

1997

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Theodore E. Kanell; Stephen P. Horvat; Hansen, Epperson & Wallace; Alan Hennebold; Labor Commission of Utah; Attorney for Respondents.

Phillip B. Shell; Day, Shell & Liljenquist; Attorney for Petitioner.

Recommended Citation

Brief of Respondent, *Warner v. Industrial Commission of Utah*, No. 970335 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/907

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

IN THE UTAH COURT OF APPEALS

LORI WARNER,

Petitioner,

vs.

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

*
*
*
*
*
*
*
*
*

Case No. 970335-CA

Priority No. 7

BRIEF OF RESPONDENTS MERIT MEDICAL SYSTEMS, INC.
and TIG INSURANCE CO.

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

The Honorable Barbara A. Elicerio
Administrative Law Judge

Phillip B. Shell
DAY SHELL & LILJENQUEST
45 East Vine Street
Murray, UT 84107
Attorney for Petitioner

Alan Hennebold
LABOR COMMISSION OF UTAH
P.O. Box 146615
Salt Lake City, UT 84114-6615
Attorney for Respondent
Industrial Commission

Theodore E. Kanell (1768)
Stephen P. Horvat (6249)
HANSON, EPPERSON & WALLACE
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970
(801) 363-7611
Attorneys for Respondents
Merit Medical Systems, Inc.
TIG Insurance Co.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 970335-CA

FILED

DEC - 5 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LORI WARNER,	*	
	*	
Petitioner,	*	
	*	
vs.	*	Case No. 970335-CA
	*	
INDUSTRIAL COMMISSION OF UTAH,	*	
MERIT MEDICAL SYSTEMS, INC., and	*	
TIG INSURANCE CO.,	*	Priority No. 7
Respondents.	*	

BRIEF OF RESPONDENTS MERIT MEDICAL SYSTEMS, INC.
and TIG INSURANCE CO.

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

The Honorable Barbara A. Elicerio
Administrative Law Judge

Phillip B. Shell
DAY SHELL & LILJENQUEST
45 East Vine Street
Murray, UT 84107
Attorney for Petitioner

Alan Hennebold
LABOR COMMISSION OF UTAH
P.O. Box 146615
Salt Lake City, UT 84114-6615
Attorney for Respondent
Industrial Commission

Theodore E. Kanell (1768)
Stephen P. Horvat (6249)
HANSON, EPPERSON & WALLACE
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970
(801) 363-7611
Attorneys for Respondents
Merit Medical Systems, Inc.
TIG Insurance Co.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES ON APPEAL.....	1
DETERMINATIVE STATUTES.....	2
STATEMENT OF THE CASE.....	4
Nature of the Case.....	4
Course of Proceedings.....	4
Statement of Facts.....	6
SUMMARY OF THE ARGUMENT.....	12
ARGUMENT.....	14
I. THE COMMISSION PROPERLY CONCLUDED THAT THE APPLICANT FAILED TO PROVE THAT HER EMPLOYMENT LEGALLY CAUSED HER BACK CONDITION.....	16
A. <u>The Industrial Commission's determination is entitled to deference</u>	16
1. Pre-UAPA: The determination as to whether an employee has established an unusual exertion is entitled to intermediate deference.....	17
2. UAPA: The Commission has discretion to apply the Workers' Compensation Act in cases before it, and its determinations are to be upheld unless they are unreasonable.....	19
3. <u>Drake v. Industrial Commission:</u> Where the legal standard being applied grants the agency discretion in its operation, the agency's determination will be accorded a strong presumption of correctness.....	23

	<u>Page</u>
4. Under UAPA and <u>Drake</u> , the Commission's determination as to whether an employee established an unusual exertion is reviewed with heightened deference.....	28
B. <u>The Industrial commission did not err in determining that the applicant's employment did not involve an unusual exertion</u>	29
II. THE COMMISSION PROPERLY CONCLUDED THAT THE APPLICANT FAILED TO ESTABLISH THAT HER BACK CONDITION WAS MEDICALLY CAUSED BY HER EMPLOYMENT.....	33
A. <u>The Commission is not bound to adopt findings made in a medical panel report</u>	34
B. <u>The Commission's factual finding that the applicant failed to establish medical causation should be affirmed</u>	37
1. The finding should be taken as conclusive because the applicant has failed to marshal the evidence supporting it.....	37
2. The Commission's finding is supported by substantial evidence.....	39
CONCLUSION.....	42
ADDENDUM.....	44
1. Order Granting Motion for Review	
2. Findings of Fact, Conclusions of Law, and Order	
3. Order Denying Request for Reconsideration	
4. Model State Administrative Procedure Act § 5-116	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Allen v. Indus. Comm'n</u> , 729 P.2d 15 (Utah 1986).....	1,9,11,12,15,16,17, 18,28,29,30,31,40
<u>Buczynski v. Indus. Comm'n</u> , 934 P.2d 1169 (Utah Ct. App. 1997).....	20
<u>Caporoz v. Indus. Comm'n</u> , 945 P.2d 141 (Utah Ct. App. 1997).....	20,21,22,23,27
<u>Crapo v. Indus. Comm'n</u> , 922 P.2d 39 (Utah Ct. App. 1997).....	20
<u>Cross v. Board of Review</u> , 824 P.2d 1202 (Utah Ct. App. 1992).....	20,23,27
<u>Drake v. Indus. Comm'n</u> , 904 P.2d 203 (Utah Ct. App. 1995), <u>rev'd</u> , 939 P.2d 177 (Utah 1997).....	24
<u>Drake v. Indus. Comm'n</u> , 939 P.2d 177 (Utah 1997).....	1,12,13,17,23,24,25, 27,28,29,30,32
<u>Employers' Reinsurance Fund v. Indus. Comm'n</u> , 856 P.2d 648 (Utah Ct. App. 1993).....	21
<u>Featherstone v. Indus. Comm'n</u> , 877 P.2d 1251 (Utah Ct. App. 1994).....	6
<u>Grace Drilling Co. v. Board of Review</u> , 776 P.2d 63, 68 (Utah Ct. App. 1989).....	41
<u>Greyhound Lines v. Wallace</u> , 728 P.2d 1021 (Utah 1986).....	35,37
<u>Heinecke v. Dep't of Commerce</u> , 810 P.2d 459 (Utah Ct. App. 1991).....	38,39
<u>Helf v. Indus. Comm'n</u> , 901 P.2d 1024 (Utah Ct. App. 1995).....	15
<u>IGA Food Fair v. Martin</u> , 584 P.2d 828 (Utah 1978).....	37
<u>Intermountain Health Care v. Board of Review</u> , 839 P.2d 841 (Utah Ct. app. 1992).....	38

	<u>Page</u>
<u>King v. Indus. Comm'n</u> , 850 P.2d 1281 (Utah Ct App. 1993).....	20,23,27
<u>Merriam v. Board of Review</u> , 812 P.2d 447 (Utah Ct. App. 1991).....	38
<u>Morton International v. Auditing Division</u> , 814 P.2d 581 (Utah 1991).....	18,19,20
<u>Nyrehn v. Indus. Comm'n</u> , 800 P.2d 330 (Utah Ct. App. 1990).....	19,32
<u>Pittsburgh Testing Laboratory v. Keller</u> , 657 P.2d 1367 (Utah 1983).....	36
<u>Price River Coal Co. v. Indus. Comm'n</u> , 731 P.2d 1079 (Utah 1986).....	18
<u>Savage Industries v. Tax Commission</u> , 811 P.2d 664 (Utah 1991).....	21
<u>Sisco Hilte v. Indus. Comm'n</u> , 766 P.2d 1089 (Utah Ct. App. 1988).....	19
<u>Smith & Edwards v. Indus. Comm'n</u> , 770 P.2d 1016 (Utah Ct. App. 1989).....	19,28,29,31
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994).....	25,26,27
<u>Stouffer Foods v. Indus. Comm'n</u> , 801 P.2d 179 (Utah Ct. App. 1990).....	19
<u>Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n</u> , 658 P.2d 601 (Utah 1983).....	18,19
<u>VanLeeuwen v. Indus. Comm'n</u> , 901 P.2d 281 (Utah Ct. App. 1995).....	2,21,38
<u>Virgin v. Board of Review</u> , 803 P.2d 1284 (Utah Ct. App. 1990).....	15
<u>Walls v. Indus. Comm'n</u> , 857 P.2d 964 (Utah Ct. App. 1994).....	20
<u>Zupon v. Indus. Comm'n</u> , 860 P.2d 960 (Utah Ct. App. 1993).....	33,37,41

	<u>Page</u>
Utah Code Ann. § 34A-1-303(6) (1997).....	1
Utah Code Ann. § 34A-2-401(1) (1997).....	15
Utah Code Ann. § 35-1-16 (1994).....	2,21
Utah Code Ann. § 35-1-16(1) (1994) (recodified at Utah Code Ann. § 34A-1-301 (1997)).....	21
Utah Code Ann. § 35-1-45 (1994).....	2,14
Utah Code Ann. § 35-1-77 (1994).....	3
Utah Code Ann. § 35-1-77(1)(a) (1994) (recodified at Utah Code Ann. § 34A-2-601(1)(a) (1997))	34
Utah Code Ann. § 35-1-77(2)(d) (1994) (recodified at Utah Code Ann. § 34A-2-601(2)(e) (1997))	35
Utah Code Ann. § 35-1-86 (1994) (repealed effective July 1, 1997).....	1
Utah Code Ann. § 63-46b-16.....	3
Utah Code Ann. § 63-46b-16(4)(d) (1997).....	16,19
Utah Code Ann. § 63-46b-16(4)(g) (1997).....	2,38
Utah Code Ann. § 63-46b-16(4)(h)(i) (1997).....	19
Model State Admin. Proc. Act § 5-116, 15 U.L.A. 128 (1990).....	21,22

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to review orders of the Industrial Commission (now the Utah Labor Commission) pursuant to former Utah Code Ann. § 35-1-86 (1994) (repealed effective July 1, 1997); Utah Code Ann. § 34A-1-303(6) (1997)).¹

STATEMENT OF ISSUES ON APPEAL

1. Whether the Industrial Commission properly found that Petitioner Lori Warner (the "applicant") failed to establish that her employment legally caused her claimed back injuries pursuant to Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

This is a matter of application of law to a set of facts. The Industrial Commission's ruling is entitled to a strong presumption of correctness, and the ruling will be affirmed unless the applicant establishes that the Commission abused its discretion. Drake v. Indus. Comm'n, 939 P.2d 177, 182 (Utah 1997).

¹The entire Utah Workers' Compensation Act was repealed and recodified effective July 1, 1997, and the Industrial Commission was replaced by the Labor Commission. This brief refers primarily to the Act as it was in effect on March 24, 1995, the date of the applicant's claimed injury. In addition, the brief refers to the "Industrial Commission," or simply the "Commission."

2. Whether the Industrial Commission properly found that Petitioner Lori Warner failed to establish that her employment "medically caused" her claimed injuries.

This issue requires review of factual findings. These findings are entitled to great deference, and the court of appeals will reverse only if the petitioner establishes that the findings are not "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1997). A person challenging factual findings must marshal all the evidence supporting the findings and then demonstrate that the findings are not justified by that evidence. VanLeeuwen v. Indus. Comm'n, 901 P.2d 281, 284 (Utah Ct. App. 1995).

DETERMINATIVE STATUTES

Utah Code Ann. § 35-1-16 (1994)

(1) The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this or any other title or chapter that it administers and to:

. . . .

Utah Code Ann. § 35-1-45 (1994)

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such

amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Utah Code Ann. § 35-1-77 (1994)

(1) (a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of and in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission.

. . . .

(2)

(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.

. . . .

Utah Code Ann. § 63-46b-16 (1997)

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

. . . .

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

. . . ;

(d) The agency has erroneously interpreted or applied the law;

. . . ;

(g) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

. . . .

STATEMENT OF THE CASE

Nature of the Case

This is a Petition for Review of an Order by the Utah Industrial Commission holding that Respondents Merit Medical Systems, Inc., and TIG Insurance Co. are not liable to pay workers' compensation benefits to Petitioner Lori Warner for back problems that became symptomatic beginning in March 1995.

Course of Proceedings

Petitioner Lori Warner (the "applicant") instituted these proceedings before the Industrial Commission of Utah on June 22, 1995, when she filed an Application for Hearing seeking workers' compensation benefits from her employer, Merit Medical Systems, Inc., and its insurer, TIG Insurance Co. (referred to collectively as "Merit Medical"), for injuries she allegedly sustained on March 24, 1995. R. 2. She filed an amended application for hearing on August 22, 1995. R. 31. Merit Medical denied liability on the ground that the applicant's

claimed injuries did not arise out of and in the course of her employment. R. 44-46.

The matter went to a hearing in front of the Honorable Barbara A. Elicerio, Administrative Law Judge, on February 6, 1996. Transcript, R. 73-187. After the hearing, Judge Elicerio referred the matter to a medical panel for an opinion on various issues, including whether the applicant's back problems were causally related to her employment with Merit Medical. R. 189-200. The medical panel issued a report, which was received by Judge Elicerio on July 11, 1996, finding only a "limited" causal connection between the applicant's employment and her back complaints. R. 412-19. Judge Elicerio then issued Findings of Fact, Conclusions of Law, and an Order holding Merit Medical liable to pay compensation and benefits for the applicant's claimed injury. ALJ Findings, R. 425-39 (Addendum Exhibit 2).

Merit Medical filed a Motion for Review with the Industrial Commission on October 11, 1996. R. 440-47. On March 17, 1997, the Commission entered a new Order, granting the Motion for Review. Commission Order, R. 453-61 (Addendum Exhibit 1). The Commission found that the applicant failed to establish that her back condition was either legally or medically caused by her employment with Merit Medical. On April 7, 1997, the applicant filed a Motion for Reconsideration with the Commission, R. 462-65, which was denied in an Order dated May 2, 1997. Addendum Exhibit 3. The applicant filed a Petition for

Review on May 30, 1997, R. 474, and a Docketing Statement on June 23, 1997. R. 482-519.

Statement of Facts

Merit Medical Systems manufactures plastic parts for medical devices. Commission Order, R. 453 (Addendum Exhibit 1). These parts are made by large machines, which drop the completed parts into small plastic bins or "totes" approximately two-and-a-half feet long, eighteen inches wide, and only eighteen inches deep. R. 453-54. A molding operator then removes the bins from the machines and carries them to a nearby table where the bins are emptied into larger containers. R. 454. Periodically, the bins are taken to a scale for weighing, or taken to a table for measuring. R. 454. These bins are lifted approximately nine times per hour, but they weigh only five to twenty pounds on average, with an occasional bin weighing up to twenty-six pounds.² ALJ Findings, R. 432 (Addendum Exhibit 2). Molding operators also vacuum and clean around their machines at the end of their shifts. R. 429.

Applicant Lori Warner began working as a molding operator for Merit Medical in January 1995. Commission Order, R. 453. She worked a basic forty-hour week without difficulty, and she

²The applicant appears to claim that the bins averaged twenty-six pounds. Petitioner's Brief at 9. However, the ALJ and the Commission made specific findings, as set forth in the text, and these findings must be accepted as conclusive unless the applicant marshals all the evidence supporting them. E.g., Featherstone v. Indust. Comm'n, 877 P.2d 1251, 1254 (Utah Ct. App. 1994). At any rate, the Commission's finding in this respect is supported by the evidence. See, e.g., R. 141:1-11.

never felt any back pain, soreness, or stiffness while she worked for Merit. Transcript, R. 113:17-21, 114:5-11, 116:12-14, 123:22-25. But when the applicant was at home on March 24, 1995, she felt a pain in her back. R. 113:17-21. She had not worked that day, as it was her scheduled day off. R. 116:15-17. In fact, she did not work a full shift on the previous day, either. The machines had been down, making her job even easier than usual, R. 113:22 - 114:3, 123:6-8, and things were so slow that the applicant's boss let her go home early because she complained of a headache. R. 103:16 - 104:2.

As later revealed by the medical evidence, the applicant was suffering from long-standing degenerative disc disease at the L4-5 and L5-S1 levels of her lumbar spine, along with facet arthritis. CT Scan Report, R. 409-10, Medical Panel Report, R. 417. In addition, she had previously injured her back in 1986, at which time she was diagnosed with a "twisting injury" and "severe" acute low back strain, with pain focused on the L4-5 and L5-S1 levels. R. 311.

The applicant went to Instacare on March 24, 1995. She reported back pain, but she did not attribute this pain to anything that happened at her job. R. 246. She was prescribed muscle relaxants, but her pain evidently did not clear up. She called in sick on March 26, but once again she did not even suggest that her back pain was caused by anything that happened at work. R. 146:24 - 147:2. In fact, she never reported any work-related back problems until three weeks after she first sought treatment, on April 14. R. 146:13-17. And even then,

she never reported any specific incident at work that caused her even the slightest back pain. R. 147:11-18.

On March 28, a CT scan was performed on the applicant's lumbar spine. At L4-5, the scan revealed degenerative changes, a broad based Grade I (minor) disc bulge, and what appeared to be an old apophyseal avulsion. R. 409. The CT scan also revealed a "vague increased soft tissue density" that suggested a possible extruded fragment, but this could not be confirmed. Id. At L5-S1, the CT scan uncovered even more significant degenerative changes, including facet arthritis and an irregularity of the posterior ring apophysis that possibly indicated an old disc herniation. Id. No significant neural compromise was noted. Id.

The applicant underwent an L5-S1 discectomy in June 1995. Commission Order, R. 454, and evidently returned to work three months later. R. 109:12-14. She apparently was off work again for a while after that, but by the February 1996 hearing, she was working full time for a different employer. R. 110:8-15. In January 1996, her treating physician rated her as having only a five percent permanent partial impairment. R. 381.

In late January 1996, the applicant was seen by Dr. Gerald Moress and Dr. Wallace Hess at the request of Merit Medical. R. 399. Drs. Moress and Hess carefully reviewed the applicant's medical records and performed a thorough examination. Drs. Moress and Hess performed the standard credibility tests on the applicant, and her responses were "inappropriate" on five of the seven categories. R. 405. These doctors assessed

the applicant as suffering from a "pain disorder characterized by psychological factors and general medical condition." R. 406.

Drs. Moress and Hess concluded that there was no causal connection between the applicant's employment and her claimed back problems. They found it significant that "there was no incident at work that could be identified." R. 406. They further noted that the CT scan revealed only a small disc bulge at L4-5, and possibly at L5-S1, but that it also showed a "fracture of the apophyseal ring which had nothing to do with the industrial accident and is developmental in origin." Id. The doctors therefore concluded that none of the applicant's impairment, disability, or medical care was attributable to the claimed industrial accident. R. 407.

The matter went to a hearing in February 1996. Merit Medical denied liability on the ground that the applicant's job was neither the legal cause nor the medical cause of her injury, pursuant to Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). After the hearing, the administrative law judge referred the matter to a medical panel for an opinion regarding medical causation and other issues. R. 189-200. The medical panel noted that the CT scan had revealed degenerative changes in the applicant's lumbar spine and that subsequent studies confirmed narrowing at the L4-5 and L5-S1 levels, along with spurring and scoliosis. R. 417. The panel's report was unclear, but it ultimately concluded that there was only a "limited" causal connection between the applicant's work

exposure and her subsequent back problems. R. 417. The panel also concluded that the industrial exposure aggravated a preexisting condition, but it clarified that there had been only a "temporary aggravation related to her work." R. 418. The panel therefore attributed only one percent of her impairment to her work. Id. The panel also opined that the applicant's surgery was necessitated by the work exposure only "to a limited extent." Id. The panel then cautioned that "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." Id.

After receiving the medical panel report, Judge Elicerio issued Findings of Fact, Conclusions of Law, and an Order. R. 425-39 (Addendum Exhibit 2). She interpreted the medical panel report as finding that the work for Merit Medical was a medical cause of the applicant's back condition, and she adopted this finding as her own. R. 434-35. She also found that legal causation was barely satisfied, concluding that the applicant's job, which required her to lift the five-to-twenty-pound bins approximately nine times per hour, was "slightly" more exertive than what the average person does in his or her everyday nonemployment life. R. 435-36.

The Commission overruled the ALJ on both grounds. R. 453-61. The Commission reviewed the medical reports and concluded that the applicant had not established a medical link between her employment and her injuries. The Commission carefully considered the medical panel report, a report by the

applicant's treating physician, and the report provided by Drs. Moress and Hess, and it concluded that the Moress/Hess report was the most persuasive medical evidence. R. 457-58. The Commission reasoned as follows:

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.

R. 458 (emphasis added).

The Industrial Commission also found that the applicant had failed to establish that her job was a legal cause of her back injuries, because her job did not require an "unusual exertion," as required by Allen. R. 456-57. The Commission "carefully considered the demands of Ms. Warner's work at Merit, as well as the manner in which Ms. Warner performed those duties," and concluded that her work exertions were not unusual or extraordinary. R. 456. The Commission concluded,

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.

R. 457.

This appeal followed.

SUMMARY OF THE ARGUMENT

Applicant Lori Warner seeks to require Merit Medical to pay compensation and medical expenses even though there is no real connection between her employment with Merit Medical and the back problems that became symptomatic in March 1995. The Industrial Commission carefully considered the applicant's evidence and held that she had failed to demonstrate that her employment was either a medical cause or a legal cause of her back problems. Both of these determinations are entitled to deference on appeal, and the applicant has not established that they are erroneous.

Under Allen v. Industrial Commission, an employee must establish both legal causation and medical causation in order to recover workers' compensation benefits. To establish legal causation, an employee with a preexisting condition must demonstrate that his or her employment imposed an "unusual or extraordinary exertion" that contributed to the injury. To show medical causation, the employee must show that the work-related exertion actually physically caused his or her injury. If the employee fails to meet either element, compensation must be denied.

The Commission did not err in concluding that the applicant failed to establish legal causation. This conclusion is entitled to deference under UAPA and under Drake v. Industrial Commission, a recent Utah Supreme Court case holding that an administrative agency's application of a highly fact-sensitive

legal standard is entitled to a "strong presumption" of correctness.

In Drake, the supreme court held that the determination as to whether an employee was on a "special errand" was entitled to heightened deference because the question was highly fact-specific and did not readily yield uniform rules. And the issue in our case, whether the applicant's employment constituted an unusual exertion, is even more fact-specific than the issue involved in Drake. In addition, the Commission has experience and expertise in applying the unusual exertion test because it specializes in workers' compensation cases and deals with this issue all the time. Therefore, under the principles set forth in Drake, the Commission's determination that the applicant failed to establish legal causation is also entitled to deference.

The Commission's determination regarding legal causation should be upheld by the court. The evidence presented before the Commission shows that the applicant's job did not involve an unusual or extraordinary exertion: she simply had to lift small plastic bins containing plastic parts. She had to lift these with some frequency, but the bins were light and she did not have to carry them very far. The exertions involved in the applicant's work are certainly comparable to those involved in many everyday activities. Therefore, the Commission did not abuse its wide discretion in finding that legal causation was not shown.

Because the applicant failed to establish legal causation, the denial of benefits should be affirmed. But the Commission also did not err in finding that the applicant had failed to establish medical causation. This is a question of fact, and the court of appeals must affirm if the Commission's finding is supported by substantial evidence in the record. In our case, the Commission relied on the persuasive medical report prepared by Dr. Gerald Moress and Dr. Wallace Hess, who examined the applicant on behalf of Merit Medical. A medical panel had issued a confusing report that appeared to contradict the report of Drs. Moress and Hess, but the Commission carefully considered both reports and found the Moress/Hess report to be more persuasive. Under the plain language of the governing statute, the Commission is free to consider evidence that contradicts a medical panel report, and the Commission is not bound by a medical panel report if "other substantial conflicting evidence" supports a contrary finding. In addition, the Commission's finding was certainly supported by substantial evidence. Therefore, the finding that there was no medical causation should also be upheld on appeal.

ARGUMENT

Under the Utah Worker's Compensation Act, an employer is liable to pay compensation and medical expenses only if the employee establishes an injury "by accident arising out of and in the course of his employment." Utah Code Ann. § 35-1-45

(1994) (recodified at Utah Code Ann. § 34A-2-401(1) (1997)). In Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Utah Supreme Court explained that compensation is to be awarded "only where there is a sufficient causal connection between the disability and the working conditions." Id. at 24-25. The Allen court adopted a two-part test to determine causation: the employee must prove that his or her employment was both the "legal cause" and the "medical cause" of the injury. Id. at 25-27. If the employee fails to prove either of these elements, he or she is not entitled to compensation. E.g., Helf v. Indus. Comm'n, 901 P.2d 1024, 1027 n.4 (Utah Ct. App. 1995).

In our case, the Industrial Commission determined that the applicant had failed to satisfy either prong of the Allen test.³ Therefore, the Commission concluded that the applicant had not established that her injury "arose out of and in the course of" her employment with Merit Medical. For this court to reverse, it must find that the Commission erred in both determinations. However, on appeal, the applicant has failed to demonstrate that either of the Commission's rulings was erroneous. The finding that the applicant did not establish legal causation is within the Commission's discretion, and the finding that she did not establish medical causation is

³The Commission, and not the administrative law judge, is the ultimate finder of fact in workers' compensation cases, and it is the Commission's decision that must be reviewed by the court of appeals. E.g., Virgin v. Board of Review, 803 P.2d 1284, 1289 (Utah Ct. App. 1990).

supported by substantial evidence. Therefore, the Commission's order denying compensation should be affirmed.

I. THE COMMISSION PROPERLY CONCLUDED THAT THE APPLICANT FAILED TO PROVE THAT HER EMPLOYMENT LEGALLY CAUSED HER BACK CONDITION.

Under Allen, when an employee has a preexisting condition, an aggravation of that condition is not compensable unless the employee establishes that the aggravation resulted from a work-related "unusual or extraordinary exertion." Id. at 26. If the employee fails to meet this burden, then legal causation is not met, and the claim must be denied. The applicant in our case suffered from preexisting degenerative disc disease, so she was required to meet the "unusual exertion" standard.⁴ However, the Commission found that the applicant's work-related exertions were neither unusual nor extraordinary: she was required simply to lift small plastic bins containing plastic parts. This finding is entitled to a great deal of deference under Utah case law.

A. The Industrial Commission's determination is entitled to deference.

Under the Utah Administrative Procedure Act (UAPA), a reviewing court may reverse agency action if the agency has "erroneously interpreted or applied the law." Utah Code Ann. § 63-46b-16(4)(d) (1997). However, in determining whether an

⁴The applicant has not challenged this finding on appeal.

agency's application of the law to the facts was "erroneous," the appellate court will review the agency's ruling with some measure of deference, depending on the nature of the legal standard being applied. Drake v. Indus. Comm'n, 939 P.2d 177, 181-82 (Utah 1997). As noted above, to establish that her claimed injuries were legally caused by her employment, the applicant was required to show that her injuries arose from an "unusual or extraordinary exertion." Allen, 729 P.2d at 26. The determination as to whether this standard was met is highly fact-dependent, does not readily yield uniform rules, and is one which an appellate court could not profitably review de novo in every instance. Therefore, the standard of review of the Commission's determination on this issue is one of heightened deference.

The reasoning employed by the Utah Supreme Court in Drake represented a major departure from the analytical model previously used in determining the standard of review of agency actions. Drake did not mention UAPA, nor did it discuss any of the important cases interpreting UAPA. Therefore, to fully understand Drake's effect on the standard of review analysis under UAPA, a little history is in order.

1. Pre-UAPA: The determination as to whether an employee has established an unusual exertion is entitled to intermediate deference.

Before the enactment of UAPA, appellate courts generally reviewed agency determinations under three standards of review.

Morton Int'l v. Auditing Div., 814 P.2d 581, 585 (Utah 1991); see also Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n, 658 P.2d 601, 608 (Utah 1983). Questions of "general law" were reviewed nondeferentially, using a correction-of-error standard. Morton, 814 P.2d at 585. Findings of fact, on the other hand, were reviewed with great deference: appellate courts upheld such findings if they were supported by "evidence of any substance." See Admin. Servs., 658 P.2d at 608-09. But "mixed questions of law and fact," or questions involving the application of law to basic facts, were generally reviewed under an intermediate standard, and agency decisions on those questions were upheld if they were "reasonable or rational." This intermediate standard applied unless the court was in as good a position as the agency to make the determination, considering factors such as the agency's expertise and experience in the area. Id. at 610; Morton, 814 P.2d at 585-87.

Under these principles, Industrial Commission applications of the Allen "unusual exertion" test were reviewed using a bifurcated standard. The Commission's determination as to the precise requirements of an employee's job, an issue of fact, was reviewed with great deference. However, the determination whether the employee's job-related activities amounted to an unusual exertion was a "mixed question," Price River Coal Co. v. Indus. Comm'n, 731 P.2d 1079, 1082 (Utah 1986), and was reviewed under the intermediate standard: the Commission's determination as to whether the "unusual exertion" standard was met would stand unless the court found that the decision was

not "'within the limits of reasonableness and rationality.'" Sisco Hilte v. Indus. Comm'n, 766 P.2d 1089, 1091 (Utah Ct. App. 1988) (quoting Admin. Servs., 658 P.2d at 610); accord Stouffer Foods v. Indus. Comm'n, 801 P.2d 179, 181 (Utah Ct. App. 1990); Nyrehn v. Indus. Comm'n, 800 P.2d 330, 333 (Utah Ct. App. 1990); Smith & Edwards v. Indus. Comm'n, 770 P.2d 1016, 1017-18 (Utah Ct. App. 1989).

2. UAPA: The Commission has discretion to apply the Workers' Compensation Act in cases before it, and its determinations are to be upheld unless they are unreasonable.

UAPA changed the way appellate courts approached Industrial Commission rulings under the Workers' Compensation Act. Under UAPA, an appellate court may reverse agency action if the agency "erroneously interpreted or applied the law." Utah Code Ann. § 63-46b-16(4)(d) (1997). In Morton International, the supreme court declared that this new statute generally imposed a correction-of-error standard in reviewing an agency's interpretation or application of a statutory term. 814 P.2d at 587-88. However, if the agency was granted some *discretion* to interpret or apply the statute, then the agency action would be reviewed under the abuse-of-discretion standard provided in subsection 16(4)(h)(i), which states that a court may reverse if the agency action is "an abuse of the discretion delegated to the agency by statute." Utah Code Ann. § 63-46b-16(4)(h)(i) (1997). Thus, in determining how much deference to afford agency action, the key was no longer simply the agency's

expertise and experience; instead, the focus was on whether the agency had been granted any discretion, implicitly or explicitly, by the statute. Morton, 814 P.2d at 588.

UAPA, and the explanation given it in Morton, proved to be difficult to apply, and the post-UAPA cases reviewing Industrial Commission actions under the Workers' Compensation Act have not yielded consistent results. For example, some cases have concluded that the court of appeals should review Industrial Commission rulings under a strict correction-of-error standard. See, e.g., Cross v. Board of Review, 824 P.2d 1202, 1204 (Utah Ct. App. 1992); King v. Indus. Comm'n, 850 P.2d 1281, 1291-92 (Utah Ct. App. 1993). These cases generally looked at the language of section 35-1-45 and simply concluded that the statute did not contain a grant of discretion. Cross, 824 P.2d at 1204; King, 850 P.2d at 1291-92. It appears that most of the subsequent cases addressing the standard of review under the Workers' Compensation Act have relied on Cross and King, or their progeny.⁵

A significant new case, however, has drawn a distinction between review of the Commission's interpretation of the Workers' Compensation Act and review of the Commission's application of the Act to specific factual situations. Caporoz v. Indus. Comm'n, 945 P.2d 141, 143 (Utah Ct. App. 1997). See

⁵E.g., Walls v. Indus. Comm'n, 857 P.2d 964, 966-67 (Utah Ct. App. 1994) (citing Cross and King); Crapo v. Indus. Comm'n, 922 P.2d 39, 41 (Utah Ct. App. 1996) (Cross and King); Buczynski v. Indus. Comm'n, 934 P.2d 1169, 1172 (Utah Ct. App. 1997) (Walls and Cross).

also VanLeeuwen v. Indus. Comm'n, 901 P.2d 281, 283 (Utah Ct. App. 1995); Employers' Reinsurance Fund v. Indus. Comm'n, 856 P.2d 648, 655 (Utah Ct. App. 1993) (Billings, P.J., concurring in the result, joined by Russon, J.). In Caporoz, the most recent pronouncement on the issue, the court recognized that former section 35-1-16 of the Act grants the Commission "the duty and the full power, jurisdiction, and authority to determine the facts and apply the law." Therefore, Commission applications of the Act should be reviewed under the more deferential "reasonableness" standard. Caporoz, 945 P.2d at 143; see Utah Code Ann. § 35-1-16(1) (1994) (recodified at Utah Code Ann. § 34A-1-301 (1997)).

Caporoz is more consistent with UAPA's legislative history. As noted in Savage Industries v. Tax Commission, 811 P.2d 664, 669-70 (Utah 1991), the UAPA standards of review are based on section 5-116 of the Model State Administrative Procedure Act. Subsection 16(4)(d) of UAPA is identical to subsection 5-116(c)(4) of the Model Act. The commentators to the Model Act noted that the standards set forth in that provision "reflect the well-accepted principle that *the role of the reviewing court is, in general, a limited one.*" Model State Admin. Proc. Act § 5-116 comment, 15 U.L.A. 128 (1990) (emphasis added) (Addendum Exhibit 4). And, addressing the specific provision at issue in our case, the commentators specifically explained that agency *applications* of law are to be reviewed under a more deferential standard than are agency *interpretations* of the law:

Paragraph (c)(4) includes two distinct matters -- interpretation and application of the law. With regard to the agency's *interpretation* of the law, courts generally give little deference to the agency, with the result that a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation. By contrast, with regard to the agency's *application* of the law to specific situations, the enabling statute normally confers some discretion upon the agency. Accordingly, a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its discretion

Id. (*italics in original, bold print added*).

While statutory interpretation and application are related concepts, there are definite differences between the two. For example, when an issue requires the consideration of only a few simple, undisputed, basic facts, the matter can be seen as one of statutory interpretation. In these cases, the court can issue a general rule that will uniformly govern all future situations of a similar nature. Thus, in these "interpretation" cases, review is proper under the less deferential correction-of-error standard.

But where the issue is whether an established legal standard is satisfied, and if the facts are disputed or highly involved, or if the standard itself is nebulous (e.g., whether an action is "reasonable"), then the question is primarily one of "application." And, as recognized in Caporoz, the Commission has been granted the discretion to apply the Workers' Compensation Act, so its applications must be reviewed with deference.

Both King and Cross were "interpretation" cases. In King the issue was whether an employee's incarceration after an industrial accident affected his or her entitlement to temporary total disability. 850 P.2d at 1292. In Cross, the issue was whether an employee is entitled to benefits when driving home from work. 824 P.2d at 1204. In both of these cases, the facts were undisputed and straightforward, and in each case the court's holding effectively created a uniform rule applicable to all future cases. Caporoz, however, was an "application" case: the issue was whether a decedent's two sisters qualified as "dependents" under the Act and were thus entitled to death benefits. 945 P.2d at 142-43. In that case, the facts were highly detailed, and the standard being applied was very fact-specific. The holding in that case, that those particular sisters were not dependents, is not a generally applicable "rule."

3. Drake v. Industrial Commission: Where the legal standard being applied grants the agency discretion in its operation, the agency's determination will be accorded a strong presumption of correctness.

The Utah Supreme Court employed a new method of analysis in Drake v. Industrial Commission, 939 P.2d 177 (Utah 1997). In Drake, the employee was injured in an automobile accident while driving home after work. 939 P.2d at 179. She lived in Ogden, but she normally worked at her employer's Salt Lake City office. About two or three days per week, however, she

delivered documents to her employer's Ogden office at the end of the day, before going home. The route from the Salt Lake City office to her home via the Ogden office was about five or six miles farther than a route from the Salt Lake office directly home. She did this regularly for months. The accident took place after she left the Ogden office on her way home. Id.

The Industrial Commission denied the employee's claim for workers' compensation benefits under the "coming and going" rule, which provides that an employee is not in the course of her employment when she is going to or coming home from work. Id. at 180. The employee claimed that she was acting in the course of her employment under the "special errand" exception to the rule, but the Commission found that, because the deliveries to the Ogden office were part of the employee's regular duties, she was not on a special errand. Instead, her work day simply ended when she left the Ogden office, and she was not in the course of her employment while simply on her way home when the accident took place.

The court of appeals reversed. Drake, 904 P.2d 203 (Utah Ct. App. 1995). The court first held that the Commission did not have any discretion to interpret the Workers' Compensation Act, so the Commission's denial of benefits would be reviewed "for correctness." Id. at 205. The court then engaged in an independent application of the special errand doctrine to the facts and concluded that the delivery of the documents to the

Ogden office was in fact a special errand, outside the employee's regular duties. Id. at 206-07.

The Utah Supreme Court granted certiorari and reversed the court of appeals, holding that a more deferential standard of review was required. 939 P.2d at 184. In doing so, the supreme court did not apply the standard UAPA "discretion granted by statute" analysis (in fact, except for one brief "see also" citation, UAPA was not even mentioned). The supreme court instead adopted the standard of review analysis used in State v. Pena, 869 P.2d 932, 934-39 (Utah 1994), a criminal case. In Pena, the issue was whether the trial court had erred in finding that an investigatory stop was supported by reasonable suspicion. 869 P.2d at 934. Addressing the standard of review, the supreme court held in that case that whether a set of facts gives rise to reasonable suspicion is a question of law, but the trial court's legal conclusion would be reviewed with some deference, because the legal standard *itself* conveys a measure of discretion to a trial court in its operation. Id. at 939.

The supreme court applied this analysis in Drake. The court explained that, in determining the proper standard of review, the first step is to decide whether the issue being reviewed is a question of fact, a question of law, or a "mixed question requiring application of the law to the facts." 939 P.2d at 181. The court further explained that, with regard to mixed questions, a bifurcated standard would be used. Id.

Under this bifurcated standard, findings as to the underlying empirical facts are reviewed under the deferential "substantial evidence" standard for factual findings. Id. But the agency's conclusion as to whether those facts satisfy a legal standard is not necessarily reviewed under the strict correction-of-error standard, even though the legal effect of a given set of facts is a question of law. Rather, an agency's application of the law is to be reviewed with "varying degrees of strictness," from the strict correction-of-error standard to a broad "abuse of discretion" standard. Id. The precise level of deference to be granted depends on whether, based on "policy considerations and other factors," the legal standard itself "'actually grants some operational discretion to the trial courts applying it.'" Id. (quoting Pena, 869 P.2d at 935-36).

The court held that the Commission's conclusion that the employee was not on a "special errand" was entitled to deference. The court noted that the special errand doctrine was highly fact-intensive. Id. As a result, it was unlikely that an objective "rule" could be formulated that would apply to all "special errand" cases. Id. The court explained, "Thus, this is a question that 'we cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law through a course of such decisions.'" Id. (quoting Pena at 938). The court concluded, "Given the nature of the legal issue, we conclude that the legal standard is one that 'conveys a measure of discretion to [the Commission] when

applying that standard to a given set of facts.'" Id. (quoting Pena at 939).

Addressing the merits, the court noted that the Commission had found that the deliveries were part of the employee's regular duties. The court reasoned, "Under the standard enunciated above, *we defer to the Commission's decision and accord a strong presumption that the deliveries were not 'special.'*" Id. at 184 (emphasis added). The court thus upheld the Commission's denial of benefits.

While Drake ignored UAPA, it actually appears to have adopted the "interpretation" vs. "application" analysis discussed previously. Under Drake, if the legal question is highly fact-intensive, or if the legal standard itself requires the use of judgment in its operation, then the legal standard grants discretion to the agency, and the agency's decision will be afforded a "strong presumption" of correctness. But under the interpretation-application analysis, such a situation would be considered one requiring "application" of the law, and the determination would be reviewed with deference under Caporoz. On the other hand, if the facts are simple and the legal standard is straightforward, or if the court's ruling could be used as a uniform "rule," then the appellate court will review the agency on a stricter correction-of-error standard, under either Drake or cases such as Cross and King.

Drake also revived elements of the pre-UAPA analysis. For a key aspect of the Pena-Drake analysis is that the standard of review depends on whether the agency or the appellate court is

in the better position to determine whether a legal standard is satisfied. And one of the "policy considerations and other factors" that must be weighed would be the agency's experience and expertise in the subject matter. Thus, under Drake, where there is a mixed question of law and fact, and where the agency has the expertise and experience, the agency's actions would once again be reviewed under an intermediate standard of review.

4. Under UAPA and Drake, the Commission's determination as to whether an employee established an unusual exertion is reviewed with heightened deference.

Applying these considerations to our case, it is easy to see that the Commission's determination as to whether an unusual exertion was established must be reviewed with heightened deference. For whether someone's job-related exertions are "unusual" is even more fact-intensive than the question of whether an errand is "special." The Allen test requires consideration of a wide variety of factors, and each case must be judged based on its own unique set of facts. See, e.g., Smith & Edwards, 770 P.2d at 1018 (noting that the determination requires consideration of several factors). Further, because each case is unique, it is quite doubtful that any uniform rules or principles "can be formulated that will adequately address all potential facts in these cases." Drake, 939 P.2d at 182. Thus, a court cannot profitably review each "unusual exertion" case de novo. Id.

In addition, the Commission has experience and expertise in applying the Allen standard. The Commission specializes in workers' compensation cases, and it applies the unusual exertion test all the time. The Commission is thus in the best position to consider all the variables that arise in these cases and to get a sense of what exertions are unusual and what exertions are not. See, e.g., Smith & Edwards v. Indus. Comm'n, 770 P.2d 1016, 1017 (Utah Ct. App. 1989) (intermediate standard is appropriate for unusual exertion test because court relies "'heavily upon the Commission's expertise and familiarity with the work environment.'")

The argument for deference is even stronger in our case than it was in Drake. In Drake there were really only a few key facts: the employee made her deliveries two to three times per week, she had been doing so for months, it was expected that she would keep making these deliveries in the future, and the deliveries required a five or six mile detour. These facts were undisputed, and they are much more discrete and definite than the factors involved in the application of the unusual exertion test. The concerns expressed in Drake thus apply with even greater force in our situation.

- B. The Industrial Commission did not err in determining that the applicant's employment did not involve an unusual exertion.

The applicant had preexisting back injuries, so, under Allen, she must demonstrate that her injury resulted from a

work-related unusual or extraordinary exertion in order to establish legal causation. The Industrial Commission carefully considered the evidence regarding the demands of the applicant's job, and it unanimously concluded that the minor physical requirements of her job did not constitute an unusual or extraordinary exertion.⁶ Under UAPA and Drake, this decision is afforded a strong presumption of correctness, and the applicant has not overcome this presumption.

Most significantly, the applicant's job did not require any heavy lifting. The applicant simply had to lift small plastic bins containing light plastic parts. Commission Order, R. 453-54 (Addendum Exhibit 1). These bins were only about two-and-a-half feet long by one-and-a-half feet wide, and only eighteen inches deep. Id. The most these bins ever weighed, even when full, was twenty-six pounds, and they rarely weighed even that much: they generally weighed no more than twenty pounds, and they often weighed as little as five pounds. ALJ Findings, R. 432 (Addendum Exhibit 2), Commission Order, R. 454. This is certainly not an unusual exertion when compared to typical nonemployment activities.

The court in Allen set forth specific examples of activities that would be considered "typical nonemployment activities." These included taking full garbage cans to the

⁶Commissioner Carlson purported to "dissent" from the Commission's ruling, but he objected only to the finding of medical causation. He did not disagree with the Commission's conclusion that the applicant had failed to establish legal causation. Therefore, Commissioner Carlson's opinion should be deemed a "concurrence in the result."

street, lifting and carrying baggage for travel, changing a flat tire on an automobile, and lifting a small child to chest height. Allen, 729 P.2d at 26. Each of these activities involves far greater physical strain than does lifting the plastic bins involved in our case. See, e.g., Smith & Edwards v. Indus. Comm'n, 770 P.2d 1016, 1018 (Utah Ct. App. 1989) (lift of 47.5 pounds was not an unusual exertion).

That the applicant lifted these plastic bins nine times per hour does not make her job particularly demanding. First, while lifting "nine times an hour" may sound like a lot in the abstract, it means that the applicant would still have, on average, more than *six full minutes* between lifts. Second, and more importantly, the bins were light. The applicant's job allowed her to lift a light bin, do something else for six minutes, and then lift another one. These exertions are less stressful than those required in many everyday activities, such as cleaning house, performing yard work, doing laundry, or chasing after small children.

The Commission specifically considered and rejected the applicant's argument that her job required an unusual exertion due to the frequency of the lifting. The Commission reasoned,

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 [sic] considered, even the frequency of Ms. Warner's lifting and carrying at work is not unusual or extraordinary.

Commission Order, R. 457 (emphasis added).

Our case is easily distinguishable from Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah Ct. App. 1990), because the strain caused by the employment in Nyrehn was *much* greater than any strain involved in our case. In Nyrehn, the employee was required to lift tubs regularly weighing up to *forty* pounds. Id. at 331. As set forth above, in our case the bins weighed a *maximum* of twenty-six pounds, and even that was rare; most of the time they were between five and twenty pounds. ALJ Findings, R. 432. Common experience shows that a forty-pound lift causes a much greater strain than a five-to-twenty-pound lift, and it is much easier to make several easy lifts than to make one forty-pound lift. Moreover, an additional factor in Nyrehn was that the employee was required to engage in "constant bending and stooping" to sort merchandise into different tubs. Nyrehn, 800 P.2d at 331. There are no comparable factual findings in our case.

As established by Drake, the Commission's determination that the unusual exertion standard was not met is entitled to a "strong presumption" of correctness. Drake, 939 P.2d at 184. The Commission carefully considered the requirements of the applicant's job and concluded that, when everything was taken into account, the applicant's job simply did not require any unusual exertion. The applicant has not presented anything to overcome this presumption. The only authority she relies on, Nyrehn, is distinguishable, and she has not cited any other authority to suggest that lifting between five and twenty-six pounds is an unusual exertion, even if done nine times in an

hour. The applicant has failed to establish that her back condition was legally caused by her employment, and as such the Commission's denial of benefits should be affirmed.

II. THE COMMISSION PROPERLY CONCLUDED THAT THE APPLICANT FAILED TO ESTABLISH THAT HER BACK CONDITION WAS MEDICALLY CAUSED BY HER EMPLOYMENT.

Because the applicant failed to prove legal causation, Merit Medical is not required to pay benefits, and the Commission's Order can be affirmed. Thus, the court need not address medical causation. However, if the court finds that the Commission abused its wide discretion in not finding legal causation, then Merit Medical still is not liable for any compensation, as the applicant has also failed to establish that her condition was medically caused by her employment.

To establish medical causation, an employee must prove that her disability "is medically the result of an exertion or injury that occurred during a work-related activity." 729 P.2d at 27. The key question is "whether, given this body and this exertion, the exertion in fact contributed to the injury." *Id.* at 24. This requirement serves two important purposes: it helps prevent an employer from becoming a general insurer, and it aids in discouraging fraudulent claims. *Id.* at 27. Medical causation is a question of fact for the Commission, reviewed under the highly deferential "substantial evidence" standard. Zupon v. Indus. Comm'n, 860 P.2d 960, 963 (Utah Ct. App. 1993).

The Commission found that the applicant failed to estab-

lish any medical causal connection between her employment and her subsequent back condition. In making this finding, the Commission relied on the medical evidence, including a report provided by Dr. Gerald Moress and Dr. Wallace Hess, who examined the applicant and reviewed her medical records at the request of Merit Medical. A medical panel appointed by the administrative law judge suggested that there was a "limited" connection between the applicant's employment and her back problems, but the Commission concluded, after careful analysis, that this report was ambiguous, equivocal, and unpersuasive. Under the Act, the Commission has the right to decide whether to adopt findings made in a medical panel report, and the Commission's ultimate finding that the applicant failed to establish medical causation was supported by substantial evidence in the record.

A. The Commission is not bound to adopt findings made in a medical panel report.

The Industrial Commission is not required to blindly adopt findings presented by a medical panel. Under former section 35-1-77 of the Workers' Compensation Act, the Commission commission "may" refer the medical aspects of a disputed claim to a medical panel. Utah Code Ann. § 35-1-77(1)(a) (1994) (recodified at Utah Code Ann. § 34A-2-601(1)(a) (1997)). However, the Commission must decide on its own whether to follow the medical panel's report:

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.*

Utah Code Ann. § 35-1-77(2)(d) (1994) (emphasis added) (recodified at Utah Code Ann. § 34A-2-601(2)(e) (1997)).

Under the plain language of this statute, the Commission was not bound by the medical panel's report in our case. First, nowhere does the statute require the Commission to base its findings on the panel report; it simply says that the Commission "may" do so. Second, the report of Drs. Moress and Hess clearly constitutes "other substantial conflicting evidence in the case": the report is "other" evidence, it is "substantial" evidence, and it is "conflicting" evidence. Thus, under the plain language of the statute, the Commission was free to make its own factual findings.

Utah case law also unambiguously provides that the Commission is not required to follow a medical panel report. For example, in Greyhound Lines v. Wallace, 728 P.2d 1021 (Utah 1986), the supreme court upheld the Commission's finding as to the date of stabilization, even though that finding conflicted with the date given by the medical panel. In that case, the medical panel had concluded that the applicant had reached stabilization three months after his industrial accident, but the Commission rejected this finding, instead relying on the fact that the applicant's treating physician did not issue an impairment rating until almost two full years after the accident. Id. at 1022.

The supreme court affirmed, finding that the Commission was not bound to follow the medical panel report: "Plaintiff suggests that stabilization is a medical question and that, in the absence of any objection, the report of the medical panel must be accepted. *This misconstrues the role of the medical panel.*" Id. (emphasis added). Relying on the plain language of section 35-1-77, the court explained that "the Commission has the discretion to accept or reject a panel's report even in the absence of objections." Id. at 1023.

The supreme court again upheld the Commission's departure from a medical panel report in Pittsburgh Testing Laboratory v. Keller, 657 P.2d 1367 (Utah 1983). In that case, a medical panel had concluded that there was no connection between the employee's work and his subsequent heart attack, but another doctor testified to the contrary. The Commission disregarded the medical panel report and found that medical causation was established, and the supreme court once again affirmed. The court concluded that the Commission's finding was supported by the evidence, "despite the contrary findings of the medical panel." Id. at 1371-72.

There is no support in the statute, in the case law, or in logic, for the applicant's argument that, because the report of Drs. Moress and Hess was included in the medical records submitted to the medical panel, it somehow ceased to be "other substantial conflicting evidence" under the statute. The fact that the Moress/Hess report was submitted to the medical panel does not mean that the report ceased to exist, or that it

mysteriously lost its status as "evidence." The applicant's argument thus flies in the face of the plain language of the statute.⁷

The Commission has the ultimate responsibility for making factual findings in workers' compensation cases, and it has not only the right, but the *duty*, to consider *all* of the relevant evidence in doing so. Cf. IGA Food Fair v. Martin, 584 P.2d 828, 830 (Utah 1978). In accordance with this principle, the Act clearly provides that the Commission is not required to blindly follow a report issued by a medical panel, and Utah case law confirms this. Therefore, the court should hold that the Commission did not err by considering evidence in addition to the medical panel report.

B. The Commission's factual finding that the applicant failed to establish medical causation should be affirmed.

1. The finding should be taken as conclusive because the applicant has failed to marshal the evidence supporting it.

As noted above, medical causation is a question of fact. Zupon v. Indus. Comm'n, 860 P.2d 960, 963 (Utah Ct. App. 1993). When a petitioner challenges an agency's findings of fact, the appellate court must uphold the findings unless the petitioner

⁷In addition, it appears that in Greyhound Lines, discussed above, all of the relevant records had been submitted to the medical panel, and the supreme court still held that the Commission acted within its authority in rejecting the panel's report. Wallace, 728 P.2d at 1021.

establishes that they are not supported by "substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1997); VanLeeuwen v. Indus. Comm'n, 901 P.2d 281, 284 (Utah Ct. App. 1995). The party challenging findings of fact must "'marshal all of the evidence supporting the findings and show that despite the supporting facts, the [agency's] findings are not supported by substantial evidence.'" VanLeeuwen, 901 P.2d at 284 (brackets in original). If the applicant fails to marshal the evidence supporting factual findings, the findings will be accepted as conclusive. Merriam v. Board of Review, 812 P.2d 447, 450 (Utah Ct. App. 1991).

In our case, the applicant appears to challenge the Commission's factual finding that she failed to prove medical causation, but she has not marshaled the evidence supporting that determination. To properly marshal the evidence, a petitioner must first set forth the evidence that *supports* the finding, and then carefully explain why that evidence is, in fact, insufficient. Then, only after the supporting evidence has been separately marshalled, can the petitioner address the evidence he or she claims contradicts the finding. See, e.g., Intermountain Health Care v. Board of Review, 839 P.2d 841, 844 n.3 (Utah Ct. App. 1992) (evidence contrary to the findings should be referred to in briefing only after the supporting evidence has been separately marshalled); Heinecke v. Dep't of Commerce, 810 P.2d 459, 464 n.8 (Utah Ct. App. 1991) (same).

However, the applicant begins by presenting the evidence that supports her own position, instead of the Commission's findings. Moreover, her discussion of the report of Drs. Moress and Hess focuses only on what she feels are the shortcomings of that report. And, she does not even address any of the nonmedical evidence that supports the Commission's findings. The law imposes a "heavy burden" on a party seeking to overturn an agency's factual findings, Heinecke, 810 P.2d at 464, and the applicant has failed to carry this burden. The Commission's finding that there was no medical causation should therefore be taken as conclusive.

2. The Commission's finding is supported by substantial evidence.

Even if this court were to address this issue on the merits, it would conclude that the Commission's finding of no medical causation is supported by substantial evidence. Most importantly, the report from Drs. Moress and Hess unequivocally states that there is no causal connection between the applicant's employment and her back problems. R. 406-08. Doctors Moress and Hess examined the applicant and carefully reviewed her medical records. R. 400-06. They performed the standard credibility tests and found that the applicant's responses were "inappropriate" in several categories. R. 405. They reviewed the CT scan and noted that it showed a small disc bulge on only one angle, and that there was no other clear evidence of a disc herniation. R. 405. They also explained that the CT scan

revealed a "fracture of the apophyseal ring which had nothing to do with the industrial accident and is developmental in origin." R. 406. Finally, they pointed out that the applicant did not feel any onset of pain while at work, and that it was possible that she had simply been suffering from an acute low back strain. R. 407. Drs. Moress and Hess therefore unequivocally concluded that none of the applicant's impairment, disability, or need for medical expenses was attributable to her industrial exposure. Id.

In addition, there are numerous "historical" facts supporting the Commission's finding. Most importantly, the applicant never felt any back pain, soreness, or stiffness during the entire time she worked for Merit Medical. Transcript, R. 113:17-21, 116:12-14. Also, the applicant's job did not require any heavy lifting or excessive bending: as discussed previously, the applicant simply lifted plastic bins containing small plastic parts. Cf. Allen, 729 P.2d at 27 n.9 (evidence of ordinariness of the exertion is relevant to the issue of medical causation). And, if the applicant's back problems were really caused by her work, it is doubtful that her pain would have first appeared when it did, while at home on the day after an especially short and easy shift.

The applicant does not really argue that this evidence is insufficient to support the Commission's determination. Instead, she presents various reasons why she feels that the report of Drs. Moress and Hess is less persuasive than the medical panel report. But these arguments are not properly

made on appeal. The Commission has already determined which report is more persuasive, and this court's role under UAPA is not to review that determination; rather, this court's role is simply to determine whether the Commission's findings are supported by substantial evidence. As this court has pointed out, "It is the province of the Board, not the appellate courts, to resolve conflicting evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989). Therefore, the court of appeals "will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review." Id.

At any rate, the Commission acted properly in choosing not to be persuaded by the medical penal report, for the panel report does not provide much support for the applicant's case. For example, the panel stated that her work caused only a "temporary aggravation," R. 418, and it could find only a "limited" causal connection between the applicant's job and her condition. R. 417. And the panel attributed merely one percent of the applicant's impairment to her alleged industrial exposure. R. 418.

It is the *applicant* who bears the burden of proof in a workers' compensation proceeding, and she must establish medical causation by a preponderance of the evidence. See Zupon, 860 P.2d at 963. The Commission was certainly within its discretion in deciding that the uncertain medical panel report was not sufficient to meet that burden, particularly

when faced with the more definite, better reasoned report of Drs. Moress and Hess and the nonmedical facts set forth above. As the applicant herself admits, this is a close case. The Commission has made its decision, the decision is supported by substantial evidence, and the decision is entitled to deference.

CONCLUSION

Respondents Merit Medical Systems, Inc., and TIG Insurance Co. hereby respectfully request that this court enter an order affirming the Industrial Commission's ruling in this case.

DATED this 5th day of December, 1997.

HANSON, EPPERSON & WALLACE



THEODORE E. KANELL
STEPHEN P. HORVAT
Attorneys for Respondents
Merit Medical Systems, Inc.
TIG Insurance Co.

CERTIFICATE OF DELIVERY

I hereby certify that on the 5th day of December, 1997,
two true and correct copies of the foregoing were hand-
delivered to the following:

Phillip B. Shell
DAY SHELL & LILJENQUEST
45 East Vine Street
Murray, UT 84107
Attorney for Petitioner

Alan Hennebold
LABOR COMMISSION OF UTAH
P.O. Box 146615
Salt Lake City, UT 84114-6615
Attorney for Respondent
Industrial Commission



ADDENDUM

1. Industrial Commission Order Granting Motion For Review
2. Administrative Law Judge's Findings of Fact, Conclusions of Law, and Order
3. Industrial Commission Order Denying Request for Reconsideration
4. Model State Administrative Procedure Act (1981) § 5-116

Tab 1

THE INDUSTRIAL COMMISSION OF UTAH

LORI WARNER,	*	
	*	ORDER GRANTING
Applicant,	*	MOTION FOR REVIEW
	*	
v.	*	
	*	
MERIT MEDICAL SYSTEMS, INC.	*	
and TIG INSURANCE COMPANY,	*	Case No. 95-0555
	*	
Defendants.	*	

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

ORDER GRANTING MOTION FOR REVIEW

LORI WARNER

PAGE 2

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 calipers 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

ORDER GRANTING MOTION FOR REVIEW
LORI WARNER
PAGE 3

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

ORDER GRANTING MOTION FOR REVIEW
LORI WARNER
PAGE 5

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
PAGE 6

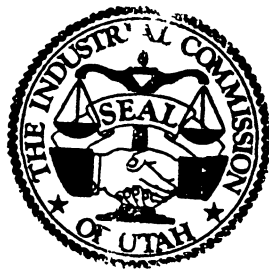
records and examined Ms. Warner. However, on the issue of medical causation, the panel was unusually equivocal when it concluded there was "a *limited* medically demonstrable causal connection" between Ms. Warner's work and her low back pain. The panel did not explain what it meant by a "limited" causal 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

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
PAGE 8

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.



A handwritten signature in cursive script, reading "Thomas R. Carlson", is written over a horizontal line.

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:

LORI WARNER
7655 SOUTH 10TH EAST
MIDVALE, UTAH 84047

PHILLIP B. SHELL
DAY SHELL & LILJENQUIST, L. C.
45 EAST VINE STREET
MURRAY, UTAH 84107

THEODORE E. KANELL
HANSON, EPPERSON & SMITH
4 TRIAD CENTER SUITE 500
P O BOX 2970
SALT LAKE CITY, UTAH 84110-2970

MERIT MEDICAL SYSTEMS
1600 WEST MERIT PARK WAY
SOUTH JORDAN, UTAH 84095

TIG INSURANCE
6925 UNION PARK CENTER #420
MIDVALE, UTAH 84047


Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

order\95-0555

Tab 2

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

ORDER
RE: LORI WARNER
PAGE 2

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

ORDER
RE: LORI WARNER
PAGE 3

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

00427

ORDER
RE: LORI WARNER
PAGE 4

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

00428

ORDER
RE: LORI WARNER
PAGE 5

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

ORDER
RE: LORI WARNER
PAGE 7

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.

ORDER
RE: LORI WARNER
PAGE 8

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

ORDER
RE: LORI WARNER
PAGE 9

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

ORDER
RE: LORI WARNER
PAGE 10

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) earlier 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.

ORDER
RE: LORI WARNER
PAGE 11

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

ORDER
RE: LORI WARNER
PAGE 12

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 $\$1,046.53$ ($\$5,232.63 \times .20$).

ORDER
RE: LORI WARNER
PAGE 13

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.

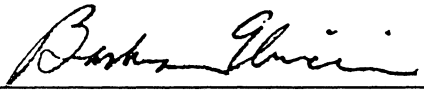
IT IS FURTHER ORDERED that the defendants, Merit Medical Systems, Inc./TIG Insurance, pay the applicant, Lori Warner, permanent impairment benefits, at the rate of \$195.00 per week, for 3.12 weeks, or a total of \$608.40, for the 1% whole person permanent impairment resulting from the early 1995 back 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.

ORDER
RE: LORI WARNER
PAGE 14

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

00478

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of Sept, 1996, I mailed a true and correct copy of the foregoing FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER, in the case of Lori Warner, to the following parties:

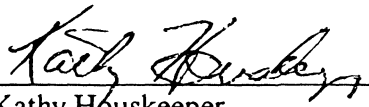
POSTAGE PREPAID:

Lori Warner
7655 South 10th East
Midvale UT 84047

Theodore Kanell, Atty
4 Triad Center #500
PO Box 2970
Salt Lake City UT 84180

Phillip Shell, Atty
45 East Vine Street
Murray UT 84107

INDUSTRIAL COMMISSION OF UTAH


Kathy Houskeeper

00439

Tab 3

THE INDUSTRIAL COMMISSION OF UTAH

LORI WARNER,

Applicant,

vs.

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

Defendants.

*
*
*
*
*
*
*
*
*

**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

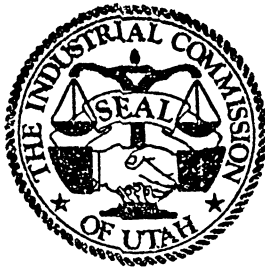
In her request for reconsideration, Ms. Warner raises the same issues that the Industrial Commission considered in reaching its prior decision in this matter. Having once more reviewed the facts of Ms. Warner's claim, the Industrial Commission again concludes that Ms. Warner has failed to establish either 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.





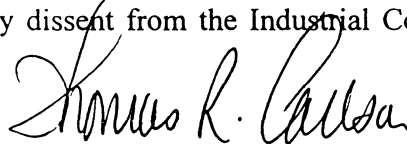
R. Lee Ellertson
Chairman



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:

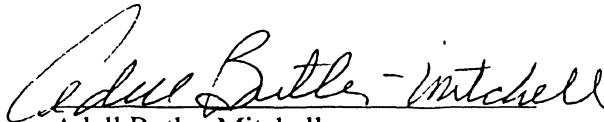
LORI WARNER
7655 SOUTH 10TH EAST
MIDVALE, UTAH 84047

PHILLIP B. SHELL
DAY SHELL & LILJENQUIST, L. C.
45 EAST VINE STREET
MURRAY, UTAH 84107

THEODORE E. KANELL
HANSON, EPPERSON & SMITH
4 TRIAD CENTER SUITE 500
P O BOX 2970
SALT LAKE CITY, UTAH 84110-2970

MERIT MEDICAL SYSTEM
1600 WEST MERIT PARK WAY
SOUTH JORDAN, UTAH 84095

TIG INSURANCE
6925 UNION PARK CENTER #420
MIDVALE, UTAH 84047


Adell Butler-Mitchell
Support Specialist
Industrial Commission

Tab 4

§ 5-116. [Scope of Review; Grounds for Invalidity].

(a) Except to the extent that this Act or another statute provides otherwise:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and

(2) The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

(2) The agency has acted beyond the jurisdiction conferred by any provision of law.

(3) The agency has not decided all issues requiring resolution.

(4) The agency has erroneously interpreted or applied the law.

(5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.

(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.

(8) The agency action is:

(i) outside the range of discretion delegated to the agency by any provision of law;

(ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]

(iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [.]

(iv) [otherwise unreasonable, arbitrary or capricious.]

COMMENT

The 1961 Revised Model Act prescribed tested cases, Section 15(g), no standards standards for the judicial review of con- for the judicial review of rules, Section 7,

and no mention of judicial review of agency action other than rules or orders. This Act, having established a single form of action for judicial review of all types of agency action in Section 5-105, prescribes a single set of standards for judicial review in Section 5-116. This section is adapted, with considerable changes, from Florida Act, Section 120.68 and Wisconsin Act, Section 227.20, which are discussed with approval in Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 Ariz.St.L.J. 537.

The standards for judicial review in this section reflect the well-accepted principle that the role of the reviewing court is, in general, a limited one. The limited scope of judicial review provided in this section may be superseded by another statute, which could either preclude judicial review entirely (an approach that might raise constitutional questions), or establish review based on different standards than those of this Act. Further, in some states, the courts have established a constitutional right to de novo judicial review of certain matters in certain types of circumstances; see, e.g., *Strumsky v. San Diego Employees Retirement Assn.*, 11 Cal.3d 28, 520 P.2d 29 (1974), noted in 63 Calif.L.Rev. 27 (1975), 26 Hastings L.J. 1465 (1975). This Act includes some special provisions on the scope of judicial review of agency action in specified circumstances—Section 3-109(b) (review of interpretative rules); Section 3-204(d)(5) (review of rule after the administrative rules committee has filed an objection); and Section 5-111(d) (review of agency action on an application for stay or other temporary remedies, unless the agency has found its action necessary to protect against a substantial threat to the public health, safety, or welfare.) In addition, this Act includes special adaptations of the Section 5-116 standards of review in Sections 5-202(c) and 5-203 (civil enforcement).

Subsection (a) places the burden of demonstrating the invalidity of agency action upon the party who asserts invalidity. This subsection also emphasizes that the focus of the reviewing court's inquiry must be the agency action at the time it

was taken, and not at the time of judicial review.

Subsection (c) requires the person seeking judicial relief to demonstrate substantial prejudice in order to be entitled to relief. This prejudice must, moreover, arise from one or more of the grounds listed in the paragraphs under this subsection.

Paragraph (c)(3), providing for judicial relief if the agency has not decided all issues requiring resolution, deals with the possibility that the reviewing court may dispose of the case on the basis of issues that were not considered by the agency. An example would arise if the court had to decide on the facial constitutionality of the agency's enabling statute, in a state where agencies are precluded from passing on such questions; see Section 5-112(1). This provision is not intended to authorize the reviewing court to initially decide issues that are within the agency's primary jurisdiction; such issues should first be decided by the agency, subject to the limited judicial review provided by this Act.

Paragraph (c)(4) includes two distinct matters—interpretation and application of the law. With regard to the agency's *interpretation* to the law, courts generally give little deference to the agency, with the result that a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation. By contrast, with regard to the agency's *application* of the law to specific situations, the enabling statute normally confers some discretion upon the agency. Accordingly, a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its discretion, within the framework of paragraph (c)(8).

One example of an agency's failure to follow prescribed procedure, under paragraph (c)(5), is the agency's failure to act within the prescribed time upon a matter submitted to the agency. Relief in such cases is available under Section 5-117(b) and (c).

Paragraph (c)(7) establishes the "substantial evidence on the whole record" test for judicial review of determinations

of fact that are made or implied by the agency. In applying this test, the pertinent record is the whole record that is before the court, which includes not only the agency record, but also any additional evidence received by the court in accordance with Section 5-114. Thus, if the agency action under review is an order resulting from a formal or conference adjudicative hearing, and if no circumstances exist to justify the receipt of any additional evidence by the reviewing court beyond that contained in the agency record, the substantial evidence test will be applied to the agency record since in this situation the agency record is the "whole record before the court." By contrast, if the agency action under review is a rule, or an order issued pursuant to emergency or summary adjudicative proceedings, and if a determination of the validity of the agency action requires resolution of a factual dispute, the court may take new evidence under Section 5-114(a)(3), and the "whole record before the court" will then consist of a combination of the agency record plus the new evidence taken by the court. The 1961 Revised Model Act, Section 15(g)(5), dealt with judicial review of factual questions only with regard to the review of contested cases. For those purposes, the 1961 Revised Model Act used the "clearly erroneous" test. This Act opts for the "substantial evidence" test, which was used in the 1946 Model Act, Section 12(7)(e), and is used in the Federal Act, Section 706(2)(E), and an increasing number of states, either by express statutory language or by judicial interpretation; see B. Schwartz, *Administrative Law* Section 214 (1976). Professor Schwartz also observes: "Substantial evidence is such evidence as might lead a reasonable person to make a finding. The evidence in support of a fact-finding is substantial when from it an inference of existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a

contrary inference from the evidence." *Id.*, Section 210, at p. 595.

Paragraph (c)(8) is related, to some extent, to the formula found in the 1961 Revised Model Act Section 15(g)(6)—"arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." This Act offers two options, depending on whether or not bracketed subparagraph (iv) is adopted as part of paragraph (c)(8).

Without the bracketed language, this paragraph provides a more limited judicial role than the 1961 Model Act. The intent of this limitation is to discourage reviewing courts from substituting their judgment for that of the agency as to the wisdom or desirability of the agency action under review.

With inclusion of the bracketed language, this paragraph authorizes judicial relief if the agency action is "otherwise unreasonable, arbitrary or capricious." This language is approximately although not precisely the same as that of the 1961 Model Act. Cases decided under the 1961 Model Act are likely to be utilized, at least to some extent, as interpretations of this bracketed language of the 1981 Act, although the introduction of the term "unreasonable" in the bracketed language of the 1981 Act may provide judicial opportunities for interpretations that differ from precedents decided under the 1961 Model Act.

Note that subparagraph (iii) of (c)(8), providing for judicial relief if the challenged agency action is inconsistent with the agency's prior practice, is related to Section 2-102, requiring agencies to prepare an index of their written final orders and to make this index and the orders available for public inspection and copying. A party may invoke the indexing and public access requirements of Section 2-102, for the purpose of ascertaining the agency's prior practice, so as to reveal any inconsistency between the challenged agency action and prior agency practice.

Law Review Commentaries

Judicial review of rulemaking under Texas administrative procedure and Texas Register Act. John J. Watkins and Debora S. Beck. 34 *Baylor L.Rev.* 1 (1982).

Survey of Kansas law: Administrative law. Steve L. Leben. 37 *U.Kansas L.Rev.* 679 (1989).

Library References

American Digest System

Scope of review, see Administrative Law and Procedure ¶741 to 800.

Encyclopedias

Scope of review, see C.J.S. Public Administrative Law and Procedure §§ 213 to 248.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Explanation.

Notes of Decisions

Generally 1

Deference to agency interpretation of rules 2

Substitution of court's judgment for that of agency 3

1. Generally

Administrative Procedure Act establishes scope of review of Utilities and Transportation Commission actions upon applications for motor carrier permits. *Inland Empire Distribution Systems, Inc. v. Utilities and Transp. Com'n*, 1989, 770 P.2d 624, 112 Wash.2d 278.

Even though superior court has broader authority to review administrative decisions in special action than under ordinary certiorari, its primary purpose is to determine whether administrative decision was arbitrary, capricious, or abuse of discretion. *Blake v. City of Phoenix*, App.1988, 754 P.2d 1368, 157 Ariz. 93.

2. Deference to agency interpretation of rules

In reviewing administrative decisions by state agencies, deference is given to agency's interpretation of its own regulations; however, such deference is not total and agency's interpretation must be examined to determine if it is consistent with language of regulation and with purpose which the regulation is intended to serve. *In re David B.*, 1986, 508 A.2d 1045, 127 N.H. 772.

In reviewing administrative agency's decision in petition for certiorari, agency's interpretation of its regulations is to be accorded

great deference. *Petition of Pelletier*, 1984, 484 A.2d 1119, 125 N.H. 565.

Administrative agency's construction of a statute is question of law reviewed de novo under error of law standard with heightened degree of deference given to administrative agency's interpretation when statute is within agency's field of expertise. *Inland Empire Distribution Systems, Inc. v. Utilities and Transp. Com'n*, 1989, 770 P.2d 624, 112 Wash.2d 278.

3. Substitution of court's judgment for that of agency

Administrative rule may be declared invalid only if it violates Constitution or statute or was adopted without compliance with statutory procedures; consequently, court will not substitute its judgment for that of an agency nor will it examine record for substantial evidence in reviewing declaratory judgment on validity of rule. *American Network, Inc. v. Washington Utilities and Transp. Com'n*, 1989, 776 P.2d 950, 113 Wash.2d 59.

Reviewing court properly refused to substitute its judgment for that of fact-finding tribunal where accusations concerning employee's misconduct were subject of hotly disputed evidence at administrative hearing, with substantial evidence supporting positions of both employee and employer. *Zavala v. Arizona State Personnel Bd.*, App.1987, 766 P.2d 608, 159 Ariz. 256.

Under "error of law" standard, Appellate Court may substitute its determination for that of agency although agency's determination is entitled to substantial weight. *Montell v. State, Dept. of Social and Health Services*, 1989, 775 P.2d 976, 54 Wash.App. 708.

§ 5-117. [Type of Relief].

(a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.