

1987

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

C. Richard Henriksen, Jr.; Henriksen, Henriksen, and Call, P.C.; Attorney for Respondent Lamoreaux. Erie V. Boorman, Administrator; Second Injury Fund; Industrial Commission of Utah. Michael E. Dyer, Stephanie A. Mallory; Richards, Brandt, Miller, and Nelson; Attorneys for Petitioners Varian-Eimac, Inc. and or Employers Mutual Liability Insurance.

Recommended Citation

Brief of Respondent, *Varian-Eimac v. Lamoreaux*, No. 870344 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/552

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50

.A10

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/Appellants,)	
	:	Case No. 870344- CA
v.)	
	:	
HELEN D. LAMOREAUX, THE SECOND)	
INJURY FUND, and THE UTAH	:	Category 6
STATE INDUSTRIAL COMMISSION,)	
	:	
Respondents.)	

BRIEF OF RESPONDENT HELEN D. LAMOREAUX

The Honorable Gilbert A. Martinez
Administrative Law Judge

C. RICHARD HENRIKSEN, JR.
HENRIKSEN, HENRIKSEN & CALL, P.C.
320 South 500 East
Salt Lake City, Utah 84102
Attorney for Respondent Lamoreaux

ERIE V. BOORMAN, Administrator
SECOND INJURY FUND
160 East 300 South
Salt Lake City, Utah 84145-0580

INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
P.O. Box 5800
Salt Lake City, Utah 84110-5800

MICHAEL E. DYER
STEPHANIE A. MALLORY
RICHARDS, BRANDT, MILLER &
NELSON
CSB Tower, Suite 701
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Petitioners
Varian - Eimac, Inc. and/or
Employers Mutual Liability
Insurance

FILED

MAR 3 1988

Timothy M. Sizer
Clerk of the Court

IN THE COURT OF APPEALS, STATE OF UTAH

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

BRIEF OF RESPONDENT HELEN D. LAMOREAUX

The Honorable Gilbert A. Martinez
Administrative Law Judge

C. RICHARD HENRIKSEN, JR.
HENRIKSEN, HENRIKSEN & CALL, P.C.
320 South 500 East
Salt Lake City, Utah 84102
Attorney for Respondent Lamoreaux

ERIE V. BOORMAN, Administrator
SECOND INJURY FUND
160 East 300 South
Salt Lake City, Utah 84145-0580

INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
P.O. Box 5800
Salt Lake City, Utah 84110-5800

MICHAEL E. DYER
STEPHANIE A. MALLORY
RICHARDS, BRANDT, MILLER &
NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Petitioners
Varian - Eimac, Inc. and/or
Employers Mutual Liability
Insurance

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i,ii,iii
JURISDICTION	1
DETERMINATIVE PROVISIONS	1
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	7,8
ARGUMENT	8
POINT I	
THE INDUSTRIAL COMMISSION'S RULING PROPERLY APPLIES THE LEGAL CAUSATION STANDARD IN <u>ALLEN</u> , AS WELL AS ITS UNDERLYING POLICY	8
A. THE AGGRAVATION OF A PRE-EXISTING INJURY AS A CUMULATIVE RESULT OF REPETITIVE, UNUSUAL EXERTIONS MEETS THE LEGAL CAUSATION TEST ANNOUNCED IN <u>ALLEN</u>	8
B. THE INDUSTRIAL COMMISSION'S RULING SATISFIES THE POLICY CONCERNS OF <u>ALLEN</u> BY PROTECTING EMPLOYERS FROM COMPENSATING INJURIES WHICH PRE-DATE EMPLOYMENT	11
POINT II	
THE INDUSTRIAL COMMISSION HAD JURISDICTION TO ENTER ITS ORDER BASED UPON RESPONDANT'S MOTION FOR REVIEW	14
A. RESPONDANT'S MOTION FOR REVIEW WAS TIMELY FILED	14

TABLE OF CONTENTS-Cont'd

	PAGE
B. ASSUMING ARGUENDO THE RESPONDANTS MOTION FOR REVIEW WAS ACTUALLY NOT RECEIVED AND FILED UNTIL FEBRUARY 19, 1987, THE INDUSTRIAL COMMISSION STILL HAD JURISDICTION TO ENTER ITS ORDER	17
1. THE WORKERS COMPENSATION ACT IS TO BE LIBERALLY CONSTRUED IN FAVOR OF GRANTING COMPENSATION AND SUBSTANTIAL COMPLIANCE WITH ITS REQUIREMENTS IS SUFFICIENT	17,18
2. BECAUSE OF THE PURPOSES OF THE WORKERS COMPENSATION ACT, EVEN IN THE ABSENCE OF TIMELY FILING WHERE DELAY IS NOT EXCESSIVE OR FAIR, THE INDUSTRIAL COMMISSION HAS, UNDER THE PROPER CIRCUMSTANCES AND IN INTEREST OF JUSTICE, THE AUTHORITY TO WAIVE TIMELINESS OF FILING	22
CONCLUSION	26
CERTIFICATE OF DELIVERY	28
ADDENDUM 1	29
ADDENDUM 2	30
ADDENDUM 3	31
ADDENDUM 4	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Allen v. Industrial Commission</u> , 729 P.2d 15 (Utah, 1986)	2,3,6,7,8,9,10,11,12,13,26
<u>Carling v. Industrial Commission</u> , 16 Utah 2d 260, 399 P.2d 202 (1965)	9
<u>Chandler v. Industrial Commission</u> , 55 Utah 213, 184 P 1020 (1919)	18
<u>Cook v. Industrial Commission</u> , 133 Ariz. 310, 651 P.2d 365 (1982)	24
<u>Chavez v. Industrial Commission</u> , 576 p.2d 134 (Crt. of App. Arizona, 1977)	24
<u>Fink v. Industrial Commission</u> , 689 P.2d 708 (Colo. App., 1984)	23
<u>Hurd v. Ford</u> , 74 Utah 46, 276 P.908	23
<u>Jones v. Department of Employment Security</u> , 641 P.2d 156 (Utah, 1982)	24
<u>Kaiser Steel Corp. v. Monfredi</u> , 531 P.2d 888 (Utah, 1981)	9,10
<u>Katz v. Pierce</u> , 732 P.2d 92, 41 Utah Adv. Rep. 12, (9/10/86)	23
<u>Kirkwood v. Department of Employment Security</u> , 709 P.2d 1158 (Utah, 1985)	25
<u>Lantham v. Industrial Commission</u> , 717 P.2d 255 (Utah, 1986)	21
<u>McPhie v. Industrial Commission</u> , 567 P.2d 153 (Utah, 1977)	10,18
<u>Miera v. Industrial Commission</u> , 729 P.2d 1023 (Utah, 1986)	9,10
<u>Mini Spas Inc. v. Industrial Commission</u> , 51 Utah Adv. Rep 13 (Feb 3, 1987)	25

TABLE OF AUTHORITIES Cont'd

<u>CASES</u>	<u>PAGE</u>
<u>Morrison-Knudsen Construction v. Industrial Commission,</u> 18 Utah 2d 390, 474 P.2d 138 (1967)	19
<u>Parsons v. Bekins Freight,</u> 493 P.2d 913 (Arizona, 1972)	24
<u>Prows v. Industrial Commission,</u> 610 P.2d 1362 (Utah, 1980)	18
<u>Prowswood, Inc. v. Mountain Fuel Supply, Co.,</u> 676 P.2d (Utah, 1980)	20, 21
<u>Residential and Commercial Construction Co. v.</u> <u>Industrial Commission,</u> 529 P.2d 427 (Utah, 1974)	12
<u>Richfield Care Center v. Torgerson,</u> 733 P.2d 178 (Utah, 1987)	13
<u>Russell v. Martell,</u> 681 P.2d 1193 (Utah, 1981)	23
<u>Schmidt v. Industrial Commission,</u> 617 P.2d 639 (Utah, 1980)	9
<u>State v. Johnson,</u> 700 P.2d 1125 (Utah, 1980)	20, 21
<u>Thiessens v. Department of Employment Security</u> 663 P.2d 72 (Utah, 1983)	24, 25
<u>United States Steel Co. v. Draper,</u> 613 P.2d 508 (Utah, 1980)	9
<u>Watson v. Anderson,</u> 29 Utah 23 36, 504 P.2d 1003 (1973)	20, 21
<u>Warren v. Dixon Ranch Co.,</u> 260 P.2d 741, (Utah, 1953)	22, 23
<u>Wood v. Department of Employment Security,</u> 680 P.2d 38 (Utah, 1984)	25

TABLE OF AUTHORITIES Cont'd

<u>STATUTES</u>	PAGE
<u>Utah Code Ann.</u> Section 35-1-20 (1987 Supp.)	1,2
<u>Utah Code Ann.</u> Section 35-1-33 (1987 Supp.)	1,18,19
<u>Utah Code Ann.</u> Section 35-1-45 (1987 Supp.)	2,7
<u>Utah Code Ann.</u> Section 35-1-82.53 (1987 Supp.)	14
<u>Utah Code Ann.</u> Section 35-1-82.55 (1987 Supp.)	2,14,17,21
<u>Utah Code Ann.</u> Section 35-4-1(a) (1987 Supp.)	24
<u>Utah Code Ann.</u> Section 35-4-10(b) (1987 Supp.)	24
<u>Utah Code Ann.</u> Section 68-3-2 (1987 Supp.)	18
Utah Rules of Civil Procedure, Rule 6(a)	15
Utah Rules of Civil Procedure, R 6(b)	22,23
Utah State Industrial Commission Rule 490-1-5	14,16
Utah State Industrial Commission Rule 475-6(c)-8	26

AUTHORITIES

Larson, <u>Workers Compensation</u> , Section 38.83(b) (1986)	11
--	----

IN THE COURT OF APPEALS, STATE OF UTAH

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

BRIEF OF RESPONDENT HELEN D. LAMOREAUX

JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. Section 35-1-83 (1987 Supp.).

DETERMINATIVE PROVISIONS

The Respondent submits that the issue of timely filing is governed by the following statutes and rules:

UCA Section 35-1-33 [1953]

A substantial compliance with the requirements of this title shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal on word for any omission of a technical nature.

U.C.A. Section 35-1-20 [1953]

All orders of the commission within its jurisdiction shall be presumed reasonable and lawful until they are found

otherwise in an action brought for that purpose, or until altered or revoked by the commission.

Respondent's timely filing is also governed by 35-1-82.55 which provides:

Every motion for review shall be in writing, and shall specify in detail the particular errors and objections. Such motions must be filed within fifteen days of the date of any order of the administrative law judge or commission unless further time is granted by the administrative law judge or commission within fifteen days, and unless so filed, said order shall become the award of the commission and shall be final.

The question of legal causation is governed by U.C.A. Section 35-1-45 [Supp. 1987] and the cases of this state's courts interpreting that statute, in particular Allen v. Industrial Commission, 729 P.2d 15 (Utah, 1986).

Section 35-1-45 (Supp. 1987) provides:

Every employee mentioned in Section 35-1-43 who is injured, and the dependants of every such employee who is killed, by accident arising out of or in the course of his 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 or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

STATEMENT OF THE CASE

On July 24, 1986, Helen D. Lamoreaux filed an application for Hearing with the Utah State Industrial Commission. Mrs. Lamoreaux, the Respondent, sought compensation for an injury sustained in the course of her employment with Petitioner Varian - Eimac, Inc., on November 15, 1985. Petitioners filed an answer denying that the injury to Mrs. Lamoreaux was compensable. On November 17, 1986, a hearing was held before Administrative Law Judge Gilbert A. Martinez, following which Mrs. Lamoreaux was referred to a medical panel. Judge Martinez subsequently issued his Findings of Fact, Conclusions of Law and Order, in which he found a medical causal relationship between Mrs. Lamoreaux's injuries and her employment with Petitioner. However, Judge Martinez "reluctantly" denied compensation, based on his understanding of Allen v. Industrial Commission, 729 P.2d 15 (1986) (R. at 261). Respondent filed a Motion for Review of the Findings of Fact, Conclusions of Law and Order, pointing out: (1) compensation should be awarded under Allen, Supra, and (2) compensation should be awarded because Mrs. Lamoreaux's so-called pre-existing injury also arose out of her employment with Petitioner. The Industrial Commission issued an Order granting compensation on the grounds that Respondent had not brought a personal risk to the work place and therefore the policy demands of Allen were met. Petitioners appealed this Order.

STATEMENT OF THE FACTS

1. In February, 1980, Helen D. Lamoreaux began working for Petitioner Varian - Eimac, Inc. (R. at 32.)

2. Mrs. Lamoreaux at that time, had no back problems or pain of any kind. (R. at 27, 18, 246.)

3. Mrs. Lamoreaux had injured her back 28 years previously; however, this injury was to her middle back area, not the lower back, and had healed completely. (R. at 26, 256.)

4. Mrs. Lamoreaux's assignment, beginning in November, 1982, with Petitioner was preping and loading x-ray tubes, which involved lifting weights up to 100 pounds up to 90 times a day, as well as torquing to assemble the tubes. (R. at 33-37.)

5. Mrs. Lamoreaux continued in this job until September of 1985. (R. at 38.)

6. As a result of this assignment, Mrs. Lamoreaux had occasional back pain which caused her to seek chiropractic and medical treatment. She did not, however, miss a single day's work due to this discomfort. (R. at 28, 29, 37, 38.)

7. This discomfort was not in the same place in Mrs. Lamoreaux's back as the subsequent injury of November 15, 1985. (R. at 38.)

8. On November 15, 1985, Mrs. Lamoreaux's work involved lifting, from the floor, turning and carrying, 18 1/2 pound objects 40 to 60 times a day (R. at 39, 271.)

9. At this time, November 15, 1985, Mrs. Lamoreaux's previous back problem was "completely quiescent" (R. at 246.)

10. On November 15, 1985, Mrs. Lamoreaux was lifting a B1-90 center and turned to the right to walk down the hall, twisting her back. (R. at 39, 279.)

11. As she twisted her back, Mrs. Lamoreaux testified that she felt a sharp pain in her lower back, which later radiated to her left leg. (R. at 39, 249, 279.)

12. As a result, Mrs. Lamoreaux suffered a ruptured intertabral disk which was caused by the lifting, turning and carrying motion made while carrying the B1-90 centers. (R. at 187, 194, 207, 256.)

13. Medical testimony and reports show that lifting an 18 1/2 pound object and turning to the right can cause intertabral disk herniation. (R. at 248, 249, 256.)

14. Mrs. Lamoreaux was temporarily totally disabled from November 21, 1985 through June 23, 1986. (R. at 257.)

15. On December 17, 1985, a partial laminectomy of the left L-5 Lamina with left L5-S1 disk excision was performed. (R. at 122.)

16. While this operation eliminated the radiating leg pain, Mrs. Lamoreaux's lifestyle and physical abilities have been severely limited as residuals of her disk herniation and subsequent surgery. (R. at 45-51, 220-225, 248.)

17. Mrs. Lamoreaux, as a result of this injury, has a 15% whole person permanent partial impairment. (R. at 249, 257.)

18. Gilbert A. Martinez, Administrative Law Judge, found that there was "a direct medically causal connection between applicant's low back problems and the industrial incident of November 14, 1985." (R. at 256.)

19. Administrative Law Judge Martinez further found that "the incident at work in lifting an 18 1/2 pound object and turning to the right can indeed cause an intervertebral disk herniation." (R. at 256.)

20. However, Administrative Law Judge Martinez "reluctantly" denied compensation, in spite of the medical causal connection. (R. at 261.)

21. On review, the Industrial Commission, citing Allen v. Industrial Commission, 729 P.2d 15 (Utah, 1986) said:

To meet the legal causation requirement, a claimant with a pre-existing condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition ... this extra exertion serves to offset the pre-existing condition of the employee as a likely cause of the injury, thereby eliminating claims from impairments resulting from a personal risk rather than exertions at work. [Allen, at 25].

If the purpose of applying the higher causation standard is to prevent the employer from being liable for a risk not created by that employer, then it does not serve that purpose to apply that higher standard to cases where the contributing pre-existing condition is one which developed due to work duties with the same employer responsible for the most recent accident.

On this basis, the Commission awarded Mrs. Lamoreaux compensation constant with the Findings of the Administrative Law Judge. (R. at 285, 286.)

SUMMARY OF ARGUMENT

The Utah Workers Compensation law, in U.C.A. Section 35-1-45 (Supp. 1987) requires that each claimant's injuries be a result of an accident, which is causally related, legally and medically, to the claimant's employment. Allen v. Industrial Commission, 729 P.2d 15 (Utah, 1986). If the employee has a pre-existing condition, the event causing the injury must be unusual exertion not common to normal daily living to meet the legal causation prong of the test.

The present case involves an employee who entered the job with no pre-existing condition. Thereafter, the claimant had some back problems with her back in the course of her employment. The employee, Helen D. Lamoreaux, then began a new assignment with the same employer. This job involved lifting, turning, and carrying 20 pound objects up to sixty times a day. The cumulative result of these exertions was the cause of an injury of the Respondent's lower back.

The Industrial Commission properly awarded Mrs. Lamoreaux compensation for her injuries. Cumulative exertions resulting in injuries have often been compensated by the Supreme Court. Further, the repetitiveness of these efforts is clearly unusual, as defined in Allen, and subsequent court decisions. As

the purpose of this high legal causation standard is to protect employers from compensating employees who bring a personal risk to the job, the Petitioner is not entitled to its protection when the risk was caused in the course of the same employment. The award of the Commission is correct in the application of the standard and in the purpose of the legal causation test.

The Respondents Motion for Review was timely filed and the Industrial Commission had authority to enter its Order.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION'S RULING PROPERLY APPLIES THE LEGAL CAUSATION STANDARD IN ALLEN AS WELL AS ITS UNDERLYING POLICY AND SHOULD BE AFFIRMED.

A. The aggravation of a pre-existing injury as a cumulative result of repetative, unusual exertions meets the legal causation test announced in Allen.

The Supreme Court, in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), announced clearly the standard to be used in evaluating industrial injuries for compensation. Petitioner agrees that the injuries suffered by the Respondent, Helen Lamoreaux, were the result of an accident, as defined in Allen. Petitioner also agrees that these injuries were a direct medical result of the accident which Ms. Lamoreaux experienced while working for the Petitioner. Rather, Petitioner attacks the ruling of Industrial Commission on the grounds that since Ms.

Lamoreaux was injured previously while in their employ, they are entitled to protection from liability by the higher legal standard announced in Allen. However, even when this standard is applied, the injuries to Ms. Lamoreaux are compensable.

The Supreme Court has long recognized that an injury which is the cumulative result of repetative exertions is compensable by Workmen's Compensation. See Miera v. Industrial Commission, 728 P.2d 1023 (Utah 1986); Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981); Schmidt v. Industrial Commission, 617 P.2d 1693 (Utah 1980); United States Steel Co. v. Draper, 613 P.3d 508 (Utah 1980); (pre-existing condition aggravated or added to in course of work); Carling v. Industrial Commission, 16 Utah 2d 260, 399 P.2d 202 (1965).

Miera, Supra is significant in that it was decided after Allen and applied the higher legal causation standard. In that case the employee periodically jumped onto a shelf in a hole, then to the bottom (two, four-foot jumps) at half hour intervals (a total of eight times). The onset of the pain was gradual. The Court, applying Allen, said that these exertions were "considerably greater exertion than that encountered in non-employment life and therefore are legally sufficient". Miera, at 1024, 1025. Further, in Allen itself, the Court said that whether Allen's exertion was unusual depended on "how many crates were moved by the Claimant, the distance the crates were moved, the precise

weight of the crates, and the size of the area in which the lifting and moving took place". Allen, at 28.

In our case, Helen Lamoreaux was injured on November 15, 1985. Her job at the time involved lifting B1-90 x-ray tubes, weighing about 20 pounds each, from the floor, turning and carrying the B1-90, and setting it down. This was repeated every day, 40 to 60 times a day. Typical non-employment exertions include carrying garbage cans and luggage, and lifting small children. They do not include lifting, turning and carrying 20 pound objects 40 to 60 times a day, any more than they include making four foot jumps into a hole (Miera) or slipping an arm under a person to raise them while straightening their shirt (Richfield Care Center v. Torgerson, 733 P.2d 178 (Utah 1987) (applying Allen higher legal causation standard)).

This case is very similar to Kaiser Steel Corporation v. Monfredi, Supra. The applicant had been a miner for 27 years and had a history of back problems. He aggravated these pre-existing problems while shoveling. The Court, noting the "recognized rule of construction [that] resolves any doubt respecting the right of compensation in favor of the injured employee" and the principle that "the compensation statutes should be liberally construed in favor of recovery" affirmed the award of the Industrial Commission, supra, at 892, quoting McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977).

In both Monfredi and the case at bar, the actual exertion preceding the injury was not strenuous in and of itself. However, the Court looked at the cumulative exertion of shoveling. Likewise it was the repetative lifting, turning and carrying, which produced Helen Lamoreaux's injuries. This clearly meets the standard set by Allen.

B. The Industrial Commission's ruling granting compensation satisfies the policy concerns of Allen by protecting employer's from compensating injuries which pre-date employment.

The Court, in Allen, Supra, stated the standard for legal causation where there are pre-existing injuries, and also clearly articulated the purpose and policy behind this rule; when it said:

To meet the legal causation requirement, a claimant with a pre-existing condition must show that the employment contributed something substantial to increase the risk he already faced in every day life because of his condition. . .This extra exertion serves to offset the pre-existing condition of the employee as a likely cause of the injury, thereby eliminating claims from impairments resulting from a personal risk rather than exertions at work. (Allen at 25).

The Court further cited Professor Larson as saying that "if there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the [injury] as a matter of medical fact is adequate to satisfy the legal test of causation". Larson, Workmen's Compensation, Section 38.83(b), at 7-278 (1986).

The purpose, then, is to protect employers from claims based on injuries which, while they occur on the job, are not related to the work being done by the employee. Helen Lamoreaux, however, had no back pain or injury when she began to work for Petitioner in February, 1980. All the problems which she experienced prior to November 15, 1985, arose out of her employment for Petitioner. In the language of the Court, there was no "personal risk" which Helen Lamoreaux brought with her in 1980. Since there was no "personal causal contribution. . . , any exertion connected with the [injury] as a matter of medical fact adequate to satisfy the legal test of causation", Allen, at 26. Important to note is that the Medical Panel found no pre-existing injury and Helen Lamoreaux began employment for Petitioner in 1980. (Record P. 246, Medical Panel Report.)

In granting Helen Lamoreaux compensation for her injuries the Industrial Commission made Findings of Fact which carefully took into account the medical reports and the personal history of the Claimant and made a decision based on credible evidence. It was not "arbitrary or capricious". Residential and Commercial Construction Co. vs. Industrial Commission, 529 P.2d 427 (Utah, 1974). The Commission applied Allen according to its clearly articulated purpose. In doing so, it rejected claims by the Petitioner that it be shielded from liability because Mrs. Lamoreaux had been previously injured while in its employ.

Nor does the Industrial Commission's award generate confusion as Petitioner fears. Medical boards routinely apportion causation between the accident and several pre-existing conditions. For example, in Richfield Care Center v. Torgerson, Supra, the Court made an award apportioned between three injuries. (2.5% to pre-existing conditions; 2.5% to a 1980 injury; 2.5% to the accident.) Significantly, this case was decided using the Allen test and involved a pre-existing condition as well as a second injury from the same employment. The Court stated that slipping an arm under a patient to raise him and reaching around to straighten his shirt met the legal causation standard.

However, the case at bar differs from Torgerson in as much as Helen Lamoreaux had no condition pre-existing her employment with Petitioner. (See Record P. 246, Record of Medical Panel.)

The Petitioner's argument would allow an employer whose work caused 100% of the injured worker's injury to escape liability when the injured worker brought no personal risk (no pre-existing injury) at the time of employment. Such an argument does not meet the policy of the Workers Compensation Act as it existed by Court decisions prior to Allen and would violate the policy and formula set out in Allen. Thus, the Industrial Commission's award should be affirmed.

POINT II

THE INDUSTRIAL COMMISSION HAD JURISDICTION TO ENTER ITS ORDER BASED UPON RESPONDANT'S MOTION FOR REVIEW.

A. Respondent's Motion for Review was Timely Filed.

Utah Code Annotated Section 35-1-82.53 provides for the review of an Order from an Administrative Law Judge or the Commission. It provides:

(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge or the commission may file a motion for review of such order. Upon the filing of such motion to review his order the administrative law judge may (a) reopen the case and enter a supplemental order after holding such further hearing and receiving such further evidence as he may deem necessary; or (b) amend or modify his prior order by a supplemental order; or (c) refer the entire case to the commission. If the administrative law judge makes a supplemental order, as provided above, it shall be final unless a motion to review the same shall be filed with the commission.

The time within which a Motion for Review must be filed is governed by Utah Code Annotated Section 35-1-55, Rule 490-1-5, Workers Compensation Rules and Regulations and Rule 6(a) of the Utah Rules of Civil Procedure.

Section 35-1-82.55 provides:

Every motion for review shall be in writing, and shall specify in detail the particular errors and objections. Such motions must be filed within fifteen days of the date of any order of the administrative law judge or commission unless further time is granted by the administrative law

judge or commission within fifteen days, and unless so filed, said order shall become the award of the commission and shall be final.

Rule 490-1-5 provides:

Whenever a notice or other paper requiring or permitting some action on behalf of a party is served on a party by mail, three (3) days shall be added to the prescribed period contained in this Rules or in the Workers' Compensation Act.

Rule 6(a) of the Utah Rules of Civil Procedure which applies since February 16, 1987, was President's Day, a State Holiday, reads:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. (emphasis added)

It is clear that the Petitioner's argument did not accurately calculate the due date, because February 16, 1987 was a National and State holiday. Moreover, the office of the Industrial Commission was closed, thus, no filings could be made that day. (See Addendum 1, letter of Barbara Elcerio, legal counsel, Industrial Commission).

An accurate calculation of the due date would be made by counting as follows:

January 29, 1987	(not included, see Rule 6(a))
January 30, 1987	1st day
January 31, 1987	2nd day
February 1, 1987	3rd day
February 2, 1987	4th day
February 3, 1987	5th day
February 4, 1987	6th day
February 5, 1987	7th day
February 6, 1987	8th day
February 7, 1987	9th day
February 8, 1987	10th day
February 9, 1987	11th day
February 10, 1987	12th day
February 11, 1987	13th day
February 12, 1987	14th day
February 13, 1987	15th day
February 14, 1987	1st day additional for mailing Rule 490-1-5
February 15, 1987	2nd day additional for mailing Rule 490-1-5
February 16, 1987	3rd day additional for mailing Rule 490-1-5 Date filing due if not a Holiday
February 17, 1987	Date Due

That to the knowledge of counsel for Respondent, the Motion for Review was in fact, delivered to the Industrial

Commission on February 17, 1987, the date due, by his staff. (See Addendum 2, Affidavit of C. Richard Henriksen, Jr.)

Counsel for Respondent was in Provo and was not sure he could file the Motion for Review that day so Respondent requested an extension of time for filing the Motion for Review earlier on February 17, 1987, from Judge Martinez, in case it became necessary. Upon his return from Provo, counsel for Respondent was able to prepare the Motion For Review and it was hand-delivered timely on February 17, 1987. The Industrial Commission has the power under Section 35-1-82.55 Utah Code Annotated, to grant an extension and the decision of the Commission dated July 13, 1987 is evidence of such extension. The timeliness of the filing of the Motion for Review would not have been questioned in any event because as a general practice the Commission does not address timeliness of filing when an item is a day or two late. (See Addendum 1, letter of Barbara Elcerio, Legal Counsel, Industrial Commission).

B. Assuming arguendo the Respondents Motion for Review was actually not received and stamped until February 19, 1987, the Industrial Commission still had jurisdiction to enter its Order.

1. The Workers Compensation Act is to be liberally construed in favor of granting compensation and substantial compliance with its requirements is sufficient.

The purpose of the Workers Compensation system is remedial. As such, both the legislature and the Supreme Court

have determined that its provisions are to be liberally construed in favor of granting compensation. McPhie v. Industrial Commission, 567 P.2d 153, 155. We are also reminded that the Workers Compensation statute, like other statutes, should be liberally construed to effect the purpose of the statute and justice. See Chandler v. Industrial Commission, 55 Utah 43, 21, 184 P.2d 1020, 1021 (1919) and Prows v. Industrial Commission, 610 P.2d 1362 (Utah, 1980).

Section 68-3-2 Utah Code Annotated provides:

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail. (emphasis added)

The Utah State Legislature has specifically mandated that the Commission and the Courts avoid over-technical applications of procedure which might deny fair compensation to injured claimants.

Section 35-1-33 reads:

A substantial compliance with the requirements of this title shall be considered sufficient to give effect to the orders of the Commission, and they shall not be considered inoperative, illegal, or void for any omission of a technical nature. (emphasis added)

The Court in Morrison-Knudsen Construction Co. v. Industrial Commission, P.2d 138, stated that "proceedings before the Industrial Commission need not be as technical as are those in the Courts". Id., at P.141. (Citing Section 35-1-33, the Court allowed the Commission to consider and base its findings on hearsay evidence).

Additionally, there appears to be a very apparent problem in the timely stamping and filing of documents at the Industrial Commission, which has caused the Industrial Commission to overlook filings a day or two late. (See Addendum 1, letter of Barbara Elcerio, Legal Counsel, Industrial Commission).

An example of this filing problem is on page 242 of the record. A letter written by counsel for Appellant dated December 4, 1986, was received and stamped at counsel for Respondents' office on December 5, 1987 (See Addendum 3) but not stamped as being filed at the Industrial Commission until December 8, 1987, three days later. (R. at 242). Also the Medical Panel Report dated December 11, 1987, (R. at 246) is not stamped as being filed by the Commission until December 17, 1987. A letter from Counsel for Respondent dated and mailed January 16, 1987 is not stamped as being filed until January 20, 1987. (R. at 252.)

This problem is not limited to mailed documents. For example, Respondent's Motion for Review was hand-delivered to the Industrial Commission on February 17, 1987 and not stamped as filed

until February 19, 1987. (R. at 271.) Another example of a hand-delivery problem was Petitioners Petition for Writ of Review (R. at 290-292) which was hand-delivered to the office of counsel for Respondent August 12, 1987 (See Addendum 4) and the Court of Appeals on August 12, 1987 and hand-delivered to Industrial Commission August 12, 1987, (R. at 292). However, it was not stamped as being filed at the Commission until December 13, 1987 (R. at 290)!

In this light and pursuant to authority granted to the Industrial Commission, it is little wonder why the Industrial Commission does not and should not reject documents, motions, etc., for being untimely stamped as filed if only one or two days late. (See Addendum 1, letter of Barbara Elcerio, legal counsel, Industrial Commission).

Also, in this light, where the timing of a particular Motion may be crucial, we are left to ponder what date should the Commission and the Court use as a basis for decision: 1) the date of hand-delivery by counsel or 2) date of stamping and filing which may be one, two, three or more days later. Obvious injustice would occur if the fact that a date stamp done tardy were used to reject a document timely delivered by counsel.

Cases cited by the Petitioner are not compelling under our facts, nor are they controlling, Watson v. Anderson, 29 Utah.2d 36, 504 P.2d 1003 (1973); Prowswood, Inc. v. Mountain Fuel Sup-

ply Co., 676 P.2d 952 (Utah 1984); and State v. Johnson, 700 P.2d 1125 (Utah 1985). In Watson, Supra, the Court dismissed the Appellants Appeal because it was filed 4 1/2 months beyond the 30 day appeal period. In State v. Johnson, Supra, the Court dismissed a criminal defendant's appeal because of the failure to timely pay the filing fee. In Prowswood, Supra, the Court also dismissed an appeal for the failure of Appellant to pay the required filing fee.

In Lantham v. Industrial Commission, 717 P.2d 255 (Utah, 1986) the Court referred to Section 35-1-82.55 and recites the statute without explanation. In Lantham, Supra, the Court was faced with the issue as to when a Motion for Review should be filed for an interlocutory or temporary order. The Court held that although the Motion for Review was filed 43 days after the interlocutory order, since the Motion for Review was filed within 15 days of the Final Order, it was timely. The Court made a ruling based in fairness and equity of facts existing in that case.

In Retherford v. Industrial Commission, 60 Utah Adv. Rep.61 (Utah Court App. 1987) the Court dealt solely with issue of whether or not a Petition for Writ of Review was filed in a timely manner with the Court of Appeals as required in Section 35-1-83 Utah Code Annotated.

It is clear then, that the Respondent's filing of its Motion for Review February 17, 1987 was timely and that the late

date stamp which was later than the actual hand-delivery by the Industrial Commission should not be used to deny recovery.

2. Because of the purposes of the Workers Compensation, Act even in the absence of timely filing where delay is not excessive or fair, the Industrial Commission has, under the proper circumstances and in interest of justice, have authority to waive timeliness of filing .

In a civil case, where because of excusable neglect a default judgment or other order is entered, under proper circumstances under Rule 60(b) of the Utah Rules of Civil Procedure the judgment or order may be set aside. Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect... or (7) any other reason justifying relief from the operation of the judgment.

In Warren v. Dixon Ranch Co., 260 P.2d 741, (Utah, 1953), the Court stated:

The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortune to which prevent the presentation of a claim or defense. (260 P.2d 742.)

The Court also stated:

Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing. Hurd v. Ford, 74 Utah 46, 276 P.908. However, the movant must show that he has shown due diligence and that he was prevented from appearing by circumstances of which he had no control. Peterson v. Crosier, 29 Utah 235, 81 P.860. (260 P.2d at 743)

The Court, in Katz v. Pierce, 732 P.2d 92, 41 Utah Adv. Rep. 12, (9/10/86), held that:

The District Court judges are vested with considerable discretion under this rule in granting or denying a Motion to Set Aside a Judgment. The Court should be generally indulgent toward setting a judgment aside whether it is reasonable justification or excuse for the defendant's failure to answer and when timely application is made...Where there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so. (41 Utah Adv. Rep. at 13. See Also Russell v. Martell, 681 P.2d 1193 (Utah, 1981))

The same reasoning and purpose of Rule 60(b) has been applied in Workers Compensation cases.

In Fink v. Industrial Commission, 689 P.2d 708 (Colorado, 1984) the Colorado Court of Appeals determined that although a Petition for Review was filed four days after the deadline, a mistake by an employee of the Appeals Section of the Commission upon which counsel for Petitioner relied upon, warranted waiver of timeliness.

In Cook v. Industrial Commission, 651 P.2d 365 (Arizona, 1982) in a unanimous decision of the Supreme Court of Arizona the issue involved the filing five days late of a Request for Review. The Court held that the attorney's substitute secretary's inaccurate notation, which resulted in late filing, warranted waiver of timely filing requirement where delay not excessive nor prejudicial. See also Chavez v. Industrial Commission, 576 P.2d 134 (Crt. of App. Arizona, 1977) late filing of one day waived for good cause-miscalculation; Parsons v. Bekins Freight, 493 P.2d 913 (Arizona, 1972) late filing of 10 days waived for good cause, late doctor report and ambiguous notice).

The Utah Supreme Court has also recognized the Industrial Commission's authority to waive the timeliness requirement of a Motion for Review in an Employment Security case. Section 35-4-1(a) provides that a review of a decision involving contribution liability shall be filed within ten days of the decision. Section 35-4-10(b) provides that an appeal to an appeal referee shall be made within ten days.

In Jones v. Department of Employment Security, 641 P.2d 156 (Utah, 1982) held that the unemployment compensation recipient had not timely filed his appeal to the appeal referee within ten days and thus the appeal referee had no jurisdiction to hear the case.

In Thiessens v. Department of Employment Security, 663 P.2d 72 (Utah, 1983), the court held that an untimely appeal to

the appeals section by an unemployment compensation claimant could be heard, if under the Industrial Commission's rule the claimant could show good cause for the delay in filing. The court clearly recognizes the power of the Industrial Commission to allow a late filing of an administrative appeal if the claimant could show good cause.

This recognized ability of the Industrial Commission is also supported by the decisions on the cases of Wood v. Department of Employment Security, 680 P.2d 38 (Utah, 1984), Kirkwood v. Department of Employment Security, 709 P.2d 1158 (Utah, 1985) and Mini Spas Inc. v. Industrial Commission, 51 Utah Adv. Rep. 13 (Feb. 3, 1987).

The Industrial Commission in Workers Compensation has also adopted a policy to allow the consideration of untimely filings of Motions for Review. (See Addendum 1, letter of Barbara Alcerio, legal counsel, Industrial Commission).

The Court, in order to fulfill the mandate of Section 35-1-33 Utah Code Annotated (1953, as amended) should allow the Industrial Commission to waive non-excessive, non-prejudicial late filings for good cause shown. If the purposes of the liberality of Workers Compensation are to be fulfilled, certainly claimants here should be allowed at least the same equity and equal protection of the laws as civil litigants due under Rule 60(b), and employment security cases under Industrial Commission Employment

Security rule 475-6c-8. The Court should adopt this equitable principle and allow the Industrial Commission latitude to consider Motions for Review on their merits and not remove from consideration of Industrial Commission by technical rules or mistakes. Particularly, in this case, where the untimeliness if any was caused by the Industrial Commission's own recognized dating and filing problems.

CONCLUSION

The Utah Supreme Court has frequently and consistently held that repetitive exertions which cumulate in injury are compensable under the Workers Compensation Act. In Allen, and since, the Court has looked at repetitiveness as a factor making an exertion unusual for the purpose of the higher legal causation test. Mrs. Lamoreaux's injuries resulted from this type of cumulative exertion.


The purpose of the higher legal causation standard, where the claimant has a pre-existing injury, is to protect employers from having to pay for injuries which the employee brought with him. It protects the employer where the work he provides is not the causal agent. The higher standard does not serve that purpose in the present case, because the injury did not pre-exist Mrs. Lamoreaux's employment with Petitioner, but was in fact caused by it.

Finally, given the remedial purpose of the Act, and the fact that Mrs. Lamoreaux has suffered a compensable injury, the dating and filing problem of the Industrial Commission, and the power of the Industrial Commission, the court should hold the Respondents' Motion for Review was filed timely, or that an extension for filing or that the Commission has the recognized power to waive timeliness of the Motion.

The Industrial Commission's Order granting Motion for Review and awarding compensation to Respondent should be affirmed.

DATED this 2nd day of March, 1988.

Respectfully Submitted,


C. Richard Henriksen, Jr.
Attorney for Respondent

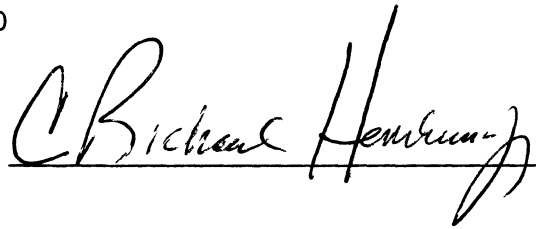
CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that four (4) true and correct copies of the foregoing instrument were HAND-DELIVERED on this 3rd day of March, 1988, to the following counsel of record:

MICHAEL E. DYER
STEPHANIE A. MALLORY
RICHARDS, BRANDT, MILLER &
NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Petitioners
Varian - Eimac, Inc. and/or
Employers Mutual Liability Insurance

ERIE V. BOORMAN, Administrator
SECOND INJURY FUND
160 East 300 South
Salt Lake City, Utah 84145-0580

INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
P.O. Box 5800
Salt Lake City, Utah 84110-5800



ADDENDUM 1



Norman H. Bangert
Governor

Frances T. Moffat
Director

INDUSTRIAL COMMISSION OF UTAH
INDUSTRIAL ACCIDENT DIVISION

160 East 300 South
P.O. Box 510250
Salt Lake City, Utah 84151-0250
Toll Free 1-800-426-0667

February 26, 1988

Stephen M. Hadley
Chairman
L. L. Nielsen
Commissioner
John Florez
Commissioner


Roger Henriksen
Attorney
320 South 500 East
Salt Lake City, Utah 84102

Dear Mr. Henriksen:

This letter is in response to your inquiry regarding general Industrial Commission procedure. The Industrial Commission is a state agency recognizing all state holidays including President's Day. Therefore, The Industrial Commission was closed for business on February 16, 1987.

All Industrial Commission mail is received at the Heber Wells Building at a central distribution mail room where it is hand-sorted and then delivered to the third floor. Industrial Commission mail is delivered to Administration where it is again hand-sorted according to which division of the Industrial Commission is indicated on the envelope. When the Industrial Accident Division gets its mail from Administration, the mail is placed in a basket to be stamped in. The foregoing process may take several days to complete. Although the stamp at the upper right hand corner states "received" on a certain date, that date is not necessarily the date the mail got to the Heber Wells Building or even the Industrial Commission. That stamped date is at best an approximation of the date of receipt. Realizing the stamped date may vary several days from actual receipt of the item at issue, the Commission maintains the general practice of not addressing timeliness of filing where an item is mailed and only one or two days are at issue. I hope this adequately answers your question regarding Industrial Commission procedure.

BY DIRECTION:
INDUSTRIAL COMMISSION OF UTAH


Barbara Elicerio
Legal Counsel



Norman H. Bangerter
Governor
Frances T. Moffat
Director

State of Utah
INDUSTRIAL COMMISSION OF UTAH
INDUSTRIAL ACCIDENT DIVISION

160 East 300 South
P.O. Box 510250
Salt Lake City, Utah 84151-0250
Toll Free 1-800-426-0667

February 26, 1988

Stephen M. Hadley
Chairman
L. L. Nielsen
Commissioner
John Florez
Commissioner

Timothy Shea
Clerk of the Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Dear Mr. Shea:

This letter will act as notice to you and the Court that there has been yet another change in the manner in which Industrial Commission workers compensation appeals will be handled. It is unfortunate that the representation of the Industrial Commission on appeal has been in a state of transition ever since the Court first began hearing cases. Hopefully, this is the last time I will need to communicate with you on this particular topic.

On February 17, 1988, I confirmed with Earl Dorius, Assistant Attorney General and Division Chief for the Governmental Affairs Division, that the Attorney General's office would agree to provide representation for the Industrial Commission Industrial Accident Division (formerly the Workers Compensation Division) on appeals to the Court of Appeals. The Attorney General's office has decided to proceed in the same manner as it did formerly on workers compensation appeals to the Supreme Court. In other words, the Attorney General will provide representation for the Industrial Commission in cases where the party aligned with the Industrial Commission is not represented by counsel. In cases where the respondent or respondents aligned with the Industrial Commission is/are represented by counsel, the Attorney General will not make an appearance on behalf of the Industrial Commission. I will continue to monitor all cases on appeal to the Court of Appeals. I will be writing Mark Wainwright, Assistant Attorney General, in each case appealed informing him whether he will need to appear on behalf of the Industrial Commission and I will copy the Court with those letters.

Specifically, this new understanding will effect only one case currently on appeal. That case is :

Varian-Eimac, Inc. and/or Employers Mutual Liability
Insurance v. Helen D. Lamoreaux, the Second Injury
Fund and the Industrial Commission of Utah, Case No.
870344-CA

The Industrial Commission originally indicated it would be making a separate appearance in this matter. The Respondent briefs are due March 3, 1988. I have discussed the matter with Roger Henriksen, counsel for Helen D. Lamoreaux, the party aligned with the Industrial Commission on appeal. Mr. Henriksen's arguments on appeal are identical to the arguments the Industrial Commission had intended on making and so Mr. Henriksen and I have agreed there is no need for the Industrial Commission to file a separate brief. By a copy of this letter, I am notifying the other parties to this appeal of the Industrial Commission's decision in this respect.

Once again, I apologize for the confusion that has been caused by the changes. I encourage you and your staff to call me with any questions or concerns you may have with respect to this final change.

BY DIRECTION:
INDUSTRIAL COMMISSION OF UTAH

cc: Mark Wainwright, Roger Henriksen,
Michael Dyer, Erie Boorman, Stephanie Mallory

Barbara Elvini

ADDENDUM 2

IN THE COURT OF APPEALS, STATE OF UTAH

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

AFFIDAVIT OF C. RICHARD HENRIKSEN, JR.

The Honorable Gilbert A. Martinez
Administrative Law Judge

STATE OF UTAH)
 : ss.
County of Salt Lake)

COMES NOW C. Richard Henriksen, Jr., after first being sworn, deposes and swears as follows:

1. That I am a duly licensed attorney in the State of Utah and attorney for Respondant.

2. That on February 17, 1987, I was in Provo, Utah working on a case and realized I may have difficulty in filing the Motion for Review in this case on that date.

3. That I called the Honorable Gilbert A. Martinez, Administrative Law Judge of the Industrial Commission and left a message at his office that I may need an additional few days to file the Motion for Review and if that was not permissible, please call my secretary, Judy Banks Garrett.

4. That upon my return to the office from Provo, we had not heard back from Judge Martinez, so to be sure we were timely, I prepared and my secretary typed the Motion for Review.

5. That we mailed the Motion for Review to those persons shown on the Mailing Certificate and had either Judy Banks Garrett, Paul B. Ellis or Stephen Buhler deliver the Motion for Review to the Industrial Commission for filing.

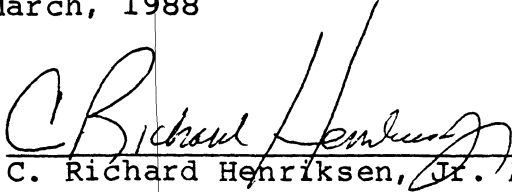
6. That because of the shortness of time, the typographical error on Page 3 (ommission of the date line and signature line) I corrected by hand those lines as our messenger went out the door.

7. That I have spoken to the Industrial Commission to see if they have a record of my telephone message to Judge Martinez on February 17, 1987 and they do not have such a record; however, Judge Martinez told me he receives such calls a dozen times per day and not all messages are saved.

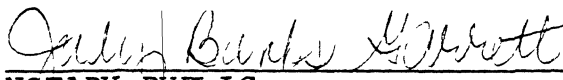
8. That to my best knowledge and belief the Motion for Review was filed with the Industrial Commission on February 17, 1987, the due date.

9. Further, Affiant sayeth not.

DATED this 2nd day of March, 1988

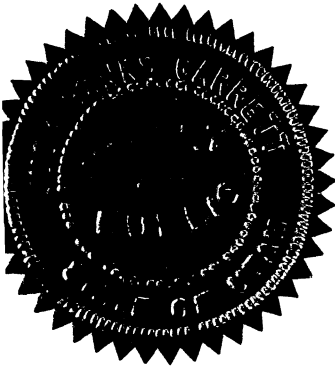

C. Richard Henriksen, Jr. Affiant

SUBSCRIBED and SWORN to before me this 2nd day of March,
1988.


NOTARY PUBLIC,
Residing at Salt Lake Co., Utah

My Commission Expires:

February 2, 1991



ADDENDUM 3

Poll case

RICHARDS, BRANDT, MILLER & NELSON

A PROFESSIONAL LAW CORPORATION
CSB TOWER—50 SOUTH MAIN—SUITE 700
P O BOX 2465
SALT LAKE CITY UTAH 84110

DEC 05 1986

ROBERT W. MILLER
(1940-1983)

TELEPHONE
(801) 531-777

WILLIAM S. RICHARDS P.C. LYNN S. DAVIES
ROBERT W. BRANDT ROBERT G. GILCHRIST
P. KEITH NELSON MICHAEL E. DYER
M. KENT CHRISTOPHERSON RUSSELL C. FERICKS
GARY D. STOTT MICHAEL K. MOHRMAN
GARY B. FERGUSON MICHAEL P. ZACCHEO
ROBERT L. STEVENS GARY L. JOHNSON
NELSON L. HAYES STEPHANIE A. MALLORY
DAVID L. BARCLAY RICHARD L. KING
JOHN L. YOUNG MICHAEL L. SCHWAB
DAVID K. LAURITZEN

December 4, 1986

Judge Gilbert A. Martinez
Industrial Commission of Utah
160 East 300 South
P.O. Box 15580
Salt Lake City, Utah 84145-0580

Re: Helen D. Lamoreaux v. Varian-EIMAC, Inc.
Our File No.: 25766-190
Claim No.: D57-14511
Date of Injury: 11/15/85

Dear Judge Martinez:

Please accept this letter as a supplemental memorandum in the above matter based upon the recent landmark decision of Allen v. Industrial Commission, filed November 14, 1986, No. 20026. In general terms, Allen stands for the proposition that, if a worker has a preexisting condition, the worker must prove unusual or extraordinary exertion in order to meet legal causation. If the worker does not have a preexisting condition, usual or ordinary exertion is sufficient.

In the case of Helen Lamoreaux, the applicant herein, the evidence is clear that Mrs. Lamoreaux was suffering from a preexisting condition. As fairly noted in the Summary of Testimony, Mrs. Lamoreaux injured her back in an automobile accident as early as 1958. While Mrs. Lamoreaux claimed not to have had back problems immediately following the automobile accident, she did have low-back pain later on in life prior to the alleged industrial incident of November 15, 1985. Significantly, Dr. Bauman recorded her history as follows:

She has a previous history of back problems which dates back over a couple of years. She had had mild aching back at the end of the day. She had never missed any work or had any leg pain associated with the back pain which she had had. Her job involves lifting 10- and 18-pound

objects all day long. For some reason when she lifted this one time off the shelf she felt a sudden pain in her back which went down into her left leg. (Emphasis supplied.)

The applicant's low-back pain was sufficiently severe that she sought medical treatment on several occasions prior to her alleged injury on November 15, 1986. For example, Dr. Wayne Zundel noted in his clinical data the following diagnosis of the applicant on April 22, 1985:

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

(Exhibit D-1 at 45.)

Clearly, the applicant was suffering from preexisting arthritis in the spine which, on occasion, became disabling due to pain. Because of the preexisting nature of the applicant's injuries, the higher standard elucidated in the Allen decision must be applied.

The question then becomes whether or not the lifting of an object weighing 18 1/2 pounds is, on an objective basis, an unusual or extraordinary effort. The answer to that question is clearly "no" based upon the direct analysis of the Utah Supreme Court in the Allen decision. In footnote 8 of Allen, the Supreme Court defined in part the "usual wear and tear of life -- which certainly includes lifting objects weighing 20 pounds, such as bags of golf clubs, minnow pails, and stepladders." (Allen, footnote 8 at 16.) (Emphasis supplied.)

It is undisputed in the present case that the applicant was lifting only 18 1/2 pounds at the time of her alleged incident. Directly applying the Supreme Court's analysis of Allen to this case, it cannot be reasonably stated that Mrs. Lamoreaux was engaged in activities of an unusual or extraordinary nature. Therefore, based upon the

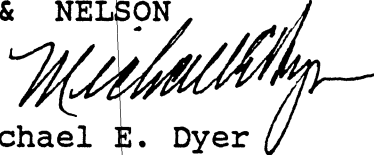
Judge Gilbert A. Martinez
December 4, 1986
Page 3

analysis in Allen, the defendants respectfully submit that the applicant has failed in her burden as to legal causation, and her claim must be denied.

Thank you for your consideration of this matter.

Very truly yours,

RICHARDS, BRANDT, MILLER
& NELSON



Michael E. Dyer

MED8/al
cc: C. Richard Henriksen ✓
Erie V. Boorman
Wausau Insurance Companies

ADDENDUM 4

Hand Delivered

MICHAEL E. DYER
STEPHANIE A. MALLORY
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for Petitioners
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

--- 0000000 ---

VARIAN - EIMAC, INC. AND/OR	:	
EMPLOYERS MUTUAL LIABILITY	:	
INSURANCE,	:	PETITION FOR WRIT OF REVIEW
	:	
Petitioners,	:	
	:	
vs.	:	Case No. 86000755
	:	
HELEN D. LAMOREAUX, THE SECOND	:	COURT OF APPEALS # _____ -CA
INJURY FUND, AND THE UTAH STATE	:	
INDUSTRIAL COMMISSION,	:	
	:	Category #6
Respondents.	:	

--- 0000000 ---

Pursuant to Utah Code Annotated, §35-1-83 (1986), and Rule 14 of the Rules of the Utah Court of Appeals, petitioners Varian - Eimac, Inc. and/or Employers Mutual Liability Insurance, by and through their counsel of record, petition the Court for review of the Order of the Industrial Commission dated July 13, 1987 granting defendant Lamoreaux's Motion for Review.

Petitioners seek review of the Order aforementioned on the following grounds:

1. The Commission had no jurisdiction to enter its order of July 13, 1987, as respondent Lamoreaux's Motion for Review of the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge was not timely filed pursuant to the requirements of U.C.A. §35-1-82.55 and the Order of the Administrative Law Judge. The Findings of Fact, Conclusions of Law, and Order of the Administrative Law Judge thus constituted a final Order from which no relief could be granted.

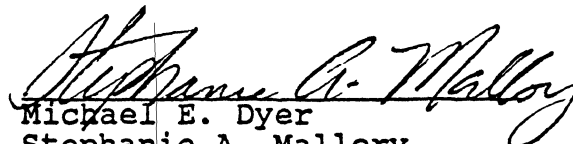
2. The industrial incident of November 15, 1985 does not constitute a compensable industrial accident for purposes of Utah Worker's Compensation Law inasmuch as the applicant was suffering from a preexisting condition at the time of her injury and she failed to establish the requisite legal causation necessary to render the incident compensable where a preexisting condition is involved as per the standards set forth in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

3. If respondent Lamoreaux suffered a compensable industrial accident on November 15, 1985, the Second Injury Fund is liable for a percentage of the benefits owed to her under U.C.A. §35-1-69 inasmuch as Ms. Lamoreaux was clearly suffering from a preexisting condition at the time her injury occurred.

4. A copy of the Order of the Industrial Commission from which petitioners seek review is attached hereto as Exhibit A.

DATED this 12th day of August, 1987.

RICHARDS, BRANDT, MILLER
& NELSON


Michael E. Dyer
Stephanie A. Mallory
Attorneys for Petitioners

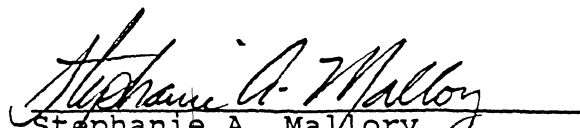
CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the
foregoing instrument was hand delivered on the 12th day of
August, 1987, to the following counsel of record:

Utah State Industrial Commission
P.O. 5800
Salt Lake City, Utah 84110-5800

C. Richard Henriksen, Jr.
HENRIKSEN, HENRIKSEN & CALL, P.C.
Attorneys for Plaintiff
320 South 500 East
Salt Lake City, Utah 84102

Erie V. Boorman
Administrator
Second Injury Fund
160 East 300 South
Salt Lake City, Utah 84111


Stephanie A. Mallory

LAM/01/SAM1