

1987

Varian-Eimac Inc., and or Employers Mutual Liability Insurance v. Helen D. Lamoreaux, The Second Injury Fund, and the Utah State Industrial Commission : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870344-CA

IN THE COURT OF APPEALS, STATE OF UTAH

VARIAN - EIMAC, INC. AND/OR	:	
EMPLOYERS MUTUAL LIABILITY	:	
INSURANCE,	:	COURT OF APPEALS
	:	
Petitioners,	:	
	:	
vs.	:	Case No. 870344-CA
	:	
HELEN D. LAMOREAUX, THE SECOND	:	
INJURY FUND, AND THE UTAH STATE	:	
INDUSTRIAL COMMISSION,	:	
	:	Category #6
Respondents.	:	

REPLY BRIEF OF PETITIONERS VARIAN - EIMAC, INC.
AND/OR EMPLOYERS MUTUAL LIABILITY INSURANCE

Petition for Review of an Order
of the Industrial Commission
of the State of Utah

The Honorable Gilbert A. Martinez
Administrative Law Judge

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IN THE COURT OF APPEALS, STATE OF UTAH

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EMPLOYERS MUTUAL LIABILITY	:	
INSURANCE,	:	COURT OF APPEALS
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Petitioners/Appellants,	:	
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vs.	:	Case No. 870344-CA
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HELEN D. LAMOREAUX, THE SECOND	:	
INJURY FUND, and THE UTAH	:	
STATE INDUSTRIAL COMMISSION,	:	Category 6
	:	
Respondents.	:	

REPLY BRIEF OF PETITIONERS VARIAN - EIMAC, INC.
AND/OR EMPLOYERS MUTUAL LIABILITY INSURANCE

SUMMARY OF ARGUMENT

In its Order Granting Motion for Review, the Industrial Commission erroneously interpreted and failed to apply the standard of legal causation set forth in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) for cases involving workers with a pre-existing condition aggravated by an industrial injury. In Allen, the Utah Supreme Court clearly stated that before benefits can be awarded to a worker in such instances, he ". . . 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." Id. at 25. In the instant case, respondent Lamoreaux was indisputedly suffering from a pre-existing back condition at the time of her back injury at issue. Furthermore, the evidence revealed that the event precipitating her injury was the lifting, from waist level, of an 18 1/2-pound x-ray tube. This activity does not constitute "an exertion greater than that undertaken in normal everyday life." Thus, under the law set forth in Allen, Ms. Lamoreaux is clearly not entitled to worker's compensation benefits for the injury she suffered on November 15, 1985. The Commission's award of benefits should, therefore, be reversed, and the decision of the Administrative Law Judge should be reinstated.

ARGUMENT

I. THE INDUSTRIAL COMMISSION'S ORDER IS UNSUPPORTED BY EITHER LEGAL PRECEDENCE OR FACTUAL EVIDENCE.

Utah Code Annotated § 35-1-84 (1953 as amended) provides that upon review of a Commission order, the Court may set aside the award if the Commission acted "without or in excess of its powers" or if "the findings of fact do not support the award." In the instant case, the Commission acted contrary to law and thus, outside the scope of its powers. Additionally, its decision is not supported by the evidence. Therefore, its Order should be reversed and the Findings and Order of the Administrative Law Judge reinstated.

- A. The Commission was Acting Outside the Scope of Its Jurisdiction in Formulating a New Standard of Legal Causation for Cases Involving Allegedly Job-Induced Preexisting Conditions.

The Commission's Order purports to award benefits to Ms. Lamoreaux on the grounds her preexisting back problem was solely the result of her employment activities with Varian - Eimac. According to the Commission, an applicant with such a preexisting condition is not bound by the higher standard of legal causation despite the clarity of that requirement, as set forth in Allen, for cases involving aggravated preexisting conditions. The Order of the Commission in this regard directly contravenes the standard of compensability adopted by the Utah Supreme Court since the Court in Allen made no distinction between job-induced preexisting conditions by the same employer and preexisting conditions attributable to non-employment life or to the working conditions of a different employer.

The level of legal causation to be applied in any given case is clearly a question of law. As the Utah Supreme Court stated in Cudahay Packing Company of Nebraska v. Brown, 210 P. 608, 610 (Utah 1922), "[t]he legal effect of the evidence produced is a question of law which is the duty of this Court to decide." The rule that no deference should be given to Commission findings on questions of law was once again reaffirmed by the Court in Utah Consolidated Mining Company v. Industrial Commission of Utah, 240 P. 440, 442 (Utah 1925) where it stated:

No doubt the Commission may misapply some provision of the statute or positive law in making or denying an award. If the Commission does so and makes an award for compensation which is contrary to law, it does what is not sanctioned by the law under which it acts, and hence, as it is expressed in the statute, it acts in excess of its jurisdiction.

Although both Cudahay and Utah Consolidated Mining were decided under prior law, the statute providing for review of Commission decisions was the same as the statute applicable herein. Inasmuch as Allen clearly states the positive law governing the compensability of Industrial Commission claims, the Commission's blatant disregard of the standard established by the Utah Supreme Court in favor of fashioning a standard of its own clearly violates the scope of its authority and warrants reversal by this Court.

- B. There is no Evidence in the Record to Support Ms. Lamoreaux's Claim that Her Preexisting Back Condition is Due Solely to Her Work Activities at Varian - Eimac.

In the medical panel report, Dr. Girard Vanderhooft, the medical panel physician, states:

I do believe that there was a pre-existing weakness of the ligaments which would make intervertebral disc herniation more likely. This was evidenced by the fact that she [Ms. Lamoreaux] had sought chiropractic treatments in April and August prior to her injury in November.

. . . Considering all factors, however, I believe that a 15 percent permanent partial impairment of the whole person is the appropriate impairment rating in this state

and at this time. I think that the permanent impairment would justly be divided equally between the pre-existing condition and the injury of November 15, 1985. That is, 7 1/2 percent whole person impairment due to the pre-existing condition and 7 1/2 percent is due to the injury of November 15, 1985. . . .
(Emphasis added.)

(R. at 249.) Ms. Lamoreaux does not contest the above finding by the medical panel doctor of a preexisting condition in her back rendering her more susceptible to injury at the time of her disc herniation on November 15, 1985. Rather, she claims that the preexisting condition identified by Dr. Vanderhooft was wholly job-induced by her employment duties at Varian. Her claim to this effect is based largely on the fact that she had not experienced any symptomatic back problems prior to her employment with the appellant. Case law is clear, however, that a preexisting condition need not be known to the applicant in order to be considered preexisting for purposes of Allen. For example, in Justice Zimmerman's concurring opinion in Holloway v. Industrial Commission of Utah, 729 P.2d 31 (Utah 1986), he states:

. . . I would observe that the preexisting condition of which Allen speaks need not be patent; in fact, it need not have been known or knowable to anyone before the injury. The sole question is whether the worker came to the workplace with a condition that increased his risk of injury. If he did and that condition contributed to the injury, then Allen's higher standard of legal casuation comes into play so as to place that worker on the same footing as one who did not come to work with a preexisting condition.
(Emphasis added.)

Id. at 32. Thus, a quiescent preexisting problem brought to light by an industrial injury is sufficient to invoke the higher standard of legal causation mandated by Allen for purposes of determining compensability.

Although Ms. Lamoreaux and the Industrial Commission claim that her preexisting condition is attributable solely to her employment with Varian, the evidence is to the contrary. At the time of her injury, Ms. Lamoreaux weighed approximately 190 pounds and had been at at least this weight for a number of years. (R. at 73.) She was also suffering from preexisting arthritis in her back. This fact is evidenced by the office notes of Dr. Wayne Zundell who, on April 22, 1985, made the following entry:

Lifting at work and at home and injured her back four days ago.

Arthritis - was much improved until she lifted tube at work and irritated back. Next morning, bent over to pick up a child and sudden onset of severe, non-radiating low back pain. Better today, but still disabling.

(R. at 143.)

Furthermore, the notes of Dr. Thomas Bowman dated December 9, 1985 indicate that Ms. Lamoreaux had had a previous history of back problems dating back "over a couple of years". (R. at 96). Even the Employer's First Report of Injury signed by Ms. Lamoreaux indicates that she had had ongoing problems with her back for some time and had been seeing a chiropractor. (R. at 186.) In fact, the applicant testified that she had experienced some rather severe low back pain in

both April and August of 1985. In April, her back pain was severe enough to lead her to seek the assistance of Dr. Sharp, a chiropractor, and in August it led her to seek the assistance of both Dr. Sharp and Dr. Zundell, a medical doctor. (R. at 28-30.) And finally, Mr. Rand Holding, a supervisor of Ms. Lamoreaux, testified that approximately a week to a week and a half prior to the time of her injury of November 15, 1985, Ms. Lamoreaux reported to him, upon arriving at work, that she had felt something pop in her back as she got out of her car that morning. (R. at 90, 93.) All of this evidence points to the existence of a back condition either predating Ms. Lamoreaux's employment with the employer or brought about or aggravated by non-employment activities. In Jones v. California Packing Corp., 244 P.2d 640, 644 (Ut. 1952), the Utah Supreme Court stated that law does not invest the Commission with the "arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence." In the instant case, that is exactly what the Commission has done for there is no evidence to suggest Ms. Lamoreaux did not have a preexisting condition, nor is there evidence to support the Commission and the respondent's theory that any preexisting condition she did have was wholly induced by her work at Varian - Eimac.

It should be noted at this point that in determining compensability, it is important to keep the issues of legal and medical causation separate and distinct. The fact that medical causation may be concretely established does not render an injury compensable unless the requisite legal causation is also

proven. Professor Larson, in his treatise on workmen's compensation, states:

All too often these two tests [the legal test and the medical test] are scrambled together. When this happens, the effect is usually that one is lost sight of. Thus, obsession with the legal test of unusual exertion may lead to a holding that a very slight exertion, because it satisfies the legal test in being unusual for this employee, is adequate to support an award, although its ability medically to account for the collapse seems remote. Conversely, obsession with medical causation sometimes leads to a slighting of the need for precision in defining the legal rule, with the result that decisions may be based on statements by doctors that the exertion did or did not cause the heart attack, although neither the doctors nor the lawyers may have had a clear and consistent concept of what 'caused' meant in this setting.

Larson, Workmen's Compensation (Desk Ed.) § 38.83 (1987).

In view of the evidence adduced in this case, it appears that the Commission's decision to award Ms. Lamoreaux benefits is based largely on the medical panel's finding that the lifting of 18 1/2 pounds can cause a disc herniation like that suffered by her. Standing alone, however, this finding is not sufficient to sustain an award for the issue of legal causation must still be addressed. In the instant case, the Administrative Law Judge correctly applied the higher standard of legal causation identified in Allen and found in favor of the defendant/employer.

In view of the fact that there is no evidence to support Ms. Lamoreaux's claim that her preexisting condition was solely the result of work activities at Varian, and in view

of the uncontradicted medical evidence that respondent did have a preexisting back condition, it is clear that the unusual exertion standard should have been applied in determining the compensability of her claim. The Commission's failure to acknowledge the evidence of record and to apply the correct legal standard in rendering its decision is clearly arbitrary and capricious and should be reversed.

C. The Applicant's Work Activities on November 15, 1985 Do Not Constitute Unusual Exertion under Allen.

Respondent contends that even if the unusual exertion test is the proper test to be applied in the instant case, her activities on November 15, 1985 constitute unusual exertion due to their repetitious nature. As support for this position, she cites Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981). Monfredi, however, was decided under prior law and the issue addressed by the Court was whether the applicant had sustained a "definite identifiable injury" or accident as that term was then defined. The issues of legal and medical causation were never discussed. In view of this fact, Monfredi is not controlling in the instant case.

Varian does not contest respondent's allegation that an injury which is the result of repetitive exertions may be compensable. However, Varian notes that claims for such injuries are still subject to the requirements of Allen. This fact is borne out by the Supreme Court's decision in Miera v. Industrial Commission, 728 P.2d 1023 (Utah 1986).

In Miera, the Administrative Law Judge denied the applicant's claim because the onset of his pain was gradual, not identified with a specific event and was related to his normal work activities. In reversing the agency's decision, the Supreme Court noted that Allen had "redefined the unexpected result of a work-related activity as a compensable accident if both medical and legal causation could be shown." Id. at 1024. It then went on to find that although Miera had a preexisting condition "his jumps into an eight-foot hole from a four-foot platform at thirty-minute intervals," constituted unusual exertion sufficient to meet the higher standard of legal causation required of workers with preexisting conditions. Id. at 1024 1025. Since medical causation was also evident from the record, benefits were awarded.

Although the Court, in Miera, found that jumping into an eight-foot hole at thirty-minute intervals meets the higher standard of legal causation under Allen, the lifting of 18 1/2 pounds from waist level is clearly not unusual exertion when compared to typical non-employment activity. Although in her brief, Ms. Lamoreaux describes the duties of her employment as lifting a B1-90 x-ray tube from the floor, turning and carrying it and setting it down from 40 to 60 times a day, her testimony at the time of the hearing was much different. During cross-examination, Ms. Lamoreaux was questioned in detail about her work activities. She indicated that she had only been working on the B1-90 part for

approximately six months prior to the date of her injury. (R. at 55, 56.) She also testified that she was required to lift each part she worked on between six and ten times and that she worked on no more than six B1-90's per day. (R. at 56.) Ms. Lamoreaux further stated that she worked at a workbench of just below chest height and that although she initially had to pick up the B1-90s out of a tub on the floor near her work area, the other times she lifted the part it was from her workbench. (R. at 57.) And finally, she testified that once she had completed her work on a particular B1-90, she would pick it up and take it to some other location. (R. at 57.) It is also significant that Ms. Lamoreaux did not work on the B1-90s every day and that the other parts on which she worked were smaller. (R. at 63.) In fact, according to her testimony, she worked on the B1-90 on an average of only one time per week, depending on the order. (R. at 63.)

In view of the above-cited testimony, appellants contend that the employment duties associated with Ms. Lamoreaux's work on the B1-90s do not constitute unusual exertion as that term has been defined in Allen. The respondent worked on such parts only once a week on the average. Furthermore, even when she did work on those parts, she had only to lift them one time each from the floor with the remainder of the work being performed from her workbench for the purpose of changing the position of the tube. There is no evidence that she was working in a confined or cramped area, and she was not working on an assembly line such that any of

the lifting done by her had to be made at a constant rate of speed. Under these circumstances, the Administrative Law Judge properly applied the legal causation test announced in Allen and denied benefits.

II. THE COMMISSION HAD NO JURISDICTION TO CONSIDER
RESPONDENT'S MOTION FOR REVIEW AS THE
MOTION WAS NOT TIMELY FILED.

Unfortunately, appellants are not in a position to respond to many of the arguments raised by the respondent in support of her claim that the filing of her Motion for Review was timely. In its Order Granting Motion for Review, the Commission failed to make any factual findings or otherwise address the timeliness issue even though it was raised by appellants in their Response to Motion for Review. (R. at 274.) The evidence presented by Ms. Lamoreaux in the form of Mr. Henriksen's Affidavit and the letter from Barbara Elicerio are not a part of the record and appellants are unable to address the allegations raised in them. Appellant's contention that Ms. Lamoreaux failed to timely file her Motion for Review is based upon the statutory time requirements for filing a Motion for Review and the date respondents Motion was stamped as having been filed with the Commission.

In their original brief, appellants indicated that Ms. Lamoreaux's Motion for Review should have been filed on or before February 16, 1987. The applicant points out in her brief, however, that February 16th was President's Day and the Commission was not open, thus, her Motion for Review was

not due until February 17th. This point is herewith conceded. Even so, appellants note that a copy of respondent's Motion was not date stamped as having been received in their counsel's office until February 23, 1987, a full six days after the date the Motion was allegedly hand delivered to the Commission and mailed to all opposing counsel. (See Addendum, Exhibit A.) Inasmuch as it is appellant's counsel's experience that documents mailed from one Salt Lake City address to another are generally delivered within one to two days after mailing, the late receipt by them of respondent's Motion still leads them to question the timeliness of respondent's filing.

In her response to the timeliness issue, Ms. Lamoreaux alleges that worker's compensation statutes are to be liberally construed. While appellants generally agree with this position, the rule of liberal construction was not intended to apply to the time requirements imposed on filings of jurisdictional magnitude. While the concept of what constitutes a filing may be liberally construed, the time within which a filing is required to be made must, of necessity, be strictly enforced, for to do otherwise renders such time limitations meaningless.

Ms. Lamoreaux also cites Rule 60(b) of the Utah Rules of Civil Procedure and several cases interpreting that rule in support of her claim that the Commission should not be deprived of its jurisdiction to hear her motion due to her alleged late filing. Rule 60(b) provides for the setting aside

of a final judgment, order or proceeding on the basis of "mistake, inadvertence, surprise or excusable neglect. . . ." In the instant case, respondent was admittedly aware of the date on which her Motion for Review was due. Her subsequent failure to timely file the Motion, therefore, fails to meet the basic requirements of the rule, thus rendering relief under it inappropriate.

Finally, appellants allege that the untimely filing of a Motion for Review is a defect of jurisdictional magnitude which cannot be waived by the Commission anymore than the late filing of an appeal may be waived by this Court under Rule 3(a) of the Rules of the Utah Court of Appeals. This position is supported by the Utah Supreme Court's decision in Griffith v. Industrial Commission, 16 Ut.2d 264, 399 P.2d 204 (1965). In Griffith, the applicant's Petition for Rehearing was denied by the Commission as being untimely made. On appeal, the Supreme Court reversed, noting that the applicant's Petition was timely filed when the three days allowed for mailing were taken into account. It then stated:

. . . [R]ealizing that the last day of the 30-day period allowed by Section 35-1-82, U.C.A. 1953 fell on February 22, a state holiday, the plaintiff's petition for rehearing was timely filed; and therefore, this court has jurisdiction for review under Section 35-1-82, U.C.A. 1953 requiring for preservation of the right to judicial review a timely request for rehearing on the Commission's decision.
(Footnote omitted.)

Id. at 206. Since the record reflects a late filing by the respondent, the Commission had no jurisdiction to entertain her

Motion for Review and its Order granting the same should be vacated.

CONCLUSION

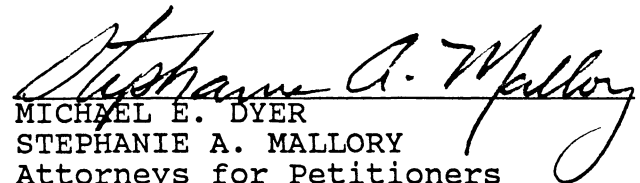
The Commission had no jurisdiction to enter its Order Granting Motion for Review since Ms. Lamoreaux's Motion for Review was not timely filed. The failure to timely file a motion for review is a failure of jurisdictional magnitude. Therefore, the Commission's Order should be vacated and the decision of the Administrative Law Judge should be reinstated and affirmed.

Assuming, arguendo, that the Commission's Order was properly entered, the record below does not substantiate to any degree the Industrial Commission's claim that Ms. Lamoreaux's job at Varian - Eimac was the sole cause of her preexisting back problems. Moreover, the law does not require a preexisting problem to be non-industrial before the higher standard of legal causation is invoked for purposes of determining compensability. Since the medical evidence of record indicates Ms. Lamoreaux was suffering from arthritis in her back and had sought medical treatment for her back on several prior occasions for injuries occurring both at work and at home, and because the medical panel report clearly states Ms. Lamoreaux was suffering from a preexisting condition at the time of her injury, her claim for benefits must necessarily be denied for failure to meet the higher standard of legal causation under Allen. Accordingly, the Administrative Law

Judge's ruling was correct and it should be reinstated by this Court.

DATED this 4th day of May, 1988.

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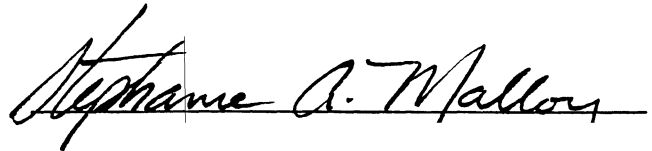
MAILING CERTIFICATE

I HEREBY CERTIFY that four (4) true and correct
copies of the foregoing instrument were mailed, first class,
postage prepaid on this 4th day of May, 1988, to the
following counsel of record:

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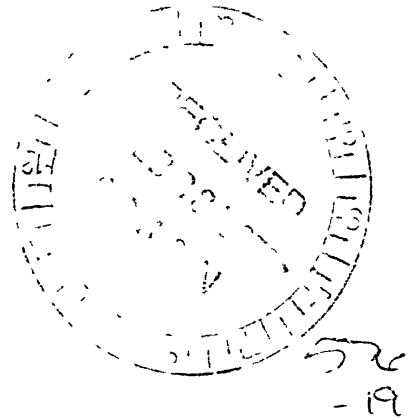
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ADDENDUM

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INDUSTRIAL COMMISSION OF UTAH

CASE No. 86000755

HELEN D. LAMOREAUX,
Applicant,

v.

VARIAN-EIMAC, INC., AND/OR
EMPLOYERS MUTUAL LIABILITY
INSURANCE, AND SEOND INJURY
FUND

Defendants.

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MOTION FOR REVIEW OF FINDINGS
OF FACT, CONCLUSIONS OF LAW
VD ORDER

* * * * *

COMES NOW Helen D. Lamoreaux, by and through her attorney, C. Richard Henriksen, Jr., of the firm of Henriksen, Henriksen, & Call, P.C. and moves that the Findings of Fact, Conclusions of Law and Order of the Honorable Administrative Law Judge, Gilbert A. Martinez, be reviewed by the Industrial Commission. Such motion is based upon the following particular errors and objections:

1. That the Findings of Fact do not include the fact that the B1-90 centers were lifted six to ten times each, six centers per day for between 40 and 60 times per day, which is not what an average person does in normal, every day life.

2. Prior to the time that Helen Lamoreaux began work for Varian-Eimac, Inc., she had no pre-existing injury whatsoever. That the treatments in April and in August of 1985

were directly related to her employment, and in particular, to torquing and lifting on the job.

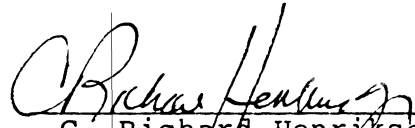
3. The Findings of Fact do not include a finding that the automobile collision the applicant sustained when she was approximately 17 years of age did not result in a long-term injury, except for some minor pain to her back, which went away after a short time.

4. As of February, 1980 when the claimant, Helen Lamoreaux, went to work for Varian-Eimac, Inc., she had no pre-existing injuries whatsoever.

5. That the Administrative Law Judge has misapplied the laws of the state of Utah, and in particular, the Allen vs. Industrial Commission 46 Utah A.R.3 (Utah 1986). When that case is applied since Helen lifted Bl-90's 40 to 60 times per day which weigh approximately 18 1/2 lbs., which is not an average person would normally do in an average day, compensation should be awarded. Also Helen's case is distinguishable from the Allen case, in that case, the claimant had sustained three separate, identifiable, pre-existing injuries prior to employment with the employer. In this case, any pre-existing problems were caused by working with this employer and Helen did not bring with her to the work place, with a condition that increased her risk of injury, but all of the increase and risk of injury was contributed to and caused by her employment. When the legal causation test of the Allen decision is used, the question is whether the employee came to the work place with a condition that increased the risk of injury, and then it is important to consider a worker who comes to work for the employer without any increased risk of injury, and because of the work that

the employee is required to perform, causes a failure. In the opinion of the Administrative Law Judge, the claimant would be compensible under a long line of decisions prior to Allen. This case is distinguishable from the Allen case. The claimant did not bring to the work place a personal increase in the risk of injury and compensation should be awarded. This is a case very similar to the case of Kaiser Steel Corporation vs. Monfredi 631 p.2d 888 (Utah 1981) wherein Monfredi, the applicant who had a history of back problems, was awarded compensation because of a climax due to exertion, stress and other repetitive causes at his work place. Also see Schmidt vs. Industrial Commission of Utah 617 p.2d 693.

DATED this 17th day of February, 1987.


C. Richard Henriksen, Jr.
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CERTIFICATE OF MAILING

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