

2007

Lori Jill Leavitt v. Sinclair Oil : Reply Brief

Utah Court of Appeals

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

Mark D. Dean; Blackburn & Stoll; Jay L. Kessler; Attorneys for appellees.

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IN THE UTAH COURT OF APPEALS

LORI JILL LEAVITT,
Appellant,

v.

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

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APPELLANT REPLY BRIEF

Appellate Case No. 20070646-CA

APPELLANT REPLY 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

Labor Commission
160 East 300 South
Salt Lake City, Utah 84114

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RICHARDS, BRANDT, MILLER & NELSON
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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

Labor Commission
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JURISDICTION

All parties to this action admit and agree that the Utah Court of Appeals has jurisdiction in this matter, and as such jurisdiction is proper.

ARGUMENT

1. THE OCTOBER, 2004 INJURY WAS PROPERLY REPORTED

As stated previously, whether a claimant properly reports a work-related injury is a factual finding which can only be overturned if the ALJ's finding is 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)).

There is nothing cited in the statute that mandates reporting a work-related injury by filing a written incident or accident report. At one time a written notice of injury was required within a limited period of time or the claimant could be barred from receiving services and benefits, but that law was changed.

Now, the code reads:

(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 of the Utah Code Ann.

There is nothing in the code that mandates a written notice to the employer. Ms. Leavitt did tell her supervisor that she was hurt at work. She also told her supervisor that she was injured twelve years earlier in a car accident, an admission that accentuates her credibility.

The Petitioner firmly believes that her opening brief clearly outlines the marshaling of the evidence, but credibility becomes the issue when discussing the reporting of the incident.

The ALJ took great stock in the testimony of Ms. Leavitt's supervisor, Robbie Curry. Mr. Curry testified that Ms. Leavitt began work in 2000 or 2002, while he was the supervisor, and that she became an assistant manager in 2003. (Tr at 17-18).

Mr. Curry testified that on October 5, 2004, Ms. Leavitt told him that she hurt her back, and that before this date he did not notice her having a back problem. (TR at 26). Mr. Curry admitted that Ms. Leavitt voluntarily

told Mr. Curry about her back being hurt, and that although she was limping, he did not have to ask her what happened because she told him. (TR at 26).

Mr. Curry testified that he did not recall what she told him about how she hurt her back though, but said that he knew it wasn't work-related because "if she told me it was work related we would have reported it". (TR at 27). Unfortunately, this statement is completely self-serving and biased toward his initial contention.

Regarding Ms. Leavitt's credibility, Mr. Curry testified that she had previously went through the worker's compensation procedures through him and Sinclair when she hurt her wrist, and that she had experience with the company regarding the worker's compensation procedures. (TR at 32).

Mr. Curry testified that there was a first report of the wrist injury, and that he remembered the incident. (TR at 32).

In reality, the wrist injury happened to Ms. Leavitt in 1999, well before she worked for Sinclair and while she was working for Ellis Skychief, and went through their worker's compensation department. (Volume 3- Exhibit 009).

Further, Ms. Leavitt testified that when she was hurt at Skychief she did not fill out any papers for worker's compensation, but that her supervisors became aware of her injury and filled out what was needed for her to receive benefits. (TR at 149).

Clearly, Mr. Curry made self serving remarks that Ms. Leavitt had experience in filling out documents for worker's compensation benefits while with Sinclair, but the reality is that she did not. Further, Ms. Leavitt had no experience filling out worker's compensation benefits for herself.

On direct examination, Ms. Leavitt testified that she told Mr. Curry, her supervisor, that she hurt her back at work, and that she thought it was from her car accident 12 years ago. (TR at 129-130)

After marshaling the evidence in our first brief, the "fatal flaw" is clearly the self-serving or perjurious testimony of Ms. Leavitt's supervisor, Mr. Curry, which should have reduced his credibility. The ALJ relied upon Mr. Curry's testimony as the foundation of his Findings of Fact that Ms. Leavitt never reported the October, 2004 work-related injury. (See Volume 1 Exhibit 153-164).

Further, the ALJ's Findings of Fact were flawed by referencing that Ms. Leavitt's back surgery occurred on November 17, 2002, instead of 1992; and that Ms. Leavitt "suffered from a surgically treated herniated disk at the L4-5 level of her lumbar spine" in 1984. (See Volume 1 Exhibit 153-164).

The ALJ makes absolutely no reference to Ms. Leavitt stating she told her supervisor or other managers that she hurt her back at work, while she testified that she did in numerous places of the transcript as previously outlined.

The ALJ lessened Ms. Leavitt's credibility by finding that when she was confronted in trial by inconsistent dates of injury and medical records, and that she altered the date of the water stacking activity to October 3, 2004. (See Volume 1 Exhibit 153-164).

Many dates were altered by both sides to this matter. In fact, although Ms. Leavitt stated that she was injured at Skychief in 1998, it was actually 1999. (Volume 3- Exhibit 009), and (TR at 149).

Did Ms. Leavitt report her work-related injury to her supervisor within 180 days of the injury? Yes, if the court would have reviewed the substantial evidence in light of the whole record. Because the Commission did not review the substantial evidence in light of the whole record, the Petitioner contends that the Commission's Findings were arbitrary and capricious because the substantial evidence is that Mr. Curry either lied under oath for his employer's purposes, or was negligent in his statements; and that although Ms. Leavitt's statements were somewhat inconsistent on dates and times, she was completely honest to a fault by stating that she thought her injuries stemmed from a 12 year old car accident that was completely healed. In effect, Ms. Leavitt reported her October 2004, injury in a timely manner.

2. THE OCTOBER, 2004 INJURY DID ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT

As stated previously, 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).

3. LEGAL CAUSATION FOR THE OCTOBER 2004 INJURY

Ms. Leavitt admitted that she had a pre-existing condition, albeit the previous back problem which occurred thirteen years previous from the car accident. But Ms. Leavitt asserted, and all of the medical evidence bears out that she fully recovered from her car accident of 1991. Ms. Leavitt had no back problems nor medical needs with regard to her back from 1993-2004.

First, the court did not properly find facts with regard to causation on the October, 2004 injury, because the ALJ held that she was barred from benefits for failure to report. As such, Ms. Leavitt properly marshaled the evidence in that she completely outlined the pre-existing condition, and that nothing occurred for twelve years notwithstanding her vigorous employment and lifestyle between 1992 and 2004. Ms. Leavitt contends that the higher standard of legal causation is improper. Regardless, findings were not made on this subject.

Notwithstanding the Respondent's assertions, the Petitioner's previous brief outlines that while

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. 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.

Further, the Petitioner contends that the Commission's Findings were arbitrary and capricious because the substantial evidence is that Ms. Leavitt was completely healed for twelve years and her first new back injury came about in October 2004, lifting crates of water for the Respondent, and as such the higher standard of legal causation was not necessary.

4. MEDICAL CAUSATION FOR OCTOBER 2004 INJURY.

Because the ALJ did not address medical causation, and the Petitioner addressed it in her previous brief, we believe that nothing more need be said regarding a subject where there are no findings of fact with which to dispute.

5. LEGAL CAUSATION FOR THE DECEMBER 2005 INJURY.

As stated in our previous brief, it is not disputed that by December, 2005 Ms. Leavitt had a pre-existing condition with her back, namely the

October, 2004 accident.

The argument 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).

As outlined in Petitioner's previous brief, Ms. Leavitt's exertions in putting away the delivery order is indeed an exertion not normally undertaken in everyday life, and that the Labor Commission abused its discretion in determining that it was not. The facts previously stated regarding the weight and repetition of lifting and turning with these crates of product is an extra-ordinary exertion not posed in everyday life.

Clearly one does not lift a toddler numerous times within a few minutes, or change numerous tires in a row as part of normal life. Her exertion was atypical and contributed to her injury. As such the legal causation standard has been met.

The Petitioner contends that the Commission's Findings were arbitrary and capricious because the substantial evidence shows that Ms. Leavitt was completely healed for twelve years and her first new back injury came about in October 2004, lifting crates of water, and her second injury which greatly worsened the first injury occurred in December, 2005, while lifting other crates of company product. As such the higher standard of legal causation should not have been imposed upon Ms. Leavitt. Even if the higher standard is proper, the first brief completely outlines why we

believe benefits are due to Ms. Leavitt.

6. Medical causation was not addressed by the court.

Because the Court did not address medical causation, and did not make findings of fact, there are no facts or law to argue.

7. Although the October, 2004 injury has been adjudicated as time-barred (now on appeal), the October, 2004 injury would evidence a pre-existing injury at the same employer and the higher standard of legal causation would not apply toward the December, 2005 injury.

The Respondent argues that any apportionment between the two injuries are irrelevant because Ms. Leavitt was never awarded benefits on the October, 2004 incident. Fred Meyer v. Industrial Commission of Utah, 800 P.2d 825,829 (Ut. Ct. Ap. 1990).

In the Fred Meyer case, an employee sustained a back injury from work and received benefits in both 1975 and then again in 1978. A new injury took place on the job in 1985, and benefits were denied because the ALJ stated that the employee had to prove the higher standard of causation due to a preexisting condition. Although this employee had no record of a back injury outside of employment contrary to the case at bar, the court held that the “higher legal standard of Allen does not apply when a preexisting condition is caused by prior work-related injuries previously incurred in the same workplace”. (Fred Meyer at 828).

In the present case, Dr. Jaffe’s summation letter clearly stated that Ms. Leavitt’s injuries were attributed to 65% from the October 2004, work

injury and 35% from the December, 2005 injury. No part of the injury was attributed to the 1991 auto accident. (Volume 2 Exhibit 194). Although Dr. Jaffe had Ms. Leavitt's medical records regarding her car accident from 1991, he did not attribute any of her present injuries to the 1991 accident. One hundred percent of Ms. Leavitt's injuries are attributed to her working for the Respondents at the same workplace.

We still contend that even if Ms. Leavitt did not report her October 2004, injury on time, (which we contend was timely), it was still a work-related injury which gives rise to the December, 2005 injury being compensable without going through the higher standard of legal causation.

Even if the higher standard of legal causation is required, we believe that our first brief fully outlines that she is entitled to benefits.

If the court's holding in Allen does now require that, "This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairment resulting from a personal risk rather than exertions at work", then the court erred by not looking at the long injury-free time period of Ms. Leavitt's back. Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986).

The 12 years from 1992 through the end of 2004, were injury free for Ms. Leavitt's back. During this time she worked hard, physical jobs; she 4-wheeled; she was pain free. Things changed due to the October, 2004 injury, and she should be compensated for both it and the December, 2005 injury.

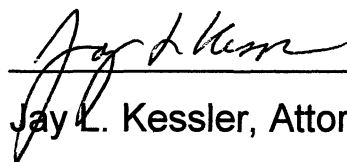
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CONCLUSION

The Labor Commission exceeded the bounds of reasonableness and rationality by not addressing Ms. Leavitt's 12 years of injury free work, the doctor stating that 100% of the injury was work related, and by the either the perjury or negligence of the Respondent's key witness, Robbie Curry. This Court has held that, "Furthermore, to facilitate the purposes of the legislation, the Worker's Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant". USX Corp. v. Industrial 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 1st day of July, 2008.

KESSLER LAW OFFICE



Jay L. Kessler, Attorney for Appellant

CERTIFICATE OF SERVICE

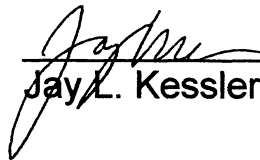
I hereby certify that on this 1ST day of July, 2008, I

hand-delivered the foregoing Appellant Reply Brief to the following:

Labor Commission of Utah
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