

1997

Lori Warner v. Industrial Commission of Utah, Merit Medical Systems, Inc., and Tig Insurance Co., : Brief of Petitioner

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Warner v. Industrial Commission of Utah*, No. 970335 (Utah Court of Appeals, 1997).
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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.**

970335-CA

IN THE COURT OF APPEALS, STATE OF UTAH

LORI WARNER,

Applicant/Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,
MERIT MEDICAL SYSTEMS, INC., and
TIG INSURANCE CO.,

Defendants/Respondents.

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Case: 970335-CA

Priority Classification 7

BRIEF OF PETITIONER LORI WARNER

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

The Honorable Barbara A. Elicerio
Administrative Law Judge

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FILED

COURT OF APPEALS

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BRIEF OF PETITIONER LORI WARNER

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court pursuant to former Utah Code Ann. Section 35-1-86 (1988) and current Utah Code Section 34A-1-303 (1997) as this is an appeal from a final Order of the Industrial Commission (now renamed the Labor Commission).

STATEMENT OF ISSUES ON APPEAL

1. Whether the Industrial Commission erroneously interpreted and applied the law relative to the higher legal standard of causation under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) in light of the facts of the Applicant's injury.

The standard of review is correction of error in erroneous interpretation or application of the law. Section 63-46b-16(4)(c), U.C.A. and King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993). There is no specific or implied grant of discretion to the Industrial

Commission in the interpretation of the law. See King, id.

2. Whether the Industrial Commission erroneously interpreted and applied the law relative to application of Section 35-1-77(2)(d), U.C.A. in rejecting the conclusions of the medical panel in favor of a medical report previously obtained by the insurance carrier.

The standard of review is correction of error in erroneous interpretation or application of the law. Section 63-46b-16(4)(c), U.C.A. and King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993). There is no specific or implied grant of discretion to the Industrial Commission in the interpretation of the law. See King, id.

DETERMINATIVE STATUTES AND RULES

We believe that Section 35-1-77(2)(d), U.C.A. is controlling on the second issue. This section states, in pertinent part:

(d) The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding.

STATEMENT OF THE CASE

Procedural History

Lori Warner filed an application for hearing with the Industrial Commission on June 22, 1994, seeking compensation and benefits for a low back injury that occurred at work. R. at 2. An amended application was filed with the Commission on August 22, 1995 in which Ms. Warner alleged a cumulative injury due to repetitive bending, twisting and lifting at work culminating in low back injury on March 24, 1995. R. at 31.

Ms. Warner's claim was heard before an Administrative Law Judge of the Industrial Commission on February 6, 1996. A medical panel appointed by the ALJ subsequently saw Ms. Warner and the panel issued a report following an examination by the panel of the applicant and her medical records and films. R. at 412-419. No timely objections were filed by either party to the medical panel report. The medical panel concluded that a causal relationship exists between Ms. Warner's work activities and her low back problems. She was given a 5% impairment rating for her low back condition with 4/5 due to pre-existing conditions and 1/5 due to her work activities. R. at 418.

The ALJ issued her Findings of Fact, Conclusions of Law and Order on September 13, 1996. R. at 425-439. In this order, the ALJ found and concluded that Ms. Warner had met her burden of legal and medical causation and appropriate benefits were awarded.

The Defendants filed a timely Motion for Review with the Industrial Commission on October 11, 1996 and the Petitioner responded on October 29, 1996. R. at 440-447 and 449 - 451. The Commissioners of the Industrial Commission issued the Order Granting Motion for Review on March 17, 1997. R. at 453-461. This order denied Ms. Warner's claim by concluding that her actions resulting in her injury did not meet the higher causational standard required by Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), regarding a person with a pre-existing back condition. Two of the three Commissioners also rejected the report of the medical panel and instead adopted the opinions of doctors who provided a report on Ms. Warner for the insurance carrier. Hence, the Commissioner concluded that medical causation was not met. R. at 457-458.

The Petitioner filed a timely Motion for Reconsideration on April 7, 1997. R. at 462-

465. An Order Extending Time for Reconsideration allowing the Industrial Commission until May 6, 1997 to issue a decision was entered on April 8, 1997. R. at 466-468. The Industrial Commission's Order Denying Request for Reconsideration was issued on May 2, 1997. R. at 469-473.

The Petitioner filed a Petition for Writ of Review with this Court on Monday June 2, 1997. R. at 477-478.

Factual History

1. Lori Warner worked full time for Merit Medical Systems, Inc. as a molding operator from January of 1995 up to March 23, 1995. Her job involved collecting and transporting plastic medical parts that were produced by a number of large molding machines assembled in a large room. R. at 453, 454. These machines operated 24 hours a day. Each machine would produce parts that dropped into five pound plastic bins or totes. She was responsible for collecting the output of three machines, and would also cover for co-workers when they were on breaks or at lunch. R. at 454 and 426-428.

2. Ms. Warner would empty the contents of the totes on a average of nine times per hour and carry them across the room to a weigh station where she would lift the tote onto the waist height scales to be weighed, and would then remove it from the scales and place it on the floor for others in QA, quality assurance, to process further. She would do this about 72 times in an 8 hour shift. The bins or totes weighed between 5 and 26 pounds depending upon the parts they contained and the quantity accumulated therein. Some bins which collected larger parts were located on the floor by their machine, others with smaller parts were located at about waist height on the machines. R. at 454 and 428.

3. Because she was afraid of receiving electric shocks from some machines, she stood as far away as possible from the machines, which required her to lean over to lift or pull the bins from the machines or the floor. R. at 454, 428.

4. Ms. Warner's job duties also included occasionally checking the size of the parts for quality control, and she would also vacuum and clean around the machines. She remained busy throughout her entire shift with no time to sit. R. at 454 and 428.

5. Ms. Warner awoke on March 24, 1995 with back pain that radiated into her right buttocks and leg. She also had difficulty walking. She initially went to Instacare for treatment and then went to Dr. J. Lynn Smith for care. After conservative care failed to alleviate her pain, Dr. Smith performed back surgery on June 6, 1995. R. at 454-455 and 429-431.

6. Prior to March 24, 1995, Ms. Warner was not having low back pain or difficulties. She had one prior back injury that had occurred about nine years previously when she slipped in the shower. She saw a doctor following the incident and within a few days had no more symptoms or problems. R. at 431.

7. Dr. Smith stated the opinion that although there was evidence of pre-existing conditions in the lower back, Ms. Warner's medical condition relative to her low back after March 24, 1995 was related to her bending and lifting activities at work over the course of her employment. R. at 381.

7. She was examined on or about January 22, 1996 by Dr. Gerald Moress and Dr. Wallace Hess at the request of the employer's insurance carrier. These doctors issued a report to the insurance carrier denying medical causation following this exam. They felt because

there was no pain prior to March 24, 1994 or single event at work that caused pain, and because of the pre-existing condition, that there was no relationship between the applicant's work and the low back problems that began on March 24, 1995. R. at 396-408.

SUMMARY OF ARGUMENT

The Industrial Commission erred in interpreting and applying the law of the Allen case under the circumstances of Ms. Warner's claim, especially in light of the holding in Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990). Under the facts adopted by the Industrial Commission, we must reach the conclusion that Ms. Warner's extensive lifting and bending activities at work resulted in a legally compensable injury.

The Industrial Commission also erred in its wholesale rejection of the uncontroverted report of the medical panel in favor of the report of the insurance carrier's reviewing doctors, which report had been reviewed by the medical panel in its assessment of the medical aspects of the claim. There was no new substantial conflicting evidence upon which to base such a rejection.

ARGUMENT

POINT I

The Industrial Commission Improperly Interpreted and Applied the Law Relative to the Higher Standard of Causation under Allen v. Industrial Commission

Upon the Respondents' Motion for Review, the Commissioners of the Industrial Commission reversed the order of the A.L.J. and ruled that Ms. Warner's accident was not compensable because she had not established both legal and medical causation. Their rationale regarding legal causation was that her actions did not meet the higher exertion standards

required by the Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) decision. The Commissioners overturned the conclusions of the A.L.J. that the Petitioner's exertions did indeed meet the higher standard. There was no substantial change between the facts found in the ALJ's Findings of Fact, Conclusions of Law, and Order and the facts used by the Commissioners in the Order Granting Motion for Review.

To meet the legal causation requirement, the Allen decision requires a claimant with a pre-existing condition to "show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition." Allen, 729 P.2d at 25.

This requirement helps to distinguish between injuries which

(a) coincidentally occur at work because a preexisting condition results in symptoms which appear during work 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.

Allen, id.

The Court in Allen recognized that the issue must be determined on the facts of each case. Allen at 25. The facts are not in dispute here.

We submit that the law was improperly applied to the facts of this case by the Commissioners. Their interpretation of Allen is incorrect and is also at odds with the decision reached in Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990).

In the Nyrehn case, the applicant was a stock room clerk who would sort and price merchandise located in tubs. The tubs weighed between fifteen and forty pounds, depending upon their contents. Ms. Nyrehn would lift and carry these tubs to and from the sorting area

about thirty to thirty-six times per day. She was also involved in constant bending and stooping in the sorting of the merchandise. She had been doing this job for about 2 ½ months before she began having low back pain.

This Court found that the work-related exertion which caused her injury exceeded, as stated in Allen, the "usual wear and tear and exertions of nonemployment life."

In the case before us it is unquestionable that two and a half months of lifting tubs of merchandise 30 to 36 times per day would cause unusual and extraordinary wear and tear on a body when compared with the "usual wear and tear and exertions of nonemployment life." Allen, 729 P.2d at 26. 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. We doubt that there are many physical activities outside of the work place where this type of effort is being repeated so often over such a significant period of time.

Nyrehn at 336.

The majority decision of the Industrial Commission compared Ms. Warner's exertions with examples of typical exertions of modern day life, as given in the Allen decision:

The lifting, carrying and standing that Ms. Warner did at Merit is not different from the exertions involved in changing a flat tire, doing laundry, moving garbage cans and recycling bins, lawn care, or caring for young children, to mention just a few everyday examples. R. at 456-457.

The Commission concluded that when the full range of all non-employment activities were considered, the frequency of her lifting was not unusual or extraordinary, and hence, legal causation was not met.

This is again at odds with the Nyrehn decision:

The Commission's finding that Nyrehn's work-related exertion was not an unusual exertion was comparable to a conclusion that the typical nonemployment activities of people in today's society includes lifting a full

garbage can 30 to 36 times per day each working day for two and a half months. Merely stating the comparison shows the fallacy of the Commission's finding. Nyrehn's back injury was not a coincidental injury which appeared at work without any enhancement from the work place. "[Her] employment contributed something substantial to increase the risk [she] already faced in everyday life because of [her] condition." Allen, 729 P.2d at 25. The Commission's conclusion that Nyrehn failed to prove legal causation was therefore not reasonable and rational.

Nyrehn at 336.

Lori Warner worked the same job at Merit Medical for over two months. She lifted tubs or totes containing medical parts weighing from 5 to 26 pounds. As found by the Commission, she did this about 9 times per hour, which amounts to 72 times per day. Merit's witness Terry Price verified under oath that the 26 pounds was an average; some weigh more, some less, but none weigh more than 40 pounds. R at 61.

Hence, in an 8 hour work day, Ms. Warner bent to lift a total of about 72 totes as she carried them from the machines located throughout the 9,000 square foot room where the operation was located, to a counter where she would lift them up to weigh them and then place them down again on the floor for subsequent inspection by QA workers. R. at 428, 454. She was continually busy during her shift. R. at 429.

This case involves substantially more lifting than was found in the Nyrehn case. The Industrial Commission has made the same errors in its analysis and application of the law as it did in the Nyrehn case. For the same reasons its conclusions are in error. This Court should conclude, as it did in Nyrehn, that the applicant did prove legal causation.

POINT II
The Industrial Commission Improperly Disregarded the
Conclusions of the Medical Panel

Utah law provides for use of a medical panel, appointed by the Industrial Commission, to which medical aspects of a case can be referred when significant medical issues are involved. Generally, significant medical issues are involved when there are conflicting medical reports on file in the case. Section 35-1-77(1)(a), U.C.A. (1994) and Utah Admin. Code R568-1-9 (1996).

Section 37-1-77(2)(d) of the Utah Code states:

The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding.

In this matter, the ALJ referred the medical aspects of the case to a medical panel consisting of Drs. Madison Thomas and A. Owen Smoot, both orthopedic surgeons. Included in the medical record that was considered by the panel were medical reports from Ms. Warner's treating physician and a report from doctors previously retained by the insurance carrier who, at the carrier's request, had examined Ms. Warner and her medical records, and given an opinion. The report of Ms. Warner's doctor and that of the insurance company's doctors differ on the conclusions about medical causation and provide the basis for the "significant medical issue" that resulted in the referral by the Commission to the medical panel.

Following the medical panel examination, the panel issued a report that was then circulated to the parties by the Industrial Commission. The parties were allowed 15 days

within which to submit objections to the medical panel report. No timely objections were made.

As a result of the examination of the applicant, as well as of her records and x-rays, the medical panel concluded that there is a "limited medically demonstrable causal connection between the applicant's low back problems and the work exposure from January through March of 1995." The panel noted the existence of pre-existing conditions in Ms. Warner's low back.

The panel found that the June 5, 1995 low back surgery was necessitated "to a limited extent" by the work exposure. It found that the medical care she received for her low back since March 24, 1995 was necessitated by her work exposure, again to a "limited extent". The panel stated in that regard that "other factors, such as embarrassment and apprehension contributed to her situation." R. at 418.

In discussing the surgery, the panel noted, " It is quite possible that the surgery may not have been needed at that time had there been more concern for the functional aspect of her reactions to her total circumstances." However, they did not conclude that it was unneeded or unrelated to the work activities in question. R. at 418.

Obviously, questions may be raised by the panel's use of "limited extent" in its answer to some of the questions posed by the ALJ. The Industrial Commission, however, did not ask the medical panel for clarification of what it meant by use of the phrase "limited extent". Nevertheless, the panel assigned 1% out of a 5% whole body impairment relative to the lower back for the industrial claim. That, in and of itself, is indicative of a limited relationship with 80% of the rating being pre-existing.

Two of the three Commissioners rejected the medical panel report in favor of adopting the insurance company's report. This latter report noted, as did the medical panel, the pre-existing conditions of fractured apophyseal rings and bulging lumbar disks. They also noted that Ms. Warner's pain did not begin at work. This is not contested, as Ms. Warner testified that she had the beginning of low back pain upon awakening one morning after a prior evening's work. They noted there was no single event at work that was associated with the pain. This is also not contested as this is exactly what the claim is about: back pain resulting from cumulative trauma over the two to two and a half month period that Ms. Warner was employed by Merit. However, it is evident from the report of these two doctors that there was no consideration of the weight lifted by Ms. Warner. They commented that there was no description of the work injury in any of the medical records they reviewed, and their report does not mention any lifting over 5 lbs. R. at 400. This is in sharp contrast to the testimony at the hearing and the resulting findings of the Commission that Ms. Warner was lifting tubs that weighed 26 lbs.

The Commissioners stated that the insurance doctors' opinion is persuasive because "it is supported by a thorough review of Ms. Warner's medical records, as well as physical examination of Ms. Warner." R. at 458.

However, the medical panel also had the benefit of an examination of Ms. Warner, as well as having her medical records and x-rays to examine. The panel also had the benefit of the insurance doctor's report and also the summary of testimony provided by the ALJ following an evidentiary hearing. The ALJ's findings discussed the weights involved, which the insurance company's doctors did not do. The insurance company's report was prepared

before the hearing.

The whole purpose of a medical panel is to provide an impartial examination of the worker and her medical records. Yet, here, the majority of the Commissioners rejected the medical panel's report likely because of the use of the word "limited", without even obtaining the benefit of a clarification from the panel as to what was meant by the use of that word.

Language contained in Commissioner Carlson's dissent to the Order on Motion for Review is important here:

This case epitomizes what is so difficult in these cases. It is such a close call that even the medical panel obviously struggled with the decision. And because it is so close, one must recognize that even the most conscientious in the medical community who are being hired by an insurance company (as is the case here) easily and almost automatically arrive at decisions that do not favor the claimant. That is precisely why the medical panel system is used. It is my understanding that the medical panel concept was created to avoid the possibility of representational bias as the panel is paid by the Commission through a statutorily described method. Certainly, that is the logic behind its continued use today. By rejecting the opinion of the Commission's own medical experts, I believe the majority stretches beyond its capability and knowledge to adequately judge this case and, in effect, ignores the fundamental purpose of the medical panel in arriving at its conclusion.

R. at 459-460

Section 35-1-77(2)(d) of the Utah Code, as noted above, indicates that the Industrial Commission is not bound by the medical panel's report "if other substantial conflicting evidence in the case supports a contrary finding." (Emphasis added). This language indicates that the discretion of the Industrial Commission is limited such that it may not reject the findings of a medical panel unless there is other substantial conflicting evidence in the case, be it medical evidence, or other factual evidence.

A common example of conflicting medical evidence that could overturn a medical panel

report is evidence that results from additional testing or from testimony given at a hearing on medical panel objections that is significant and conflicts with the medical panel's conclusions. Substantial conflicting nonmedical evidence to support a rejection or modification of a medical panel report could be in the form of witness testimony or physical evidence that bears upon the question of the occurrence of an industrial accident, or whether a worker was injured in the manner claimed.

There is no substantial conflicting evidence sufficient to upset a medical panel report, to which no objections have been filed, when there is nothing new added to the case medically or otherwise that has not already been considered. Here, the medical panel had the opportunity to review and consider the report of the insurance company's doctors. After reviewing all opinions and records, the panel concluded that the cumulative trauma at work was causally related, even if by a slim margin, to the low back problems.

Consider the problems that would be created by a policy that allowed a medical panel's report to be simply disregarded by the Industrial Commission, without even a hearing, in favor of a report of an insurance company doctor, or even an applicant's doctor, that was at odds with the medical panel, but that was considered by the panel in its deliberations. The value of a medical panel in our workers' compensation system would be minimized if not destroyed. The constitutionality of such a policy would be in serious question as well.

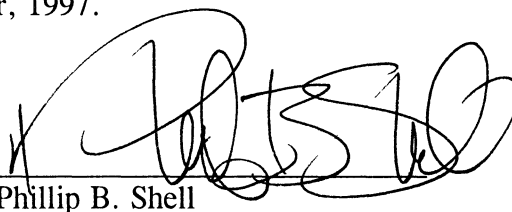
Certainly this may be a close case, but the Commission erred in overturning the decision of the ALJ by simply rejecting the medical panel report with no other evidence than what had otherwise been presented. There was no other significant conflicting evidence in this case upon which such an action could justifiably be based.

CONCLUSION

Ms. Warner has met her burden of establishing legal causation under the higher standard required by the Allen decision. The Industrial Commission did not properly apply the Allen decision to the facts of this case.

She has also met her burden of establishing medical causation based upon the report of the medical panel. The order of the Industrial Commission should be reversed because of its improper interpretation and application of the law and the initial award of the ALJ be reinstated.

Dated this 22 day of October, 1997.

A handwritten signature in black ink, appearing to read "P. B. Shell", written over a horizontal line.

Phillip B. Shell
Day Shell & Liljenquist, L.C.
Attorneys for Petitioner Lori Warner

Mailing Certificate

I hereby certify that two true and correct copies of the foregoing were mailed, first class, postage prepaid on this 22nd day of October, 1997, to each of the following counsel of record:

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Phillip B. Shell
Day Shell & Liljenquist, L.C.

ADDENDUM

1. Findings of Fact, Conclusions of Law and Order, dated September 13, 1996
2. Order Granting Motion for Review, dated March 17, 1997
3. Order Denying Motion for Reconsideration, dated May 2, 1997

INDUSTRIAL COMMISSION OF UTAH

Case No. 95555

LORI WARNER,	*	
	*	
	*	
Applicant,	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
MERIT MEDICAL SYSTEMS, INC./	*	AND ORDER
TIG INSURANCE,	*	
	*	
Defendants.	*	
	*	
* * * * *		

HEARING: Hearing Room 332, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah, on
February 6, 1996 at 10:00 o'clock a.m. Said
hearing was pursuant to Order and Notice of the
Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was represented by Phillip Shell,
Attorney.

The defendants were represented by Theodore Kanell,
Attorney.

This case involves a claim for temporary total compensation (TTC), medical expenses and permanent impairment benefits related to low back injury caused by cumulative trauma on the job. The defendants deny all liability in this case, based primarily on the lack of a medical causal connection between the applicant's work exposure and the back problems that she began having on March 24, 1995. The defendants also assert that any back injury she sustained is non-compensable, as she had a contributory pre-existing condition and was not injured as a result of any unusual exertion (as required for compensability, per the ruling in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986)). The applicant relies on the opinion of her treating physician, Dr. J. L. Smith, to support her contention that her back problems and need for surgery are related to repetitive bending, twisting and lifting in her job with Merit Medical Systems, Inc. She claims TTC from March 24, 1995 through September 21, 1995 (she returned to work on September 22, 1995), medical expenses and permanent impairment benefits (she has been rated by her own treating physician, Dr. J. L. Smith at 5% whole person and by the defendants' chosen

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physician, Dr. G. Moress, at 10% whole person). The defendants rely on the opinion of their chosen physician, Dr. G. Moress, to support their contention that there is no medical causal connection between the applicant's back problems and her work at Merit Medical Systems, Inc.

Because of the divergent medical opinions regarding the causal connection between the applicant's injury/condition and her work at Merit Medical, the ALJ determined that the matter should be referred to a medical panel for additional input on the causal controversy. The matter was referred to the medical panel on May 14, 1996. The medical panel report was received at the Commission on July 11, 1996, and was distributed to the parties on that same date, with 15 days allowed for the filing of objections. On July 25, 1996, the ALJ received comments from the applicant. On August 16, 1996, the ALJ received comments/argument from the defendants. The matter was considered ready for order as of July 26, 1996.

EVIDENCE PRESENTED:

The applicant is a female who was 35 years old on March 24, 1995, with no spouse nor minor children. She was employed with Merit Medical Systems, Inc. at that time, as a molding operator, working 40 hours per week, earning a wage of \$7.30/hour. The applicant began performing this job in January of 1995 and she worked swing shift, from 2:00 PM to 10:00 PM. The applicant's job consisted of servicing a number of large machines that manufactured plastic medical parts, such as syringe barrels, angioplasty barrels and "cock manifolds." The machines were quite large, measuring over 5 feet tall and over 10 feet long. A drawing of one of the machines was submitted at hearing and was marked as Exhibit A-1. A video was also shown at hearing in which several of the machines are seen. The applicant has argued that the drawing and the video do not show the full range of machines that she serviced and that some of the machines were quite different than the ones seen on the video. The defendants apparently feel that any difference in the machines serviced by the applicant is irrelevant to the nature of the applicant's work duties.

One of the applicant's main responsibilities was to empty a plastic tote that was positioned on the machine to catch the completed parts as the machine produced them. Apparently, the size of the totes is not in dispute. The applicant described the totes

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as being 2½ feet by 1½ feet by 1½ feet and she estimated that they weighed 5 pounds when empty. The weight of the totes when they were to be emptied and the number of totes that the applicant handled in an average shift are very much in dispute.

The applicant estimated that the totes weighed anywhere from 5 pounds to 35 pounds when she emptied them, with the average tote weighing around 25 pounds. Rex Teitgen, the molding manager at the time that the applicant was working for Merit Medical, testified that the heaviest tote, per a read-out of the scales where the totes were weighed, was 26 pounds. Therefore, it is the defendants position that the average tote weighed considerably less than 25 pounds. There was quite a bit of confusion regarding in the testimony regarding how many totes needed to be emptied per hour. The number of totes to be handled was dependent upon a number of variables. First, this depended on how many machines a worker was handling at any given time. The machines were located in a very large room and there were 5 to 8 workers working together in the room at one time. Apparently, most workers were responsible for just 3 machines at a time. However, when a worker needed to go on break or lunch, the other workers filled in and took care of the machines assigned to the absent worker. The defendants acknowledged that this occurred, but it is unclear if the defense witnesses took this into consideration in estimating how often a worker would be emptying a tote. The applicant estimated that she emptied 3 totes per hour off each machine for which she was responsible (at least 9 totes total per hour). However, she stated that this was when the machines were set to produce at a maximum rate, which was not all the time. Rex Teitgen, the molding manager, estimated that a worker would be emptying just 4 totes per hour total.

Per the video, the totes were emptied by sliding the tote out from the machine and walking several feet over to a table where the contents of the tote were either poured into a plastic bag (if the parts were quite small) or were lifted out by the handful and placed into another larger tote (if the parts were somewhat larger). Although Rex Teitgen testified that all the totes were located in the same place on all the machines (waist height or just below), the applicant testified that on some of the machines, the tote was located on the floor, requiring the worker to bend over to pick up the tote so it could be emptied. The applicant stated that the machines that had the totes on the floor manufactured the larger heavier parts. In addition, the applicant stated that she would get an electrical shock from some of the machines as she

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emptied the totes, if any part of her body touched the machine as she did so. In order to avoid this shock, the applicant stated that she would stand as far away from the machine as she could and then would lean and reach over to pull the tote out. Rex Teitgen testified that no one ever reported to him that they were shocked by any of the machines.

In addition to emptying the totes on the machines, the workers were required to periodically take a tote or bag of completed parts over to a table where the parts were weighed by the worker and measured. Once again, there was considerable disparity between the testimony of the applicant and the defense witnesses on what was required for this task. The applicant referred to carrying the totes across the large room to a weighing table. Then she stated she needed to lift the tote full of parts to head height in order to get it on the scale. She stated that she then lifted the tote off the scale and carried it over to the quality assurance (QA) inspectors. About once per hour, the applicant stated she also had to spend some time standing at a table checking dimensions on the manufactured parts. She used calipers and pin gauges to do this. She stated that she was allowed to sit or stand, but felt that the supervisors preferred the workers to stand so they could quickly get back to service a machine, if necessary. The applicant estimated that the measuring took about 20 minutes, during which the machines would continue to produce parts. The applicant stated that the machine totes could get quite full while she was away doing the measuring and this resulted in heavier totes. Rex Teitgen, the molding manager, stated that he felt the measuring would take only 10-12 minutes, but admitted that this was based on all workers being present without consideration of need to fill in for a worker on lunch or breaks.

The video shows that the large totes into which the parts were dumped were located on wheeled carts. Rex Teitgen stated that there was no need to carry these totes over to the scale. He indicated that they could be wheeled over to the scale on the cart. However, the applicant stated that the video shows the current set-up at Merit Medical and that this set-up is not the same as it was when she worked there. She stated that initially there were no wheeled carts on which to move the totes and they had to be carried over to the scale. In addition, she stated that when the carts were obtained, there was not a cart assigned to each machine and therefore a cart was not always available for transporting the larger totes to the scale. Teitgen testified that he felt that even though there was only 3 wheeled carts during early 1995, that

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a cart would always be available for the workers to transport the totes. He stated that he never personally saw a worker carrying a tote over to the scale, but he could not say that it never happened.

The applicant testified that she needed to move quickly and continually in order to service 3 machines and that there was no time when she was just standing or sitting. In addition to servicing the machines, the applicant stated that she periodically needed to vacuum the floors at the end of the shift to pick up any fallen parts. The applicant also testified that she felt the video was not necessarily representative of her work duties, for the reasons already noted, and because she stated that the video showed the day shift, whereas she worked swing shift. Unfortunately, it was not clear to the ALJ what specifically was different about the two shifts.

On March 23, 1995, the applicant was working her normal shift, but went home early that day. She left early due to a headache that was related to a dental problem. The applicant testified that the next morning, on March 24, 1995, she awoke with low back pain radiating to her right buttocks and down past her knee. The applicant stated that she had difficulty walking at that time, as well. She stated that she could not recall anything unusual about her work duties in the weeks just preceding March 24, 1995. The applicant went to the Holladay Instacare on March 24, 1995 with complaints of back pain and pain walking noted at the clinic. The record for that visit is handwritten and very illegible. The applicant testified that she was given a prescription for muscle relaxants. She rested the rest of that day and the next and was scheduled to work March 26, 1995. She stated she called in to work on that day and indicated that she would not be there due to problems she was having walking.

The follow-up she got after going to Instacare is somewhat unclear. The medical record exhibit, Exhibit D-1, does not show any follow-up at Instacare. There is a March 28, 1995 report of a CT scan of the lumbar spine, with the referring physician being Dr. Clark Newhall. It is unclear how the applicant got referred for this scan and what involvement Dr. Newhall had in the applicant's care. The CT scan was read as follows:

1. Degenerative disc changes L5-S1 with Grade I-II central disc bulge and associated irregular calcification possibly representing old ring apophyseal avulsion. No significant neural element compromise.
2. Grade I diffuse bulge L4-5 with associated suspected small Grade I-II superiorly extruded herniated fragment. There is also irregularity of the posterior ring apophysis suggesting old trauma to this apophysis as well.
3. Otherwise unremarkable CT of the lumbar spine.

The applicant testified that Cottonwood Hospital referred her to Dr. J. L. Smith. Dr. Smith saw the applicant for the first time on April 7, 1995 and he noted that she had injured her back on March 24, 1995 and had pain and difficulty in the buttocks since that time. He read X-rays to show degeneration at L5-S1 (grade I-II) and some at L4-5 with a possible extruded fragment. He prescribed anti-inflammatories and exercise and noted that if the applicant did not improve he "might have to go after the extruded fragment." When Dr. Smith saw the applicant again on April 13, 1995, he noted that the applicant was worse and that an attempt to return to work was unsuccessful. He took the applicant off work, referred her for physical therapy and noted that he planned to schedule surgery, if she was still symptomatic by May 2, 1995.

The applicant was seen at Southwest Emergency on April 14, 1995 with complaints of back pain that had begun on March 24, 1995. It was noted that the pain was in the low back and hips, with the right buttocks pain resolved. No numbness or tingling was reported. The report notes that the applicant originally had thought that her symptoms were flu related. Also noted was the fact that her job involved alot of bending, but not lifting of more than 20 pounds. An acute lumbar strain was diagnosed and the applicant was referred back to Dr. Smith for follow-up. The attending physician noted that he was not sure if her problem was work related. When Dr. Smith saw her again on May 2, 1995, he noted that the applicant was no better and that physical therapy had not helped. He noted that the applicant had low back pain radiating down her leg that she was unable stand anymore. He noted

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that he informed the applicant that surgery offered a 50-70% chance of helping her. It was decided that he would go forward with a discectomy.

The applicant was at Cottonwood Hospital from June 5, 1995 through June 7, 1995 for the surgery. The records for the visit and surgery are somewhat confusing. The history and physical examination report notes that the applicant had a history of right leg pain only for 3 months. The diagnosis is listed as herniated disc at L4-5 and encroachment on L5-S1. Although the procedure on the operative report is listed as: discectomy L4-5 and right exploration L5-S1, the actual report suggests that an L5-S1 discectomy was the only procedure performed. After the surgery, the applicant followed-up with Dr. Smith. The applicant stated that the surgery did help in that she was able to walk afterwards and could not prior to the surgery. However, she stated that she still had low back pain and buttocks pain, as of the date of the hearing, and she stated she was still taking medication and seeing Dr. Smith, as of that time.

Dr. Smith completed a Summary of Medical Record form dated June 22, 1995. On that form he notes an affirmative answer to the question regarding a causal connection between the work injury and the treatment offered (the reference to a March 24, 1997 is apparently a mistake). He notes future treatment as physical therapy and the permanent impairment rating as unknown. Dr. Smith also wrote a letter to-whom-it-may-concern dated August 10, 1995. In that letter, Dr. Smith notes an August 1986 slip in the shower, but notes that the applicant had no back pain after that until March 24, 1995. The one record with respect to the 1986 shower incident is an FHP urgent care visit note. It indicates that the applicant slipped in the shower and tried to catch herself, but did not fall. It notes extreme low back pain, with an injection and prescription medication offered as treatment. The applicant stated that this resolved in one or two days. Dr. Smith's August 10, 1995 letter goes on to note that the applicant told him that her pain was brought on by her work, where she did repetitive lifting and bending type motions. In this letter, Dr. Smith notes that the applicant had an extruded fragment at L4-5, for which he did a discectomy and exploration of L5-S1. In a letter dated January 4, 1996, Dr. Smith notes that the applicant had reached maximum medical improvement and had a 5% whole person rating.

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The applicant was seen by Dr. G. Moress and Dr. W. Hess on January 22, 1996 at the request of the defendants. The report for that examination notes that the applicant complained of pain of 6/10 at the time of the visit, the same level as pre-surgery. Buttocks aching and leg tingling were also noted as complaints. The report states that the doctors read the CT scan to show a small disc bulge at L4-5 and possibly one at L5-S1, without any compromise of the neural structures. The fracture of the apophyseal ring seen on the CT was developmental in origin per Dr. Moress and Dr. Hess. Dr. Moress and Hess note that it was unclear to them which level of the applicant's spine Dr. Smith operated on and what exactly he did in the operation. Dr. Moress and Hess include in their diagnostic impression a diagnosis of pain disorder characterized by psychological factors. The doctors note that the applicant's examination was replete with inappropriate credibility tests. Because the applicant's pain began away from the work place, the doctors conclude that it was difficult to assign the applicant's work as the cause of her back injury/condition. The doctors rated the applicant at 10% whole person, all of which they found to be unrelated to the applicant's work.

PRELIMINARY FACT CONCLUSIONS:

With respect to factual conclusions regarding the specifics of the applicant's work duties, the ALJ will need to simply offer ranges in the weights and number of repetitions involved. The testimony was rather divergent and there were no obvious credibility problems, so that the ALJ must conclude that the two witnesses (the applicant and Teitgen) just honestly estimate differently. With respect to the average weight of the totes, the ALJ finds that they weighed anywhere from 5-20 pounds generally, with some occasionally weighing up to 26 pounds. The applicant herself apparently told the Southwest Emergency personnel that she did not lift in excess of 20 pounds and thus the ALJ finds the applicant's hearing testimony of an average of 25 pounds to be somewhat of a high estimate. With respect to the number of times the applicant had to empty a machine tote, the ALJ accepts the applicant's testimony of at least 9 times per hour, as the ALJ believes that Teitgen's testimony did not account for times when the applicant may have been operating more than just her 3 assigned machines. The ALJ also accepts the applicant's testimony that she did carry totes to the scale, rather than pushing them on a cart, as the carts were either totally unavailable or only occasionally available for her use. The ALJ finds that the video gives only a

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very general idea of the applicant's work site and work duties, and should not be accepted as an exact representation of the work the applicant performed.

THE MEDICAL PANEL REPORT:

In addition to her back symptoms, the panel report notes that the applicant currently has irritable bowel syndrome and currently takes medication (doxepin) for stress management. The panel notes that the applicant feels that she has emotional problems. The panel notes that the applicant's pain diagram shows symptoms in all 4 limbs and over most of the spine/back. The panel also notes that the applicant acknowledged a long history of depression (with past treatment). With respect to the back, the panel noted that the applicant did have prior X-ray evidence of "changes." Even so, the panel concluded that there was a "limited" medical causal connection between the applicant's low back problems and her work exposure from January 1995 through March 1995. The panel specified this limited connection to be a work aggravation of her prior impaired condition, occurring in a "setting of psychologic overlay." However, the panel found that the applicant's gastro-intestinal problems and her depressive symptoms were long-standing and were not caused by her work exposure. Low back treatment after March 24, 1995 was found to be necessitated by the work exposure, including the June 5, 1995 surgery. With respect to the surgery, the panel did comment as follows:

It is quite possible that the surgery may not have been needed at that time had there been more concern for the functional aspect of her reaction to her total circumstances.

The panel rated the applicant's low back condition at 5% whole person, attributing 1% whole person to the applicant's early 1995 work exposure and 4% whole person to pre-existing conditions. The panel also found that the applicant medically stabilized about 3 months after the June 5, 1995 surgery.

OBJECTIONS/COMMENTS FROM THE PARTIES:

The comments filed by the applicant include a hand-written letter noting a list of additional facts, and some correction of panel facts, mostly in reference to symptoms, activity and work

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dating after the applicant's work exposure at Merit Medical. The list also includes some refinements on the testing and symptoms that occurred at the time that the applicant was seen at Southwest Emergency. There is no argument submitted with this listing, and in fact, the applicant's attorney included a cover letter with the listing, noting that the applicant understood that her comments did not necessarily raise any medical or legal issue sufficient to controvert the panel's report.

The comments filed by the defendants note that the defendants did not file objections to the medical panel report, because the report seemed to indicate that Merit Medical should not be responsible for payment of the surgery. The comments also note that the defendants object to any claim for bladder problems. With respect to the overall panel report, the defendants make an unclear argument that there "may be a serious question as to the viability of the medical panel report" and an insufficient "level of degree of medical certainty" on the medical causal conclusion, due to the applicant's "attacks upon the medical panel report." In closing, the defendants note that they were reasserting the legal causation argument (i.e. no unusual exertion) earilier made.

CONCLUSIONS OF LAW:

Medical Cause:

The ALJ adopts the medical panel report to resolve the medical causal issues in this case. The ALJ does so because the panel report is the most soundly based medical opinion that clearly addresses all the medical questions relevant to the applicant's entitlement to benefits. In addition, the ALJ finds that there have been no real objections to the panel findings and conclusions. The defendants make an effort at stating some objection to the panel findings on causation, but their argument in this regard is difficult for the ALJ to understand and appears to relate back to the applicant's comments, which are not really objections either. As the ALJ can find no clearly explained objections to the panel's conclusions, the ALJ finds that there are no real objections to the report. As such, the ALJ adopts the panel findings.

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Although the panel commented on the interplay between the applicant's "functional" or psychological concerns and her back injury, the panel did not go so far as to make any conclusions that the applicant's back problems were solely functional. Instead, the panel clearly states that it found the back treatment necessitated by the applicant's work exposure at Merit Medical in early 1995. In conjunction with this, and consistent with this, the panel specifically found that the back surgery was necessitated by the work exposure. The panel stated this in very clear terms on page seven of the report, under item number eight. Therefore, the ALJ does not understand how the defendants read the report to indicate otherwise. The panel did merely comment that, had the functional concerns been investigated more closely, it may have been determined that the surgery was unnecessary. However, the panel is clear in their conclusion regarding the medical causal connection between the work exposure and the surgery and makes the above-noted comment only as a suggestion as to a different result that could have happened, but did not.

Based on the above-explained interpretation of the medical panel report and the above-explained reasons for adopting that report, the ALJ adopts the panel conclusion that the applicant's work exposure at Merit Medical medically caused her subsequent back treatment and surgery. Consistently, the ALJ also adopts the panel finding that the applicant has a 1% whole person permanent impairment to her low back as a result of the work exposure.

Legal Cause:

In adopting the medical panel conclusions, the ALJ also adopts the panel conclusion that the applicant had a contributory pre-existing low back impairment (rated at 4% whole person). As a result, per the Allen case cited at that beginning of this order, in order for the applicant's back injury to be compensable, the injury must have occurred as a result of exertion greater than what is experienced away from work by the average late-20th century individual. Although the ALJ finds the ruling in Allen quite logical and certainly preferable to the jumble of conflicting opinions that existed prior to its issuance, the ALJ still has considerable difficulty in applying the "unusual exertion" standard to certain facts, especially in cases such as this, where there is no obvious unusual strain (like lifting 100 pounds or doing something rapidly over and over many times). Depending on who you

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pick to be the "average" person, the applicant's lifting/carrying of 5 to 20 pounds, 9 times per hour, may be more exertive or less exertive than the average person's non-employment activities. However, the ALJ finds that some consideration must be given to how the lifting/carrying occurred.

In this case, the ALJ found that the applicant stood far away from the machines, and reached over with her arms outstretched, to remove the totes from the machines. The ALJ found that she did this in order to avoid a potential electrical shock that she felt might occur if she stood too closely to the machine. Regardless of whether or not these electrical shocks were reality, the applicant testified, and the ALJ accepted, that she had great concern regarding this potential shocking. The exaggerated posture would seem to the ALJ to cause her activity to be more strenuous than had she stood close to the machine, and lifted the totes or bins keeping them close to her body, as she did so. Taking this into consideration, and without any real guidelines to use in determining what "average" people do in their non-employment lives, the ALJ concludes that the lifting of the 5-20 pound totes in this exaggerated manner, nine times per hour, is slightly more exertive than what the average person does in their everyday non-employment lives. As such, the ALJ concludes that legal causation is established.

BENEFITS DUE:

Medical and legal causation established, the ALJ finds that the applicant sustained a compensable industrial injury as a result of her work activities at Merit Medical in early 1995. The applicant's compensation rate is figured as follows: $\$7.30/\text{hour} \times 40 \text{ hours/week} = \$292.00/\text{week} \times .667 = \194.76 or $\$195.00/\text{week}$, when rounded off as required by U.C.A. 35-1-75. Based on the conclusions of the medical panel, the applicant is due temporary total compensation (TTC) for the period of medical instability, apparently from March 24, 1995 through September 5, 1995 (3 months after the June 5, 1995 surgery). That period is 23 weeks and 5 days, or 23.714 weeks. The TTC award is thus $\$195.00/\text{week} \times 23.714 \text{ weeks}$, or a total of $\$4,624.23$. Permanent impairment benefits are based on the 1% whole person rating offered by the panel. This would entitle the applicant to an additional 3.12 weeks (312 weeks for the whole person $\times .01$) of benefits or $\$608.40$ ($\$195.00/\text{week} \times 3.12 \text{ weeks}$). The applicant's total award is thus $\$5,232.63$ ($\$4,624.23 \text{ TTC} + \608.40 PPI). Attorney fees, per R568-1-7, are $\$1,046.53$ ($\$5,232.63 \times .20$).

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ORDER:

IT IS THEREFORE ORDERED that the defendants, Merit Medical Systems, Inc./TIG Insurance, pay the applicant, Lori Warner, temporary total compensation, at the rate of \$195.00 per week, for 23.714 weeks, or a total of \$4,624.23, for the period of medical instability related to the early 1995 back injury, from March 24, 1995 to September 5, 1995. That amount is accrued and due and payable in a lump sum, plus interest at 8% per annum, per U.C.A. 35-1-78, and less the attorney fees to be awarded below.

IT IS FURTHER ORDERED that the defendants, Merit Medical Systems, Inc./TIG Insurance, pay all medical expenses incurred as the result of the early 1995 back injury, as outlined in the order above; said expenses to be paid in accordance with the medical and surgical fee schedule of the Industrial Commission of Utah.

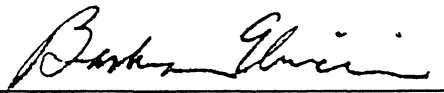
IT IS FURTHER ORDERED that the defendants, Merit Medical Systems, Inc./TIG Insurance, pay the applicant, Lori Warner, permanent impairment benefits, at the rate of \$195.00 per week, for 3.12 weeks, or a total of \$608.40, for the 1% whole person permanent impairment resulting from the early 1995 back injury. That amount is accrued and due and payable in a lump sum, plus interest at 8% per annum, per U.C.A. 35-1-78.

IT IS FURTHER ORDERED that the defendants, Merit Medical Systems, Inc./TIG Insurance, pay Phillip Shell, attorney for the applicant, the sum of \$1,046.53, plus 20.% of the interest on the award, per R568-1-7, for services rendered in this matter, the same to be deducted from the aforesaid award to the applicant, and to be remitted directly to the office of Phillip Shell.

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IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be received in the offices of the Commission within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless received by the Commission within thirty (30) days of the date hereof, this Order shall be final and not subject to review or appeal. If a Motion for Review is received by the Commission within thirty (30) days of the date hereof, any response of the opposing party shall be filed within fifteen (15) days of the date of the receipt of the Motion for Review by the Commission in accordance with U.C.A. Section 63-46b-12.

DATED this 13th day of September, 1996.



Barbara Elicerio
Administrative Law Judge

THE INDUSTRIAL COMMISSION OF UTAH

LORI WARNER,

Applicant,

v.

MERIT MEDICAL SYSTEMS, INC.

and TIG INSURANCE COMPANY,

Defendants.

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ORDER GRANTING
MOTION FOR REVIEW

Case No. 95-0555

Merit Medical Systems, Inc. and its workers' compensation insurance carrier, TIG Insurance Company (referred to jointly as "Merit" hereafter), ask The Industrial Commission of Utah to review the Administrative Law Judge's award of benefits to Lori Warner under the Utah Workers' Compensation Act.

The Industrial Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53, and Utah Admin. Code R568-1-4.M.

ISSUE PRESENTED

Was Ms. Warner's work at Merit both the legal cause and the medical cause of the injury for which she now seeks workers' compensation benefits?

FINDINGS OF FACT

Ms. Warner seeks temporary total disability compensation, permanent partial disability compensation and medical expenses for a back injury allegedly caused by her work at Merit. Specifically, she contends that cumulative trauma from her work resulted in pain beginning March 24, 1995, which necessitated surgery in June 1995 to remove the disc at the L5-S1 level of her spine.

Ms. Warner began employment at Merit during January 1995, as a molding operator. She worked the swing shift five days a week, 8 hours a day, servicing machines that produced plastic parts for medical devices. As the machines produced the parts, they fell

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into bins with dimensions of 35" x 18" x 18". Ms. Warner would remove the bins from the machines and carry them several feet to a table where she emptied the bins into larger containers.

On average, Ms. Warner emptied 9 bins an hour. On some machines the bins were at waist level, while on other machines the bins were on the floor. The bins weighed between 5 and 26 pounds depending on how much product they contained. The heavier hoppers tended to be at floor level. Because she was afraid of receiving electrical shocks from the machines, Ms. Warner stood as far as possible from them, which required her to lean over to pull the bins from the machines.

Also as part of her duties, Ms. Warner periodically carried a bin across the manufacturing room to a set of scales that were at the height of her head. Additionally, she periodically checked the dimensions of various parts by placing them on a table and measuring them with calibers and gauges. She also vacuumed and cleaned around her machines.

Ms. Warner has not identified any unusual work activity or any pain related to her work prior to March 24, 1995. On March 23, 1995, she left work early with a headache caused by dental problems. The next morning, she awoke with back pain and found it difficult to walk. She sought medical attention at an Instacare clinic and was given a prescription for a muscle relaxant. She did not report to work as scheduled on March 25, 1995 due to her back pain. Then, on March 28, 1995, she underwent a CT scan and was diagnosed with 1) degenerative disc changes at the L5-S1 level of her spine; 2) a bulging disc with possible herniated fragments at the L4-5 level; and 3) evidence of old trauma at both sites.

On April 7, 1995, Ms. Warner was examined by Dr. Smith and again diagnosed with degeneration at the L5-S1 and L4-5 levels, with possible extruded fragments. Dr. Smith prescribed conservative treatment, but after such conservative therapy failed to alleviate Ms. Warner's pain, he performed a discectomy at the L5-S1 level.

After surgery, Ms. Warner experienced some relief from her back pain. Her recovery was uneventful and she was placed on

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physical therapy for several months. She returned to work for a time, but eventually stopped work due to continuing back pain.

Dr. Smith has expressed a very brief, conclusionary opinion that Ms. Warner's work at Merit was a cause of her back pain and ensuing surgery. Merit then employed Dr. Moress, a neurologist, and Dr. Hess, an orthopedist, to examine Ms. Warner and review her medical records. Based on this evaluation, the doctors noted that Ms. Warner's back pain did not occur at work and that she could not recall any specific work event that might have triggered the pain. They concluded that she suffered from "fractured apophyseal rings" at the L4-5 and L5-S1 levels with associated bulging discs, but that such conditions were developmental in nature and not related to her work at Merit.

In light of the difference of opinion between Dr. Smith on one hand and Dr. Hess and Dr. Moress on the other, the ALJ appointed a medical panel consisting of Dr. Smoot, an orthopedist, and Dr. Thomas, a neurologist, to evaluate the medical aspects of Ms. Warner's claim. The panel examined Ms. Warner and reviewed her medical records, then submitted a report finding a "limited" causal connection between her work and her back problems. The panel did not explain what it meant by a "limited" causal connection, but did point out that Ms. Warner's x-rays showed preexisting back problems resulting from "old changes". The medical panel concluded that Ms. Warner had a 5% whole person impairment due to her low back problems, but that only 1% was attributable to her work at Merit. The panel attributed the remaining 4% impairment to her pre-existing problems. Finally, the panel concluded that Ms. Warner's medical care and surgery was necessary to care for her work related injury "to a limited extent." The medical panel commented:

It is quite possible that the surgery may not have been needed at that time had there been more concern for the functional aspect of her reaction to her total circumstances.

DISCUSSION AND CONCLUSIONS OF LAW

The Utah Workers' Compensation Act requires employers and their workers' compensation insurance carriers to provide disability compensation and medical care to employees injured by accidents "arising out of and in the course of their employment." In order to qualify for such benefits, an injured worker must establish by a preponderance of evidence that 1) the employee's work is the legal cause of the injury for which benefits are sought; and 2) the employee's work is the medical cause of the injury. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

Because Merit contends that Ms. Warner's work at Merit was neither the legal cause nor the medical cause of her injuries, the Industrial Commission will consider both issues.

I. LEGAL CAUSATION:

In order to obtain benefits under Utah's Workers' Compensation Act, a worker with a preexisting medical condition must prove that his or her work is the legal cause of the injury for which benefits are claimed. This requirement of legal causation is met when the worker shows an unusual or extraordinary exertion at work that exceeds the exertions experienced by a typical individual in everyday nonemployment life. Allen at 25.

The evidence in this case establishes that Ms. Warner suffers from a preexisting low back condition related to the injury for which she now seeks workers' compensation benefits. She must, therefore, show some unusual or extraordinary exertion arising from her work at Merit. In other words, she must prove that her employment contributed something substantial to increase the risk she already faced because of her preexisting condition.

The Industrial Commission has carefully considered the demands of Ms. Warner's work at Merit, as well as the manner in which Ms. Warner performed those duties, and concludes that her work exertions were not unusual or extraordinary when compared to the typical exertions of modern day life. The lifting, carrying and standing that Ms. Warner did at Merit is not different from the exertions involved in changing a flat tire, doing laundry, moving garbage cans and recycling bins, lawn care, or caring for

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young children, to mention just a few everyday activities. The Industrial Commission recognizes that Ms. Warner's work required her to carry as many as 9 bins an hour, but the bins were not heavy and usually were not carried very far. When the full range of all non-employment activities are considered, even the frequency of Ms. Warner's lifting and carrying at work is not unusual or extraordinary. The Industrial Commission therefore finds that Ms. Warner's work at Merit is not the legal cause of her injury.

II. MEDICAL CAUSATION:

In order to establish medical causation, an injured worker must establish a medically demonstrable causal link between the stress, strain or exertion of the worker's employment and the worker's injuries. Allen at 27. In considering whether Ms. Warner has established such a link between her work at Merit and her injuries, the Industrial Commission looks primarily to the opinions of the medical experts who are familiar with Ms. Warner's medical history and her current complaints.

Dr. Smith, who performed surgery on Ms. Warner's back, has reported that her back injury is work related. In making this assessment, Dr. Smith apparently relies on Ms. Warner's representation to him that her back pain was "brought on" by her work. This statement is contrary to the fact that Ms. Warner did not experience back pain at work, but rather, began to suffer back pain when she awoke in the morning, after she had been away from work for most of a day.

Dr. Moress and Dr. Hess, the specialists who examined Ms. Warner on behalf of Merit, have stated their unequivocal opinion that Ms. Warner's current low back problems are not caused by her work, but are entirely the result of preexisting conditions. This opinion is persuasive because it is supported by a thorough review of Ms. Warner's medical records, as well as physical examination of Ms. Warner. The doctors' opinion also appears consistent with circumstances surrounding the onset of Ms. Warner's low back problems during March 1995.

The final opinion regarding medical causation is that of the medical panel appointed by the ALJ. As did Dr. Moress and Dr. Hess, the medical panel thoroughly reviewed Ms. Warner's medical

ORDER GRANTING MOTION FOR REVIEW

LORI WARNER

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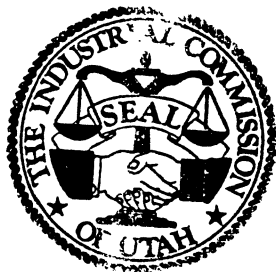
records and examined Ms. Warner. However, on the issue of medical causation, the panel was unusually equivocal when it concluded there was "a *limited* medically demonstrable causal connection" between Ms. Warner's work and her low back pain. The panel did not explain what it meant by a "limited" causal connection, but the panel specifically noted that Ms. Warner's x-rays showed pre-existing injuries. On the question of whether Ms. Warner's surgery had been necessary to treat a work related injury, the medical panel was even more ambiguous.

In considering the probative value of the three medical opinions cited above, the Industrial Commission gives least weight to Dr. Smith's statements because they lack detail and foundation. The Industrial Commission finds the medical panel's report somewhat unpersuasive because of its ambiguous and equivocating answers. In contrast, the report of Dr. Moress and Dr. Hess is well reasoned and consistent with the circumstances under which Ms. Warner began to experience low back pain. The Industrial Commission therefore accepts the opinion of Dr. Moress and Dr. Hess that there is no medical causal connection between Ms. Warner's work at Merit and her low back injury.

ORDER

The Industrial Commission concludes that Ms. Warner has failed to establish that her work at Merit is the legal and medical cause of the low back injury for which she seeks workers' compensation benefits. The Industrial Commission therefore grants Merit's motion for review, sets aside the ALJ's order, and dismisses Ms. Warner's application for benefits. It is so ordered.

Dated this 17th day of March , 1997.



A handwritten signature in cursive script, reading "R. Lee Ellertson".

R. Lee Ellertson
Chairman

A handwritten signature in cursive script, reading "Colleen S. Colton".

Colleen S. Colton
Commissioner

ORDER GRANTING MOTION FOR REVIEW

LORI WARNER

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DISSENT:

The Commission, through its Administrative Law Judges, utilizes medical panels on a continuing basis. The Commission routinely remands those cases decided by ALJ's without the use of medical panels if the Commission finds that medical issues, opinions, or expenses need to be resolved by a medical panel as delineated in administrative rule R568-1-9. This instant case involves the use of a medical panel to assist the Commission in resolving the differing medical opinions raised by the treating physician and reviewing medical doctors paid by the insurance company.

The majority doesn't accept the response from the medical panel report wherein it states "There is a limited medically demonstrable causal connection...." (page 6). My colleagues have decided that the medical panel's conclusion was "unusually equivocal" through the panel's use of the word "limited". The majority also gives little weight to the treating physician's opinion that there is a "medically demonstrative causal relationship between the industrial accident and the problems [he has] been treating". The majority apparently feels that the treating physician merely automatically accepted what Ms. Warner told him regarding the pain and its source and, therefore, his response in "To Whom It May Concern" and in the Summary of Medical Record (form 113) simply restates his lack of knowledge, even though he surely had the most fundamental and intimate understanding of the claimant's problem as he was also the surgeon as well as the treating physician.

This case epitomizes what is so difficult in these issues. It is such a close call that even the medical panel obviously struggled with the decision. And because it is so close, one must recognize that even though the most conscientious in the medical community who are being hired by an insurance company (as is the case here) easily and almost automatically arrive at decisions that do not favor the claimant. That is precisely why the medical panel system is used. It is my understanding that the medical panel concept was created to avoid the possibility of representational bias as the panel is paid by the Commission through a statutorily described method. Certainly, that is the logic behind its continued useage today. By rejecting the opinion of the


ORDER GRANTING MOTION FOR REVIEW
LORI WARNER
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Commission's own medical experts, I believe the majority stretches beyond its capability and knowledge to adequately judge this case and, in effect, ignores the fundamental purpose of the medical panel in arriving at its conclusion.

Also, Section 35-1-77(2)(d) states rather clearly that "The commission may base its finding and decision on the report of the panel . . . but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding". (underline added for emphasis) In this instant case, the medical panel reviewed all the medical facts including the opinion of the insurance company's paid reviewing medical doctors. The panel also examined the claimant. There is no other substantial conflicting evidence. (underline added for emphasis) My reading of this statutory language is that the legislature has allowed the Commission to use medical panel reports as the foundation of its findings regarding medical issues. By adding the other language of "not bound by" and "if" regarding "other substantial conflicting evidence", the legislature restricted the Commission's discretion normally allowed by the use of the word "may". Therefore, following the premise of this reading, I would conclude that my colleagues' decision may not be consistent with the requirements of the statute.

DATED THIS 17th day of March, 1997.




Thomas R. Carlson
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Industrial Commission to reconsider this Order by filing a request for reconsideration with the Industrial Commission. Any such request for reconsideration must be received by the Industrial 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 that court within 30 days of the date of this order.

ORDER GRANTING MOTION FOR REVIEW
LORI WARNER
PAGE 9

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review in the matter of Lori Warner, Case No. 95-0555, was mailed first class postage prepaid this 17th day of February, 1997, to the following:

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MIDVALE, UTAH 84047


Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

THE INDUSTRIAL COMMISSION OF UTAH

LORI WARNER,

Applicant,

vs.

**MERIT MEDICAL SYSTEMS, INC.
and TIG INSURANCE CO.,**

Defendants.

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**ORDER DENYING REQUEST
FOR RECONSIDERATION**

Case No. 95-0555

Lori Warner asks The Industrial Commission of Utah to reconsider its prior decision denying Ms. Warner's claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission exercises jurisdiction over Ms. Warner's request for reconsideration pursuant to Utah Code Ann. §63-46b-13 and Rule R568-1-4.O, Utah Administrative Code.

ISSUES PRESENTED

Did the Industrial Commission err in concluding that Ms. Warner had failed to establish that her work at Merit Medical Systems, Inc. was the legal and medical cause of the injuries for which she now seeks workers' compensation benefits.

DISCUSSION

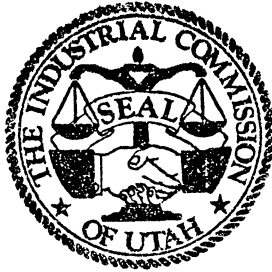
In her request for reconsideration, Ms. Warner raises the same issues that the Industrial Commission considered in reaching its prior decision in this matter. Having once more reviewed the facts of Ms. Warner's claim, the Industrial Commission again concludes that Ms. Warner has failed to establish either legal causation or medical causation in her claim for workers' compensation benefits. The Industrial Commission therefore reaffirms its prior decision denying Ms. Warner's application.

ORDER DENYING MOTION FOR REVIEW
LORI WARNER
PAGE 2

ORDER

The Industrial Commission reaffirms its prior decision in this matter and denies Ms. Warner's request for reconsideration. It is so ordered.

DATED this 2nd day of May, 1997.




R. Lee Ellertson

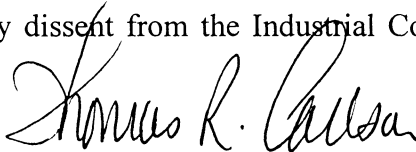
Chairman


Colleen S. Colton

Commissioner

DISSENT

I dissent from the majority's conclusion that Ms. Warner has not established medical causation, for the reasons expressed in my dissent from the Industrial Commission's previous decision in this matter.


Thomas R. Carlson

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 MOTION FOR REVIEW
LORI WARNER
PAGE 3

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Request For Reconsideration in the matter of Lori Warner, Case No. 95-0555, was mailed first class postage prepaid this 2nd day of May, 1997, to the following:

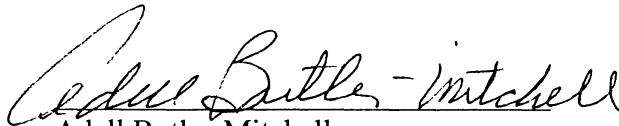
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