

2008

Michael Verburg v. Utah Labor Commission and Ogden City Police Department : Brief of Petitioner

Utah Court of Appeals

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Sharon J. Eblen; Blackburn and Stoll, L.C.; Attorneys for Appellee/Respondent Ogden City Police Department.

Alan L. Hennebold, General Counsel; Labor Commission of Utah; Attorneys for Appellee/Respondent Labor Commission of Utah. Gary E. Atkin; K. Dawn Atkin; Atkin and Associates; Attorneys for Appellant/Petitioner Michael Verburg.

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IN THE UTAH COURT OF APPEALS

MICHAEL VERBURG, :
 :
 Petitioner, : **Appeal No. 20080139**
 :
 vs. : **Labor Commission No. 04-1130**
 :
 UTAH LABOR COMMISSION and :
 OGDEN CITY POLICE : **Priority 7**
 DEPARTMENT, :
 :
 Respondents. : **ORAL ARGUMENT REQUESTED**

BRIEF OF PETITIONER
MICHAEL VERBURG (EMPLOYEE)

Appeal from Order Denying Request for Reconsideration by
the Utah Labor Commission, dated January 14, 2008, and its Underlying
prior Order Reversing ALJ's Decision and Denying Benefits
dated November 19, 2007

Sharon J. Eblen (5832)
BLACKBURN & STOLL, L.C.
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

Attorneys for Appellee/Respondent
Ogden City Police Department

Alan L. Hennebold, General Counsel
LABOR COMMISSION OF UTAH
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114
Attorneys for Appellee/Respondent
Labor Commission of Utah

Gary E. Atkin (0144)
K. Dawn Atkin (6471)
ATKIN & ASSOCIATES
1111 E. Brickyard Road, Suite 206
Salt Lake City, Utah 84106

Attorneys for Appellant/Petitioner
Michael Verburg

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Labor Commission of Utah

Gary E. Atkin (0144)
K. Dawn Atkin (6471)
ATKIN & ASSOCIATES
1111 E. Brickyard Road, Suite 206
Salt Lake City, Utah 84106

Attorneys for Appellant/Petitioner
Michael Verburg

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UTAH LABOR COMMISSION and	:	
OGDEN CITY POLICE	:	Priority 7
DEPARTMENT,	:	
Respondents.	:	

BRIEF OF PETITIONER
MICHAEL VERBURG (EMPLOYEE)

JURISDICTION

This Petition for Review seeks review of the Final Order Denying Request for Reconsideration of the Commission entered January 14, 2008, as well as the underlying Order Reversing ALJ's Decision and Denying Benefits, dated November 19, 2007, as referenced therein, which Order denied benefits to Employee, Michael Verburg, based on his June 17, 2004 industrial accident, contrary to the Findings of Fact and Conclusions of Law and Order by the Administrative Law Judge dated October 6, 2005.

ISSUES PRESENTED FOR REVIEW

The issues on this appeal are three-fold: (1) Whether the Labor Commission erred in its application of the *Allen*¹ test for "Legal Causation" to the unexpected occurrence of

¹*Allen v. Industrial Commission*, 729 P. 2d 15 (Utah, 1986)

Employee striking his head against the car door jamb; (2) Whether the Labor Commission erred in rendering its medical conclusion that Employee's vision "going black" for a moment was related to his preexisting cervical problems, a conclusion not supported by the medical records; and (3) Whether the Labor Commission erred in considering the issue of "Medical Causation" of Employee's injury when the sole issue before the ALJ was that of "Legal Causation."

STANDARD OF REVIEW

The standard of review varies in matters involving appeals from the Labor Commission. Matters of statutory construction are questions of law that are generally reviewed for correctness.² The Appeals Court reviews the legal determinations of the Commission under a similar standard, "[C]eding the board no deference as appellate courts have 'the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.'"³

This Court has similarly declared that, since, "The Allen test is a judicially crafted rule that the Commission is in no better position to interpret than this court", whether the Commission erroneously interpreted and applied that decision "is a question of law reviewed for correctness."⁴

²*Esquivel v. Labor Comm'n*, 2000 UT 66, 7 P. 3d 777 (Utah, 2000).

³*Salt Lake City Corp. v. Utah Labor Comm'n*, 153 P. 3d 179, 181 (Utah, 2007)

⁴*Acosta v. Labor Comm'n*, 2002 UT App. 67, ¶10, 44 P. 3d 819 (Utah App., 2002)

On the other hand, the standard of review for mixed questions of law and fact has been summarized as follows:

In this case, the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. See Utah Code Ann. §34A-1-301 (1997) . . . As such, we must uphold the Commission's determination . . . unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under 63-46b-16(h)(i) of the UAPA. . . . Moreover, we resolve, "[a]ny doubt respecting the right of compensation in favor of the injured employee." *Drake v. Industrial Comm'n*, 939 P. 2d 177, 182 (Utah, 1997) (citation omitted).⁵

Finally, the Court reviews Commission rulings in workers compensation cases, particularly those that result in a denial of benefits, with a "heightened degree of oversight" in order to give effect to the purpose of the act to alleviate hardship on workers and their families. As the Court explained in *Salt Lake City Corp. v. Labor Comm'n*:

We will therefore look closely to assure ourselves that the Commission has liberally construed and applied the Act to provide coverage and has resolved any doubt respecting the right to compensation in favor of an injured employee.⁶

DETERMINATIVE STATUTES

Utah Code Anno. §34A-2-401 (1999) provides the basic statutory outline for compensability of injuries to employees as follows:

(1) Each employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury

⁵*AE Clevite v. Labor Comm'n*, 996 P. 2d 1072, 1074 (Utah App., 2000), *cert. den.* 4 P. 3d 1289 (Utah, 2000)

⁶*Supra*, note 3 at 182

occurred, if the accident was not purposely self-inflicted, shall be paid [benefits]

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

Employee filed an Application for Hearing with the Commission on December 13, 2004, claiming entitlement for worker's compensation benefits arising out of two alleged industrial accidents which Employee claimed had resulted in his injuries.

An evidentiary hearing was held on June 7, 2005, before the Honorable Lorrie Lima, Administrative Law Judge, at which time Employee voluntarily withdrew his claim regarding the injury of March 24, 2004 and proceeded on his claim for the June 17, 2004 injury.

Judge Lima entered her Findings of Fact, Conclusions of Law, and Order in this matter on October 6, 2005. In that Order, Judge Lima determined that Employee had aggravated his preexisting condition on June 17, 2004 when he struck his head while attempting to get into his car at the end of a shift. While recognizing that Employee must meet the higher burden of "legal causation" under *Allen*, Judge Lima found that the preponderance of the evidence established that Employee had met that higher burden and benefits were awarded.

Employer timely filed a Motion for Review, asserting that Employee's work related accident did not satisfy the higher burden of "legal causation" under *Allen*. The Labor Commission granted Employer's Motion for Review and entered its Order

Reversing ALJ's Decision and Denying Benefits on November 19, 2007. It based that reversal upon its determination that Employee had failed to establish that the employment activity, "involved some unusual or extraordinary exertion over and above the 'usual wear and tear and exertions of nonemployment life'" and that the event complained of was, rather, "a relatively routine event in which he bumped his head as he slid into the driver's seat."

On December 5, 2007, Employee timely filed his Motion for Reconsideration of the Commission's Order.

On January 14, 2008, the Commission entered its Order Denying Request for Reconsideration.

On February 13, 2008, Employee timely filed his Petition for Review with this Court.

STATEMENT OF FACTS

Employee believes that the following Statement of Facts substantially reflects all of the relevant and material facts of this case, as established at the Hearing before the Honorable Lorrie Lima, Administrative Law Judge, on June 7, 2005. The majority of these were outlined in the Findings of Fact, Conclusion of Law, and Order of Judge Lima dated October 6, 2005,⁷ and were based upon the undisputed testimony of Employee and the medical records:

⁷R. (vol. 1) at 00037

1. Employee worked for Ogden City as a Community Service Officer⁸.
2. Employee had a history of cervical spine problems relating back to November of 2002 when an MRI reflected multi-level degenerative disc disease. Due to ongoing complaints of pain and headaches, Employee underwent an anterior cervical microdiscectomy and fusion at C5-6 and C6-7 levels on December 10, 2002⁹.
3. Employee underwent an anterior cervical discectomy at C4-5 with decompression of the nerve root, and an anterior cervical fusion at C4-5 for degenerative disc disease at C4-5 due to multiple levels of degenerative disc disease superimposed on post-op changes, on April 19, 2004.¹⁰
4. Following the April 19, 2004 surgery. Employee's neck felt better than before the surgery and the pain "pretty much went away." Employee "was quite happy with the results."¹¹
5. Employee was released to return to his regular work on June 8, 2004¹². His doctor's notes on that date state, "Overall he reports that he has had good improvement in pain . . . He is not taking any real pain medications at this time."¹³

⁸R. (vol. 3) at 10; R. (vol. 1) at 00038

⁹R. (vol. 2) at 054

¹⁰R. (vol. 2) at 054; R. (vol. 1) at 00038

¹¹R. (vol. 3) at 23; R. (vol. 1) at 00038, 00041

¹²R. (vol. 3) at 24; R. (vol. 1) at 00038

¹³R. (vol. 2) at 057

6. On June 17, 2004, at the conclusion of Employee's work shift, he had to get his stuff out of the patrol car, because the officers had to share cars. He was "standing facing the front of the car" and his body was in motion from a standing to sitting position as he went to "kind of scoot sideways" onto the seat.¹⁴ With the force of that momentum, he struck his head on the top of the door frame on the right side, "halfway between the crown and the top of my head and ear."¹⁵ The continuous movement of his body and weight added more force to the impact of his head and neck on the door jam.¹⁶ "Everything went black for a couple of seconds" and he "just sat there in the car" but he did not believe he was actually unconscious.¹⁷ Although there was an indication in the medical records that he "hit car door by turning too fast,"¹⁸ Employee clarified that the injury had occurred as he had testified and that "I didn't do any twisting."¹⁹ As it was the end of the shift on a Friday, he did not return to work but got the rest of the stuff out of the vehicle and went home.²⁰

7. Employee also described a prior incident in which he had hit his head on a garage door, an event which he described as follows:

¹⁴R. (vol. 3) at 25; R. (vol. 1) at 00038, 00041

¹⁵R. (vol. 3) at 11 - 12; R. (vol. 1) at 00038, 00041

¹⁶R. (vol. 1) at 00041

¹⁷R. (vol. 3) at 12; R. (vol. 1) at 00038

¹⁸R. (vol. 2) at 138

¹⁹R. (vol. 3) at 26

²⁰R. (vol. 3) at 13; R. (vol. 1) at 00038

I didn't really hit it really hard on the garage door. What it was, is about – there was a walkabout on row on 2nd Street, and I was on a call where a car had broke through the lady's garage door and left. And I was responding on the hit-and-run call. I guess the car went through the garage door and smashed it up and actually hit the car inside the garage and pushed it forward. And the garage door was kind of hanging down a little bit, and as I went underneath it, I can't – my head doesn't bend as much anymore. I just hit – caught my head on the garage door.²¹

He went on to explain that, in that prior incident, his vision did not go black and he did not have to stop and rest after the incident and “just kept doing my job.”²²

8. After the accident of June 17, 2004, Employee initially had no other symptoms. However, unlike the prior event with the garage door, about an hour afterwards, after he got home, he started having problems.²³ His pain progressively worsened.²⁴ There was a lot of pain in the center of his neck and pain radiating back in his shoulders and, since it was shortly after surgery he was concerned that he might have disrupted his fusion..²⁵

9. When the pain worsened and Employee told his sergeant what had happened, he was directed to the emergency room²⁶, where the doctor took him off

²¹R. (vol. 3) at 15

²²*Id.*

²³R. (vol. 3) at 13, 24; R. (vol. 1) at 00038

²⁴R. (vol. 3) at 16; R. (vol. 1) at 00038, 00041

²⁵*Id.*

²⁶R. (vol. 3) at 17

work until he met with his surgeon. After he saw his surgeon, he was taken off work until after the surgery and recuperation.²⁷

10. Employee's doctor's notes on July 13, 2004, reflect, "He states that he was doing quite well until he hit his head on a car and states that now he has similar pain to what he has had previously, prior to the surgery."²⁸

11. Although subsequent initial X-rays and evaluation reflected a stable fusion and was diagnosed as a muscle strain, pain continued to increase. Employee continued to receive treatment and pain medications through June 2, 2005, when Dr. Brown issued an independent medical evaluation, which noted his pre-existing condition and opined a medical nexus between the injury of June 17, 2004 and the complaints of increased cervical spine pain. He found medical treatment through that date was medically necessary due to the industrial injury of June 17, 2004 and that further treatment of the condition would include pain management for significant neck pain without further surgery.²⁹

12. Employee was finally released to return to work on January 10, 2005.³⁰

13. At the commencement of the hearing, Employee noted that there was a pre-existing injury and that the issue to be determined "is just going to be legal

²⁷R. (vol. 3) at 17; R. (vol. 1) at 00038

²⁸R. (vol. 2) at 059; R. (vol. 1) at 00039

²⁹R. (vol. 2) at 232 - 233; R. (vol. 1) at 00038

³⁰R (vol. 3) at 17; R. (vol. 1) at 00039

causation,”³¹ Employer agreed with Employee’s indication in that regard and confirmed that their contention was that the bump on the head “does not satisfy the higher legal causation standard of *Allen*.”³²

14. Following the Hearing, in her Findings of Fact, Conclusions of Law, and Order, Judge Lima recognized that, although medical causation was satisfied, due to the pre-existing condition of Employee, the more stringent test for “legal causation” under *Allen*, must also be satisfied. In that regard, Judge Lima determined:

The preponderance of the evidence demonstrates that the direct force Petitioner experienced moving from a standing to sitting position while propelling his body sideways with such a force, that when he struck his head his vision went black, was not a typical exertion experienced by men and women in modern non-employment life. While getting into a motor vehicle is typical of modern non-employment life, such exertion does not typically involve the combination of factors presented here. Specifically, the continuous movement of Petitioner’s body and weight added more force to the impact of Petitioner’s head and neck on the door jam which was unusual and extraordinary and satisfies the requirement of legal causation. This extra exertion served to offset the preexisting condition of Petitioner as the likely cause of the injury. Moreover, how Petitioner felt before and after the [sic] June 17, 2004, evidences the degree of force exerted by Petitioner. Following surgery in April, 2004, Petitioner felt better than before the surgery and he was happy with the result. However, following June 17, 2004, Petitioner experienced significantly increased pain in his cervical spine.³³

³¹R. (vol. 3) at 6

³²R. (vol. 3) at 7

³³R. (vol. 1) at 00041 (Order is attached as Addendum 1 to this Brief)

Judge Lima then determined that Employee's exertion at the time of the accident was sufficient to satisfy *Allen*'s higher standard of "legal causation."

15. In its Order Reversing ALJ's Decision and Denying Benefits, the Commission noted that the parties did not dispute Judge Lima's findings.³⁴

16. In that Order, the Commission then determined that *Allen* and its progeny declare that, when a claimant suffers from a pre-existing condition such as that of the Employee in this case, the claimant must show "that the employment activity involved some unusual or extraordinary exertion over and above the 'usual wear and tear and exertions of nonemployment life.'"³⁵ The Commission declared:

Usually, the exertion can be easily classified as "unusual or extraordinary" and compensable, or "usual and ordinary" and noncompensable. Mr. Verburg's exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door.³⁶

17. The Commission went on to declare that the record indicated Mr. Verburg's accident "appears to have been a relatively routine event in which he bumped his head as he slid into the driver's seat."³⁷ Finally, the Commission concluded:

The Commission is unconvinced that Mr. Verburg's testimony of his vision going dark is a measure of the force of impact. The Commission also notes the absence of any evidence of bruising or other marks from the impact. In

³⁴R. (vol. 1) at 00059 (Order is attached as Addendum 2 to this Brief)

³⁵R. (vol. 1) at 00060

³⁶R. (vol. 1) at 00061

³⁷*Id.*

summary, the Commission finds that the evidence does not establish that the exertion involved in Mr. Verburg's accident was unusual or extraordinary.³⁸

18. On December 5, 2007, Employee timely filed a Motion for Reconsideration of the Commission's Order on the basis that it contained factual errors regarding the activities of Employee when he was injured and legal errors with regard to the manner of its application of *Allen* and in its consideration of the undisputed issue of medical causation.³⁹

19. On January 14, 2008, the Commission entered its Order Denying Request for Reconsideration, again reflecting its determination that Mr. Verburg experienced a "relatively routine event" and, as such, did not satisfy the test for legal causation under *Allen*. In the course of that Order, the Commission further set forth its medical conclusion that Employee's vision "going black" for a moment was "more reasonably related to Mr. Verburg's preexisting cervical problems,"⁴⁰ a conclusion unsupported by any appropriate findings or any medical records or opinions.

SUMMARY OF THE ARGUMENT

POINT I. The Commission erred in the manner it applied the *Allen* test for "legal causation" to the unexpected occurrence of Employee striking his head against the car door frame.

³⁸*Id.*

³⁹R. (vol. 1) at 00063

⁴⁰R. (vol. 1) at 00080 (Order is attached as Addendum 3 to this Brief)

Allen's "legal causation" test was intended to weed out aggravations of preexisting conditions which just happen to occur while an employee is at work but performing activities of normal everyday nonemployment life while at work. It requires that the employee be subjected to some exertion "greater than that undertaken in normal, everyday life." In applying that test to Employee's injury, the Commission erroneously determined that Employee's sudden, unexpected event of impacting his head on the car door frame was a "relatively routine event"⁴¹ which was not uncommon to normal everyday life and, therefore, did not meet that "legal causation" test.

People do, at times, suffer sudden unexpected events while engaged in "normal everyday" activities such as those referenced in *Allen*, such as falling while climbing a normal flight of stairs. However, such sudden unexpected events are not part of "normal" everyday life. Rather, they constitute "abnormal" events occurring during everyday life.

With such a sudden unexpected event, there is a clear and direct relationship between that identifiable event and the resulting injury. Such instances are significantly different from the aggravations of preexisting conditions which *Allen* was trying to weed out, such as where an employee, while lifting a normal garbage can at work, feels a pain and claims an aggravation of a preexisting back injury as a result.

Utah case law confirms that the test under *Allen* is not whether the type of exertion which caused the injury is unknown in nonemployment life but, rather, whether it exceeds exertion used in "normal everyday" nonemployment life. The uncontradicted evidence

⁴¹*Supra*, note 36

presented at the hearing demonstrates that the Employee met that higher standard of “legal cause.” The facts surrounding the incident, as set forth in Employee’s Statement of Facts,⁴² do not reflect a “relatively routine event” or a mere bump on the head. Rather, they reflect that there was a forceful impact as found by Judge Lima:

The direct force Petitioner experienced moving from a standing to sitting position while propelling his body sideways with such a force, that when he struck his head his vision went black. . . The continuous movement of Petitioner’s body and weight added more force to the impact of Petitioner’s head and neck on the door jam which was unusual and extraordinary.⁴³

The Commission’s conclusion that those facts failed to meet the “legal causation” test of *Allen* was erroneous, contrary to the law, and exceeded the bounds of reasonableness and rationality so as to constitute an abuse of discretion.

POINT II. The Commission erred in basing its decision on findings and conclusions without adequate supported in the record.

In supporting its conclusion that the facts of Employee’s accident did not meet the “legal causation” test of *Allen*, the Commission relied upon findings and conclusions which were not supported by the evidence and, rather, appear to have been improperly based solely on the Commission’s assumptions without finding support in the record. The Commission concluded, “Mr. Verburg’s exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door;” “The Commission is unconvinced that Mr. Verburg’s testimony of his vision going

⁴²Statement of Facts Nos. 5 - 8

⁴³*Supra*, note 33

dark is a measure of impact,” and “The Commission also notes the absence of any evidence of bruising or other marks from the impact.”⁴⁴

In its subsequent Order Denying Request for Reconsideration, the Commission further concluded:

(1) The fact that Mr. Verburg experienced an unusual reaction to that event - his vision ‘going black’ for a moment - does not change the nature or force of the impact itself, but is more reasonably related to Mr. Verburg’s preexisting cervical problems.”⁴⁵

Judge Lima’s Findings of Fact, which were not disputed by the parties, established a significant factual basis upon which Judge Lima and the Commission could readily determine that the event in question involved an exertion which was not comparable to that encountered in “normal everyday nonemployment life,” which was all that was required to meet the Allen test of “legal causation.”

There was no medical evidence or testimony in the record relating the fact of Employee’s vision going black with his preexisting cervical problems. Even if there had been such a relationship established in the medical record, it would not change the fact that it was the unusual exertion of that impact which was the cause of his vision going black.

Not only was there no evidence in the records concerning the existence or non-existence of such bruising or marks, but the Employee did not see a doctor until the first

⁴⁴*Supra*, note 36

⁴⁵*Supra*, note 40

part of July, long enough after the June 17 incident for such marks to have significantly decreased or disappeared.

The Commission reflects an inconsistent approach to “legal causation” by refusing to consider the Employee’s vision going black as reflecting the force of the impact while implying that bruising or other marks would have been considered for that purpose, without any explanation of why they assumed bruises would better support the amount of force of that impact more than Employee’s vision going black.

The Commission’s reliance upon these unsupported assumptions and inconsistent approaches to determining the force of the impact, were contrary to the Commission’s obligation to liberally construe and apply the Act to provide coverage and to resolve any doubt respecting the right to compensation in favor of an injured employee and reflect that the Commission exceeded the bounds of reasonableness and rationality so as to constitute an abuse of discretion.

ARGUMENT

POINT I

THE COMMISSION ERRED IN THE MANNER IT APPLIED THE *ALLEN* TEST FOR “LEGAL CAUSATION” TO THE UNEXPECTED OCCURRENCE OF EMPLOYEE STRIKING HIS HEAD AGAINST THE CAR DOOR FRAME.

Utah Code Anno. §34A-2-401 (1999) provides the basic statutory outline for compensability of injuries to employees as follows:

- (1) Each employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of

and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid [benefits]

Prior to *Allen*, the Utah Courts had adopted an "unusual exertion" rule with regard to the aggravation of preexisting injuries. That rule basically examined the work which the employee was performing at the time of the injury and whether the exertion was unusual to his normal employment activities. In *Allen*, the Utah Supreme Court extensively examined the problems with the "unusual exertion" rule and recognized that it created serious problems, among which was that an employee whose job entailed lifting heavy loads was not protected while lifting, while another employee lifting the same loads, who did not normally perform such lifting, was protected. Relying extensively on Professor Larson's⁴⁶ insight into the unworkability of the "unusual exertion" standard, as well as the "inconsistent and confused approach" demonstrated by a chronological reading of the prior Utah cases utilizing that standard, the Court concluded:

Because we find the present use of the usual-unusual distinction unhelpful and our prior precedent inconsistent, we take this opportunity to examine an alternative causation analysis that may better meet the objectives of the workers' compensation laws. **We are mindful that the key question in determining causation is whether, given this body and this exertion, the exertion in fact contributed to the injury.**⁴⁷

With that caveat, the Court went on to explain:

Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that "the aggravation or lighting up of a pre-existing condition must show that the

⁴⁶Larson, *Workers' Compensation*, §38.62, at 7-162 (1986)

⁴⁷*Supra*, note 1 at 24 (emphasis added)

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**. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work.⁴⁸

The Court then adopted the two-part test, which has come to be referred to as the “*Allen Test*,” to be applied to weed out aggravations of preexisting conditions which just happen to occur while an employee is performing “normal” exertions of “everyday nonemployment life” while at work. It requires that, in addition to establishing the “medical cause” of the injury, the employee must establish the “legal cause.” To meet that higher standard, the employee’s body must have been subjected to some exertion “greater than that undertaken in normal, everyday life.” To help clarify what type of activities would be considered as those undertaken in “normal everyday life,” the Court cited a number of examples, namely, “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.”⁴⁹

There is no doubt but that people do, at times, suffer sudden unexpected events while they are engaged in any number of “normal” activities of “everyday nonemployment life.” They slip while carrying full garbage cans to the street, they are injured when jacks slip while they are changing flat tires, they collide with other objects

⁴⁸*Supra*, note 1 at 25 (emphasis added)

⁴⁹*Supra*, note 1 at 26

while driving their automobiles, they fall while climbing a normal flight of stairs and, as in this case, they bang their heads into a car door frames while entering cars. However, while such sudden unexpected events certainly occur, they are not part of “normal, everyday life.” Rather, they constitute “abnormal” events occurring during “everyday life.”

The *Allen* Court’s examples included only incidents which one encounters in “normal everyday life” and which involved unexpected results, rather than sudden unexpected events. We submit that it was no coincidence that the Court did not include in its list any sudden, unexpected events, such as automobile collisions, falls while climbing stairs, or bangs to the head on car door frames. After all, the Court’s stated purpose in creating the new test was to weed out aggravations of preexisting conditions which just happened to occur while the employee was at work, performing “normal” exertions of “everyday nonemployment life.”

The *Allen* test was not intended to preclude employees from recovering for injuries received in a sudden unexpected event occurring at work, merely because they could have been involved someday in a similar type of sudden unexpected event in their “everyday nonemployment life.” Such an interpretation would unreasonably bar recoveries by a vast number, if not a majority, of the employees injured at work since, as previously reflected, many of the sudden unexpected events at work could as readily have occurred during the employee’s “everyday nonemployment life.” However, nothing in *Allen* reflects that the Court intended that the mere fact that the sudden unexpected event

could have occurred as readily away from work as at work should bar a recovery for aggravation of a preexisting condition arising from such an event.

The Court's concern in *Allen* was with incidents where the preexisting condition just happened to become symptomatic at the time an employee was performing some activity for the employer. As the Court noted, the "key question" which the "*Allen* Test" was created to determine, "[I]s whether, given this body and this exertion, the exertion in fact contributed to the injury."⁵⁰

With a sudden unexpected event such as falling while climbing a normal flight of stairs, being in an automobile collision, or banging one's head on a car door frame while at work, there is a clear and direct relationship between that identifiable incident and the resulting injury. Such an instance is significantly different from an incident where an employee, while lifting a garbage can at work feels a pain and claims an aggravation of a preexisting back injury as a result.

Allen clearly did not bar employees from recovery for aggravation of a preexisting condition which occurs while performing normal activity of "everyday nonemployment life," when that activity is undertaken in such a manner that the exertion exceeds that which persons encounter in "normal everyday nonemployment life." The facts in *Allen* itself involved an employee who felt a sharp pain in his lower back while he was lifting a crate containing four to six gallons of milk (certainly less weight than a full garbage can) from the floor onto a cooler shelf about chest height. The Commission rejected the claim

⁵⁰*Supra*, note 1 at 24

for benefits because it did not meet the former “unusual exertion” test. The Court explained that the employee was performing those actions repetitively and in an enclosed area and that it was reversing and remanding the Commission’s decision for further determination, because:

It is unclear from the record 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.⁵¹

The Court explained that the higher standard of the “legal causation” test attempts to distinguish between injuries which:

(a) coincidentally occur at work because a preexisting condition results in symptoms which appear during working hours without any enhancement from the workplace, and (b) those injuries which occur because some condition or exertion of employment increases the risk of injury which the worker normally faces in everyday life.⁵²

On a regular basis since *Allen*, compensation has been affirmed in preexisting injury cases where the employee was engaged in activities which were such as to fall within the category of activities of “normal everyday nonemployment life,” but in a manner which did not constitute part of “normal everyday nonemployment life.” Thus, compensation has been affirmed for the following: an employee cleaning food processing equipment with high pressure water hoses which were operated similar to a gas pumps, but on which the locks had recently broken so that the employee had to use continuous

⁵¹*Supra*, note 1 at 28

⁵²*Supra*, note 1 at 25

force to hold them in the “on” position;⁵³ a machinist performing tasks comparable to what he performed away from work, but in a repetitive manner different from what the average person encountered in everyday life;⁵⁴ a carpenter cleaning six inch by ten foot steel forms weighing 50 pounds while also tending a sump pump in an eight foot deep pit, which required him to jump down onto a four foot shelf then four feet into the hole, a total of eight times in thirty minute intervals;⁵⁵ a stock room clerk who suffered back injuries with gradual onset of pain, while lifting and carrying tubs which weighed 15 to 40 lbs each, depending on their contents, to a sorting area and stacking them, between thirty and thirty-six times a day;⁵⁶ and an employee at a care center who was assisting a one hundred and ninety pound patient to dress, holding the patient with one arm and reached around with the other to straighten his T-shirt.⁵⁷

This Court in *Nyrehn*⁵⁸ further clarified the language of *Allen*. There, a stockroom clerk suffered back injuries with a gradual onset of pain, while lifting and carrying tubs which weighed 15 to 40 lbs each, depending on their contents, to a sorting area and stacking them, between thirty and thirty-six times a day. The ALJ found that the employee had failed to prove “legal causation” as required under *Allen*, but concluded

⁵³*Stouffer Foods v. Industrial Comm’n*, 801 P. 2d 179 (Utah App., 1990)

⁵⁴*Chase v. Industrial Comm’n*, 872 P. 2d 475 (Utah App., 1994)

⁵⁵*Miera v. Industrial Comm’n*, 728 P. 2d 1023 (Utah, 1986)

⁵⁶*Nyrehn v. Industrial Comm’n*, 800 P. 2d 330 (Utah App., 1990)

⁵⁷*Richfield Care Center v. Utah Industrial Comm’n*, 733 P. 2d 178 (Utah, 1987)

⁵⁸*Supra*, note 56

that the “Allen test” was unconstitutional, and awarded benefits. The Commission, upon Review, adopted the factual findings of the ALJ including the conclusion that the employee had failed to prove “legal causation” under the “Allen test” and, therefore, reversed the award.

That Court concluded that the Commission had improperly based its determination of a preexisting injury on pure assumption, but declared that failure was not fatal to the Commission’s decision because the employee’s exertions met even the higher standard of “legal cause.” The Court, referring to the examples cited in *Allen* of everyday exertions, explained:

While lifting a tub of merchandise weighing between 15 and 40 pounds once or twice could likewise fit into the list of examples above, lifting such a tub 30 to 36 times a day for two and a half months is not a typical nonemployment activity. The foregoing moderately strenuous activities which may not be considered unusual when performed once or twice may nevertheless amount to unusual exertion when performed repeatedly. Otherwise, garbage collectors, baggage handlers, auto mechanics, childcare providers, etc., would be barred by the foregoing examples.⁵⁹

The Court further explained:

The test is not whether the type of exertion which caused the injury is unknown in nonemployment life, but rather whether the cumulative work-related exertion exceeds the normal level of exertion in nonemployment life.⁶⁰

Getting into a car, absent any sudden unexpected event, could certainly be classified as an exertion which employees would typically experience in everyday non-

⁵⁹*Supra*, note 56 at 336

⁶⁰*Id.*

employment life. However, it cannot be said that striking one's head against the car door frame while getting into the car is a typical experience in "everyday nonemployment life." any more than having a collision while driving the car would be. Sudden unexpected events such as those may well occur to numerous people in their everyday life, but that does not make them typical experiences in "everyday non-employment life."

*American Roofing v. Green*⁶¹ came to this same conclusion. There, an employee was injured while attempting to unload a thirty pound bucket of debris over the bed of his truck bed. He was lifting it out of the truck bed when the bucket suddenly snagged on something and the employee felt a "lightning bolt" of pain in his back and legs. The Commission found the incident to be compensable, declaring that the weight of the bucket, the manner of lifting, and the fact that the bucket snagged, all combined to make the incident unusual or extraordinary under *Allen*, although the weight of the bucket alone would not have met "legal causation." This Court upheld the Commission's determination without imposing any requirement that there be some determination by the Commission of the precise amount of force involved when the bucket snagged.

Employee has also become aware of *Schreiber v. Labor Comm'n*,⁶² a 1999 Memorandum Decision by this Court which, at first glance, appears to be a contrary decision. Employee recognizes that Memorandum Decisions are generally not considered

⁶¹752 P. 2d 912 (Utah App., 1988)

⁶²1999 UT App 376 (December 23, 1999), Judges Greenwood, Bench and Billings (For ease of access, a copy is attached as Addendum 4 to this Brief)

as precedent for anyone other than the specific parties involved in the case.⁶³ However, Employee feels obligated to bring the case to the Court's attention because it did involve a sudden unexpected event in which an employee with a preexisting back condition was hit in the back with a rubber ball on the playground, and this Court upheld the Commission's determination of a failure to establish "legal cause." It is important to note, however, that, unlike the Commission's determination in Mr. Verburg's case, the Commission's determination in *Schreiber* that the force of the ball was "relatively minor, comparable to the jostling one frequently encounters in crowds," was supported by substantial evidence presented by the employer's biomechanical expert. This Court's decision upholding the Commission's determination in that case was based upon the existence of that substantial contrary evidence. No such contrary evidence appears in Mr. Verburg's case.

Employee respectfully submits that the Commission applied the *Allen* test for "legal causation" with regard to Mr. Verburg's case in an inappropriate manner, as more fully reflected in Point II. Contrary to the Commission's declaration that, "Mr. Verburg's exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door,"⁶⁴ the uncontradicted evidence was sufficient to establish that he had suffered an exertion sufficient to meet "legal cause." Striking his

⁶³See former Rule 4-508, *Rules of Judicial Administration* and *Grand County v. Rogers*, 2002 UT 25, 44 P. 3d 734 (Utah, 2002)

⁶⁴*Supra*, note 36

head in the manner he did on the door frame was an exertion beyond that “normally” confronted in “everyday nonemployment life.” The undisputed facts surrounding the incident, as more fully set forth in this Employee’s Statement of Facts⁶⁵ do not reflect a “relatively routine event” or a mere bump on the head. Rather, they reflect that Employee’s body was in motion from a standing to sitting position and being thrust sideways toward the seat. It was with the full force of that momentum that he struck his head halfway between the crown and the top of his head and ear on the door frame. At impact, his vision went black for a few seconds and he just sat in the car. The incident was significantly different from the mere bump on the head he had received previously on the bottom of a garage door, when he did not have to stop what he was doing and his vision did not go black.⁶⁶ That undisputed evidence was fully in keeping with Judge Lima’s determination that:

The direct force Petitioner experienced moving from a standing to sitting position while propelling his body sideways with such a force, that when he struck his head his vision went black. . . The continuous movement of Petitioner’s body and weight added more force to the impact of Petitioner’s head and neck on the door jam which was unusual and extraordinary.⁶⁷

The undisputed evidence in this case reasonably demonstrates that the the impact to Employee’s head with the door frame was of sufficient force to take it beyond the realm of exertions undertaken in “normal everyday nonemployment life.” He was not

⁶⁵Statement of Facts No. 5 - 8

⁶⁶*Supra*, note 21

⁶⁷*Supra*, note 33

injured by the “normal” exertion of “everyday nonemployment life” in getting into his car but, rather, by the “abnormal” sudden unexpected event of impacting his head against the car door frame while doing so, a distinction not unlike that between a person injured while climbing a normal flight of stairs as opposed to a person falling while doing so. In finding to the contrary, the Commission failed to meet its obligation to “liberally construe and apply the Act to provide coverage” and to resolve “any doubt respecting the right to compensation in favor of the injured employee.”⁶⁸

The Commission’s conclusion that the undisputed facts of this case failed to meet *Allen*’s “legal causation” test was erroneous, contrary to the law, and exceeded the bounds of reasonableness and rationality so as to constitute an abuse of discretion.

POINT II

THE COMMISSION ERRED IN BASING ITS DECISION ON FINDINGS AND CONCLUSIONS WITHOUT ADEQUATE SUPPORT IN THE RECORD.

In supporting its conclusion that the facts of Employee’s accident did not meet the “legal causation” test of *Allen*, the Commission relied upon findings and conclusions without adequate support in the record and which, rather, appear to have been based upon the Commission’s assumptions.

The Commission, in its Order Reversing ALJ’s Decision and Denying Benefits, concluded, “Mr. Verburg’s exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door . . . The

⁶⁸*Supra*, note 3

Commission is unconvinced that Mr. Verburg's testimony of his vision going dark is a measure of impact."⁶⁹

In its subsequent Order Denying Request for Reconsideration, the Commission further concluded:

(1) The fact that Mr. Verburg experienced an unusual reaction to that event - his vision 'going black' for a moment - does not change the nature or force of the impact itself, but is more reasonably related to Mr. Verburg's preexisting cervical problems."⁷⁰

Judge Lima's Findings of Fact, which were not disputed by the parties,⁷¹ established a significant factual basis upon which Judge Lima and the Commission could readily determine that the event in question involved an exertion which was not comparable to that encountered in "normal everyday nonemployment life," as was done in *American Roofing*.⁷² Whether or not the precise quantum of force involved could be determined was of no import. The Findings, with adequate support in the record, determined that the impact was sufficient to meet the Allen test of "legal causation."

There was also no medical evidence, testimony, or other adequate support in the record linking the fact of Employee's vision going black with any of his preexisting cervical problems. Even if there had been such a relationship established in the medical

⁶⁹*Supra*, note 36

⁷⁰*Supra*, note 40

⁷¹R. (vol. 1) at 00038 - 00040; Statement of Facts No. 14

⁷²*Supra*, note 61

records. it would not change the fact that it was the unusual exertion of that impact which was the cause of his vision going black.

The Commission also improperly supported its denial of benefits with its conclusion that, “The Commission also notes the absence of any evidence of bruising or other marks from the impact.”⁷³ None of the medical records reflected any absence of bruising or other marks and there was no other evidence in the records concerning the existence or non-existence of such items. It is also important to note that Employee did not see a doctor until the first part of July, long enough after the accident that any such bruising or marks would have significantly decreased or disappeared. Thus, these unsupported conclusions again appear to have been based merely upon the Commission’s assumptions.

The Commission must have some evidentiary foundation upon which they base their material findings, not just their assumptions. In *Nyrehn*, the Court explained:

Such material findings, however, may not be implied. In order for us to meaningfully review the findings of the Commission, the findings must be “sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” [citing cases]. The failure of a trial court to make adequate findings is reversible error. *Id.* Likewise, the failure of an agency to make adequate findings of fact on material issues renders its findings ‘arbitrary and capricious’ unless the evidence is “clear, uncontroverted and capable of only one conclusion.”⁷⁴

⁷³*Supra*, note 36

⁷⁴*Supra*, note 56 at 335

In *Nyrehn*, because the employee's actions met even the higher "legal causation" standard, the Court explained that the Commission's failure to have adequate findings supporting that assumption was harmless. However, in Mr. Verburg's case, that failure severely prejudiced his right to compensation.

The Commission's determinations on these issues further reflect a significant inconsistency in its approach to determining whether Employee met the "legal causation" test under *Allen*. While denying that Employee's vision going black supports a determination of the significant force of the impact, and ignoring Employee's comparison of the minor impact with the garage door, the Commission implies that "bruising or other marks" would have supported a determination of a more forceful impact. However, no indication is made as to why bruises would support the significant force of that impact more than Employee's vision going black, nor is there any reference in the record that the incident did not, in fact, result in bruising or other marks. Rather, the record is simply silent on that issue.

These determinations were made contrary to the Commission's obligation to liberally construe and apply the Act to provide coverage and to resolve any doubt respecting the right to compensation in favor of an injured employee. The Commission's reliance upon its unsupported assumptions and inconsistent approaches to determining the force of the impact was erroneous, contrary to the law, and exceeded the bounds of reasonableness and rationality so as to constitute an abuse of discretion.

CONCLUSION

The Commission's conclusion that Employee failed to meet *Allen's* "legal causation" requirement was contrary to the uncontradicted evidence at the Hearing before Judge Lima. In reaching its conclusion, the Commission applied *Allen* in an erroneous manner, improperly based findings upon its own assumptions and without adequate support in the record, and failed to comply with its obligation to liberally construe and apply the Act to provide coverage and to resolve any doubt respecting the right to compensation in favor of an injured employee. We respectfully submit that the Court should reverse the Commission's November 19, 2007, Order Reversing ALJ's Decision and Denying Benefits and reinstate the Order of Judge Lima dated October 6, 2005, which determined that Employee had met the higher "legal causation" standard or, in the alternative, remand the case to the Commission for further consideration in light of the Court's determinations herein.

Respectfully submitted this 8th day of May, 2008.

By: _____

Gary E. Atkin, SB# 0144

K. Dawn Atkin, SB#6471

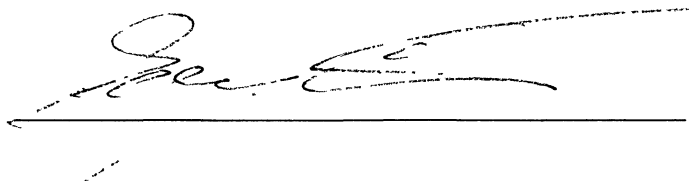
Attorneys for Employee, Michael Verburg

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 8th day of May, 2008, two true and complete copies of the foregoing Brief, and the Addendum thereto, were deposited with the United States mails, first class postage prepaid, and duly addressed for delivery to the following:

Alan L. Hennebold, General Counsel
Labor Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 146610
Salt Lake City, Utah 846610
Attorneys for Utah Labor Commission

Sharon J. Eblen, Esq.
BLACKBURN & STOLL, L.C.
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorneys for Ogden City Police Department

A handwritten signature in dark ink, appearing to be "Sharon J. Eblen", is written over a horizontal line.

ADDENDUM

1. Findings of Fact, Conclusions of Law and Order dated October 6, 2005 R. (vol. 1) at 00037 - 00043
2. Order Reversing ALJ's Decision and Denying Benefits dated November 19, 2007 R. (vol. 1) at 00059 - 00062
3. Order Denying Request for Reconsideration dated January 14, 2008 R. (vol. 1) at 00080 - 00082
4. Copy of Unpublished Memorandum Decision in *Schreiber v. Labor Comm'n*, 199 UT App. 376 (December 23, 1999)

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

MICHAEL VERBURG, Petitioner, vs. OGDEN CITY POLICE DEPARTMENT, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 04-1130 Judge Lorrie Lima
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HEARING: Room 336, Labor Commission, 160 East 300 South, Salt Lake City, Utah, on June 7, 2005 8:30 a.m. The hearing was pursuant to Order and Notice of the Commission.

BEFORE: Lorrie Lima, Administrative Law Judge.

APPEARANCES: The petitioner, Michael Verburg, was present and represented by Dawn Atkin, Esq.

The respondent, Ogden City Police Department, was represented by Sharon J. Eblen, Esq.

STATEMENT OF THE CASE

On December 13, 2004, Michael Verburg ("Petitioner") filed an Application for Hearing and claimed entitlement to medical expenses, recommended medical care, temporary total, temporary partial and permanent partial disability compensation, travel expenses, interest and other - wage rate and clothing allowance of \$44.00. Petitioner's claim for workers compensation benefits arose out of two industrial accidents on March 24, 2004, and June 17, 2004.

On December 28, 2004, the Ogden City Police Department ("Respondent") filed an Answer and denied that Petitioner sustained compensable accidents due to a lack of legal and medical nexus.

At the hearing, Petitioner withdrew his claim regarding the date of injury, March 24, 2004, based on an independent medical evaluation conducted by Dr. Terry Brown. Petitioner also withdrew his claimed entitlement to temporary partial and permanent partial compensation.

FINDINGS OF FACT

1. Employment and Compensation.

Petitioner was employed by Respondent as a Community Services Officer. His hourly wage was \$13.91 and he worked 40 hours per week. In addition, Petitioner received a clothing allowance of \$44.00 every two weeks. The clothing allowance was provided to Petitioner to pay the costs of dry cleaning his uniform. The clothing allowance was added to his regular wage in his paychecks. Petitioner reported to the Internal Revenue Service that he paid taxes on the allowance.

Petitioner was married and he had one dependent child.

Respondent paid the following workers compensation benefits to Petitioner: (1) temporary total compensation from July 6, 2004, to December 10, 2004, at a weekly benefit rate of \$376.00 [$\$13.91 \times 40 = \$556.50 \times 2/3 = \371.12 plus \$5.00 for spouse = \$376.00] and (2) medical expenses through December 10, 2004. At the hearing, Respondent conceded that Petitioner's compensation rate should have included an additional \$5.00 for one dependent child.

2. Industrial Accident.

On April 19, 2004, Petitioner had an anterior cervical discectomy at C4-5 with decompression of the nerve root, an anterior cervical fusion at C4-5 for degenerative disc disease at C4-5. Medical Records Exhibit ("MRE"), p. 54. An impression of Petitioner's cervical spine CT scan, on April 5, 2004, revealed multiple levels of degenerative disc disease superimposed on post-op changes significant at C4-5, C3-4 followed by C5-6 and C7-T1. MRE, p. 44. Following surgery, Petitioner was released to regular duty on June 8, 2004. Petitioner felt better than before the surgery and he was happy with the result.

On June 17, 2004, at the conclusion of Petitioner's work shift, he was in the process of sitting down into the driver's seat of his police vehicle when he hit his head on the door jamb. Petitioner hit the top right side of his head above his ear. Petitioner's vision went black for a second but he did not lose consciousness. Petitioner collected his personal items from the police vehicle and he went home. Approximately one hour after arriving home, Petitioner's neck, head and shoulders began to feel stiff and hurt. His pain progressively worsened.

On June 29, 2004, Petitioner was evaluated by Dr. Brent Felix. MRE, p. 59. X-rays of Petitioner's cervical spine showed a stable fusion.

On July 2, 2005, Petitioner was evaluated by the Ogden Clinic for neck pain. MRE, p. 138. On July 5, 2004, Petitioner was instructed by Respondent to present for an evaluation at McKay-Dee Hospital Center. MRE, p. 1. The diagnosis was muscle strain of Petitioner's neck and he was informed to return to work in four days and follow-up with his treating physician.

On July 13, 2004, Dr. Felix noted that Petitioner experienced pain at the C7-T1 area as he did prior to surgery. MRE, p. 59. Dr. Felix released Petitioner from work for four weeks.

On August 10, 2004, Dr. Felix noted that Petitioner continued to experience pain in the C7-T1 area. MRE, p. 61. Dr. Felix further noted that Petitioner reported that he did well following the surgery until he struck his head on the car door. Dr. Felix prescribed physical therapy and pain management for Petitioner. He released Petitioner to return to work with a restriction to not lift more than 10 pounds. Petitioner received physical therapy three times weekly for two months. MRE, p. 71. On August 13, and 27, 2004, Dr. Matthew Pingree evaluated Petitioner for left neck and shoulder pain increased at least 50% since June 17, 2004. MRE, pp. 179-183. Dr. Pingree prescribed pain medication, a TENS trial and physical therapy. He released Petitioner from work.

On October 1, 2004, an impression of Petitioner's cervical spine revealed a satisfactory post-op cervical spine. MRE, p. 52. On October 18, 2004, Petitioner reported an increase in neck pain and headaches. MRE, p. 69. On October 26, and November 12, 2004, Dr. Pingree requested a MRI scan of Petitioner's cervical spine. He noted that Petitioner was on family leave. MRE, pp. 191-194.

On December 30, 2004, Dr. Pingree released Petitioner to return to work on January 7, 2005, with lifting restrictions of 50 pounds and no bending, twisting. MRE, p. 194A. On January 10, 2005, Petitioner returned to work at Respondent.

On March 7 and 21, 2005, Petitioner was evaluated by Dr. Kevin Gardner for persistent neck pain. MRE, pp. 154 and 157. He was prescribed pain medication.

On June 2, 2005, Dr. Brown issued an independent medical evaluation of Petitioner. MRE, pp. 226-232. Dr. Brown noted that Petitioner suffered from a preexisting condition of his cervical spine that contributed to his complaints. Dr. Brown opined a medical nexus between Petitioner's injury on June 17, 2004, and his complaints of increased cervical spine pain. Dr. Brown further opined that Petitioner was medically stable but had ongoing significant pain. Dr. Brown noted that the medical treatment Petitioner received after June 17, 2004, was medically necessary due to the industrial injury. Dr. Brown further noted that future treatment of Petitioner's condition would include pain management for significant neck pain and no surgery.

Currently, Petitioner is prescribed a Duragesic patch, Percocet for break through pain and Advil for his cervical pain.

3. Prior Cervical Spine History.

On November 19, 2002, an impression of Petitioner's cervical spine revealed multi-level disk disease, the most pronounced at C5-6, broad-based herniation on the anterior thecal sac and distortion and impingement on the left anterior aspect of the cervical, and broad based bulging and herniation at C6-7. MRE, pp. 18-19. On December 10, 2002, Petitioner had an anterior

discectomy with microsurgical decompression and internal plate fixation at C5-6 and C-67.
MRE, p. 25.

DISCUSSION AND CONCLUSIONS OF LAW

1. Employment and Compensation.

At all times relevant to this claim Respondent employed Petitioner as a Community Services Officer.

Section 34A-2-409 of the Workers' Compensation Act bases the amount of compensation to be awarded an injured employee on his average weekly wage at the time of his industrial injury. In *Craig Burnham Produce v. Industrial Commission*, 657 P.2d 1354 (Utah 1983), the Utah Supreme Court held that the Legislature granted generous powers to the Industrial Commission to determine what may be included in "wages" to enable the Commission to "fashion a method that would, " based on the facts presented, fairly determine the employee's average weekly wage." See Utah Code Ann. §34A-2-409(2).

In *Blake Stevens Constr. v. Henion*, 697 P.2d (Utah 1985), the Utah Supreme Court determined that "[b]efore any part of such allowances or reimbursements can be considered as part of the employee's "wages" there should be some showing that the payments are more than sufficient to reimburse the employee for the work-related expenses so that in effect the excess can be considered as extra compensation to the workman for his services performed." (quoting *Moorehead v. Industrial Commission*, 495 P.2d 866 (Ariz. 1972)). Therefore, under that analysis, the Court in *Blake* held that, under the real economic gain rule, the decedent's subsistence allowance could not be included in the average weekly wage without a finding, based on the facts, that the allowance constituted real economic gain.

In the instant case, Petitioner received a biweekly allowance for the cost of dry cleaning his work uniform. The extra benefit provided by Respondent was directly related to meeting a special expense due to Petitioner's employment and will cease upon Petitioner's separation from his employment. However, Petitioner has not shown that the clothing allowance, in part or in its entirety, was more than sufficient to reimburse him for the work-related expense and thereby realized a real economic gain. Accordingly, Petitioner's clothing allowance cannot be included in his average weekly wage.

Based on the foregoing, at the time of the accident in issue, Petitioner was married with one dependent child. Petitioner's appropriate rate for temporary total compensation was 381.00 [$\$13.91 \times 40 = \$556.50 \times 2/3 = \$371.12$ plus \$10.00 for spouse and dependent child = \$381.12].

2. Legal Causation.

In order to recover workers' compensation benefits, an employee must prove that he was injured "by accident arising out of and in the course of the employee's employment." Utah Code

Ann. §34A-2-401. *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986) requires: (1) that the injury be “by accident,” and (2) that “there be a causal connection between the injury and the employment.” *Allen* then requires a claimant to show both medical and legal causation. In the instant case, the medical nexus and “by accident” components are not at issue. All that is pending is whether Petitioner carried his burden of proving legal causation.

In *Allen*, the Utah Supreme Court held that a claimant with a preexisting non-industrial condition that contributed to his current medical condition must meet a more stringent test for legal causation: the claimant must show that his work-related activities exceeded the exertions of his normal everyday life. The undisputed medical evidence, including Respondents’ independent medical examiner, demonstrates that Petitioner suffered from a preexisting cervical spine condition that contributed to his injury of June 17, 2004. Consequently, Petitioner must satisfy the more stringent prong of the *Allen* test for legal causation.

The preponderance of the evidence demonstrates that the direct force Petitioner experienced moving from a standing to sitting position while propelling his body sideways with such a force, that when he struck his head his vision went black, was not a typical exertion experienced by men and women in modern non-employment life. While getting into a motor vehicle is typical of modern non-employment life, such exertion does not typically involve the combination of factors presented here. Specifically, the continuous movement of Petitioner’s body and weight added more force to the impact of Petitioner’s head and neck on the door jam which was unusual or extraordinary and satisfies the requirement of legal causation. This extra exertion served to offset the preexisting condition of Petitioner as a likely cause of the injury. Moreover, how Petitioner felt before and after the June 17, 2004, evidences the degree of force exerted by Petitioner. Following surgery in April 2004, Petitioner felt better than before the surgery and he was happy with the result. However, following June 17, 2004, Petitioner experienced significantly increased pain in his cervical spine.

Finally, in concluding that that facts of Petitioner’s injury satisfied the higher legal causation standard, it is the duty of the Labor Commission to construe the Workers’ Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction. *Heaton v. Second Injury Fund*, 796 P.2d 676 (Utah 1990).

Based on the foregoing, Petitioner’s exertion at the time of his accident was sufficient to satisfy the applicable standard of legal causation. Consequently, Petitioner’s injury arose out of his employment at Respondent is compensable under §34A-2-401 of the Workers’ Compensation Act.

3. Travel Expenses.

Petitioner did not submit any travel mileage documentation.

ORDER

IT IS HEREBY ORDERED: Respondents shall pay to Petitioner temporary total compensation at the weekly rate of \$381.00 from December 11, 2004, to January 10, 2005, or 4.42 weeks, for a total of \$1,684.02. The amount is accrued, due and payable in a lump sum plus interest at eight percent (8%) per annum.

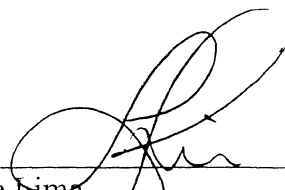
IT FURTHER ORDERED: Respondents shall pay to Petitioner temporary total compensation of an additional \$5.00 (for an additional dependent child) per week from July 6, 2004, to December 10, 2004, or 22.57 weeks, for a total of \$112.85. The amount is accrued, due and payable in a lump sum plus interest at eight percent (8%) per annum. Respondents are credited a total of \$8,433.68 of temporary total compensation already paid to Petitioner from July 6, 2004, to December 10, 2004.

IT IS FURTHER ORDERED: Respondents shall pay the statutory attorneys' fees of \$359.37, plus twenty percent (20%) of the interest awarded herein, directly to Dawn Atkin, Esq. pursuant to Utah Code Ann. §34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from Petitioner's award and sent directly to the office of Ms. Atkin.

IT IS FURTHER ORDERED: Respondents shall pay all medical expenses, including any out-of-pocket expenses incurred by Petitioner, reasonably related to his industrial accident reasonably related to Petitioner's industrial accident pursuant to Utah Code Ann. §34A-2-418(1), and the medical and surgical fee schedule of the Utah Labor Commission, and any travel allowances hereinafter incurred pursuant to Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, under Utah Code Ann. §34A-2-420(3) and Utah Administrative Code, Rule 612-2-213.

IT IS FURTHER ORDERED: Petitioner's claim for temporary total and permanent partial compensation are dismissed without prejudice.

DATED October 6, 2005.



Lorrie Lima
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on October 6, 2005, to the persons/parties at the following addresses:

K Dawn Atkin Esq
1111 E Brickyard Rd Ste 206
Salt Lake City UT 84106

Sharon J Eblen Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk, Adjudication Division
PO Box 146615
Salt Lake City, UT 84114-6615

UTAH LABOR COMMISSION

MICHAEL VERBURG,

Petitioner,

vs.

OGDEN CITY POLICE DEPARTMENT,

Respondent.

**ORDER REVERSING
ALJ'S DECISION AND
DENYING BENEFITS**

Case No. 04-1130

The Ogden City Police Department ("OCPD" hereafter) asks the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to Michael Verbarg under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Verbarg claims workers' compensation benefits for a cervical injury allegedly resulting from an accident that occurred on June 17, 2004, as he was working as a police officer for OCPD. After an evidentiary hearing, Judge Lima awarded benefits to Mr. Verbarg.

In challenging Judge Lima's decision, OCPD argues that Mr. Verbarg's work accident does not satisfy the more stringent prong of the *Allen* test for legal causation that is applicable to Mr. Verbarg's claim.

FINDINGS OF FACT

The parties do not dispute Judge Lima's findings of fact. As material to the issue now before the Commission, those facts are as follows.

Mr. Verbarg has a degenerative cervical condition that is unrelated to his work at OCPD. He underwent spinal surgery during 2002 and again during April 2004. He returned to work at OCPD on June 8, 2004. On June 17, 2004, as he was entering his police car and sitting down in the driver's seat, he hit the right side of his head on the top of the car door. His vision went dark for a moment, but he did not lose consciousness. He then went on with his work activities. He experienced pain and stiffness in his neck, head and shoulders about an hour later.

Beginning on June 29, 2004, Mr. Verbarg received medical care for his neck pain and was restricted from work. He now seeks workers' compensation benefits for this aggravation of his preexisting neck condition.

ORDER REVERSING ALJ'S DECISION & DENYING BENEFITS
MICHAEL VERBURG
PAGE 2 OF 4

DISCUSSION AND CONCLUSION OF LAW

The Utah Workers' Compensation Act provides benefits to workers injured by accident "arising out of and in the course of" employment. Utah Code Ann. §34A-2-401. To qualify for benefits under the foregoing standard, an injured worker must establish, among other elements, that his or her work was the "legal cause" of the injury in question. *Allen v. Industrial Commission*, 729 P.2d 15, 25 (Utah 1986). In the case now before the Commission, the question is whether Mr. Verburg's accident—hitting the side of his head on a car frame—satisfies this requirement of "legal causation."

In *Allen*, *Ibid.* the Utah Supreme Court discussed the context in which the requirement of "legal causation" is applied.

Whether an injury arose out of or in the course of employment is difficult to determine where the employee brings to the workplace a personal element of risk such as a preexisting condition. Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that "the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable" (Citation omitted.) To meet the legal causation requirement, a claimant with a preexisting condition 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.

In its subsequent decision in *Price River Coal Co. v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

Under *Allen*, an usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, **if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life."** The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. (Citations omitted; emphasis added.)

The parties agree that, because Mr. Verburg suffered from a preexisting condition that contributed to the cervical problems for which he now claims benefits, Mr. Verburg must satisfy the more stringent prong of the *Allen* test for legal causation. Thus, Mr. Verburg must establish that the work accident of June 17, 2004, constituted an "unusual or extraordinary exertion over and above the usual wear and tear and exertions of nonemployment life." *Price River Coal Co. v. Industrial*

ORDER REVERSING ALJ'S DECISION & DENYING BENEFITS
MICHAEL VERBURG
PAGE 3 OF 4

Commission, Ibid. Some of the examples cited in *Allen* as typical of nonemployment exertion are "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."

Since the Supreme Court's decision in *Allen*, the Commission has considered legal causation in the context of many types of exertion. Usually, the exertion can be easily classified as "unusual or extraordinary" and compensable, or "usual and ordinary" and noncompensable. Mr. Verburg's exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door. And, while it is not uncommon to hit one's head on a car door frame, a car trunk, or an open cabinet, it is also possible to imagine circumstances where such a blow is sufficiently forceful to constitute an unusual or extraordinary exertion.

In light of the foregoing considerations, the Commission has carefully considered the available information regarding Mr. Verburg's work accident on June 17, 2004. It appears to have been a relatively routine event in which he bumped his head as he slid into the drivers seat. The Commission is unconvinced that Mr. Verburg's testimony of his vision going dark is a measure of the force of impact. The Commission also notes the absence of any evidence of bruising or other marks from the impact. In summary, the Commission finds that the evidence does not establish that the exertion involved in Mr. Verburg's accident was unusual or extraordinary. Because Mr. Verburg has not satisfied the more stringent test for legal causation that is applicable to his claim, the Commission concludes that Mr. Verburg is not entitled to workers' compensation benefits.

ORDER

The Commission grants OCPD's motion for review, sets aside Judge Lima's award of benefits to Mr. Verburg, and dismisses Mr. Verburg's claim for benefits with prejudice. It is so ordered.

Dated this 19th day of November, 2007.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

00061

ORDER REVERSING ALJ'S DECISION & DENYING BENEFITS
MICHAEL VERBURG
PAGE 4 OF 4

CERTIFICATE OF MAILING


I certify that a copy of the foregoing Order Reversing ALJ's Decision and Denying Benefits in the matter of Michael Verburg, Case No. 04-1130, was mailed first class postage prepaid this 19th day of November, 2007, to the following:

Michael Verburg
2211 N 4425 W
Plain City UT 84404

Ogden City Police Department
2186 Lincoln Ave
Ogden UT 84401

K. Dawn Atkin, Esq.
1111 E Brickyard Rd Ste 206
Salt Lake City UT 84106

Sharon J. Eblen, Esq.
257 E 200 S Ste 800
Salt Lake City UT 84111



Sara Danielson
Utah Labor Commission

00062

UTAH LABOR COMMISSION

MICHAEL VERBURG,

Petitioner,

vs.

OGDEN CITY POLICE DEPARTMENT,

Respondent.

**ORDER DENYING REQUEST
FOR RECONSIDERATION**

Case No. 04-1130

Michael Verburg asks the Utah Labor Commission to reconsider its prior decision denying Mr. Verburg's claim for benefits under the Utah Workers' Compensation Act ("the Act": Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Annotated § 63-46b-13.

BACKGROUND AND ISSUE PRESENTED

Mr. Verburg, a police officer with Ogden City Police Department ("OCPD"), seeks workers' compensation benefits for a cervical injury allegedly caused or aggravated when he hit his head on the door frame as he was getting into the driver's seat of his police car. After an evidentiary hearing, Judge Lima awarded benefits to Mr. Verburg. OCPD then requested Commission review. On November 19, 2007, the Commission reversed Judge Lima's award and denied Mr. Verburg's claim for benefits on the grounds his accident was not the "legal cause" of his cervical injury.

Mr. Verburg now asks the Commission to reconsider its decision. Mr. Verburg argues that the Commission failed to appreciate the force of the impact that occurred as he hit his head on the car's door frame. Mr. Verburg contends that this force is sufficient to satisfy the requirement of legal causation.

DISCUSSION

The Commission has reviewed the evidentiary record in this matter, with particular attention to the accident that occurred as Mr. Verburg was getting into his car. Based on the evidence, the Commission reaffirms its finding that Mr. Verburg experienced a relatively routine event in which he bumped his head as he slid into the driver's seat. The fact that Mr. Verburg experienced an unusual reaction to that event—his vision "going black" for a moment—does not change the nature or force of the impact itself, but is more reasonably related to Mr. Verburg's preexisting cervical problems.

The Commission's previous decision has explained in some detail the standard for legal causation that is applicable to Mr. Verburg's claim. That explanation will not be repeated, except to

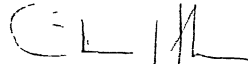
ORDER DENYING REQUEST FOR RECONSIDERATION
MICHAEL VERBERG
PAGE 2 of 3

note that the Commission has again considered Mr. Verburg's arguments but again concludes that Mr. Verburg's accident does not satisfy the test for legal causation that is applicable to Mr. Verburg's claim.

ORDER

The Commission affirms its previous decision in this matter and denies Mr. Verburg's request for reconsideration. It is so ordered.

Dated this 14th day of January, 2008.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

**ORDER DENYING REQUEST FOR RECONSIDERATION
MICHAEL VERBERG
PAGE 3 of 3**

CERTIFICATE OF MAILING


I certify that a copy of the foregoing Order Denying Motion For Reconsideration in the matter of Michael Verburg, Case No. 04-1130, was mailed, first class, postage prepaid this 14th day of January, 2008, to the following:

Michael Verburg
2211 N 4425 W
Plain City UT 84404

Ogden City Police Department
2186 Lincoln Ave
Ogden UT 84401

K Dawn Atkin Esq
1111 E Brickyard Rd Ste 206
Salt Lake City UT 84106

Sharon J Eblen Esq
257 E 200 S Ste 800
Salt Lake City UT 84111



Sara Danielson
Utah Labor Commission

FILED

DEC 23 1999

IN THE UTAH COURT OF APPEALS

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COURT OF APPEALS

Kristine S. Schreiber,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 990132-CA
v.)	
)	F I L E D
Labor Commission and Jordan)	(December 23, 1999)
School District,)	
)	
Respondents.)	

1999 UT App 376

Original Proceeding in this Court

Attorneys: Robert C. Olsen and Theodore E. Kanell, Salt Lake City, for Petitioner
Alan Hennebold, Salt Lake City, for Respondent Labor Commission
Thomas C. Sturdy and Dori K. Petersen, Salt Lake City, for Respondent Jordan School District

Before Judges Greenwood, Bench, and Billings.

BILLINGS, Judge:

Kristine S. Schreiber, a playground supervisor employed by the Jordan School District, appeals the Labor Commission's denial of workers' compensation benefits. Schreiber had a history of back problems, including back surgery. The Labor Commission determined that an accident that occurred on a playground when a rubber ball struck Schreiber in the back was not the legal cause of her injury.

In order to show legal cause, "a claimant with a preexisting [medical] condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life." Allen v. Industrial Comm'n, 729 P.2d 15, 25 (Utah 1986). To establish a work-related nexus of legal causation under Allen, a claimant with a preexisting condition must prove that the accident in question resulted from "unusual or extraordinary exertion." Id. at 26.

The Legislature has explicitly granted broad discretion to the Labor Commission to "determine the facts and apply the law in this chapter or any other title or chapter it administers." Utah Code Ann. § 34A-1-301 (1997). When discretion is delegated to an agency by statute, its interpretation or application of law receives intermediate review under the Utah Administrative Procedure Act (UAPA). See Utah Code Ann. § 63-46b-16(4)(h)(i)

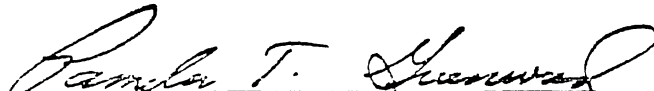
(1997); Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 587-89 (Utah 1991).¹ Thus, we must determine "whether the Labor Commission's decision exceeded the bounds of reasonableness and rationality." Osman Home Improvement v. Industrial Comm'n, 958 P.2d 240, 243 (Utah Ct. App. 1998); see also Johnson Bros. Constr. v. Labor Comm'n, 967 P.2d 1258, 1259 (Utah Ct. App. 1998); Caporoz v. Labor Comm'n, 945 P.2d 141, 143 (Utah Ct. App. 1997).

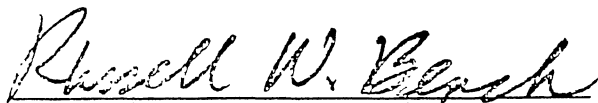
We cannot say that the Labor Commission's determination was unreasonable. The Labor Commission determined that the direct force of the ball was "relatively minor, comparable to the jostling one frequently encounters in crowds," and that Schreiber's surprised reaction "does not appear to be different from the everyday event of tripping on a rug or a [sic] uneven sidewalk." The validity of these comparisons was supported by substantial evidence presented by the School District's biomechanical expert during the hearing.

Tripping without falling, and being startled in the process, can reasonably be considered a part of ordinary nonemployment life. The Labor Commission found that Schreiber's accident involved a comparable level of exertion--a finding of fact supported by the record--and thus reasonably concluded that her accident was not the legal cause of her injury. We therefore affirm the Labor Commission's decision.


Judith M. Billings, Judge

WE CONCUR:


Pamela T. Greenwood,
Associate Presiding Judge


Russell W. Bench, Judge

1. It is important to note that § 34A-1-301(1997), formerly § 35-1-16 (1994), was enacted in 1994, well before Schreiber's 1996 accident. See Act of Indus. Comm'n Auth., ch. 207 §1, 1994 Utah Laws 972. Appellant, in arguing that we must review the Commission's decision for correctness, relies primarily on cases arising before this express grant of discretion was given to the agency by statute.