8, 2005 was simply a continuation of the recurrent disc herniation at L4-5 which had been diagnosed on October 5, 2004, more than one year prior to the alleged December 7, 2005 industrial injury.

Based upon the foregoing, Dr. Knoebel and Dr. Anderson concluded that the December 7, 2005 industrial incident did not cause Ms. Leavitt’s medical conditions and that this was simply a continuation of her ongoing preexisting conditions. Even Ms. Leavitt’s treating doctor, Dr. Jaffe concluded that the her preexisting conditions contributed to her injury in the amount of 65%. (R. Vol.3, p. 57). Given this unanimous

medical evidence as to contribution of preexisting conditions, the Labor Commission properly concluded that Ms. Leavitt's extensive preexisting conditions contributed to her injury and that Ms. Leavitt was, therefore, required to prove an unusual or extraordinary exertion to meet her burden to prove legal causation under Allen. Certainly the Labor Commission did not exceed the discretionary bounds of reasonableness and rationality by reaching this conclusion in the face of unanimous medical evidence.

**B. The Labor Commission properly concluded that the alleged December 7, 2005 industrial incident did not involve an unusual or extraordinary exertion under Utah law.**

The Labor Commission did not abuse its discretion in concluding that lifting 21-39 pounds was not an unusual exertion. Where an injured worker suffers from a preexisting condition which contributes to the injury, "an unusual or extraordinary exertion is required to prove legal causation." Allen, 729 P.2d at 26. The Utah Supreme Court clarified in Allen that "[t]he precipitating exertion must be compared with the usual wear and tear and exertions of nonemployment life, not the nonemployment life of the particular worker." *Id.* at 26. The Utah Supreme Court later clarified that "the Commission must find that his employment activities involved exertion or stress in excess of the normally expected level of nonemployment activity for men and women in the latter half of the twentieth century. If such a finding is made, then the requirement of legal cause is satisfied because it is presumed that the employment increased the risk of injury to which that worker was otherwise subject in his nonemployment life." Price River Coal v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986).

The Utah Supreme Court set forth a list of examples of typical activities which are not unusual or extraordinary under a legal causation analysis under Utah law. The court stated that “[t]ypical activities and exertions expected of men and women in the latter part of the 20<sup>th</sup> 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, 729 P.2d at 26. Thus, industrial incidents involving exertions which are at the exertion levels of those listed activities or less will not be considered unusual or extraordinary under Utah law. Given the specific examples, it was certainly not outside the bounds of reasonableness and rationality to conclude that lifting 21-39 pounds was not an unusual exertion.

The preponderance of evidence demonstrated that the alleged industrial incident did not constitute an unusual or extraordinary exertion under Utah law. On December 7, 2005, Ms. Leavitt was working for Petroleum Wholesale when she picked up a plastic tote filled with boxes of candy. As she carried it around the counter, she felt a snap and crunch in her low back. (R. Vol.1, p.159). Ms. Leavitt testified that the totes containing candy weighed approximately 21 pounds each. Dawn Christensen testified that the totes containing candy weighed approximately 25 pounds. Robbie Curry testified that the full totes weighed approximately 22 pounds. Dave Inlay estimated and calculated weight of 23 to 39 pounds based on his estimation the candy boxes weighed between two and three pounds and came 10 to 12 boxes per tote plus three pounds for the weight of the tote. Such observations from Mr. Inlay would yield a minimum weight of 23 pounds and a

maximum weight of 39 pounds per tote. (R. V.1, p.159). Based upon that evidence, the Labor Commission concluded that the preponderance of the evidence 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 discomfort. (R. V.1, p.159).

The Labor Commission noted that men and women in nonemployment life typically and routinely carry loads of 39 pounds. (R. V.1, p.164). As a result, the exertions in carrying a tote that weighed, at most, 39 pounds did not amount to an atypical nonemployment activity. Therefore, the claim based upon the December 7, 2005 incident was properly dismissed with prejudice for failure to meet the requirements of legal causation.

The Labor Commission's analysis of the exertion was proper and consistent with Utah law. It certainly does not exceed the bounds of reasonableness and rationality. As outlined above, three of the four witnesses, including Ms. Leavitt, testified that the tote she was carrying on December 7, 2005 weighed 25 pounds or less. In addition, Dave Inlay testified that the totes could weigh from 23 pounds to 39 pounds. The Labor Commission was correct in its conclusion that men and women typically and routinely carry loads of 39 pounds, and such conclusion is certainly within the bounds of discretion.

As outlined above, the Utah Supreme Court specifically listed lifting and carrying baggage for travel as a typical exertion expected of men and women. Allen, 729 P.2d at 26. Baggage for travel quite often weighs quite in excess of 39 pounds and airlines

typically do not charge extra fees for what they determine to be an “overweight bag” until the weight reaches 50 pounds. Thus, baggage weighing less than 50 pounds would be considered by the airlines to be typical, usual, and ordinary. A comparison of the exertion of Ms. Leavitt on December 7, 2005 as compared with the typical exertions of men and women lifting and carrying baggage for travel supports the Labor Commission’s conclusion that her exertion was not unusual or extraordinary based upon the language set forth in Allen.

Another specific example of usual and ordinary exertion given by the Utah Supreme Court in Allen is changing a flat tire on an automobile. To remove a flat tire with the rim from an automobile involves removing a heavy tire with awkward twisting while either bending over or squatting down. That exertion would be greater than the exertion of Ms. Leavitt in lifting a 39 pound tote. The Labor Commission’s conclusion that Ms. Leavitt’s exertion was not unusual or extraordinary is entirely consistent with the law set forth in Allen. Accordingly, such conclusion is not outside the bounds of reasonableness and rationality, and the Labor Commission’s ruling should be affirmed.

The Utah Supreme Court also specifically listed “lifting a small child to chest height” as an example of a usual and ordinary exertion in nonemployment life. Data from the National Center for Health Statistics indicates that the median weight (50<sup>th</sup> percentile) for 4 year old boys is between 36 and 37 pounds. The data indicates that 4 year old boys in the 95<sup>th</sup> percentile weigh 44 pounds. (See Addendum A). The exertion involved in the everyday activity of lifting a four year old child to chest height would not be unusual or

extraordinary under the examples listed in Allen. Ms. Leavitt's exertion in lifting a plastic tote weighing 39 pounds or less involved less exertion than lifting an average-sized four year old to chest height. Accordingly, Ms. Leavitt's exertion was not unusual or extraordinary under Utah law and the Labor Commission properly found that Ms. Leavitt failed to meet her burden to prove legal causation. The Labor Commission certainly did not step outside of the scope of reasonableness or rationality in light of these specific examples of ordinary exertion.

**II. The issue of medical causation need not be addressed where Ms. Leavitt failed to meet her burden to prove legal causation.**

Under Utah law, an injured worker has the burden to prove both medical and legal causation to establish a compensable workers' compensation claim. Nyrehn v. Industrial Comm'n of Utah, 800 P.2d 330, 334 (Utah App. 1990). In Allen, the Utah Supreme Court adopted a "two-part causation test" which requires an injured worker to prove both legal and medical causation. The Utah Supreme Court stated that "compensable injuries can best be identified by **first** considering the legal cause of the injury **and then** its medical cause." Allen, 729 P.2d at 25 (emphasis added).

As outlined above, Ms. Leavitt failed to meet her burden to prove legal causation. In the absence of proof of legal causation, the issue of medical causation is not relevant because Ms. Leavitt's claims cannot be compensable, regardless of whether Ms. Leavitt is able to prove medical causation. Accordingly, the Labor Commission properly denied

and dismissed Ms. Leavitt's claims regardless of the evidence as to medical causation and did not exceed the bounds of reasonableness and rationality.

However, even if the Labor Commission had determined that Ms. Leavitt met her burden to establish legal causation, which it did not, the medical evidence was still insufficient to meet Ms. Leavitt's burden to prove medical causation. Under Allen, if the injured worker is able to prove legal causation, only then does the tribunal move to the second part of the two-part causation test—medical causation. “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. In the event the claimant cannot show a medical causal connection, compensation should be denied.” Allen, 729 P.2d at 27. Under the evidence and findings of fact made by the Labor Commission, Ms. Leavitt cannot meet her burden to prove a medical causation connection. Accordingly, Ms. Leavitt's claims were properly denied and dismissed.

As outlined above, Ms. Leavitt had long standing preexisting back problems. She was specifically diagnosed with a large recurrent herniation at L4-5 prior to the alleged December 7, 2005 industrial incident. On December 6, 2005, one day prior to the alleged December 7, 2005 industrial incident, Dr. Jaffe recommended a repeat MRI and follow-up appointment to evaluate for surgery. (R. Vol.3, p.68). Objective diagnostic medical evidence obtained through multiple MRI scans demonstrated that there was essentially no change in the preexisting herniation through the incident that occurred on December 7, 2005. (R. Vol.1, p.160); (R. Vol.3, p.3); (R. Vol.3, p.164). After reviewing her history

and conducting an examination, Dr. Knoebel concluded that the alleged industrial incident did not medically cause Ms. Leavitt's disc herniation. (R. Vol.3, pp. 100-101). Instead, it was a recurrence of her preexisting back problems. Additionally, on October 31, 2006, Dr. Mark Anderson examined Ms. Leavitt and concluded that the alleged industrial incident did not cause the recurrent disc herniation. (R. Vol.3, p. 35).

Although the MRI scans demonstrated that Ms. Leavitt's condition on December 8, 2005 was simply a continuation of extensive preexisting conditions including the previously diagnosed large disc herniation at L4-5, Ms. Leavitt attempts to rely upon statements made by Dr. Jaffe to argue for medical causation. However, on March 3, 2006, Dr. Jaffe reaffirmed that the MRI obtained on December 8, 2005 showed the disc at L4-5 was not dramatically different. At that time, Dr. Jaffe related 35% of Ms. Leavitt's **symptoms** to a December 7, 2005 exacerbation and 65% to prior conditions and injuries. (R. Vol.3, p. 57). This opinion from Dr. Jaffe does not meet Ms. Leavitt's burden to prove medical causation under Utah law. In fact, that medical record from Dr. Jaffe demonstrates Dr. Jaffe's opinion that although Ms. Leavitt may have experienced some increased **symptoms** on December 7, 2005, the majority of her symptoms were a continuation of preexisting nonindustrial conditions. When that opinion is read in conjunction with Dr. Jaffe's conclusion from that same report that the MRI scan showed no change in condition, it is clear that Dr. Jaffe did not conclude that Ms. Leavitt's condition and need for surgery were medically caused by the alleged December 7, 2005

industrial incident. Simply put, one may have increased symptoms from an event that did not cause the underlying condition.

The Labor Commission properly denied Ms. Leavitt's claims for failure to meet her burden to prove legal causation. Based upon the medical evidence, as outlined above, Ms. Leavitt could not have met her additional and separate burden to prove medical causation. Accordingly, Ms. Leavitt's arguments regarding medical causation should be disregarded because (1) in the absence of proof of legal causation, the issue of medical causation is irrelevant; and (2) the medical evidence was insufficient to prove industrial medical causation with respect to the December 7, 2005 industrial incident. Accordingly, Ms. Leavitt's claims were properly denied and dismissed. Given the evidence, the Labor Commission certainly did not exceed the bounds of reasonableness and rationality.

**III. Ms. Leavitt's argument regarding the alleged October 12, 2004 industrial incident not being a bar to the compensability of the December 7, 2005 industrial claim is based upon statute, case law, and analysis which is irrelevant to the issue of causation under Allen.**

In Point III in her Brief, Ms. Leavitt argues that the October 2004 injury does not bar relief as a preexisting injury for benefits for the December 2005 injury. The relied upon authority is inapplicable and irrelevant. Ms. Leavitt cites to analysis from Chavez v. Industrial Commission, 709 P.2d 1168 (Utah 1985) in support of an argument that the December 7, 2005 industrial incident should be deemed compensable. It appears that the Chavez case is actually properly cited as Kaiser Steel Corp. v. Industrial Comm'n, 709

P.2d 1168 (Utah 1985). However, Kaiser Steel contains analysis and a standard which is inapplicable to the instant case and irrelevant to the issues of causation and compensability.

In Kaiser Steel, the issue presented was whether the Labor Commission erred in finding the Second Injury Fund [now called the Employers' Reinsurance Fund] liable for compensation. In that case, a Medical Panel concluded that the injured worker was 33% impaired before the industrial accident due to arthritis and pulmonary condition with a 2% increase in impairment due to the industrial accident. The Labor Commission concluded that the Second Injury Fund had no liability based upon the finding that the additional 2% impairment was minimal. The Utah Supreme Court cited to Utah Code Ann. § 35-1-69(1)(1973), the statute pertaining to Second Injury Fund liability in effect at that time, which stated that the Second Injury Fund must pay compensation 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 preexisting incapacity." Kaiser Steel, 709 P.2d at 1170. The parties in Kaiser Steel focused on whether the 2% additional impairment caused by the industrial accident was "substantially greater" under the statute pertaining to Second Injury Fund liability. Id.

From the language contained in Kaiser Steel, Ms. Leavitt argues that this court should adopt a standard that the December 2005 alleged injury should be compensable if "the worker's total incapacity following the second injury is 'substantially greater' than it would have been but for the preexisting incapacity." Id. However, this standard is

completely inapplicable to the issues and facts of the instant case. As outlined above, Kaiser Steel deals with a statutory standard for apportionment involving the Second Injury Fund as between preexisting injuries and an industrial injury. There is no basis for applying that irrelevant standard to the instant case. In fact, the Utah Court of Appeals has specifically stated that cases construing Utah Code Ann. § 35-1-69 are inapplicable to the issue of causation in that they “deal with apportionment of liability between the employer and the Employers’ Reinsurance Fund for benefits which are awarded when there is a preexisting condition. Such apportionment occurs **subsequent** to the determination that benefits will be awarded and therefore is irrelevant to the inquiry of whether benefits will be awarded under Allen.” Fred Meyer v. Industrial Comm’n of Utah, 800 P.2d 825, 829 n.6 (Utah App. 1990)(emphasis added).

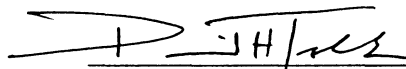
As set forth previously in this brief, the correct standard to be used for determining compensability is the two-part causation test set forth in Allen. Additionally, the Utah Court of Appeals in Fred Meyer specifically concluded that the standard in Utah Code Ann. § 35-1-69 is irrelevant to the issues of causation under Allen. Although the evidence in the instant case clearly demonstrates that Ms. Leavitt did not sustain a “substantially greater permanent incapacity” following the alleged December 2005 industrial incident, it is not necessary to reiterate such facts where such standard is irrelevant to the issue of causation under Utah law. Accordingly, Ms. Leavitt’s arguments in Point III, which are based upon an inapplicable and irrelevant standard, should be disregarded in favor of the law set forth in Allen.

## CONCLUSION

The Labor Commission did not exceed the bounds of reasonableness and rationality in this case. Ms. Leavitt failed to meet her burden to prove legal causation under Utah law. Ms. Leavitt also could not have met her burden to prove medical causation under Utah law. The standard which Ms. Leavitt urges this Court to utilize in addressing the issue of causation is irrelevant and contrary to the analysis set forth in Allen. The Labor Commission properly made Findings of Fact and Conclusions of Law which were supported by the evidence. Accordingly, the Labor Commission factual findings and conclusions of law should not be disturbed because they do not exceed the scope of reasonableness and rationality.

DATED this 21<sup>st</sup> day of May, 2008.

RICHARDS, BRANDT, MILLER  
& NELSON

  
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DAVID H. TOLK  
MICHAEL K. WOOLLEY  
Attorneys for Petitioners

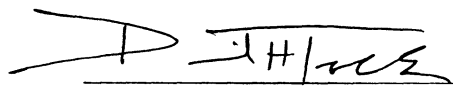
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 21<sup>st</sup> day of May, 2008, to the following:

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

Mark D. Dean  
Blackburn & Stoll  
257 East 200 South, Suite 800  
Salt Lake City, UT 84111

Alan Hennebold  
Labor Commission  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615



David H. Tolk  
Michael K. Woolley

## ADDENDUM A

National Center for Health Statistics  
“Stature-for-age and  
weight-for-age percentiles”

