

2007

Lori Jill Leavitt v. Utah Labor Commission, Sinclair Oil Corporation, and/or Ace American Insurance Company, Petroleum Wholesale and/or American Home Assurance : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORI JILL LEAVITT.	:	Court of Appeals
	:	Case No.: 2007-0646-CA
Petitioners/Appellants.	:	
	:	Priority 7
vs.	:	
UTAH LABOR COMMISSION;	:	
SINCLAIR OIL CORP. and/ or ACE	:	
AMERICAN INSURANCE	:	Labor Commission No.: 05-1108 and
COMPANY; PETROLEUM	:	06-0583
WHOLESALE and/or AMERICAN	:	
HOME ASSURANCE.	:	
	:	
Respondents/Appellees	:	

BRIEF OF APPELLEES
SINCLAIR OIL CORP. and/ or ACE AMERICAN INSURANCE COMPANY

Appeal from the Utah Labor Commission

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UTAH APPELLATE COURTS

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RESPONDENTS REQUEST ORAL ARGUMENT

AND THIS CASE BE REPORTED

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TABLE OF CONTENTS

JURISDICTION OF THE COURT OF APPEALS	1
ISSUES PRESENTED AND STANDARDS OF REVIEW	1
DETERMINATIVE LAW	3
STATEMENT OF THE CASE	4
Nature of the Case and Course of the Proceedings	4
Statement of Facts	5
SUMMARY OF THE ARGUMENT	12
ARGUMENT	13
1. Ms. Leavitt Did Not Properly Report her October 2004 Injury.	13
2. Ms. Leavitt’s October 2004 Injury Did Not Arise Out of and In the Course of Employment..	16
CONCLUSION	21

TABLE OF AUTHORITIES

STATUTES

Utah Code Ann. § 34A-2-104	16
Utah Code Ann. § 34A-2-401	3, 16, 19
Utah Code Ann. § 34A-2-407 (2004)	3, 4, 7, 10
Utah Code Ann. § 34A-2-702 (2004)	13
Utah Code Ann. § 34A-2-801(8)(a)	1
Utah Code Ann. § 63-46b-16	1, 2
Utah Code Ann. § 78-2a-3(2)(a) (2004)	1

CASES

Ae Clevite v. Labor Comm'n, 2000 UT App 35, P7 (Utah Ct. App. 2000)	2
Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986)	3, 6, 17-19
Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)	16, 18
Commercial Carriers v. Industrial Comm'n, 888 P.2d 707, 711 (Utah Ct. App. 1994) ..	1
Hales Sand & Gravel v. Audit Div., 842 P.2d 887, 888 (Utah 1992)	2
Harken v. Board of Oil, Gas and Mining, 920 P.2d 1176, 1180 (Utah 1996)	1
V-1 Oil Co. v. Division of Env'tl. Response & Remediation, 962 P.2d 93, 95 (Utah Ct. App. 1998)	2
West Valley City v. Majestic Inv. Co. 818 P.2d 1311, 1315 (Utah Ct. App. 1991)	15

JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellant, Lori Leavitt, is from a final order of the Labor Commission of Utah dated July 12, 2007. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a) (2004).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Did the Appeals Board properly rule that Ms. Leavitt is not entitled to worker's compensation benefits for the October 2004 accident since she did not report it within the prescribed statutory time. This issue was preserved at R. 105.

Standard of Review

Whether a claimant properly reported an injury is a question of fact. Under the Utah Administrative Procedures Act (UAPA), an agency's factual findings will be affirmed only when they are supported by substantial evidence when viewed in light of the whole record before the court. See Utah Code Ann. § 63-46b-16(4)(g). Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. See Harken v. Board of Oil, Gas and Mining, 920 P.2d 1176, 1180 (Utah 1996). Substantial evidence is more than a scintilla of evidence, though less than the weight of the evidence. See Commercial Carriers v. Industrial Comm'n, 888 P.2d 707, 711 (Utah Ct. App. 1994).

It is the province of the tribunal, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the tribunal to draw the inferences. See V-1 Oil Co. v. Division of Env'tl. Response & Remediation, 962 P.2d 93, 95 (Utah Ct. App. 1998). In seeking to challenge an agency's factual determinations, the court examines all facts and legitimate inferences drawn from them in a light most favorable to the agency's findings. See Hales Sand & Gravel v. Audit Div., 842 P.2d 887, 888 (Utah 1992).

Issue: Did Ms. Leavitt establish by a preponderance of evidence that her low back condition arose out of and in the course of employment with Sinclair Oil in October 2004? This issue was not preserved before the Appeals Board. R. 166-170.

Standard of Review:

Assuming this issue was properly preserved, the Court must uphold the Appeals Board's determination that Ms. Leavitt's injury did not "arise out of and in the course of" her employment, unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under section 63-46b-16(h)(I) of the UAPA. See Ae Clevite v. Labor Comm'n, 2000 UT App 35, P7 (Utah Ct. App. 2000).

DETERMINATIVE LAW

The determinative law is Utah Code Ann. § 34A-2-401 (Utah “Workers Compensation Act”), the provision authorizing workers’ compensation for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . 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 . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401.

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986), to require a claimant to prove both medical and legal causation.

The applicable reporting statute provides:

An 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 an injury.

Utah Code Ann. § 34A-2-407 (2004).

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case involves a determination made by the Utah Labor Commission holding that a worker for Sinclair Oil, Ms. Lori Leavitt, is not entitled to worker's compensation benefits. Ms. Leavitt filed an Application for Hearing claiming entitlement to worker's compensation benefits based upon an industrial injury while working for Sinclair Oil on or about October 12, 2004. R. 81. A hearing was held on this matter before an Administrative Law Judge on January 10, 2007. The ALJ denied benefits on the basis that (1) Ms. Leavitt did not properly report her industrial injury under 34A-2-407 of the Utah Code; and, (2) that Ms. Leavitt did not suffer any low back injury in October 2004 that arose out of and in the course of her employment. R. 153-165.

Ms. Leavitt appealed the ALJ's decision to the Labor Commission's Appeals Board. R. 166. Her Motion for Review failed to raise substantive legal argument. The Board agreed with the ALJ that Ms. Leavitt was not entitled to worker's compensation benefits. R. 184.

Ms. Leavitt has since filed a Petition for Review with this Court seeking review from the final order of the Labor Commission. A Docketing Statement was also filed.

Statement of Facts¹

1. Ms. Lori Leavitt began working for Sinclair in March of 2002 as an assistant manager for Sinclair's retail store. R. 119 (tr). She was promoted to store manager at the Fillmore, Utah location where she worked until Petroleum Wholesale purchased the operation on October 19, 2005. R. 119 (tr). 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.
2. Ms. Leavitt filed two Applications for Hearing with the Utah Labor Commission. She filed her first Application for Hearing on December 21, 2005 against Petroleum Wholesale and American Home Assurance in Case No 05-1108. R. 1. In case No. 05-1108 Ms. Leavitt claimed entitlement to permanent and total disability compensation arising out of an industrial accident of December 7, 2005 when she was lifting a 39 pound plastic tote filled with candy and felt pain in her low back. R. 1.
3. Ms. Leavitt filed her second claim on June 21, 2006 in Case No. 06-0583 against Sinclair Oil Corporation and Ace American Insurance Company. R. 81. 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)

¹ Tr. refers to the page number in the hearing transcript.

temporary total disability compensation; (4) temporary partial disability compensation; (5) permanent partial disability compensation; (6) permanent and total disability compensation, and; (7) travel expenses. See 1d. Ms. Leavitt's second claim for worker's compensation benefits arose out of an industrial accident that allegedly occurred on October 12, 2004 while stacking bottles of water.²

4. 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. R. 100-110. 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 (Utah1986). Finally, the respondents

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.

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. See Id.

5. A hearing on this matter was held on January 10, 2007. R. 111 (tr). Ms. Leavitt testified 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. R. 120 (tr). The ALJ took judicial notice of the fact that one gallon of water equals 8.34 pounds at 60 degrees Fahrenheit.³ R. 153-165. Therefore, a box containing six gallons of water weighed approximately 50.05 pounds each.
6. Ms. Leavitt also testified that she stacked boxes containing 24 plastic 24 ounce bottles of water. R 120(tr). 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. R. 122 (tr).
7. Jean Leavitt, Lori Leavitt's mother, testified that Lori Leavitt said she hurt her back stacking water on October 12, 2004. R. 92 (tr). When confronted with medical records and date inconsistencies during the hearing Lori Leavitt altered the date of the water stacking activity to October 3, 2004.⁴

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].

8. Ms. Leavitt recalled that the Monday following the water stacking incident at the Fillmore store she went to a manager's meeting for Sinclair employees held in Salt Lake City, Utah. R. 123-124 (tr). Ms. Leavitt stated that at the manager's meeting she used two canes because of her low back pain. Ms. Leavitt admitted that while at the manager's 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. R. 125, 128 (tr). 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. R. 93-94 (tr).
9. 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. R. 26-27 (tr). 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. R. 171(tr). 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. R. 134, 164 (tr) Ms. Leavitt agreed that until February 2006 no one

considered her back problems experienced in 2004 as a workers' compensation claim. R. 166 (tr).

10. At the hearing, 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. R. 166, 171 (tr). However, Robbie Curry testified that he trained Ms. Leavitt on filing workers' compensation claims as part of her manager's training. R. 202 (tr). 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 manager's binder. R. 264 (tr). 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. R. 250 (tr).
11. Evidence was also presented at hearing that Ms. Leavitt had low back problems prior to October, 2004. R. 250 (tr).
 - a. At the hearing Ms. Leavitt acknowledged her involvement in a motor vehicle accident (MVA) on November 24, 1991. R. 116 (tr).
 - b. 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.

(J-1, MRE, 11)

- c. In a surgical consult with Ms. Leavitt on July 8, 1992 Dr. Richard Schwartz M.D. diagnosed her with a: “Herniated nucleus pulposes L4-L5 left.” [Id. At 160].
 - d. 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 pulposes 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.
12. The ALJ entered his Findings of Fact, Conclusions of Law and Order on April 6, 2007. R. 153-65. The ALJ determined 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. Additionally, the ALJ held that 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 §34A-2-407(2). Therefore,

Ms. Leavitt's claim for worker's compensation benefits against Sinclair in Case No. 06-0583 was be dismissed with prejudice.

13. On April 17, 2002 Ms. Leavitt filed a Motion for Review of the ALJ's Order. R. 166-169 (tr).
14. On July 12, 2007, the Appeals Board affirmed the ALJ's Order on the basis that her Motion for Review failed to provide any meaningful argument and identification of the issues for review. R. 184.

SUMMARY OF THE ARGUMENT

The tribunal's determination that Ms. Leavitt failed to properly report her October 3, 2004 injury is supported by substantial evidence. Petitioner has failed to marshal the evidence and point out the crucial flaw in the tribunal's order to support a contrary finding. Petitioner argues that conflicting statements should be addressed in her favor. However, she fails to recognize that it is the province of the tribunal, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the tribunal to draw the inferences. Ms. Leavitt similarly fails to recognize that the Court examine all facts and legitimate inferences drawn from them in a light most favorable to the agency's findings. Here, the agency found that Petitioner's testimony was not credible. As a manager, the agency found that she knew how to report an injury.

Finally, Ms. Leavitt's claim that she testified incorrectly at hearing due to her increased medications is equally unconvincing. Nonetheless, Petitioner had the opportunity to raise this issue in her Motion for Review, but did not, barring such review at this juncture.

Ms. Leavitt's also failed to establish that her October, 2004 accident arose out of an in the course of employment with Sinclair. Ms. Leavitt has failed to provide sufficient evidence to establish that the agency's order exceeds the bounds of reasonableness and rationality. Moreover, Petitioner had the opportunity to raise this challenge in her Motion

for Review, but did not. Accordingly, such a challenge is not appropriate at the appellate level.

ARGUMENT

POINT 1: Ms. Leavitt Did Not Properly Report her October 2004 Injury.

Ms. Leavitt argues that the ALJ and Appeals Board erred in determining that she was not entitled to worker's compensation benefits for the October 2004 injury since she properly reported her industrial injury within the appropriate statutory period.

The applicable reporting statute provides:

An 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 an injury.

Utah Code Ann. § 34A-2-702 (2004).

In his Order, spanning over 12 pages, the ALJ determined that Ms. Leavitt never reported an October 2004 low back injury to Sinclair until she filed her Application for Hearing on June 21, 2006, well beyond the 180 days required by Utah Code. We agree. Indeed, it is undisputed that after the October, 2004 event, Ms. Leavitt did not tell anyone at the store she was injured while at work. R. 121 (tr). In fact, Ms. Leavitt thought that her back condition was the result of a car accident 12 years earlier. R. 122 (tr). Ms. Leavitt informed her supervisor, Rob Curry, at a manager's meeting on Monday October 4, 2004 that her back was injured and that she thought it was from the prior car accident. R. 124-25 (tr). Additionally, at the manager's meeting Ms. Leavitt was instructed to go

home by a manager named Scott since she was in pain. On direct questioning her attorney inquired as to whether she told her supervisor that her back hurt because she was moving boxes at work. She replied “No.” R. 125 (tr).

Rob Curry also testified at hearing. He indicated that he knew that Ms. Leavitt complained of back problems but that she never related them to an industrial accident until she filed her Application for Hearing on June 21, 2006. R. 26-27 (tr).

Ms. Leavitt further testified that after the meeting she went to see Dr. Jaffe and also told him that her back was injured because of a car accident 12 years ago. R. 125-26. In fact, none of Dr. Jaffe’s medical records state that her back condition is work related until his report dated January 6, 2006 (although it is misdated as 1/6/05), well after the 180 day reporting period. (MRE, 60). Additionally, physical therapy notes fails to note that she injured herself on October 2004.

At the hearing, Ms. Leavitt also testified that she did not know how to complete accident report. R. 166, 171, 264. However, evidence at hearing revealed that Ms. Leavitt was a store manager and had filled out accident reports in the past and kept incident reports in her book. Testimony of Erica Knosh also revealed that Ms. Leavitt was her manager and that Ms. Leavitt taught her how to complete an incident report. R. 250 (tr). Accordingly, the ALJ found Ms. Leavitt’s argument that she lacked knowledge of how to report an injury unconvincing.

Ms. Leavitt attempts to marshal the evidence to show that she properly reported this injury to her employer. However, it is evident that Ms. Leavitt does not “ferret out the fatal flaw in the evidence and demonstrate that the administrative decision is clearly erroneous.” See West Valley City v. Majestic Inv. Co. 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

First, Ms. Leavitt indicates that because she was medicated at the hearing on this matter, her trial testimony conflicted with that of her deposition. She states that at hearing she testified that she reported her claim to Rob Curry as occurring while involved in a motor vehicle accident 12 years prior but at the deposition she indicated that she told Rob Curry after the manager’s meeting that she hurt her back from doing “lifting and stuff” at work. She asks the court to consider her deposition testimony in lieu of that at hearing. At the outset, Ms. Leavitt’s deposition testimony is not part of the record in this case. Moreover, Ms. Leavitt’s credibility is certainly suspect given that she testified that she did not know how to report an industrial accident even though as a manager she was trained in reporting, trained others including Ms. Knosh regarding how to report an accident, had a binder of accident forms in her manager’s manual and also submitted her medical bills to her private insurance rather than to the worker’s compensation carrier.

To now argue that her own hearing testimony is flawed based upon her own medical incompetency is not supported by any medical evidence aside from her self-serving testimony. In any event, even if this were the case, Ms. Leavitt did not raise this

as a matter of error in her Motion for Review so the Appeals Board could rule on this matter. Accordingly, such a challenge is waived on appeal. See Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). Indeed, in Badger, the Court stated that to properly raise an issue for appeal, a party must raise the issue in trial court. This requires that such an issue be raised in a timely fashion, specifically raised and must be supported by evidence or legal authority. See id. Since Ms. Leavitt did not put the Appeals Board on notice of this potential error and give them the authority to correct the error, Ms. Leavitt may not raise this issue for the first time on appeal.

POINT 2: Ms. Leavitt's October, 2004 Injury Did Not Arise Out of and In the Course of Employment.

Ms. Leavitt also challenges the ALJ and Appeals Board's ruling that her October 2004 injury did not arise out of and in the course of employment with Sinclair. We disagree and submit that the administrative tribunal acted reasonably and rationally in rendering this determination.

Section 34A-2-401 of the Utah Code, the provision authorizing workers' compensation for industrial accidents, reads as follows:

An employee described in Section 34A-2-104 who is injured . . . 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 . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401 (emphasis added).

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986) to require an applicant to prove both medical and legal causation.

A. Ms. Leavitt Failed to Meet the Higher Legal Causation Standard.

Ms. Leavitt first argues that the court erred in ruling that she failed to meet the higher standard of legal causation. Sinclair submits that the tribunal's ruling was appropriate.

In Allen, the threshold case on this matter, the Court stated:

Where a 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, usual or ordinary exertion is sufficient

Allen, 729 P.2d at 26

There is no dispute in this case that the higher standard of legal causation applies here. Indeed, Petitioner had a motor vehicle accident on November 24, 1991. She underwent a CT scan on January 15, 1992 showing an L4-5 disc herniation. (MRE, 11). In 1992 she underwent a low back surgery by Dr. Schwartz including a hemilaminectomy and discectomy at L4-5. (MRE, 187). Dr. Anderson indicated in his IME report, and the tribunal agreed, that Petitioner's prior surgery contributed to her low back condition in October, 2004. (MRE. 35). Hence, the higher standard applies.

The Court stated in Allen with regard to the higher standard of legal causation:

To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk [she] already faced in everyday life because of [her] condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that taken in normal, everyday [nonemployment] life of [any person]. . . . 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. In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected in today's society, not what the [injured] . . . claimant is accustomed to doing. 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.

Id. at 26 (emphasis added).

The tribunal acted well within its discretion in ruling that Ms. Leavitt did not satisfy the higher legal causation standard. In any event, Petitioner failed to raise any challenge to the ALJ's legal causation ruling in her Motion for Review. Accordingly, such a challenge is waived on appeal to this Court. See Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998).

Moreover, Petitioner fails to properly marshall the evidence with regard to legal causation. She argues 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." By making such a statement, Ms. Leavitt clearly misunderstands the legal causation standard.

Petitioner must show that despite the overwhelming evidence in support of the Appeals

Board and ALJ's ruling that the Board committed a fatal error in overlooking crucial evidence. She has not done so.

Certainly, there was ample evidence presented at hearing for the ALJ and Appeals Board to find that stacking cardboard boxes containing 24 plastic 24 ounce bottles of water (weighing 36 pounds each) is not unusual or extraordinary activity when gauged against non-industrial 20th century non-employment life. Petitioner has not presented any legal argument or evidence showing that the tribunal's determination exceeds the bounds of reasonableness and rationality.

B. Ms. Leavitt Failed to Establish A Medical Causal Connection Between Her Back Condition and the October 2004 Industrial Episode.

In his Order, the ALJ determined that Ms. Leavitt is not entitled to worker's compensation benefits since she did not sustain her burden of proving, by a preponderance of evidence, that she sustained a low back injury that arose out of and in the course of employment with Sinclair in October 2004 as required by section 34A-2-401 of the Utah Code.

It is well settled that to prove medical causation, "a 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 v. Industrial Comm'n, 729 P.2d 15, 27 (Utah 1986).

Again, Petitioner failed to challenge the ALJ's ruling in her Motion for Review. Since Petitioner did not preserve this issue below, the Court of Appeals should not consider this argument on appeal. In any event, the medical records reveal that Petitioner's low back condition is not medically caused from a stress, strain or exertion in October, 2004 while working for Sinclair.

Indeed, Dr. Mark Anderson indicates that no treatment for her back was needed on an industrial basis as a result of the October 2004 event at Sinclair. (MRE, 35-36). Additionally, the IME of Dr. Richard Knoebel also indicates that the October 2004 event did not cause, contribute to or permanently aggravate her low back condition. (MRE, 100). Dr. Knoebel notes that Petitioner continued to work from October 2004 through December 2005, indicating no correlation between her symptoms and her work at Sinclair.

CONCLUSION

The Court of Appeals should affirm the Appeal's Board's Order denying worker's compensation benefits to Ms Leavitt for her claimed October 3, 2004 accident with Sinclair Oil. Petitioner did not properly report her claimed injury within the appropriate statutory period and did not establish, as is her burden, that this accident "arose out of an in the course of employment" with Sinclair.

Respectfully submitted this day of May, 2008.

BLACKBURN & STOLL, LC

A handwritten signature in cursive script, appearing to read "Mark D. Dean", is written over a horizontal line.

Mark D. Dean / Kristy L. Bertelsen
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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 21st day of May, 2008, to:

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