

1986

G. Carmen Herrera v. Sperry Corporation,  
Travelers Insurance Company, Second Injury Fund,  
and Industrial Commission of Utah: Brief of  
Respondents Sperry Corporation and Travelers  
Insurance Company

Utah Supreme Court

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**SUPREME COURT**

IN THE SUPREME COURT OF THE

LET NO. 86 0062

STATE OF UTAH

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G. CARMEN HERRERA,

Plaintiff -  
Appellant,

v.

SPERRY CORPORATION, TRAVELERS  
INSURANCE COMPANY, SECOND INJURY :  
FUND, INDUSTRIAL COMMISSIONER :  
UTAH, :

Defendants -  
Respondents.

Case No. 860062

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BRIEF OF RESPONDENTS SPERRY CORPORATION  
AND TRAVELERS INSURANCE COMPANY

---

APPEAL FROM THE JUDGMENT OF THE UTAH INDUSTRIAL COMMISSION

---

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**FILED**  
MAY 15 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE

STATE OF UTAH

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G. CARMEN HERRERA,	:	
	:	
Plaintiff -	:	
Appellant,	:	
	:	
v.	:	Case No. 860062
	:	
SPERRY CORPORATION, TRAVELERS	:	
INSURANCE COMPANY, SECOND INJURY	:	
FUND, INDUSTRIAL COMMISSIONER	:	
UTAH,	:	
	:	
Defendants -	:	
Respondents.	:	

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### STATEMENT OF ISSUE PRESENTED ON APPEAL

Was the Industrial Commission's finding that Plaintiff failed to demonstrate that she sustained injuries as the result of a compensable industrial accident arbitrary and capricious?

### STATEMENT OF THE CASE

This case is an appeal from the decision of the Industrial Commission of Utah denying Plaintiff's Motion for Review.

### STATEMENT OF FACTS

This action arises out of an incident which occurred on Friday, May 3, 1985. At that time, Plaintiff was 25 years old and worked at Sperry Corporation where her job was to pull computer units out of the ovens, lift them, and place them on a conveyor belt. She had worked at that task for approximately six months. R. 21-22. On the day of the incident she was lifting a unit weighing approximately 30 pounds when she felt a tingling or popping in her back. R. 22, 41. At the time of her injury, she was picking up the unit in the same way she normally did; she was "just doing her daily job at work." Nothing unusual occurred. R. 30, 33.

Plaintiff reported the incident shortly afterwards, but worked for the rest of the day. The following Monday, she went to the nurse's station at Sperry and was later examined by Dr. Henderson. R. 24. Plaintiff was later examined by several other doctors. Dr. Chester B. Powell examined her on August 6, 1985. He noted that "there is a significant disparity between

Ms. Herrera's complaints and any evidence clinically or by X-rays of any real pathology." R. 9-11. (A copy of this letter is included in the Addendum to this Brief.)

The Administrative Law Judge concluded in her Order of November 27, 1985 that "G. Carmen Herrera has failed in her burden to demonstrate that she sustained injuries as the result of a compensable industrial accident on May 3, 1985, and her claim for benefits should be denied." The Administrative Law Judge's Findings of Fact state in part that, "[t]here is nothing to take her activity on that day out of the realm of what could be considered usual and normal activities. Under Applicant's description, the same type of injury could have just as easily occurred had she bent down to pick up a clothes basket or a bag of groceries." R. 90. The Industrial Commission denied Plaintiff's Motion for Review and affirmed the Administrative Law Judge's Order on January 2, 1986. R. 103. Thereafter, Plaintiff filed a timely Petition for Review to this Court on January 29, 1986. R.105.

#### SUMMARY OF ARGUMENT

There is sufficient evidence in the record to support the Industrial Commission's finding that Plaintiff did not suffer a compensable industrial accident. Moreover, there is a wealth of authority, including one case with strikingly similar facts, which support the Commission's finding of no accident in this case.



## ARGUMENT

### I. THE COMMISSION'S DECISION MUST BE "WHOLLY WITHOUT CAUSE" TO PERMIT REVERSAL

The standard of review exercised by this Court in cases appealing decisions of the Industrial Commission is well established. In Kaiser Steel Corporation v. Monfredi, 631 P.2d 888, 890 (Utah 1981) ("Monfredi"), this Court stated:

[i]t is apparent that this Court's function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the Court agrees with the Commission's findings or whether they are supported by the preponderance of evidence. Instead, the reviewing court's inquiry is whether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

631 P.2d at 890. This standard was reaffirmed in Sabo's Electronic Service v. Sabo, 642 P.2d 722, 725 (Utah 1982). Accord, Billings Computer Corporation v. Tarango, 674 P.2d 104, 106 (Utah 1983); Moyes, ex rel. Moyes v. State, 699 P.2d 748, 750 (Utah 1985) (applying arbitrary and capricious standard); and Emery Mining Corporation v. DeFriez, 694 P.2d 606, 608 (Utah 1984).

UTAH CODE ANN. § 35-1-84 (1953) permits the Supreme Court to set aside a decision of the Commission only upon the following grounds: (1) that the Commission acted without or in excess of its powers; or (2) that the findings of fact do not support the

award. In Blaine v. Industrial Commission, 700 P.2d 1084, 1086 (Utah 1985), the Court stated that "the Commission's findings are not to be displaced in the absence of a showing that they are arbitrary and capricious", and went on to state that:

If there is a reasonable basis for the evidence (or lack of evidence) such that reasonable minds acting fairly thereon could remain unpersuaded, this Court does not upset the determination made.

700 P.2d at 1086, quoting Martinsen v. W-M Insurance Agency, 606 P.2d 256 (Utah 1980) (footnotes omitted) (discussing the standard for altering findings of fact).

In summary, the issue in this case is very narrow; whether the one inevitable conclusion of the evidence is that an accident occurred. If it is not, the Commission's finding must be affirmed. In this case, Plaintiff allegedly suffered her injury while performing her every-day tasks in exactly the same manner as she always performed them. She had no prior history of back trouble. Nothing unusual occurred at the time of the so-called incident, and Plaintiff was under no unusual stress. Finally, there is conflicting medical evidence as to whether Plaintiff's complaints are evidenced by any real pathology. Therefore, it is clear that the Commission's finding of no compensable industrial accident is not wholly without cause, and must be sustained under the standard of review set forth by this Court.

## II. NO CASES SUPPORT PLAINTIFF'S POSITION.

Since this Court's decisions in this area are numerous and their results turn in large part upon the facts of each individual case, it is helpful to differentiate between them according to the procedural stance with which the Court was faced. Of the cases cited in the Plaintiff's brief, only two involved an attempt, as in this case, by an applicant to reverse the Commission's denial of benefits, Carling v. Industrial Commission, 16 Utah 2d 260, 399 P.2d 202 (1965), and Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980) ("Schmidt"). In Carling, the Court affirmed the denial of benefits on the basis that there was "a reasonable basis in the evidence to support the Commission's conclusion that the Plaintiff's loss of hearing did not result from a single incident, nor from an "accident" arising out of or in the course of his employment." 399 P.2d at 204. In Schmidt, the Court reversed the Commission's finding of no accident. A review of the case law reveals two other cases where employees succeeded in having the Commission's denial of benefits reversed, Giles v. Industrial Commission, 692 P.2d 743 (Utah 1984), and Nuzum v. Roosendahl Construction and Mining Corp., 565 P.2d 1144 (Utah 1977). However, each of those three cases is distinguishable from the present case on their facts.

In Giles, the administrative law judge's finding that there had been a compensable accident was summarily reversed without a hearing by the Industrial Commission. This Court

reversed the Commission and affirmed the administrative law judge's original finding of an accident, noting that the Plaintiff's detached retina occurred when he attempted to open his delivery truck door which was so severely jammed that a power jack was later required to open it. The Court felt that this clearly placed the event within its definition of accident as an "unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events." 692 P.2d at 746, quoting Monfredi, 631 P.2d at 890. The Court noted that:

Giles' injury, on the other hand, did not result from a commonplace or usual incident. A badly jammed delivery truck door is neither a commonplace occurrence nor one liable to happen anywhere but work. Further, a jar to the body resulting from an attempt to open that door is not usual.

692 P.2d at 746.

In Nuzum, the Court reversed the Commission's denial of death benefits to the surviving children of a worker who died of a heart attack after repeatedly climbing the six feet in and out of the cab of his truck. The Court stressed that his multiple trips in and out of the cab were necessitated by a mechanical defect in the truck, which "put him to a greater exertion than normally would have been required if the truck had been operating properly" 565 P.2d at 1146. Unlike Giles or Nuzum, the Plaintiff in this case neither encountered any unusual situation, nor was required to use any unusual exertion in performing the task which she claims led to the injuries.

The Schmidt case is distinguishable on several grounds. In that case, the Plaintiff, who had a long history of back disorders, injured his back in the course of his duties of carrying steel which he cut to specified sizes. The case appears to be a forerunner of the "climax" rule applied in the Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981) (permitting recovery for injuries suffered as "climax" due to exertion, stress, or other repetitive cause). In the present case, there is no evidence that the Plaintiff had any prior history of back trouble, nor that the strain that allegedly occurred on May 3th was the result of a "climax". Secondly, Schmidt seems to be heavily influenced by the statutory requirement that all cases be submitted to a medical panel. That portion of the law of the case has since been legislatively reversed by the 1982 amendments to Utah Code Annotated § 35-1-77 (1953, as amended). It is not clear what the result in Schmidt would have been if the Court had not felt that referral of medical aspects of the case to a medical panel was mandatory under the Workmen's Compensation statute. Finally, it should be noted that Schmidt was a 3 to 2 decision, with no one joining Justice Maughan in the "main" opinion. In some ways, Schmidt appears to be an anomaly since the dissenters in it were in the majority in leading Workmen's Compensation cases both and before and after Schmidt, i.e., Farmer's Grain Cooperative v. Mason, 606 P.2d 237 (Utah 1980), and Sabo, 642 P.2d at 722.

Conversely, a number of recent cases have affirmed denials of compensation by the Commission, just as Defendants ask the Court to do in this case. See, e.g., Jones v. Ogden Auto Body, 646 P.2d 703 (Utah 1982) (substantial evidence supported finding of no accident); Moyes ex rel. Moyes v. State, 699 P.2d 748 (Utah 1985) (worker's accident was not a significant factor in causing the injury); Blaine v. Industrial Commission, 700 P.2d 1084 (Utah 1985) (Plaintiff's complaint stemmed from psychological problems and not from her industrial injury).

Finally, it is instructive to note that in all the cases relied on below to determine that there was no accident in this case, the Court reversed the Commission's award of benefits, rather than merely affirming the Commission's denial of benefits, as Defendants urge in this case. Redman Warehousing Corporation v. Industrial Commission, 22 Utah 2d 398, 454 P.2d 283 (Utah 1969) ("Redman"); Church of Jesus Christ of Latter-Day Saints v. Industrial Commission and Thurman, 590 P.2d 328 (Utah 1979) ("Thurman"); Farmer's Grain Cooperative v. Mason, 606 P.2d 237 (Utah 1980) ("Mason"); Sabo's Electronic Service v. Sabo, 642 P.2d Utah 1982 ("Sabo"); and Billings Computer Corporation v. Tarango, 674 P.2d 104 (Utah 1983) ("Tarango").

### III. SABO DIRECTLY CONTROLS ON THE ISSUE OF ACCIDENT AND REQUIRES AFFIRMING THE COMMISSION'S DECISION.

In Sabo's Electric Service v. Sabo, 642 P.2d 722 (Utah 1982), this Court reversed the Industrial Commission's award of

benefits, holding that its conclusion that an accident had occurred was without any substantive support in the record. The facts in that case are strikingly similar to this one and that decision should control the outcome in this case. In Sabo, the plaintiff injured his back while attempting to lift a box of clock radios. The Court stated that

[t]hough it is clear that the applicant was engaged in his regular employment and that there was an injury, we cannot find that there was an accident in the sense contemplated by the Workmen's Compensation Statutes.

642 P.2d at 724. The Court went on to state, "[t]he mere showing of injury does not ipso facto mean that a compensable accident has occurred." id. at 725. The Court discussed the Redman, Farmer's Grain, and Thurman decisions (discussed below), and concluded that "[i]t appears to be mere coincidence that defendant's injury or malfunction occurred at work. Defendant bears the burden of showing otherwise." 642 P.2d at 726 (footnotes omitted). In both Sabo and the present case, the applicant's job required "a lot of lifting", Sabo at 723, and the activities were "not unusual and were not strenuous in any way . . . . [The applicant] was doing the same things that he frequently did in connection with his employ- ment in loading boxes which usually required bending over to pick them up. He had done the same thing many times in the past." Sabo at 723-724 (quoting the administrative law judge's findings).

The administrative law judge went on to state, in a passage which could have easily been used in the findings in this case, that:

We cite the case of L.D.S. Church v. Thurman [Utah, 590 P.2d 328 (1980)] and find here, as found in that case, that "there is nothing in his testimony that shows anything unusual about his activities, that shows any unusual exertion or strain or that shows any contact with objects or a fall. There is simply nothing different about his activities on the day in question than any other such working day." It is obvious that the back failure could have occurred at any time while engaged in any activity on or off work since our ordinary day to day activities require us to bend over, turn, twist, and lift many times and in many different ways.

642 P.2d at 724.

The record in this case makes it clear that the plaintiff was doing everyday activities in her usual way at the time she felt a sensation in her back. R. 30. Similarly, the Administrative Law Judge's Findings of Fact, which were adopted by the Industrial Commission, state:

Additionally, she (plaintiff) indicated very clearly on the record that her normal procedure in lifting the parts was to squat, lift, and straighten and then turn to place them on the conveyer belt. She testified that there was no variation from this procedure on May 3, 1985. There is nothing to take her activity on that day out of the realm of what could be considered usual and normal activities. Under applicant's description, the same type of injury could have just as easily occurred had she bent down to pick up a clothes basket or bag of groceries.

R. 90. The disposition of this case is controlled by the Court's decision in Sabo, which was made under a much stricter standard of review since there the Court reversed the Commission, and therefore Commission's Order in this case should be affirmed.



Plaintiff's Brief attempts to distinguish Sabo and other cases such as Redman, Mason, and Thurman on the ground that there was no finding of causation between the accident and the injury in those cases while there was such a showing here. This analysis not only mischaracterizes the holdings of those cases, but is inapplicable to this case in light of the lack of any finding of causation.

A. There Was No Finding of Causation In This Case.

The Administrative Law Judge's Findings of Facts, which were adopted by the Industrial Commission, list the issues presented as including (1) whether the applicant sustained injuries as a result of a compensable industrial accident on May 3, 1985, and (2) the cause or relationship of the incident to the applicant's alleged injuries. The findings then go on to state that "Inasmuch as one of the above-listed issues is dispositive of the others, the Administrative Law Judge will deal only with the issue of whether the applicant sustained injuries as a result of a compensable industrial accident." R. 88. Therefore, by its own terms, the disposition by the Administrative Law Judge and the Industrial Commission does not reach the issue of causation on which plaintiff relies to distinguish Sabo.

Moreover, there is insufficient evidence in the record to establish causation. Plaintiff relies solely on the report of Dr. Gene R. Smith, dated September 24, 1985, R. 48-50, which states that:

In answer to the question of causal relationship, it would appear medically probable in my opinion, that the lumbar disc problem in Karmen (sic) Herrera was causally related to the lifting and twisting of the 30-40 pound weights in her occupation.

This is not conclusive since in Sabo, where the plaintiff maintains there was no such causal relationship, the Court stated that:

There is nothing in the doctor's evaluation which would justify a change from the initial decision that no "accident" occurred. The mere fact that defendant's impairment resulted (in the words of Dr. Momberger) "entirely from the incident which he alleges to" should not imply that a compensable accident has occurred, as defined in this opinion.

642 P.2d at 726 (emphasis added). In that case, the doctor's evaluation seems to be much more strongly worded as to causation than in this case, but Plaintiff claims that although there was no finding of causation in Sabo, there was such a "showing" in this case.

In any event, there is additional and contradictory evidence in this case which casts doubt on both the physical basis of applicant's complaints and on their source of origin. In the letter from Dr. Chester B. Powell to Dr. Mark V. Anderson, dated August 10, 1985 (just over a month prior to Dr. Smith's letter), R. 9-11, Doctor Powell states that: "I think that there is a significant disparity between Ms. Herrera's complaints and any evidence clinically or by X-rays of any real pathology" and he

goes on to indicate that there is a "probable psychophysiologic reaction" in this case, and that "appropriate consultation would be advisable" if time suggests that the psychophysiologic factor is a large element in Ms. Herrera's discomfort. Cf., Blaine v. Industrial Commission, 700 P.2d 1084 (Utah 1985) (affirming a denial of benefits for an applicant whose "complaints stem not from the industrial injury, but from psychological problems." 700 P.2d at 1087). If Sabo is not distinguishable on causation grounds as suggested by Plaintiff, then it controls the outcome in this case and requires affirming the Commission.

B. An "Accident" in Cases Like This Requires an Unusual Event or Exertion.

The definition of accident throughout all these cases is well settled. From Carling v. Industrial Commission on, the Court has

consistently held that a finding of accident hinges on "an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events."

Emery Mining Corporation v. DeFrieze, 694 P.2d 606 at 608 (Utah 1984), quoting Carling, 399 P.2d at 203.

Except for the "climax" cases such as Kaiser Steel Corporation v. Monfredi, 631 P.2d at 888, recent cases which have affirmed awards of benefits stress some unusual event, or unusual exertion by the applicant. For example, in Champion Home Builders v. Industrial Commission, 703 P.2d 306 (Utah 1985), the applicant

suffered a perforated ulcer when lifting an "unusually heavy beam" -- one which was usually carried by two people. Similarly, in Emery Mining Corporation v. DeFriez, 694 P.2d at 606, the Court in a per curiam decision held that the applicant suffered a compensable accident when he injured his back while rapidly sliding out of a crawlspace and twisting to stand up to avoid being sprayed with hot oil. In Frito-Lay Inc. v. Jacobs, 689 P.2d 1335 (Utah 1985), the Court upheld benefits awarded for the applicant's back injury which occurred as he was loading Cheetos onto his truck. The Court noted that it was an unusual occurrence, because usually he hand-loaded the truck, but due to the large amount of product in this instance he was using a dolly, which directly led to the accident. Similarly, in IGA Food Fair v. Martin, 584 P.2d 828 (Utah 1978), the Court affirmed the Commission's finding that the injury had resulted from an "extraordinary exertion in the course of his work which produced an unusual and unanticipated result and thus comes within the definition of an accident." Id. at 830 (emphasis added). In Pittsburg Testing Laboratory v. Keller, 657 P.2d 1367 (Utah 1983), the Court affirmed the award of death benefits where the decedent had a heart attack following working inside an extremely hot (100 to 125°F) building.

On the other hand, the Court has continued to reverse awards of benefits if the applicant fails to meet his burden of showing the occurrence of an accident. See, Billings Computer Corporation v. Tarango, 674 P.2d 104 (Utah 1983). In that case

the applicant injured her knee when she knelt down to pick up some small items off the floor. The Court quoted extensively from Sabo, and stated:

The circumstances which precipitated her injury were in no way unusual or accidental, as that term is explained above. As noted previously, her testimony of these events is that she knelt down in the normal and usual way and that she did not fall and strike her knee on the floor, but rather placed it on the floor without abrupt contact. In light of these facts, we conclude that Mrs. Tarango did not meet her burden of showing a compensable accident and that the Industrial Commission's conclusion to that effect was "contrary to the 'one [inevitable] conclusion from the evidence.'" We therefore vacate the Commission's order and award of benefits.

674 P.2d at 107 quoting from Monfredi, 631 P.2d at 888. Similarly, in this case the plaintiff has failed to establish that the circumstances which precipitated her injury were in any way unusual or "accidental" and therefore, she did not meet her burden of showing a compensable accident.

C. The Decisions in Sabo, et al., Turn Upon the Finding of "No Accident", Rather Than a Lack of Causation.

As stated above, plaintiff attempts to distinguish Sabo by asserting that the decision there and those in Redman, Mason, and Thurman turn upon a lack of causation between the injury and the accident. A more careful reading of the cases indicates that in each of those cases the Court determined that no compensable accident occurred, just as the Commission found in this case.

While it is difficult to separate the question of the accident's existence from the question of causation, the case law clearly indicates that the analysis is a two-step process. Schmidt, 612 P.2d at 695; Sabo, 642 P.2d at 725. It is equally clear that it is the Commission's responsibility to make findings of fact such as the existence of the accident. See, e.g., U.S. Steel Corporation v. Industrial Commission, 607 P.2d 807 (Utah 1980); Emery Mining Corporation v. DeFriez, 694 P.2d 606, 608 (Utah 1984) ("A finding of accident . . . is primarily a factual question best left to the Commission."); Sabo, 642 P.2d at 725.

Rather than turning on a finding of no causation, as claimed by Plaintiff, the Court in Redman, where the applicant suffered a herniated disc while driving a truck, stated:

[t]here is nothing in this record that shows any unusual event or 'accident' if you please, justifying compensability within the nature, intent or spirit of the Workmen's Compensation Act.

454 P.2d at 285 (reversing the Commission's award of benefits).

In Thurman the Court also reversed an award of benefits. It quoted extensively from Redman and stated:

The evidence does not support the Industrial Commission's conclusion that an "accident" had arisen out of or in the course of Thurman's employment.

590 P.2d at 330. In that case, the applicant experienced pain in

his back upon standing to answer a telephone. Similarly, in Mason, the Court reversed an award of benefits, stating that "the record before us does not support the Commission's conclusion that an accident arose out of or in the course of defendant's employment," 606 P.2d at 240, where the applicant injured his back while unloading 100-pound bags from his truck. As discussed above, the Sabo Court held that "the Commission's conclusion that an accident occurred is without any substantive support in the record." 642 P.2d at 726. In that case, the applicant was merely picking up a box of clock radios in the usual way in the course of his employment.

To the extent causation is a factor in the decisions in these cases, the proposition they stand for was well stated in Kennecott Corporation v. Industrial Commission of Utah, 675 P.2d 1187, 1191 (Utah 1983):

The general rule concerning causation is that an employee cannot recover for a physiological malfunction which is not job-induced and which could have happened as easily away from work as at work.

In that case the Court affirmed the award of death benefits to an employee's widow based on the idiopathic fall doctrine, which has no application here. The Findings of Fact in this case expressly state that:

There is nothing to take her activity on that day out of the realm of what could be considered usual and normal activities . . . the same type

of injury could have just as easily occurred had she bent down to pick up a clothes basket or bag of groceries.

R. 90. The facts in this case clearly show that there was no unusual exertion or occurrence and that Plaintiff's malfunction would have just as easily happened away from work. Nor do the facts demand the conclusion that her malfunction was job-induced.

D. The Definition of Accident as Interpreted in Sabo is Supported by Strong Policy Considerations and Should Not be Discarded.

This case is so closely governed by existing precedent, that to reverse the Commission would require overturning Sabo and the other cases discussed above which require the showing of an identifiable accident under circumstances such as those present in this case. Plaintiff's brief appears to indirectly request this result since it argues that Utah is in the minority position on this issue. Aside from the obvious problems with stare decisis such a decision would incur, the present definition of accident serves significant policy goals which have been well articulated by the Court. In Mason, the Court stated:

It is also to be observed, that should the determination of the Commission be left to stand (i.e., award of benefits to applicant whose back was injured while unloading bags of whey), its practical effect would be to severely limit the employment prospects of those in the work-force who have existing physical limitations. Employers would simply be apt to refuse employment to those so afflicted rather than to



run the risk of having to bear the cost of compensation for non-accident oriented disabilities that may occur.

606 P.2d at 240; see also, Redman, 454 P.2d at 285.

To allow compensation in situations such as this where there is no preexisting injury and no identifiable accident would effectively change the impact of the Workmen's Compensation Statute. Its purpose has been to alter the common law tort rights between employers and employees for work-related injuries to permit the employee rapid, inexpensive recovery for them and to allow the employer to limit its total liability for such injuries. A broader definition of accident would effectively make employers insurers for all physiological malfunctions which happen to occur when the employee is at work. Redman, 454 P.2d at 285. While this may encourage people to work longer hours so that they may be covered if they develop a health problem while at work, it is more likely that the change will impose significant financial obligations on employers and cause discrimination against otherwise productive employees who have preexisting internal weaknesses.

The "leading case" that petitioner relies upon for reversal is Purity Biscuit Company v. Industrial Commission, 115 Utah 1, 201 P.2d 961 (1949). That case, however, has been repeatedly critized. In Redman, the Court stated that it

has been a nub of contention in legal circles, but in its 20 year lifespan it has not been overruled apodictically, nor given nourishment by an approbation. Purity enjoys a unique and doubtful distinction of being a living corpse.

454 P.2d at 286. Similarly, in Mellen v. Industrial Commission, 19 Utah 2d 373, 431 P.2d 798 (1967), the Court noted that it was "another 3 to 2 decision, which, decided in 1949, 18 years ago, in a long, difficult to understand opinion, which has never been cited by this Court or any other Court to support the law of that case. . . . The Purity Biscuit case certainly needs a healthy reappraisalment." Id. at 799-800.

While Purity may have seemed revived in Schmidt, 617 P.2d at 693, Schmidt, as discussed above, stands on its own and is distinguishable from this action. Purity has not been cited by this Court since Schmidt. To resuscitate Purity the Court would have to repudiate its modern line of cases, including Sabo, Tarango, Mason, and Thurman. Respondent urges that the Court retain some meaning in the term "accident" in cases such as this and not permit employees to recover based on the "mere coincidence that (plaintiff's) injury or malfunction occurred at work." Sabo, 642 P.2d at 726.

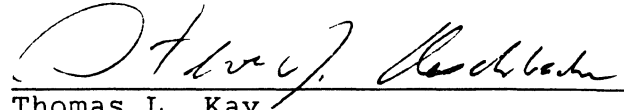
#### CONCLUSION

The Commission's finding of no accident in this case, where the Plaintiff's injury occurred while performing her ordinary tasks in her usual manner, in the absence of any preexisting problem, or any unusual stress or exertion, is not arbitrary or capricious. Clearly, reasonable minds would not be driven to the "one [inevitable] conclusion from the evidence" that

an accident occurred. Accordingly, defendants request this Court affirm the decision of the Industrial Commission.

Dated this 15<sup>th</sup> day of May, 1986.

RAY, QUINNEY & NEBEKER

A handwritten signature in cursive script, appearing to read "Thomas L. Kay", is written over a horizontal line.

Thomas L. Kay  
Steven J. Aeschbacher

Attorneys for Defendants-  
Respondents

SJA+6


CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of May, 1986, four (4) true and correct copies of the foregoing Brief of Respondents Sperry Corporation and Travelers Insurance Company were mailed, postage prepaid, to each of the following:

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## A D D E N D U M

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August 10, 1985

Mark V. Anderson, M.D.  
2020 West 2200 South  
Salt Lake City, Utah 84119

RE: G. Carmen Herrera  
Emp: Sperry Univac  
D/I: May 6, 1985

Dear Doctor Anderson:

Ms. Herrera, age 25, a test specialist for Sperry Corp. was seen at your request August 6 for neurosurgical evaluation with persistent symptoms three months following low back stress:

1. "My buttocks hurt.
2. Low back ache.
3. Upper back ache, headaches and I hurt all over."

History:

Ms. Herrera, who denies prior problems, states that on May 6, at work she was "lifting a computer unit that weighs about 25 lbs. and coming up after I picked it up felt a tingling and snap in my back". She was able to finish the day but the next day was sufficiently uncomfortable that she saw you, had X-rays and a CT scan and has been treated with physical therapy and anti-inflammatory medication. She reports an initial improvement which was slow and thereafter her condition stabilized with these persistent complaints:

Low back and buttocks - Her chief discomfort with a feeling of "bruised and pressure". More comfortable lying on her side with a pillow between her knees. Symptoms aggravated by walking, standing, bending over or sitting or walking up stairs. Sneezing hurts in the back.

Left hip - Painful.

Upper back - "Feels bruised".

Headaches - Indicates right side behind the eye and in the occiput with numbness and pain in the back of the neck.

These symptoms are fairly constant but she feels have "leveled off and/or may be worse". She attempted to return to work but was released, there being no duty not requiring lifting. She says she is depressed.

Mark V. Anderson, M.D.  
August 10, 1985

RE: G. Carmen Herrera

Your duplicates records are appreciated and noted. Included is a denial of industrial liability.

Past History:

Denies any medical problems or other significant trauma. Has had surgical reduction of a left hip dislocation and repair of ligamentous injury in the left knee and removal of a bone chip in the left foot. Familial background reviewed is negative. Inquiry by systems discloses no other problems. Patient has seasonal hayfever and becomes nauseated with Codeine.

Examination:

5'5", 137 lbs., a non-obese, healthy appearing, young woman in no evident physical distress.

Physical Examination: Posture and gait are normal and there is a good range of lumbar mobility. Skin is normal except for surgical scars, peripheral pulses and joints normal. Chest and abdomen WNL.

Neurologic Examination: Cranial nerves intact. Upper extremities symmetrically normal. In lower extremities strength and sensation are normal. Reflexes are sluggish but equal except that the left ankle jerk may be relatively diminished. Sciatic stretch sign is negative while straight leg elevation aggravates low back discomfort.

Supplemental Data and Comment:

X-rays, 5-10-85, were reviewed:

Lumbar spine - Normal.

CT - Normal. Dr. Brinton's report, however, indicates question of lumbosacral level on the right but in the absence of the loss of epidural fat or evident displacement of nerve root or dural sac, I think this is speculative.

I think there is a significant disparity between Ms. Herrera's complaints and any evidence clinically or by X-rays of any real pathology. At most I would feel she sustained a low back strain and I think the symptoms are probably functionally accentuated.

All I could recommend is continuing on a conservative basis with physical therapy, anti-inflammatory and muscle relaxant medication, simple analgesics and continued observation in the event more specific symptoms and/or some objective clinical changes appear. In that event I think a myelogram would be desirable for hard, objective evidence, before considering intervention.

RE: G. Carmen Herrera

If time suggests that the psychophysiologic factor is a large element, then appropriate consultation would be advisable.

Impression:

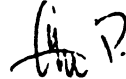
1. History of low back stress sustained incident to lifting 5-6-85 with:

- a. Persistent low back discomfort with radiation.
- b. Various subjective discomforts.
- c. Without objective clinical or X-ray evidence of specific pathology.

2. Probable psychophysiologic reaction.

Thanks for the opportunity of seeing Ms. Herrera.

Cordially,



Chester B. Powell, M.D.

CBP:cw

cc: The Travelers Insurance  
Utah Industrial Commission

D: 8-7-85  
T: 8-10-85