

2008

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

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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MICHAEL VERBURG,

Petitioner/Appellant,

vs.

UTAH LABOR COMMISSION and  
OGDEN CITY POLICE  
DEPARTMENT,

Respondents/Appellees.

Court of Appeals

Case No.: **20080139**

Priority 7

Labor Commission No.: 04-1130

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**BRIEF OF APPELLEES**

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Appeal from the Utah Labor Commission

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## **JURISDICTION**

This matter is an appeal of a final order of the Utah Labor Commission issued on January 14, 2008. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 63-46b-16 (1988) and Utah Code Ann. § 34A-2-801(8)(2003).

## **ISSUES ON REVIEW**

1. Whether the Petitioner proved by a preponderance of the evidence that his work accident is the legal cause of his ongoing neck complaints.
2. Whether the Labor Commission's review of the record to evaluate legal causation improperly reconsidered medical causation.

## **STATUTORY PROVISIONS**

Section 34A-2-401, Utah Code Annotated, provides in relevant part:

(1) An employee described in Section 34A-2-104, who is injured . . . by accident arising out of and in the course of the employment, wherever such injury occurred, if the accident was not purposely self-inflicted shall be paid:

(a) compensation for the loss sustained on account of injury or death;

(b) the amount provided in this chapter for:

(i) medical, nurse and hospital services;

(ii) medicines . . .

## STATEMENT OF THE CASE

Petitioner (hereinafter “Verburg”) filed an application for hearing seeking an award of workers’ compensation benefits related to two alleged industrial accidents, on March 24, 2004 and again on June 17, 2004, during his employment with Ogden City Police Department. (R. Vol. 2 at 1-2).

A hearing was scheduled before the Labor Commission on April 26, 2005. The hearing was continued to June 7, 2005 on motion of Respondents. (R. Vol. 2 at 26-30).

An Administrative Law Judge of the Labor Commission (hereinafter “ALJ”) held a hearing in this matter on June 7, 2005. At the hearing, Verburg withdrew his claim for an accident on March 24, 2004, but proceeded to present evidence related to the alleged industrial accident of June 17, 2004. (R. Vol. 3).

On June 17, 2004, Verburg struck the right side of his head while getting into a patrol car to remove his belongings at the end of his shift. (R. Vol. 3 at pp. 11-13, 25).

The parties agreed that Verburg had a preexisting condition that contributed to the injury of June 17, 2004 and that there was a medical causal connection between the June 17, 2004 incident and Verburg’s complaints of increased neck pain thereafter. (R. Vol. 3 at 6, 7). However, the parties disputed whether the evidence was sufficient to satisfy the legal causation requirement of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986)<sup>1</sup>.

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<sup>1</sup> R. Vol. 3 at 7. Petitioner’s argument regarding legal causation is somewhat unclear. On the one hand, he seems to argue that the higher legal causation requirement should not apply to accidents which are an “unexpected occurrence.” However, petitioner never raised such an argument before the commission. The dispute herein is whether the exertions of Verburg’s accident satisfy the higher legal causation standard under Allen.

The ALJ issued her Findings of Fact, Conclusions of Law and Order on October 6, 2005. She concluded the evidence showed that Verburg struck his head with sufficient force to satisfy the higher legal causation standard under Allen. (R. Vol. 1, pp. 37-43)

Respondents (hereinafter "Ogden City") filed a Motion for Review on October 27, 2005, alleging that the ALJ's legal causation analysis was incorrect and her conclusions were not supported by a preponderance of the evidence. (R. Vol. 1, pp. 44-53).

The Labor Commissioner reviewed the record in this matter and concluded that the evidence did not show the exertion involved in Verburg's accident was enough to prove legal causation. The commission denied Verburg's claim. (R. Vol. 1, pp. 59-62).

Verburg filed a Motion for Reconsideration on December 5, 2007. (R. pp. 63-70). The commission denied Verburg's Motion for Reconsideration on January 14, 2008(R. pp. 80-82).

Verburg filed a Petition for Review in this Court on February 13, 2008.

### **STATEMENT OF FACTS**

1. Verburg worked for Ogden City as a Community Service Officer. (R. Vol. 3 at 10).
2. Verburg has a medical history of "headaches, most likely musculoskeletal," since March 1997 (R. Vol. 2 at 87); and cervical disc disease with surgical work up on December 2, 2002 (R. Vol. 2, at 22-24, 232). He received a cervical fusion at C5-6 and C6-7 on December 10, 2002 by Dr. Bryson Smith. (R. Vol 2. at 25-27). He also has a history of opiate dependency and detoxification treated at Ogden Regional Medical Center in 2000. (R. Vol. 2 at 46).



3. On January 8, 2004, Verburg saw Dr. James Rhee for evaluation of “persistent upper back pain,” aggravated by exercise, that had become worse over the past two months. (R. Vol. 2 at 195-196). He was treated with pain medications, epidural steroid injections, which did not improve his symptoms, and physical therapy, which he did not attend. (R. Vol. 2 at 196-198). He also escalated his analgesics beyond Dr. Rhee’s recommendations. Accordingly, Dr. Rhee discharged Verburg from his care. (R. Vol. 2 at 198). A cervical myelogram on April 5, 2004 showed multilevel degenerative disc disease. (R. Vol. 2 at 43-44).
4. Dr. Brent Felix performed an anterior cervical discectomy and fusion to treat Verburg’s persistent neck pain on April 19, 2004. (R. Vol. 2 at 54-56).
5. On May 4, 2004, Dr. Felix indicated that he would release Verburg to return to work at light duty on May 19, 2004. In follow up on June 8, 2004, Verburg requested that Dr. Felix release him to regular duty with the understanding that he would continue sedentary work duties, and “would not be required to go into the field and be at risk of trauma to his neck.” Zanaflex, a muscle relaxant, was prescribed at that visit. Verburg’s physician refilled his Lortab prescription on June 17, 2004 by telephone. (R. Vol. 2 at 57).
6. Verburg testified that he hit the right side of his head on the door frame of his patrol car at the end of his shift on June 17, 2004. He was not knocked unconscious, but reported that his vision “went black for a couple of seconds.” (R. Vol. 3 at 11-12). The accident report indicates the accident occurred at 5:45 p.m. (R. Vol. 1 at 11). Verburg explained that he was facing the front of the vehicle, went to sit down in the seat and “as I went down, that’s when I hit.” (R.

Vol. 3 at 25). He did not twist. Id. at 26. Verburg testified that his symptoms began about an hour or two after the incident. Id. at 13, 24. Verburg testified that he had pain in the center of his neck and pain radiating into the shoulders. He said was concerned that he might have disrupted his fusion. Id. at 16, 24. Verburg testified that he went to McKay Dee Hospital after he reported the incident to his sergeant. Id. at 17. Verburg testified that he provided all the details of the accident to the medical providers and testified that he told the medical providers that his vision went black when he hit his head. Id. at 22.

7. The medical records indicate that Verburg's first post-accident medical visit occurred on June 29, 2004. Id. At 59. The record reflects that on an unknown date, likely after June 17, 2004 and before June 29, 2004, he called Dr. Felix to request "stronger med b/c he hit head." The request for stronger medications was denied. Id.
8. Verburg saw Dr. Felix on June 29, 2004 "because he hit his head on the garage door and hit his head getting into his car." X-rays showed no problems or disruption of the fusion. 30 Percocet were prescribed. (R. Vol. 2 at 59).
9. Verburg saw Physician's Assistant Schelling at Ogden Clinic on July 2, 2004. The history indicates that Verburg hit the right side of his head on a car. The examination note indicates "+ local tenderness at the left scapular region muscle. Radiates to L post[erior] occipital region along the scap/traps." Impressions were chronic neck pain, DJD and muscle spasms. The PA offered muscle relaxants, but Verburg declined them. "Pt only wanted pain meds." (R. Vol. 2 at 138-139).

10. Verburg reported the June 17 incident to his employer on July 5, 2004 and was sent to the Emergency Room. The Employers' First Report of Injury indicates that the head bumping accident occurred on June 17, 2004 at 5:45 p.m. (R. Vol. 1 at 11).
11. Verburg went to the Emergency Room at McKay-Dee Hospital on July 5, 2004 with a complaint of neck pain. "He states that two weeks ago he hit his head getting in his police car. Since that time he has had pain in his (sic) back of his neck as well as on the right side of his head." He was diffusely tender at the posterior cervical spine. X-rays of the neck revealed no acute findings, but did show signs of effusion. He was diagnosed with a cervical strain, given a prescription for 20 Percocet and advised to use ice, stretching and exercise. (R. Vol. 2 at 1-3).
12. Verburg returned to the McKay Dee Hospital Emergency Room on July 9, 2004 with complaints of ongoing neck pain. The history indicates that Verburg "re-injured his neck while climbing into his squad car approximately two weeks ago. He struck his head. . . he is out of the Percocet and needs additional pain medications." On examination, "His posterior cervical spine is not significantly tender to palpitation in the midline, rather laterally in the musculature." He was diagnosed with an acute exacerbation of chronic neck pain and given another prescription for Percocet. (R. Vol. 2 at 5-6).
13. Verburg returned to Dr. Felix on July 13, 2004. He reported that "he was doing quite well until he hit his head on a car and now he has similar pain to what he has had previously prior to surgery. He localizes the pain mostly down in the

lower cervical area near the C-7-T-1 area. He has been taking Percocet, four per day, these are the 10 mg tablets.” Dr. Felix concluded that Verburg simply continued to have pain, and recommended physical therapy and pain management. (R. Vol. 2 at 59).

14. Verburg saw FNP Creager at Nowcare of Ogden on July 31, 2004. He reported a history of hitting his head on a patrol car in June and now his pain is worse than before his first fusion. The pain was described as a “deep burn on the left side of his neck that is worse than before.” He complained of an “overall headache that he has had for quite some time,” with nausea. An MRI was scheduled and 24 Percocet given. (R. Vol. 2 at 85-86).
15. On August 10, 2004, Verburg returned to see Dr. Felix. The doctor indicated that Verburg continued to localize his pain to the C7-T1 area. X-rays showed instrumentation in good position with no evidence of loosening or migration. However, Verburg continued to complain of pain. Dr. Felix recommended pain management, physical therapy and a cervical MRI scan. Percocet was refilled. (R. Vol. 2 at 61). Dr. Felix completed a Physician’s First Report of Injury, but the questions regarding medical causation were left blank. Id. at 63.
16. On August 13, 2004, Verburg saw Dr. Matthew Pingree for evaluation of his neck pain. Dr. Pingree noted a history of an anterior cervical fusion in April 2004. “He apparently reports that he had no pain for 7 weeks after surgery and was not taking any pain medications. On the 17<sup>th</sup> of June 2004 he hit his head on his patrol car at work and ever since has had a return of bilateral neck pain now instead of just on the left side. He did not lose consciousness however he did go

blank for one second and this has gotten progressively worse. He went to the emergency room that day and on one other occasion. He reports he has pain 100% of the time.” (R. Vol. 2 at 179-180). The x-rays performed on August 26, 2004 were reviewed and compared to prior films. They were read to show no misalignment or evidence of instability. (R. Vol. 2 at 53).

17. There is a consensus among the physicians who have examined Verburg that the increase in Verburg’s complaints of neck pain is medically causally related to the incident of June 17, 2004. R. at 13, 232. However, the parties dispute whether the exertions of the employment satisfied the higher legal causation requirement under Allen.
18. The Administrative Law Judge correctly noted that the question to be addressed was whether the petitioner “carried his burden of proving legal causation.” She reasoned that:

The preponderance of the evidence demonstrates that the direct force Petitioner experienced moving from a standing position to sitting position while propelling his body 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 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 was happy with the result.

However, following June 17, 2004, Petitioner experienced significantly increased pain in his cervical spine.

Finally, in concluding that that (sic) 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.

(R. Vol. 1 at 41).

19. Ogden City filed a Motion for Review of the ALJ's order, asserting that the ALJ incorrectly analyzed the evidence regarding legal causation and incorrectly applied a liberal construction standard to her analysis of the facts and the law. Ogden City asserted that the preponderance of the evidence did not support the ALJ's conclusion that the accident of June 17, 2004 was a compensable industrial accident. (R. Vol. 1 at 44-53).
20. The Commission granted Ogden City's Motion for Review and denied Verburg's claim for lack of legal causation. Upon review of the available evidence, the commission concluded that the accident of June 17, 2004 was "a relatively routine event in which Verburg bumped his head while getting into the drivers seat." The commission was unconvinced that Verburg's testimony that his vision went black could reasonably be used to show the force of the impact. Although the commission recognized that there are circumstances in which a head bump could satisfy the higher legal causation standard, the facts presented in this case do not establish that the exertion involved in Verburg's accident was unusual or extraordinary. The commission reversed the ALJ's decision and denied Verburg's claim. (R. Vol. 1 at 59-62).

21. Verburg filed a Motion for Reconsideration with the Labor Commission. He asserted that the commission's Order misapplied the "Allen test" and improperly reconsidered medical causation. (R. Vol. 1 at 63-70).
22. The commission issued an Order Denying Request for Reconsideration on January 14, 2008. In sum, the commission concluded that the accident event itself was a relatively routine event in which Verburg hit his head as he was sliding into the drivers seat. The commission concluded that Verburg's vision going black was an atypical response to a typical exertion, rather than persuasive evidence that the force involved in the accident was greater than typical non-employment life. (R. Vol. 1 at 80-81)

### **STANDARD OF REVIEW**

"Judicial review of final agency actions is governed by the Utah Administrative Procedures Act." Color Country Mgmt. v. Labor Comm'n, 2001 UT App 370, p. 16, 38 P.3d 969. Utah Code Ann. § 63-46b-16(4)(d) provides that the appellate courts may grant relief to a party who has been "substantially prejudiced" by an agency that "has erroneously interpreted or applied the law." Whether the Labor Commission has erroneously applied the Allen legal causation requirement, however, is a mixed question of law and fact that is reviewed for reasonableness and rationality. Acosta v. Labor Comm'n et al., 2002 UT App 67, P. 11, 44 P.3d 819, 822 (internal citations omitted).

The correction of error standard of review does not apply to this case. The appellate Court applies a correction of error standard to review the commission's interpretation of the law. See Acosta, 2002 UT App 67 P 10. However, in this matter,

Verburg requests that the Court of Appeals review the commission's application of the law to the facts.

Petitioner asserts that the rule of liberal construction of the Workers' Compensation Act subjects Labor Commission decisions that deny benefits to a "heightened degree of oversight" on appeal, citing Salt Lake City Corp. v. Labor Comm'n., 153 P.3d 179 (Utah 2007). However, Salt Lake City Corp. addressed the applicability of the coming and going rule to a police officer who was involved in a traffic accident while she was driving her police car home. While such "heightened oversight" is appropriate to determine whether to bring an injured worker under the protection of the Worker's Compensation Act, such heightened scrutiny should not apply in this matter, which is a challenge to the commission's evaluation of the evidence regarding legal causation.

### **SUMMARY OF THE ARGUMENT**

The petitioner had a long history of neck and shoulder pain for which he underwent cervical fusion surgeries in 2002 and again in 2004. His complaints of neck pain originally began without any inciting event. He had headaches and pain into his shoulders and arms that were refractory to conservative medical care.

He was surgically fused at C5-6 and C6-7 in December 2002. He underwent a second cervical fusion surgery at C4-5, on April 19, 2004. He was released to return to work at full duty on June 8, 2004. Shortly after his return to work, he hit his head on the doorframe of his patrol car. The evidence shows that he was simply getting into his vehicle and coincidentally hit his head on the car.



Verburg testified that his vision went black for a couple of seconds, but there was no immediate pain. None of the contemporaneous medical reports indicate that Verburg's vision "went black" after he bumped his head as he testified at the hearing. The vision symptom is first mentioned in the medical records in August 2004. Verburg was not knocked out or knocked down as a result of the incident. He was not responding to an emergency.

Verburg did not seek medical care or take time off work related to increased neck pain until 15 days later. He waited 18 days to report the incident to his employer as a workers' compensation accident. The medical records show that Verburg continued to receive prescriptions for muscle relaxants and narcotic pain medicines, after he returned to work, although he testified that he was pain free up until the June 17, 2004 accident.

There is no dispute that there is a medical causal connection between the June 17 accident and the complaints of increased neck pain. However, because Verburg had a preexisting contributing condition, Utah law requires that he prove, by a preponderance of the evidence, that the incident on June 17, 2004 legally caused his injury. To meet his burden, Verburg "must show that his employment contributed something substantial to increase the risk he already faced in everyday life because of his condition." Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986). The burden of proof to show a causal connection is by a preponderance of the evidence. Allen at 23, citing Lipman v. Industrial Commission, 592 P.2d 616, 618 (Utah 1979).

Petitioner asks this Court to construe the Allen decision to not apply to unusual reactions to usual events. He likens his bump on the head while getting into his patrol

car to a traffic accident, a trip and fall down stairs, or a slip and fall to the ground.

These types of accidents are easily distinguished from Verburg's minor accident.

Verburg essentially argues that if a fall down stairs is compensable, then a bump on the head must also be compensable. However, the higher legal causation requirement is intended to distinguish between those accidents that coincidentally occur at work and those in which the employment contributes more to cause the injury than "typical" non-employment activities. When one compares the examples of "typical" non-employment activities provided in Allen, such as lifting a small child to chest height, lifting and carrying luggage for travel and changing a flat tire on an automobile to Verburg's bump on the head, it is easy to see that his incidental bump on the head did not involve the type of exertion, or force to the body, needed to satisfy the legal causation requirement.

Verburg claims that because his vision went black for a moment, the bump to his head was a more significant contributor to his injury than his pre-existing, weakened condition. This is precisely the type of situation to which the higher legal causation test is intended to apply. The commission found that the evidence was inconclusive to show the force of the impact to Verburg's head was more than typically experienced in everyday life. The commission was not persuaded that Verburg's employment increased his risk of injury beyond the risk that is typically experienced in everyday, non-employment life. Rather, the commission concluded that the weight of the evidence in this matter shows that the incident on June 17, 2004 was typical of the type of insignificant insult commonly experienced in everyday non-employment life. Accordingly, Verburg's claim must fail.

Verburg argues that because the commission considered that there was no medical evidence of marks or bruising, as part of the legal causation analysis, that the commission improperly re-evaluated medical causation. It is appropriate for the commission to use common sense, life experience, and probability to evaluate the evidence to determine facts. The commission reviewed the entire record for evidence that would tend to support Verburg's claim and concluded that Verburg's complaint of a brief vision disturbance, without more, is insufficient to support a finding of legal causation.

Verburg misapprehends the commission's duty to evaluate all of the evidence. The commission is required to consider all of the evidence presented that is relevant to the decisions it must make regarding workers' compensation claims. When there is no objective evidence to show the force of the exertion, the commission must review the record for evidence to support its findings. The commission simply looked to the medical records for additional objective evidence to support an award. The absence of bruising, contusion or even tenderness to palpation on the right side of the head all support the commission's conclusion that the force of impact was more ordinary than extraordinary. The commission correctly concluded that the petitioner presented insufficient evidence to prove legal causation.

## **ARGUMENT**

### **I. THE LABOR COMMISSION CORRECTLY CONCLUDED THAT PETITIONER DID NOT PROVE LEGAL CAUSATION BY A PREPONDERANCE OF THE EVIDENCE**

It is undisputed that Verburg brought a pre-existing weakened condition to work with him on June 17, 2004. It is undisputed that the event of June 17, 2004 was an

“accident” as that term is defined by Utah law<sup>2</sup>. It is also undisputed that Verburg’s pre-existing condition, degenerative cervical disc disease for which Verburg had recently received surgery, medically contributed to his increased complaints of neck pain after the accident of June 17, 2004. The only dispute between the parties to this appeal is whether the evidence shows that the head bump on June 17, 2004 involved a force great enough to satisfy the higher legal causation standard. If legal causation is proven, Utah law requires Ogden City to pay for all future medical expenses and wage loss related to Verburg’s complaints of ongoing neck pain.

Two elements are necessary to prove an injury by accident in the course and scope of employment under Utah’s workers’ compensation system. These are: (1) an injury by accident; and (2) proof of a causal connection between the injury and the employee’s employment. In 1986, the Utah Supreme Court adopted the two part causation analysis promoted by Professor Larson’s treatise on workers’ compensation law. Allen at 22-23.

In addition to adopting the now familiar two part analysis requiring evidence of medical and legal causation, the Court also clarified that the “standard to prove causal connection is preponderance of the evidence.” Allen at 23, citing Lipman v. Industrial Comm’n, 592 P.2d 616,618 (Utah 1979). “To sustain this burden it is not enough to show a state of facts which is equally consistent with no right of compensation as it is with such a right. Surmise, conjecture, guess or speculation is not sufficient to justify a

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<sup>2</sup> An “accident is an unexpected or unintended occurrence that may be either the cause or the result of an injury.” Allen v. Industrial Commission, 729 P.2d 15, 22 (Utah 1986).

finding in the plaintiff's behalf " Higley v. Industrial Comm'n, 285 P 306, 308 (Utah 1930)

The evidence presented in this matter shows that at 5 45 p m on June 17, 2004, Verburg slid into the seat of his patrol car to retrieve some items. As he slid into the vehicle, he struck the right side of his head above the ear, on the doorframe. He was not knocked unconscious and he was not knocked down. He testified at the hearing on June 7, 2005, that his vision went black for a couple of seconds. He reported no immediate onset of pain, but said that his neck later became stiff and sore.

There was no evidence presented at the hearing to show that Verburg was responding to an emergency situation or moving quickly at the time of the accident. There was no evidence presented to show that the circumstances of Verburg's employment increased the risk of hitting hit his head or caused him to strike his head with more force than typically occurs when getting into a car and bumping one's head in everyday life. The evidence does not establish that the blow was forceful.

Verburg did not immediately seek medical care or report an industrial accident to his employer. The medical records of Dr. Felix on June 29<sup>th</sup> and July 13<sup>th</sup>, Ogden Clinic on July 2<sup>nd</sup> and McKay-Dee Hospital Emergency Room on July 5<sup>th</sup> and 9<sup>th</sup> do not mention any observed swelling, tenderness or bruising at the site of the impact. These initial medical reports from three different providers do not mention any history that Verburg's vision "went black" for a couple of seconds. These medical reports only show that Verburg was complaining of increased pain at the back and left side of his neck after hitting his head.

The ALJ reasoned that the force of the blow to Verburg's head exceeded the typical exertions of non-employment life because his vision went black for a moment. She also reasoned that the combination of his body weight and lateral movement increased the force of the blow to the side of his head, but failed to offer any rational explanation or reference to other evidence in the record to support her conclusion<sup>3</sup>. On Motion for Review, the Labor Commission was not convinced that Verburg's "testimony of his vision going dark is a measure of the force of impact," and concluded that the evidence was insufficient to prove that the exertion or force of impact involved in Verburg's accident was unusual or extraordinary in comparison to typical non-employment life.

Petitioner argues that there is ample evidence in the record from which the commission could find legal causation. Although Verburg argues that the significant force of the impact caused his vision to go black, there is no medical opinion in the record to support such an assumption. Verburg essentially asserts that a small scrap of self-serving evidence<sup>4</sup> supported by a mere supposition that this evidence reflects a greater than typical force of the impact, is sufficient to prove legal causation. Even though the commission accepted Verburg's testimony at face value, the evidence does not compel the conclusion that Verburg's accident involved an unusual, atypical,

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<sup>3</sup> As Ogden City pointed out in the Motion for Review, the evidence did not show that the circumstances of Verburg's employment increased the force of the impact compared to a similar accident in typical non-employment life.

<sup>4</sup> The only evidence in the record to support the conclusion that Verburg's vision actually did go black for a moment was his testimony and the statements he made to Dr. Pingree on August 13, 2004. He never reported this "symptom" to the medical providers he saw immediately after the accident.

forceful exertion. The evidence does not compel a conclusion that the accident was significant in any way. Although the evidence might be interpreted to show that Verburg hit his head with significant force, the evidence might also be interpreted to show, as the commission found, that Verburg had an abnormal reaction (complaints of significant pain) to a typical event (a bump on the head). Accordingly, the commission concluded that the evidence showed that Verburg's "injury" was more likely the result of his pre-existing condition. In order to prevail before this Court, Verburg must persuade the Court that the commission's application of the legal causation test is not reasonable or rational. Verburg has not demonstrated that the commission's interpretation of the evidence and application of the law to the facts is unreasonable or irrational.

Verburg fails to acknowledge that the type of accident he experienced is a relatively common occurrence, and usually insignificant. The commission noted that it is not uncommon for people in typical non-employment life to hit their heads on doorframes, cabinets, or car trunks, and sustain no significant injury. Although these types of incidents don't occur everyday, they are nevertheless a common occurrence in everyday life. There is no frequency requirement to the objective standard applied in such cases.

Among the examples of typical non-employment life provided in Allen, is changing a flat tire on an automobile. Although this is a "typical" activity, it rarely occurs in modern life more than once or twice a year, sometimes even less frequently. This typical activity is relatively strenuous. This task involves loosening lug nuts; lifting and carrying a wheel and tire; bending over or kneeling down to place the jack under the automobile; jacking the car; and tightening lug nuts. If this task is performed on the

side of the road, it would also involve watching out for errant motorists. This "typical" activity is actually rather strenuous. It is important that the Allen Court did not cite examples of typical activities like: sitting on the couch watching TV, or playing video games. It is clear that the Court intended to set the standard at a reasonable level to prevent the employer from becoming a general insurer of his employees. As the Court noted, the purpose of the higher legal causation standard is 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." Allen at 25.

This Court recently reviewed the purpose of the legal causation requirement in Acosta v. Labor Commission:

[A]s stated by Professor Larson, 'the object is to distinguish work-connected collapses from those that are due to normal progression of a disease.' 2 Arthur Larson & Lex K. Larson, LARSON'S WORKER'S COMPENSATION LAW § 46.03[4], at 46-18 (2001). The underlying purpose served by making this distinction is to prevent awarding benefits where there is not "a sufficient causal connection between the disability and the working conditions." Allen, 729 p.2d at 25.

Acosta v. Labor Commission, 2002 UT App 67, ¶ 23.

As Justice Zimmerman noted:

The sole question is whether the worker came to the workplace with a condition that increased his risk of injury. If he did, and that condition contributed to the injury, then Allen's higher standard of legal causation comes into play so as to place that worker on the same footing as one who did not come to work with a preexisting condition. To rule otherwise would create the strong likelihood that a worker who has a preexisting condition and whose virtually inevitable injury simply happens to occur at work will be able to foist the cost of that injury on his employer when the workplace had little to do with causing the injury.

Holloway v. Industrial Commission, 729 P.2d 31, 32 (Utah 1986) (Zimmerman,



J. concurring). Thus it is appropriate that Ogden City not be made Verburg's general insurer for his non-industrial neck condition.

Verburg argues that because he hit his head and medically exacerbated his neck pain, he should receive benefits for his pre-existing degenerative neck problems. However, he has not shown that his work contributed anything to increase his risk of injury from bumping his head. Rather, he suffered an atypical reaction to a typical activity. Verburg cites examples of slipping while carrying a garbage can or being injured when a jack slips while changing a tire and argues that these examples are similar to the exertions of his accident and would be compensable. However, the compensability of these examples, like the compensability of Verburg's accident depends on the totality of the evidence surrounding the accident. The example of slipping while carrying a trash can would satisfy legal causation only if the trash can was sufficiently heavy and the other circumstances reveal unusual or extraordinary exertions. If the employee fell to the ground while carrying the trash can, legal causation would clearly be satisfied. Similarly, the slipping jack could satisfy the higher legal causation standard depending on the specific exertions involved in the accident. If the car falls off the jack and lands on the petitioner, legal causation is met. If the car falls and the employee jumps out of the way, the analysis is less certain and would depend on the existence of additional facts to support a finding of causation.

Had Verburg proved that his work contributed something substantial to increase his risk of injury, the commission would have awarded benefits. However, the evidence simply did not show that Verburg's head bump was significant. Verburg wasn't knocked out; he wasn't knocked down; he didn't have immediate pain or dysfunction and he

didn't seek immediate medical care. In short, he provided no evidence other than his testimony that his vision briefly went black to show that the stress and strain he experienced on June 17, 2004 was more than the stress and strain of typical non-employment life. The commission has the duty to analyze all of the evidence presented to determine whether the evidence supports the claim. In this case, petitioner did not provide much evidence for the commission to review to evaluate his claim. When the evidence can reasonably lead to different conclusions, the commission is entitled to interpret the evidence as it sees fit, so long as the commission's interpretation of the evidence is reasonable.

Petitioner confuses the requirement for an "injury by accident" with the requirement to prove "causation." The commission carefully reviewed the record for sufficient evidence to show that Verburg's employment provided something substantial to increase his risk of injury. However, there was only one piece of evidence to support a finding of increased risk related to the employment; a brief vision disturbance. The commission was unconvinced that this evidence alone was enough to support an award of benefits. Given that there was no other evidence to support a finding that the impact in this matter was in any way greater than a typical, everyday bump on the head, the commission's decision is supported by the evidence in the record and should not be disturbed.

## **II. THE COMMISSION PROPERLY REVIEWED ALL OF THE EVIDENCE IN THE RECORD TO CORRECTLY APPLY THE LAW TO THE FACTS**

Verburg asserts that the commission should award him benefits because he sustained an unusually forceful blow to the head while getting into his patrol car after

work to retrieve his belongings. The only evidence he presented to show the force of the blow was his testimony that his vision went black for a second. The commission was unconvinced that Verburg's report of briefly darkened vision supported a conclusion of an unusually forceful impact. Accordingly, the commission reviewed the rest of the evidence in the record to determine whether there was any additional evidence that would support a finding that Verburg's blow to the head was more than a routine, typical bump to the head. The commission found no additional supportive evidence and, because the vision symptom offered by Verburg was unpersuasive as to the force of the head bump, denied Verburg's claim.

Petitioner complains that the commission improperly reconsidered medical causation because it noted the "absence of any evidence of bruising or other marks from the impact,"<sup>5</sup> that would support the conclusion that Verburg sustained more than a typical head bump on June 17, 2004. This argument is incredible. The burden to prove medical causation is typically rather low. The claimant merely has to provide a doctor's report stating that his accident medically caused his injury or medically aggravated his pre-existing condition. Medical causation is typically based on the doctor's evaluation of the history of the injury, which is provided by the injured worker and the doctor's medical knowledge about mechanisms of injury.

Medical causation does not require a showing that the injury was more likely to have occurred at work than anywhere else. Rather, it is legal causation that is designed to address that aspect of causation. Legal causation compares the injured

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<sup>5</sup> R. (Vol. 1) at 61.

worker's specific, workplace exertions to an objective, non-employment life standard, to determine whether the injury is the result of the pre-existing condition or the employment related exertion. Given that these two separate causation analyses address different aspects of the causal relationship, it is appropriate and reasonable that the commission considered whether the evidence showed that Verburg had bruises or contusions after the accident. Common life experience tells us that bruises typically result from a significant impact. The lack of evidence of bruising is simply one factor that the commission considered to determine legal causation.

The commission explained:

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<sup>6</sup>.

Verburg admits that he did not see a doctor immediately after the accident of June 17, 2004. He argues that any marks or bruising would likely have decreased or disappeared by the time he did see a doctor. The fact that Verburg did not see a doctor immediately or even within a couple of days argues against the blow having been significant. Verburg recently had fusion surgery. He claims that he was concerned about a non-union of his fusion. Such concerns would cause many patients to seek

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<sup>6</sup> R. (Vol. 1) at 80.

immediate medical care. The fact that Verburg did not seek medical attention near the time of the accident supports the commission's conclusion that the bump was a "typical" one.

Verburg argues that "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." Pet. Br. at 29. Verburg asserts that the commission's conclusion that there was no evidence of bruising is unsupported. Review of the medical records in this matter clearly shows that none of the medical providers mentioned the presence of bruising or marks on the right side of Verburg's head after the June 17, 2004 accident. Further, Verburg did not testify that he suffered bruises or other marks after the accident. It is reasonable to expect that the medical providers who saw Verburg looked for evidence of bruising or swelling when he sought care. Although the Emergency Room physicians who examined Verburg noted that his *neck* was tender to palpation and ecchymotic. They mention no symptoms on the side of his head. Accordingly, the commission's observation that there is no evidence in the record to show any bruising or other marks is correct. This observation is not an improper assumption, as Verburg claims, but rather, a correct interpretation of the evidence presented in this matter.

Similarly, the medical histories recorded by the physicians Verburg saw in June and July 2004 do not indicate that he ever reported to them that his vision briefly went black. He saw four different providers after the June 17th incident and none of their records indicate that he struck his head forcefully against the doorframe; that his vision "went black;" or that he had any bruising or discoloration as a result of the blow. The

only evidence Verburg presented to show that the force of the impact on June 17<sup>th</sup> was forceful, was his testimony that his vision briefly “went black.” There is no medical opinion in the record to support the conclusion that this vision complaint is medical evidence of a significant blow to the head. It is Verburg’s burden to prove that the accident legally caused an industrial aggravation of his pre-existing condition; he simply has not provided sufficient evidence to prove his claim. Although there is no dispute that there is a medical causal connection between the head bump and Verburg’s reported increase in neck pain, he cannot prevail in this matter without evidence to prove legal causation.

The Labor Commission and its Administrative Law Judges must use their common sense and life experience to determine whether the theories of the case presented by the parties are natural, probable, reasonable, plausible and easy to believe. The commission may not simply provide “a talismanic incantation” finding that there was “unusual or extraordinary exertion,” as a substitute for careful analysis of the evidentiary record. See Price River Coal Co. v. Industrial Comm’n, 731 P.2d 1079, 1083 (Utah 1986). When the only evidence presented to support a finding of legal causation is not persuasive and there is no other evidence in the record to reasonably support a finding of legal causation, the commission should deny the claim. Workers’ compensation is not intended to make the employer a general insurer of its employees. This is precisely the reason that the Supreme Court adopted the legal causation requirement.

It is Verburg’s burden as the petitioner, to prove legal causation by a preponderance of the evidence. To prove his case, Verburg must point to some

convincing, persuasive evidence in the record to prove that his accident is the legal cause of his injury. Under the circumstances of this case, he needed to provide evidence that the blow was forceful enough to increase his risk of injury over the risk of injury he faced in everyday life because of his pre-existing condition. Verburg simply failed to meet his burden to prove legal causation. Therefore, the commission's decision in this matter should be affirmed.

### **CONCLUSION**

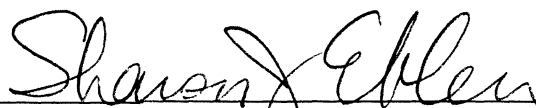
The petitioner has the burden of proof to show, by a preponderance of the evidence, that he was injured by accident in the course and scope of his employment with respondent. Where, as here, the petitioner brought an element of personal risk of injury to the workplace, he must show that the exertions of his employment substantially increased his risk of injury. The evidence presented in this matter showed that Verburg was simply getting into an automobile and coincidentally bumped the side of his head. This is exactly the type of incident to which the higher legal causation requirement is intended to apply to protect employers from becoming general insurers of their employees.

Therefore, the Labor Commission correctly concluded that the preponderance of the evidence in the record does not show that the accident of June 17, 2004 involved exertions sufficient to satisfy the higher legal causation standard under Allen.

Accordingly, this Court should affirm the order of the Labor Commission which denied workers' compensation benefits in this matter.

Respectfully submitted this 9 day of June, 2008.

BLACKBURN & STOLL, L.C.

A handwritten signature in black ink, reading "Sharon J. Eblen", written over a horizontal line.

Sharon J. Eblen, Attorneys for  
Respondent Ogden City Police Department



CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 9 day of June, 2008, to:

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