

2008

Lindsay Germer v. Famous Dave's and/or Wausau Insurance Company and Utah Labor Commission : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDSAY GERMER,

Petitioner/Appellant,

vs.

FAMOUS DAVE'S, and/or WAUSAU
INSURANCE COMPANY, and UTAH
LABOR COMMISSION,

Respondents/Appellees.

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:
:
:

Court of Appeals
Case No.: 2008-0442

Priority 7

Labor Commission No.: 05-0318

**BRIEF OF APPELLEES
FAMOUS DAVE'S and WAUSAU INSURANCE COMPANY**

Appeal from the Utah Labor Commission

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**APPELLEES RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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	:	Case No.: 2008-0442
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	:	Priority 7
vs.	:	
	:	
FAMOUS DAVE'S, and/or WAUSAU INSURANCE COMPANY, and UTAH LABOR COMMISSION,	:	Labor Commission No.: 05-0318
	:	
Respondents/Appellees.	:	
	:	

BRIEF OF APPELLEES
FAMOUS DAVE'S and WAUSAU INSURANCE COMPANY

Appeal from the Utah Labor Commission

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellant, Lindsay Germer, is from a final order of the Labor Commission of Utah dated April 23, 2008. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63G-4-403, and 78-2a-3(2)(a) (2009).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1: Did the Commission properly determine the mechanism of accident in this case?

Standard: A court must uphold the commission's factual findings if such findings are supported by substantial evidence based upon the record as a whole. Utah Code Ann. § 63G-4-403 (4)(g). See Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671 (Utah 1997). To successfully challenge an agency's factual findings, the party, "must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Martinez v. Media-Paymaster Plus, 2007 UT 42 (Utah 2007); Grace Drilling Co. v. Bd. of Review of Indus. Comm'n, 776 P.2d 63, 68 (Utah Ct. App. 1989); accord Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). This requires counsel to construct the evidence

supporting the adversary's position, and then "ferret out a fatal flaw in the evidence." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah 1991). Compliance with this undertaking helps ensure that the factual findings of the agency are overturned only when lacking in substantial evidence.

Issue 2: Was the Labor Commission "reasonable and rational" when it determined that the higher standard of legal causation was not satisfied by kicking a cooler door open while carrying trays of meat?

Standard: This involves the application of facts to the law where the Labor Commission has a grant of discretion. Reasonableness and rationality standard applies. See A.E. Clevite, 2000 UT App 35, ¶¶6-7;¹ Acosta v. Labor

¹ In A.E. Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶6, 996 P.2d 1072, the court stated:

The applicable standard of review for a formal adjudicative hearing is governed by the Utah Administrative Procedures Act (UAPA). 'When the Legislature has granted an agency discretion to determine an issue, we review the agency's action for reasonableness. Caporoz v. Labor Comm'n, 945 P.2d 141, 143 (Utah Ct. App. 1997); see Cross v. Board of Review of Indus. Comm'n, 824 P.2d 1202, 1204 (Utah Ct. App. 1992) (stating 'when there exists a grant of discretion, 'we will not disturb the Board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality') (citation omitted). . . .

In this case, the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. See Utah Code Ann. § 34A-1-301 (1997). As such, we must uphold the Commission's determination that [petitioner's] injury "arose out of and in the course of" his employment, unless the

Comm'n, 2002 UT App 67, ¶11. (Respondents disagree with Ms. Germer's standard of review which she notes is a correction of error standard).

Issue 3: Did the Commission violate Ms. Germer's right to due process in allowing a company representative to testify at hearing and in admitting certain photographs?

Standard: Due process challenges are questions of law that the court reviews under a correction of error standard. See West Valley City v. Roberts, 993 P.2d 252 (Utah 1999).

Issue 4: Did the Commission violate constitutional open court provisions when it took nearly two years to issue its Order denying benefits?

Standard: Review of constitutional violations are questions of law, reviewed for correctness. See Duke v. Graham, 2007 UT 31, ¶7 (Utah 2007).

determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under section 63-46b-16(h)(i) of the UAPA. See Caporoz, 945 P.2d at 143 (indicating agency has abused its discretion when agency action is unreasonable).

DETERMINATIVE LAW

The determinative law is Utah Code Ann. §34A-2-401 (Utah “Workers Compensation Act”), the provision authorizing workers’ compensation for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401 (2003).

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986), to require a claimant to prove both medical and legal causation in order for the claimant to establish his or her entitlement to workers’ compensation benefits.

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case presents the question whether an employee of Famous Dave's is entitled to worker's compensation benefits arising from an industrial event that occurred while working as an assistant manager on October 30, 2004.

On April 1, 2005, Lindsay Germer (hereinafter, "Ms. Germer") filed an Application for Hearing with the Utah Labor Commission. She alleged entitlement to certain workers' compensation benefits from an October 30, 2004 work accident (hereinafter, the "accident"). (R., at 1)

On May 11, 2005, Famous Dave's and/or Wausau Insurance (hereinafter, "Famous Dave's") filed an Answer to the Application for Hearing. (R., at 12)

On May 13, 2005, Ms. Germer served certain Interrogatories and Requests for Production of Documents and Things, via United States mail, on Famous Dave's.

On June 2, 2005, Famous Dave's filed an Answer to Ms. Germer's First Set of Interrogatories and a Response to Ms. Germer's First Request for Production of Documents and Things. (R., at 63).

On December 20, 2005, Ms. Germer served on Famous Dave's a Second Set of Interrogatories and Request for Production of Documents and Things.

On February 21, 2006, Famous Dave's filed an Answer to Ms. Germer's Second Set of Interrogatories and a Response to Ms. Germer's Second Request for Production of Documents and Things.

On February 14, 2006, Ms. Germer filed Pre-Trial Disclosures. (R., at 19)

On February 21, 2006, Famous Dave's filed Pre-Trial Disclosures. (R., at 24)

On March 8, 2006, Famous Dave's filed a Supplemental Answer to Ms. Germer's Interrogatories. (R., at 72). On this same date, Famous Dave's also filed Supplemental Pre-Trial Disclosures. (R., at 28)

Approximately seven to ten days prior to the evidentiary hearing, counsel for Famous Dave's contacted counsel for Ms. Germer to discuss the Supplemental Answers to Interrogatories provided by Famous Dave's to Ms. Germer. Counsel for Famous Dave's informed counsel for Ms. Germer of Famous Dave's' intent to call Scott Morton as a witness. The subject matter of Mr. Morton's testimony was discussed during that telephone conversation. Counsel for Famous Dave's also informed counsel for Ms. Germer that Mr. Morton would take several photographs of the walk-in cooler at Respondent Famous Dave's Restaurant that would be introduced into evidence at the evidentiary hearing for illustrative purposes. Although available for review, counsel for Ms. Germer made no demand from counsel for Famous Dave's to review the photographs prior to the evidentiary hearing.

On March 31, 2006, the ALJ conducted an evidentiary hearing. A copy of the hearing record has been provided.

On April 5, 2006, the ALJ issued Findings of Fact, Conclusions of Law and Order. (R., at 45).

On May 5, 2006, Ms. Germer filed a Motion for Review. (R., at 51)

On June 1, 2006, Famous Dave's filed a Response to the Motion for Review. (R., at 82).

On June 27, 2006, Ms. Germer filed a Reply to Response to Motion for Review (R., at 155).

On April 23, 2008, the Commission entered an Order Affirming ALJ's Decision. (R., at 164).

Ms. Germer has subsequently filed a Petition for Review to the Court of Appeals.

Statement of Facts

1. Lindsay Germer began working for Famous Dave's as a server in June of 2004. As of October 30, 2004, she had been promoted to assistant manager. (Tr., 22).
2. Ms. Germer began work at 7:00 am on October 30, 2004. As part of her duties she was required to go into a walk-in cooler to pick up trays of meat that needed to be cooked for the day.
3. The cooler door was fairly standard – three to four feet wide. (Tr., 24). Although Ms. Germer testified at hearing that the cooler door stuck on occasion, Ms. Germer and Scott Morton (the area manager) both testified that the door on the cooler was fully operational at the time of her alleged industrial accident. Several photographs of the cooler door were admitted at hearing. (R. 34-37, 40-42, 44).
4. At 9:00 am, Ms. Germer entered the cooler and picked up trays of meat in the cooler, weighing collectively 48 pounds. (Tr., 28). Ms. Germer picked up three trays of meat (each tray being 18" x 24", much like a cookie sheet). (Tr., 27-28). Ms. Germer walked with the trays at waist height and stepped in front of the cooler door. Ms. Germer stopped in front of the cooler door and planted both feet since the inner floor of the cooler had condensation from thawing meat. She did not make a forward continuous movement toward the walk-in cooler door (Tr., 67). Ms. Germer stood

about one to two feet from the cooler door and lifted her right foot and kicked the door with he foot to open it. (Tr., 87). The door did not stick shut. At that time, Ms. Germer felt immediate pain in her right knee. Ms. Germer did not injure her right knee by slipping and falling to the cooler room floor. Her feet were firmly planted and well-grounded. She did not trip. She did not slip. She did not stumble. She did not awkwardly twist her knee nor lose her balance. Ms. Germer's right knee made no direct contact with the door or with the floor. (Tr., 30).

5. Ms. Germer worked the remainder of her shift and the two days that followed. (Tr., 33).
6. On November 1, 2004, Ms. Germer sought medical treatment for right knee pain. She was off work for several days and worked for another five weeks, until December 13, 2004, at which time she resigned. (Tr., 34)
7. On January 2, 2005, Ms. Germer began working for a new employer – Outback Steakhouse – as a waitress.
8. On February 5, 2005, Ms. Germer sought treatment with Dr. Scott Parry. (R., 170 at 8). Dr. Parry noted that Ms. Germer has a long standing history of right knee problems dating back to at least April 2001 when she had a PCL reconstruction performed by Dr. John Edwards. Dr. Parry recommended an MRI to assess the consequences of the October 30, 2004 industrial event. (R., 170 at 8).

9. On February 25, 2005, Ms. Germer underwent surgery to her right knee for a PCL reconstruction. (R., 170 at 125).
10. On June 7, 2005, Dr. Parry indicated that Ms. Germer would likely reach medical stability in August or September 2005. (R., 170, at 125).
11. On September 27, 2005, Dr. Marble performed an independent medical evaluation. He diagnosed Ms. Germer with chronic right knee pain status post surgery in 1993, PCL reconstruction in 2001 and 2005 with degeneration (R., 170 at 133). Dr. Marble notes a long standing history of bilateral knee problems dating back to 1991, with several accidents following that date. Dr. Marble noted that no additional care is warranted on an industrial basis for the event on October 30, 2004. (R., 170 at 136).
12. Ms. Germer's right knee problems are well documented in the medical records submitted to the court. (R., 170). The parties do not dispute this treatment.
 - A. Ms. Germer was treated for a right knee condition as early as January 14, 1991. Doctors note at that time that Ms. Germer had patello-femoral pain following athletic activities. (R., 170 at 2).
 - B. In 1992, Ms. Germer underwent radiological studies at the Ogden Clinic showing degenerative changes in her knee and probable knee calcification. (R., 170 at 3).

- C. Ms. Germer also fell onto her right knee on or about January 20, 2001, while working at an assisted living center (catching her toe on the door jam of the floor) and was treated for a right knee sprain and possible ligament tear. (R., 170 at 172). She was given crutches and a knee immobilizer at that time. She underwent physical therapy for her right knee for approximately thirty-three visits (33) in 2001. She eventually underwent surgery to her right knee in February, 2001 performed by Dr. John Edwards. (R., 170 at 56).
 - D. Following this surgery, Ms. Germer re-injured her right knee by falling in April 2001. An additional surgery was performed on April 27, 2001. (R., 170 at 106).
 - E. In October 2001, Ms. Germer underwent hardware removal in her right knee. (R., 170 at 163).
 - F. Ms. Germer was also treated on December 27, 2003, for a right knee sprain when she slipped on pavement. She was prescribed Percocet for right knee pain.
 - G. Ms. Germer continued to treat in January, 2004 for right knee problems and underwent an MRI on January 14, 2004 due to continued knee pain. (R., 170 at 114).
13. Ms. Germer sought workers' compensation benefits as a result of the October, 2004 event which were denied by Famous Dave's.

14. On April 1, 2005, Ms. Germer filed an Application for Hearing seeking temporary total disability, permanent partial disability, medical expenses and recommended medical care for the October 30, 2004 accident. (R., 1).
15. On May 11, 2005, Famous Dave's filed an Answer denying compensability for lack of medical causation, due to Ms. Germer's long standing history of knee problems. Famous Dave's also denied Ms. Germer's claim for lack of legal causation. (R., 13-14).
16. On May 13, 2005, Ms. Germer served Interrogatories and Requests for Production of Documents and Things, via United States mail, on Famous Dave's.
17. On June 2, 2005, Famous Dave's filed an Answer to Ms. Germer's First Set of Interrogatories and a Response to Ms. Germer's First Request for Production of Documents and Things. (R., 63).
18. On December 20, 2005, Ms. Germer served on Famous Dave's a Second Set of Interrogatories and Request for Production of Documents and Things.
19. On February 21, 2006, Famous Dave's filed an Answer to Ms. Germer's Second Set of Interrogatories and a Response to Ms. Germer's Second Request for Production of Documents and Things.
20. On February 14, 2006, Ms. Germer filed Pre-Trial Disclosures. (R., 19).
21. On February 21, 2006, Famous Dave's filed Pre-Trial Disclosures. (R., 24)

22. On March 8, 2006, Famous Dave's filed a Supplemental Answer to Ms. Germer's Interrogatories. (R., 72). In the Supplemental Answer, Famous Dave's informed Ms. Germer of Famous Dave's intent to call Scott Morton as a witness at the evidentiary hearing. Famous Dave's provided Ms. Germer with a summary of the testimony to be solicited from Mr. Morton.
23. On March 8, 2006, Famous Dave's also filed Supplemental Pre-Trial Disclosures. (R., 28). Again, Famous Dave's notified Ms. Germer of their intent to call Scott Morton as a witness. Famous Dave's also notified Ms. Germer of their intent to submit photographs of the walk-in cooler and cooler door at Famous Dave's Restaurant in St. George. (R., 29).
24. Approximately seven to ten days prior to the evidentiary hearing, counsel for Famous Dave's contacted counsel for Ms. Germer to discuss the Supplemental Answers to Interrogatories provided by Famous Dave's to Ms. Germer. Counsel for Famous Dave's informed counsel for Ms. Germer of Famous Dave's intent to call Scott Morton as a witness. The subject matter of Mr. Morton's testimony was discussed during that telephone conversation. Counsel for Famous Dave's also informed counsel for Ms. Germer that Mr. Morton would take several photographs of the walk-in cooler at Respondent Famous Dave's Restaurant that would be introduced into evidence at the evidentiary hearing for illustrative purposes. Although available for review, counsel for Ms. Germer made no demand from

counsel for Famous Dave's to review the photographs prior to the evidentiary hearing. Moreover, counsel for Ms. Germer made no request to schedule the deposition or to conduct any sort of interview of Mr. Morton.

25. On March 31, 2006, the ALJ conducted an evidentiary hearing. A copy of the hearing record has been provided. At the hearing, Ms. Germer testified regarding her medical history and the mechanism of accident on October 30, 2004.
26. Over the objection of Ms. Germer, Famous Dave's was allowed to present testimony of Scott Morton, the area director for Famous Dave's. (Tr., 99). Ms. Germer objected to the testimony of Mr. Morton since Famous Dave's did not designate Mr. Morton as a witness in their initial discovery responses. Famous Dave's argued that Ms. Germer had notice of Mr. Morton in supplemental responses and in pre-trial disclosures of March 8, 2006.
27. At hearing, the ALJ admitted photographs of the cooler and cooler door. (R., 34-44).
28. Mr. Morton testified that no one had ever reported the cooler door sticking and that Ms. Germer did not report any malfunctioning door to Mr. Morton at any time (TR, at 123-124).
29. On April 5, 2006, the ALJ issued Findings of Fact, Conclusions of Law and Order. (R., 45). The ALJ found that Ms. Germer had a pre-existing right

knee condition that contributed to the claimed industrial accident, giving rise to the application of the higher standard of legal causation. The ALJ found that the mode of injury did not satisfy the higher standard of legal causation. On this basis, the ALJ found that Ms. Germer's claim was not compensable under Utah law.

30. On May 5, 2006, Ms. Germer filed a Motion for Review. (R.,51). Ms. Germer argued that the ALJ erred in allowing testimony of Mr. Morton and photographs of the cooler into evidence. She also argued that the ALJ erred in evaluating the legal causation test given the weight of the meat Ms. Germer was carrying. (R., 60-61). Ms. Germer did not argue (1) that the ALJ disregarded evidence that the floor was wet with condensation; or, (2) that the ALJ disregarded medical records of her orthopedic surgeon whom she now states noted the, "forcefulness" of her fall.
31. On June 1, 2006, Famous Dave's filed a Response to the Motion for Review. (R., 82).
32. On June 27, 2006, Ms. Germer filed a Reply to Response to Motion for Review (R.,155).
33. On April 23, 2008, the Commission entered an Order Affirming ALJ's Decision. (R.,164). The Commission agreed with the ALJ that Ms. Germer did not satisfy her burden of establishing that the higher standard of legal causation was met. Specifically, the Commission found that the cooler door

kicked by Ms. Germer did not stick when she kicked it. The Commission also found that prior to the accident, Ms. Germer had a pre-existing right knee condition and had undergone several surgeries to repair the right knee. (R., 164).

SUMMARY OF THE ARGUMENTS

First, the Commission properly determined that Ms. Germer's industrial claim was not compensable for failing to satisfy the higher standard of legal causation as articulated in Allen v. Industrial Commission. Ms. Germer failed to show that the mode of accident was an unusual or extraordinary exertion when compared to non-industrial 20th century activities. There is substantial evidence to support the Commission's finding regard the mode of accident. Indeed, Ms. Germer's testimony revealed that, while carrying trays of meat, she kicked the cooler door with her right foot while her left foot remained grounded. Ms. Germer was not in continuous motion at the time of the event and was well- balanced on both when she kicked the door open. She did not trip. She did not slip. She did not stumble. She did not fall to the ground. In fact, Ms. Germer's right knee never came in direct contact with the cooler door, nor did her right knee come in contact with the cooler floor as she slumped to the ground after kicking the door with her right foot.

Given the mechanism of injury, the ALJ and Commission acted reasonably and rationally in finding that the physical exertion placed on Ms. Germer's right knee at the time she claimed to have kicked the walk-in cooler door with her right foot was not extraordinary or unusual. The trays of ribs that Ms. Germer held in her arms at the time of the alleged accident had no bearing on the physical exertion, if any, placed on Ms. Germer's right knee at the time she attempted to

kick the walk-in cooler door with her right foot. Ms. Germer did not injure her right knee from having carried the trays of ribs. Moreover, there was nothing awkward, extraordinary or difficult about her effort to hold the trays of ribs as Ms. Germer attempted to kick the walk-in cooler door with her right foot. Despite carrying the trays of ribs, Ms. Germer was balanced, well-grounded, and stable at the time she claims to have kicked the door with her right foot.

The Commission and ALJ properly examined the mechanism of injury in the context of the Allen decision to activities in non-employment life. The Commission properly determined that in non-industrial life, persons use their feet to kick a door, slide a box or garbage can, or even move furniture or other items. Oftentimes, such an action may occur while the person is lifting or carrying certain objects. The ALJ and Commission were also correct to discern that individuals in their non-employment life use their feet to kick a ball while engaging in a sport or other type of extra-curricular activity. This alleged accident is also similar to non-employment physical activities such as climbing or descending stairs, or stepping on uneven surfaces.

Second, the Commission did not violate Ms. Germer's right to due process in admitting testimony of Scott Morton and photographs of the cooler and cooler door. Contrary to Ms. Germer's argument, she was not surprised by this evidence. Several weeks prior to the evidentiary hearing, Famous Dave's informed Ms. Germer of this testimony and evidence by way of pre-trial

disclosures, supplemental discovery and telephone conferences with Ms.

Germer's attorney. However, Ms. Germer's counsel made no request to depose Mr. Morton, conduct any sort of pre-hearing interview of the intended witness or to view the photographs of the cooler.

Third, the Commission's delay to issue a decision in this case, while unfortunate to all parties, has no bearing on Ms. Germer's right to compensation or the outcome of this case.

ARGUMENT

POINT 1: THE LABOR COMMISSION PROPERLY DETERMINED THAT MS. GERMER'S INDUSTRIAL INJURY CLAIM WAS NOT COMPENSABLE

Under the Utah Worker's Compensation Act, Utah Code Ann. § 34A-2-401 (2004), an employee is entitled to worker's compensation benefits for injuries occurring, "by accident arising out of and in the course of the employee's employment." Id. To receive benefits, a claimant must, among other things, prove by a preponderance of evidence a causal connection between the injury and the activities or exertions in the work place. See Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986). To do so, the claimant must prove both legal and medical causation. See id. at 25. In Allen, the threshold case on this issue, the Court stated:

Where a claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, usual or ordinary exertion is sufficient.

Allen, 729 P.2d at 26.

Ms. Germer argues that the ALJ and Commission's findings of fact must be reversed since they do not consider the, "totality of the circumstances" and "disregard uncontroverted evidence." Specifically, she argues that the Commission disregarded crucial evidence that: (1) the floor was wet with condensation at the time of accident; (2) medical records of Dr. Germer note the

“forcefulness” of her fall; and, (3) Ms. Germer was carrying a large cookie sheet with fifty pounds of meat at the time of the accident. She argues that had the ALJ and Commission considered this evidence, her mode of injury would satisfy the higher standard of legal causation. Ms. Germer’s arguments lacks merit for several reasons.

A. Ms. Germer has failed to Marshall the Evidence.

Ms. Germer’s argument – that the court disregarded crucial evidence in rendering its finding regarding the mode of injury – must fail at the outset as she has failed to marshal the evidence as required by law. Utah’s appellate courts have held that to successfully challenge an agency’s factual findings, the party “must marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.” Martinez v. Media-Paymaster Plus, 2007 UT 42 (Utah 2007); Grace Drilling Co. v. Bd. of Review of Indus. Comm’n, 776 P.2d 63, 68 (Utah Ct. App. 1989); accord Utah R. App. P. 24(a)(9) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”). This requires counsel to construct the evidence supporting the adversary’s position, and then “ferret out a fatal flaw in the evidence.” West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah 1991). Compliance with this undertaking helps ensure that the factual findings of the agency are overturned only when lacking in substantial evidence.

Ms. Germer does not marshal the evidence. Ms. Germer is required to list all of the evidence which supports the findings of the Commission and then demonstrate that the evidence is inadequate to sustain the findings. See Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998). Since Ms. Germer has failed to marshal the evidence, the Court of Appeals is bound to assume that the record supports the Commission's findings. See Wade v. Stagl, 869 P.2d 9, 12 (Utah Ct. App. 1994).

B. There is Substantial Evidence To Support the Commission's Findings Regarding What Exertions Were Involved in the Work Accident.

Even assuming, *arguendo*, that Ms. Germer satisfies her burden to marshal the evidence, there is substantial evidence to support the Commission's factual findings regarding the mechanism of injury.

In the Findings of Fact, Conclusions of Law and Order, the ALJ states in relevant part:

Petitioner's claim arises from an incident that occurred on October 30, 2004. Petitioner was in the cooler to pick up some meat that needed to be cooked for the day. When she attempted to leave the cooler, the Petitioner alleges that the door was stuck closed, and that when she kicked the door with her foot, she felt immediate pain in her knee and she "went down" on both knees.

. . . .

Petitioner testified that she was in the cooler. . .to obtain some meat that needed to be cooked for the day. She testified that she picked up three trays (each being approximately 18" x 24" much like a large cookie sheet) which weighed approximately 50 pounds total. She was careful to

approach the door and was holding the meat at about waist height. She stopped in front of the door to make sure her feet were “grounded.” [because she knew the floor was wet]. This she explained was that she balanced on both feet. She was standing about one to two feet from the door at that time. She lifted her right foot and kicked the door “as hard as she could”, expecting it would open. It did not. She felt immediate pain in her right knee. . . . During the course of cross examination, Petitioner demonstrated the incidents of the morning of October 30, 2004. She held the tray (empty) in the approximate waist high position, and approached the door in the Courtroom for demonstration purposes. She stood near the door and described her activities. Of particular note is that Petitioner claimed during her testimony and during the demonstration that she kicked the door with her foot. However, at the distance she indicated she was standing from the door, at best she could have kicked the door with the ball of her foot (toes). Then she stated that the initial contact was with the toe area of her foot, then involved the full flat part of her foot. The does not appear possible at the distance she testified she was standing to wit: one to two feet from the door.

Petitioner’s testimony was further contradicted when she stated that she was standing balanced and “grounded” on both feet and her full body weight was moving toward the door. In the position she demonstrated her body was at rest, she not in continuous motion towards the door . . .

(R., 170 at 46-47).

In its Order Affirming ALJ’s Decision, the Commission found as follows with regard to the mechanism of injury:

The Commission adopts Judge Sessions Findings of Facts. The facts relevant to the motion for review are as follows: On October 30, 2003, Ms. Germer was retrieving trays of meat out of a walk-in cooler at Famous Dave’s. As she held the meat trays in front of her, Ms. Germer kicked on the cooler door with her right foot in order to open the door. She felt immediate pain in her right knee. Although Ms. Germer claims that the door stuck when she kicked it, the evidence demonstrates that it did not stick. Prior to this accident, Ms. Germer had a pre-existing right knee condition and had undergone several surgeries to repair the right knee. (R., 170 at 164)

First, Ms. Germer argues that the court disregarded crucial evidence – that the floor was wet with condensation – which had a significant bearing on the case. However, Ms. Germer did not argue at the evidentiary hearing, or in her Motion for Review that condensation on the floor had any bearing on the court’s evaluation of legal causation. On this basis, she has waived this argument on appeal. See Brown & Root Indus. Serv. v. Industrial Comm’n, 947 P.2d 671 (Utah 1997) (failure to raise issues in Motion for Review are deemed waived on appeal as they are not properly preserved); Whitear v. Labor Comm’n, 973 P.2d 982 (Utah 1998). In any event, the ALJ’s Order appears to have considered the surface of the floor when the ALJ recognized that Ms. Germer’s feet were “grounded” immediately prior to kicking the door. Apparently, Ms. Germer grounded her feet since she knew the floor was wet with condensation. (Tr., 29, 66).

Second, Ms. Germer argues that the court disregarded medical records of her orthopedic surgeon whom she states noted the “forcefulness” of her fall. Again, Ms. Germer did not raise this issue in her Motion for Review and, therefore, has waived such a challenge on appeal. Notwithstanding, the ALJ properly evaluated the mode of injury– as kicking the door – rather than events or forces subsequent to the accident. Indeed, in evaluating legal causation, the focus is on the actual impact or the physical exertion on the right knee from the work accident, rather than the consideration of events leading up to or after the

accident. This means the focus must be on the forces acting upon Ms. Germer's right knee at the time of the workplace event.

Third, Ms. Germer argues that the court disregarded the fact that she was carrying a large cookie sheet with fifty pounds of meat at the time of the accident which is relevant to the legal causation evaluation. Ms. Germer again did not argue this in her Motion for Review and has waived this issue on appeal. Notwithstanding, the ALJ and Commission orders clearly recognize that Ms. Germer was carrying three trays of meat, totaling a combined weight of 50 pounds at the time of the accident. (R., 46-48, 164-65). Even with these trays in hand, however, the court found Ms. Germer's body balanced when she kicked the door open. She did no trip. She did not stumble. She did not fall. The fact that Ms. Germer has hold a tray of meat at the time she kicked the cooler door with her right foot had no bearing on the physical impact upon Ms. Germer's right knee caused by Ms. Germer kicking the cooler door. Accordingly, there was no error committed by the court.

C. The Labor Commission Acted Reasonably and Rationally in Ruling That Ms. Germer's Injury Did Not Meet the Higher Legal Causation Standard

This Court must next evaluate whether the Commission acted reasonably and rationally in ruling that the activities of October 30, 2004 did not rise to the level of an unusual or extraordinary exertion.

There is no dispute that the higher standard of legal causation as articulated in Allen applies in this case.² Ms. Germer does not dispute the application of this standard, but rather argues that the mechanism of injury was an “unusual or extraordinary exertion”, sufficient to meet this test.

Ms. Germer’s accident does not meet the higher standard of legal causation. In Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the threshold case on this issue, the Court stated:

Where a claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, usual or ordinary exertion is sufficient.

² Ms. Germer acknowledges that she suffered from chronic left and right knee problems which pre-dated the accident. While still in high school, Ms. Germer underwent both left and right knee surgeries to remove loose cartilage (R., 170 at 002). In 1991 and 1992, Ms. Germer sought medical care for complaints of bilateral knee pain (R., 170 at 002). In 1993, Ms. Germer underwent bilateral knee surgery for persistent complaints of left and right knee pain. In January 2001, while employed as a CNA, Ms. Germer caught her right toe in a door jam and tripped and landed on her right knee. She was diagnosed with a right TCL, MCL, LCL, and lateral meniscus tears (R., 170 at 172). Ms. Germer was then referred to physical therapy for almost six months.

On April 27, 2001, Ms. Germer underwent a right knee PCL reconstruction (R., 170 at 60-70). On October 22, 2001, Ms. Germer’s right knee hardware was removed (R., 170 at 163). On December 27, 2003, Ms. Germer jumped from a snow bank and landed on her right knee. The right knee gave way (R., 170 at 107).

From Ms. Germer’s chronic and long-standing right knee problems, it is not disputed that Ms. Germer brought an added risk of injury to her right knee to her employment with Respondent Famous Dave’s. The ALJ and the Commission were correct to find that Ms. Germer’s accident is subject to a higher standard of legal causation.

Legal Cause -- Whether an injury arose out of or in the course of employment is difficult to determine where the employee brings to the workplace a personal element of risk such as a preexisting condition. Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that "the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable" To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work. Larson summarized how the legal cause rule would work in practice as follows: If there is some personal causal contribution in the form of a [preexisting condition], the employment contribution must take the form of an exertion greater than that of nonemployment life

If there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the employment and causally connected with the [injury] as a matter of medical fact is adequate to satisfy the legal test of causation. Thus, where the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, a usual or ordinary exertion is sufficient.

....

We believe an objective standard of comparison will provide a more consistent and predictable standard for the Commission and this Court to follow. In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected of people in today's society, not what this particular claimant is accustomed to doing. Typical activities and exertions expected of men and women in the latter part of the 20th century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. By

using an objective standard, the case law will eventually define a standard for typical "nonemployment activity" in much the way case law has developed the standard of care for the reasonable man in tort law.

Allen v. Industrial Comm'n, 729 P.2d 15, 26-27 (Utah 1986).

The Commission found that the mechanism of injury occurred while Ms. Germer was carrying approximately fifty pounds of ribs on three metal trays from a walk-in cooler. Ms. Germer approached the walk-in cooler door and stopped one to two feet from the cooler door. Both of Ms. Germer's feet were grounded on the walk-in cooler floor (Tr., 66-67) due to condensation on the floor. Ms. Germer was balanced while holding the trays of ribs in her hands at an angle, the front edge of each tray resting against her abdomen. Ms. Germer was standing still (Tr., 67). She did not make a forward continuous movement toward the walk-in cooler door (Tr., 67). Ms. Germer then kicked the door with her right foot (Tr., 87). The bottom of Ms. Germer's right foot contacted the walk-in cooler door first (Tr., 87-88). Ms. Germer did not injure her right knee by slipping and falling to the cooler room floor. She did not trip. She did not stumble. She did not awkwardly twist her knee nor lose her balance. Ms. Germer's right knee did not come in direct contact with the freezer door, nor did her right knee directly hit the cooler floor as she slumped to the floor after kicking the cooler door.

Given the mechanism of injury, the ALJ and Commission acted reasonably and rationally in finding that the physical exertion placed on Ms. Germer's right

knee at the time she claimed to have kicked the walk-in cooler door with her right foot was not extraordinary or unusual. See Bigler v. TW Services, MD 95-0838-CA (8/8/96) (a one time lunge and twist to catch a falling object is not uncommon of activities in everyday life and does not involve unusual exertion).

The trays of ribs that Ms. Germer held her in arms at the time of the alleged accident had no bearing on the physical exertion, if any, placed on Ms. Germer's right knee at the time she attempted to kick the walk-in cooler door with her right foot. Certainly, Ms. Germer did not injure her right knee from having carried the trays of ribs. There was nothing awkward, extraordinary or difficult about her effort to hold the trays of ribs as Ms. Germer attempted to kick the walk-in cooler door with her right foot. Despite carrying the trays of ribs, Ms. Germer was balanced, well-grounded, and stable at the time she claims to have kicked the door with her right foot. Holding the tray of ribs against her abdomen did not cause Ms. Germer to trip, slip, stumble, lose her balance, or footing, or cause her to fall to the cooler floor.

Famous Dave's agrees with the ALJ and the Commission that it is a common experience of non-employment life for persons to use their feet to kick a door, slide a box or garbage can, or even move furniture or other items with a leg or foot. Often such an action may occur while the person is lifting or carrying certain objects. The ALJ and the Commission was also correct to discern that individuals in their non-employment life use their feet to kick a ball while engaging

in a sport or other type of extra-curricular activity. This alleged accident is also similar to non-employment activities such as climbing or descending stairs, or stepping on uneven surfaces. In this case, the physical exertion placed upon Ms. Germer's right knee at the time of the accident was *de minimis*. Ms. Germer's accident does not meet the higher standard of legal causation. The Court of Appeals should affirm the ALJ's decision to deny workers' compensation benefits to Ms. Germer because her claim did not meet the higher standard of legal causation.

POINT 2: THE COMMISSION DID NOT VIOLATE MS. GERMER'S RIGHT TO DUE PROCESS WHEN IT ADMITTED CERTAIN EVIDENCE.

Ms. Germer was not surprised by the testimony of Scott Morton or the photographs of the walk-in cooler which were introduced as evidence at the evidentiary hearing.

Ms. Germer next argues that she was denied due process when the court allowed the testimony of Scott Morton and photographs of the walk-in cooler at the evidentiary hearing. Famous Dave's disagrees and submits that there was no due process violation.

Section 34A-2-802 of the Utah Code states that the Commission is not bound by usual common law or statutory rules of evidence, or by technical or formal rules of procedure. Notwithstanding, Utah Courts have held that these rules must not deprive parties of their constitutional right to an impartial hearing. See Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 245 P. 343 (Utah

1926); Workers Comp. Fund v. Industrial Comm'n, 761 P.2d 572 (Utah Ct. App. 1988).

Article 1, Section 7 of the Utah Constitution allows for due process of law. Additionally, the Utah Administrative Procedure's Act guarantees parties a reasonable opportunity for a fair hearing. See Utah Code Ann. § 63G-4-206. Utah's courts have interpreted these sections to entitle a party to notice of proceedings and the opportunity to present testimony and witnesses at administrative proceedings. See Workers Compensation Fund v. Industrial Comm'n, 761 P.2d 572 (Utah Ct. App. 1988). In WCF, the court held:

[i]t is fundamental that in investigations such as the Industrial Commission is authorized to make, any party to a cause or proceeding is entitled to be advised of and afforded an opportunity to meet such evidence as the commission may consider and rely on in the making of its findings and decision.

Id. at 575-76.

Three weeks prior to the evidentiary hearing, Famous Dave's provided Supplemental Answers to Ms. Germer's previous discovery requests. (R., 63). In the Supplemental Answers, Famous Dave's informed Ms. Germer of their intent to call Scott Morton as a witness at the evidentiary hearing. Famous Dave's provided Ms. Germer with a summary of the testimony to be solicited from Mr. Morton at the evidentiary hearing. Famous Dave's also submitted this information to the Commission in the pre-trial disclosures on March 8, 2006. (R., 28). Famous Dave's was not obligated, as Ms. Germer suggests, to inform Ms.

Germer of each and every bit and piece of testimony to be solicited from a witness at the evidentiary hearing. Given the nature of the claim and legal causation defense raised in Famous Dave's' Answer, Ms. Germer knew, or should have known, that Famous Dave's would call Mr. Morton, or other manager, to testify regarding the operation of the walk-in cooler door, and that the subject of the functionality of the walk-in cooler would be addressed by Mr. Morton. Ms. Germer could have deposed Mr. Morton prior to the evidentiary hearing, or made some effort to interview this witness, if Ms. Germer was concerned with what testimony Mr. Morton was to offer at the evidentiary hearing. Ms. Germer made no request to depose or to interview Mr. Morton once Ms. Germer had been notified that Famous Dave's would call Mr. Morton to testify.

Even after counsel for Famous Dave's spoke to counsel for Ms. Germer several days prior to the evidentiary hearing by telephone, during which telephone conversation, counsel for Famous Dave's informed counsel for Ms. Germer that Mr. Morton would be called to testify, counsel for Ms. Germer made no oral or written request to depose or to interview Mr. Morton, or make any effort to discover the details of Mr. Morton's testimony.

In addition, there is no merit to Ms. Germer's argument that she was prejudiced by Mr. Morton's testimony that the cooler floor was, "coming up." The condition of the cooler floor had nothing to do with Ms. Germer's reported

accident. Consequently, Ms. Germer made no effort herself to focus on this issue at the hearing, or to call any witness to support this argument.

Moreover, during counsel's pre-hearing telephone conference, counsel for Ms. Germer made no oral or written request to review the photographs which were to be provided, for illustrative purposes, to the ALJ for review at the evidentiary hearing. Ms. Germer was not surprised or tricked by Mr. Morton's testimony or the introduction of the walk-in cooler photographs. In reality, however, neither Mr. Morton's testimony nor Famous Dave's submission of the walk-in cooler photographs had any bearing on the ALJ or Commission's finding that Ms. Germer's alleged accident did not meet the higher standard of legal causation. The photographs were merely introduced into evidence by counsel for Famous Dave's so that the ALJ would have a better understanding of the lay-out of the walk-in cooler and cooler door as Ms. Germer provided her testimony to ALJ. The photographs served a dual purpose to aide both the ALJ and Ms. Germer as she explained her injury event to the ALJ. The substance of Mr. Morton's testimony and the existence of the walk-in cooler photographs were fairly disclosed to Ms. Germer's legal counsel prior to the evidentiary hearing. Counsel for Ms. Germer simply failed to act on this information prior to the evidentiary hearing.

POINT 3: THE COMMISSION DID NOT VIOLATE THE OPEN COURT'S PROVISION OF THE UTAH CONSTITUTION WHEN IT ISSUED THE ORDER DENYING BENEFITS.

Ms. Germer next argues that the Commission violated the Open Court's Provision of the Utah Constitution when it took nearly two years to issue the Order denying benefits. Ms. Germer cites to Utah Const. Art I. § 11 which provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation shall have remedy by due course of law, which shall be administered without denial or unnecessary delay.

Utah Const. Art. 1, § 11. This constitutional provision has been interpreted to guarantee that litigants will have their "day in court." Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶¶38, 44 P.3d 663; Duke v. Graham, 2007 UT 31, ¶¶23 (Utah 2007).

A Motion for Review of the ALJ's Order was filed by Ms. Germer on May 5, 2006. The Commission entered its Order Affirming ALJ's Decision on April 23, 2008. Famous Dave's recognizes Ms. Germer's concern that the administrative appeals process comes with delay. It is also in the interest of Famous Dave's to have orders from the Commission issued in a more expedited fashion, if possible. Certainly, such delay affects not only the claimant, but also the employer and insurance carrier. However, the Commission's delay in this case has no bearing on whether Ms. Germer is entitled to workers' compensation

benefits, or whether she was provided a fair hearing and the opportunity to be heard.

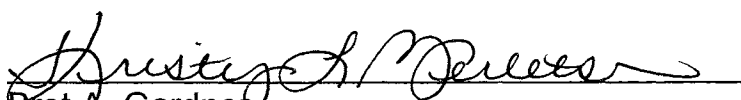
The Commission's delay to issue an order on Ms. Germer's Motion for Review did not violate the open court's provision of the state constitution. Ms. Germer had her "day in court." She was given the opportunity to present her case before an impartial administrative law judge. Unfortunately, the delay in the appeals process stems from the significant number of cases heard at the Commission and Appeals Board levels. Cases at the Commission are adjudicated by seven Administrative Law Judges. Fortunately, given the number of judges, hearings are promptly scheduled within four to five months from the date of filing of the Application for Hearing. Labor Commission orders are now issued within only a three to four months after the hearing. However, between 2006 and 2008, staffing at the Commission appeals level provided for only a staffed attorney (General Counsel), to review motions for review, and submit recommendations to the Appeals Board or Commissioner for final resolution. Unfortunately, during that time period, funding provided by the Legislature did not allow the Commission to hire additional legal staff at the Commission appeals level to keep up with the high numbers of appeals filed by aggrieved parties. Since then, the Legislature has increased funding to the Commission which has permitted additional attorney staffing to review appeals and provide a more expedited review a cases.

CONCLUSION

Based upon the foregoing arguments, Respondents ask the Court of Appeals to affirm the Commission's Order Affirming ALJ's Decision. Petitioner's workers' compensation claims should be dismissed with prejudice.

Respectfully submitted this 27th day of March, 2009.

BLACKBURN & STOLL, LC

A handwritten signature in cursive script, appearing to read "Kristy L. Bertelsen", written over a horizontal line.

Bret A. Gardner

Kristy L. Bertelsen

Attorneys for Appellees Famous Dave's and/or
Wausau Insurance. Co.

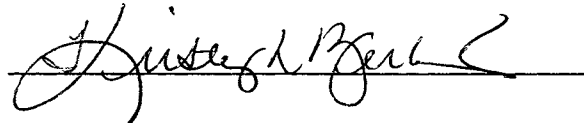
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 30th day of March, 2009, to:

Utah Court of Appeals (8 copies, one w/ original signature)
Scott M. Matheson Courthouse (Hand Delivery)
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Alan L. Hennebold, General Counsel (2 copies)
Labor Commission of Utah
160 East 300 South
P.O. Box 1466
Salt Lake City, Utah 84114-6615

Aaron Prisbrey (2 copies)
1090 East Tabernacle St.
St. George, UT 84770

A handwritten signature in cursive script, appearing to read "David B. [unclear]", written over a horizontal line.

Tab A

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

LINDSAY GERMER,
Petitioner,

vs.

**FAMOUS DAVE'S and/or WAUSAU
INSURANCE COMPANY,**
Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 05-0318

Judge Dale W Sessions

HEARING: Courtroom Number 3, Salt Lake City, Utah, on Friday, March 31, 2006. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Dale W Sessions, Administrative Law Judge.

APPEARANCES: The Petitioner, Lindsay Germer, was present and represented by his/her attorney Aaron Prisbrey Esq.

The Respondents Famous Dave's and Wausau Insurance Company were represented by attorney Bret Gardner Esq.

STATEMENT OF THE CASE

The Petitioner, Lindsay Germer, filed an "Application for Hearing" with the Utah Labor Commission on April 1, 2005 and claimed entitlement to the following workers' compensation benefits: (1) medical expenses; (2) recommended medical care; and (3) temporary total disability compensation. Lindsay Germer's claim for workers' compensation benefits arose out of an industrial accident that occurred on October 30, 2004.

The Respondents Famous Dave's and Wausau Insurance Company denied that the incident on October 30, 2004 legally or medically caused Lindsay Germer's injuries. The Famous Dave's and Wausau Insurance Company argued that Lindsay Germer suffered preexisting or independent medical problems that caused any disability endured by Lindsay Germer. The Famous Dave's and Wausau Insurance Company contended that Lindsay Germer suffered no real periods of disability as a result of the temporary exacerbation of a pre-existing injury. The Famous Dave's and Wausau Insurance Company maintained that no legal causation existed between Lindsay Germer's injuries and the industrial accident on October 30, 2004 as required by the Utah Supreme Court in *Allen v. Industrial Commission*, 729 P.2d 15, 24-25 (Utah 1986).

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II. ISSUES.

1. Did the industrial event of October 30, 2004 cause Lindsay Germer's right knee problems at issue in this case? (Legal Cause)
2. Did the industrial event of October 30, 2004 cause Lindsay Germer to suffer any periods of temporary total disability?
3. Did the industrial event of October 30, 2004 cause Lindsay Germer to suffer any permanent partial disability? (Medical Cause)

III. COURSE OF PROCEEDINGS.

This hearing was the original evidentiary hearing in the matter. No prior hearings were conducted.

IV. FINDINGS OF FACT

A. Employment.

The parties agreed that Respondent Famous Dave's employed Lindsay Germer, from June 3, 2004 to December 13, 2004.

B. Compensation Rate.

At the time of the accident in issue, Lindsay Germer, [REDACTED] married with [REDACTED] dependent children. The parties stipulated that Lindsay Germer's compensation with Famous Dave's and Wausau Insurance Company at the time of the accident in issue equaled \$430.00 per week as the computation rate for temporary total disability compensation.

C. The Industrial Accident.

Petitioner's claim arises from an incident that occurred on October 30, 2004. Petitioner was in the cooler to pick up some meat that needed to be cooked for the day. When she attempted to leave the cooler, the Petitioner alleges that the door was stuck closed, and that when she kicked the door with her foot, she felt immediate pain in her knee and she 'went down' on both knees. It is not disputed that Petitioner was acting in the course and scope of her employment on the date of the incident. Legal cause under the higher Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) standard is disputed because of undisputed extensive pre-existing conditions to Petitioner's right knee.

D. Other Relevant Findings.

1. While Petitioner initially testified that the door on the new walk-in cooler always stuck in the closed position, she later changed her testimony to reveal that on the morning of the incident she had entered the cooler and it had in fact not stuck. She also testified that she reported the malfunctioning door to Mr. Morton. However, the testimony of Scott Morton (the area manager who was at the location for significant periods of time from construction to the present date) was that in fact the door did not stick and despite the claim to the contrary by Petitioner, no employee including Petitioner had ever complained of a sticking door on the new cooler. Petitioner changed her testimony on this issue on cross examination to state that she did not report the malfunction to Mr. Morton. The weight of the evidence in the regard preponderates in favor of the testimony by Mr. Morton.

2. Petitioner testified that she was in the cooler at approximately 9:00 AM to obtain some meat that needed to be cooked for the day. She testified that she picked up 3 trays (each being approximately 18" x 24" much like a large cookie sheet) which weighed approximately 50lbs total. She was careful to approach the door and was holding the meat at about waist height. She stopped in front of the door to make sure her feet were 'grounded.' This she explained was that she was balanced on both feet. She was standing about one to two feet from the door at that time. She lifted her right foot and kicked the door 'as hard as she could', expecting it would open. It did not. She felt immediate pain in her right knee. In her words 'she went down on both knees.' The pain was severe. There is no indication that she dropped the meat. The demonstration showed that she managed to keep the meat in front of her throughout the incident.

3. After she caught her breath, she placed the meat on the chicken boxes located next to the door and used her body weight to open the door. She worked the remainder of the shift that day and the two days that followed.

4. Two days later, November 1, 2004, she sought medical care for the pain. Petitioner was off work from November 1 to November 4, then worked approximately 5 weeks (often up to 80-90 hours per week) to December 13, 2004 at which time she resigned her position. On January 2, 2005 she was working for The Outback as a waitress working from 9-13 hours per day.

5. During the course of cross examination, Petitioner demonstrated the incidents of the morning of October 30 2004. She held the tray (empty) in the approximate waist high position, and approached the door in the Courtroom for demonstration purposes. She stood near the door and described her activities. Of particular note is that Petitioner claimed during her testimony and during the demonstration that she kicked the door with her foot. However, at the distance she indicated she was standing from the door, at best she could have kicked the door with the ball of her foot (toes). Then she stated that the initial contact was with the toe area of her foot, then involved the full flat part of her foot. This does not appear possible at the distance she testified she was standing to wit: one to two feet from the door.

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7. It is undisputed that Petitioner has had prior surgeries to her right knee including a reconstruction of her PCL (posterior cruciate ligament). Injury to her right knee is documented back to age 14. Petitioner was born in 1976.

Petitioner bears the burden of proof in both legal and medical causation. Turning first to legal cause: To qualify for benefits under this standard, an injured worker must, among other things, establish that his or her exertions at work were the 'legal cause' of the injury in question. *Allen v. Industrial Commission*, at 25. In *Price River Coal Co., v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

In *American Roofing v. Industrial Commission*, 752 P.2d 912 (Utah App., 1988), the Utah Court of Appeals finding that while twisting, bending or lifting in themselves are not unusual, the combination of bending, twisting and jerking a substantial weight is unusual. The combination of actions satisfied the more stringent prong of *Allen*.

Petitioner was in the act of carrying an arm load of meat. She states that she stopped at the door made sure she was balanced on both feet and then lifted her right leg and kicked the

door with the toes of her foot. It is common experience for people to use their feet to kick or otherwise assist in sliding boxes and garbage cans while moving them. It is common experience for people to use the toes (or ball) of their feet to open or close a door. It may even be common for people to use the toes or ball of their feet to kick a ball when active in sports such as soccer or kick-ball in ordinary life.

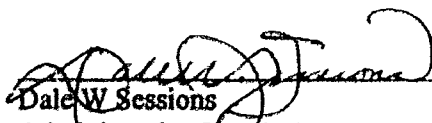
The evidence preponderates in support of the interpretation that using the facts as described and demonstrated by Petitioner: that from a distance of one to two feet from the door, starting from a resting position when both feet are flat on the floor and the body is balanced and the right foot is raised to kick the door open, the force used or exerted in attempting to open the door is no more significant than the force used in nonemployment life to accomplish the same or similar purposes. The proof of legal cause has failed.

Of the issues raised by Petitioner in the Application for Hearing, legal cause is the threshold issue. Having failed to meet that threshold burden of proof the remaining issues are moot. It is well established in Utah law that courts, and by extension, administrative agencies, should not adjudicate claims when such adjudication will have no practical effect. "Once a controversy has become moot, a trial court should enter an order of dismissal" *Merhish v. H.A. Folson & Associates*, 646 P.2d 731, 732 (Utah 1982). See also: *Keming Lu v. St. Marks Hospital*, 8010440 (LC Appeals Board, January 2005). Therefore, no further discussion of the remaining issues will be set forth here.

VI. ORDER

IT IS THEREFORE ORDERED that Petitioner's Application for Hearing is dismissed with prejudice and on the merits.

DATED April 5, 2006.


Dale W. Sessions
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

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

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

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on April 5, 2006, to the persons/parties at the following addresses:

Lindsay Germer
23.5 W Sunbrook Dr #59
St George UT 84770

Famous Dave's
391 S River Rd
St George UT 84770

Wausau Insurance Company
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St George UT 84770

Bret Gardner Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION

Clerk/Adjudication Division

PO Box 146615

Salt Lake City, UT 84114-6615

Tab B

UTAH LABOR COMMISSION

LINDSAY GERMER,

Petitioner,

vs.

FAMOUS DAVE'S and
WAUSAU INSURANCE
COMPANY,

Respondents.

ORDER AFFIRMING
ALJ'S DECISION

Case No. 05-0318

Lindsay Germer asks the Utah Labor Commission to review Administrative Law Judge Sessions' denial of Ms. Germer's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

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

BACKGROUND AND ISSUE PRESENTED

Ms. Germer claims workers' compensation benefits from Famous Dave's and its insurance carrier, Wausau Insurance Company (referred to jointly as "Famous Dave's"), for a work accident that occurred on October 30, 2003, allegedly causing injury to her right knee. After holding an evidentiary hearing, Judge Sessions denied benefits.

In her motion for review, Ms. Germer argues that had Famous Dave's given her proper notice of the substance of the testimony of one of its witnesses, she would have been able to refute the evidence that she claims led Judge Sessions to conclude there was no legal causation.

FINDINGS OF FACT

The Commission adopts Judge Session's findings of facts. The facts relevant to the motion for review are as follows: On October 30, 2003, Ms. Germer was retrieving trays of meat out of a walk-in cooler at Famous Dave's. As she held the meat trays in front of her, Ms. Germer kicked on the cooler door with her right foot in order to open the door. She felt immediate pain in her right knee. Although Ms. Germer claims that the door stuck when she kicked it, the evidence demonstrates that it did not stick. Prior to this accident, Ms. Germer had a preexisting right knee condition and had undergone several surgeries to repair the right knee.

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ORDER AFFIRMING ALJ'S DECISION
LINDSAY GERMER
PAGE 2 OF 3

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-401 of the Utah Workers' Compensation Act provides benefits to workers injured by accident "arising out of and in the course of" employment. To qualify for benefits under the foregoing standard, an injured worker must establish that his or her work was the "legal cause" of the injury. *Allen v. Industrial Commission*, 729 P.2d 15, 25 (Utah 1986). The requirement of legal causation is explained in *Price River Coal Co. v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986).

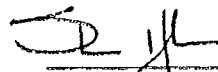
Under *Allen*, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some **unusual or extraordinary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

Because Ms. Germer suffered from a pre-existing condition that contributed to her current knee problems, her claim is subject to the more stringent test for legal causation, which requires that she show her work related exertion was "unusual or extraordinary." The Commission understands Ms. Germer to argue that her exertion in kicking the door was unusual or extraordinary because the door was stuck and did not swing freely. The Commission has found that the door did not stick. Nevertheless, even assuming the door did stick, the Commission is not convinced that this exertion would qualify as "unusual or extraordinary exertion" as compared to the usual wear and tear exertions of nonemployment life. Therefore, the Commission concludes that Ms. Germer has not satisfied the test for legal causation and cannot prevail on her claim for benefits.

ORDER

The Commission affirms Judge Session's decision. It is so ordered.

Dated this 23rd day of April, 2008.



Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

ORDER AFFIRMING ALJ'S DECISION
LINDSAY GERMER
PAGE 3 OF 3

NOTICE OF APPEAL RIGHTS

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

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Lindsay Germer, Case No. 05-0318, was mailed first class postage prepaid this 27 day of April, 2008, to the following:

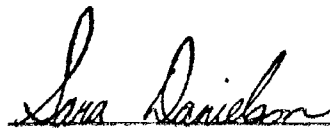
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