

1999

Kristine S. Schreiber v. Labor Commission of Utah and Jordan School District : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF

990132

KRISTINE S. SCHREIBER,

Petitioner,

vs.

LABOR COMMISSION OF UTAH and
JORDAN SCHOOL DISTRICT,

Respondents.

Court of Appeals

Case No.: 990132-CA

Priority 7

Labor Commission No.: 97-0608

**BRIEF OF RESPONDENT
JORDAN SCHOOL DISTRICT**

Appeal from the Labor Commission of Utah
Administrative Law Judge Benjamin A. Sims

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FILED

Utah Court of Appeals

**RESPONDENT RESPECTFULLY REQUESTS ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

Julia D'Alosandro
Clerk of the Court

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Court of Appeals
Case No.: 990132-CA

Priority 7

Labor Commission No.: 97-0608

JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Petitioner Kristine S. Schreiber is from an Order Granting Motion for Review of the Labor Commission, State of Utah, dated January 27, 1999. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801 (8) (a) and 78-2a-3 (2) (a) (1998).

ISSUE PRESENTED AND STANDARD OF REVIEW

Whether the Labor Commission correctly applied the legal causation standard as established by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), in concluding that the impact of a rubber playground ball -- which was

found to be comparable to the jostling one frequently encounters in crowds-- and the Petitioner's startled response -- which was found to be similar to a momentary catch of one's balance -- did not amount to unusual or extraordinary exertion.

This Court's review is governed by the Utah Administrative Procedures Act ("UAPA"), which provides relief if an agency has erroneously interpreted or applied the law. Utah Code Ann. § 63-46b-16 (4) (d) (1998). Pursuant to a 1994 legislative amendment, "[t]he [Labor] Commission has been granted broad discretion to determine the facts and apply the law. The Workers Compensation Act expressly provides that '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 it administers.'" Caporoz v. Labor Comm'n, 945 P.2d 141, 143 (Utah 1997) (quoting Utah Code Ann. § 35-1-16 (1)¹). "Where the Legislature's grant of discretion is as broad as that set forth in section 35-1-16 (1), the intermediate standard of review . . . applies." Osman v. Industrial Comm'n, 958 P.2d 240, 242 (Utah Ct. App. 1998). "Under the intermediate standard of review, [the court] look[s] for an abuse of discretion . . . [to] determine whether the agency decision exceeded the bounds of reasonableness and rationality." Id. (quotations omitted). Accord VanLeeuwen v. Industrial Comm'n, 901 P.2d 281 (Utah Ct. App. 1995).

¹This section has been recodified as 34A-1-301 (1998).

DETERMINATIVE LAW

The determinative provision is Utah Code Ann § 35-1-45 (1) (1988)², which reads as follows:

Each employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, 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 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.

This section of the Workers' Compensation Act was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), to require a claimant to prove medical and legal causation. Particularly, "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." Id. at 26 (emphasis added).

²This section has been recodified as 34A-2-401 (1998).

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case concerns a disputed workers' compensation claim. The Labor Commission has denied Ms. Schreiber's claim for workers' compensation benefits as a result of an alleged industrial accident which occurred on April 3, 1996, while she was employed by Respondent Jordan School District as a playground supervisor.

Mrs. Schreiber has an undisputed pre-existing chronic low back condition which had been surgically treated with a titanium cage fusion at the L4-5 region. Mrs. Schreiber's claim for workers compensation benefits was denied by Respondent Jordan School District on the basis that her alleged industrial accident did not meet the higher standard of legal causation established by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), which requires a claimant with a pre-existing back condition to show that the injury resulted from unusual or extraordinary exertion during their employment.

Petitioner filed an Application for Hearing with the Labor Commission of Utah on July 28, 1997. (R. at 2.) Respondent Jordan School District filed an Answer on August 29, 1997, denying liability based upon the defenses of medical and legal causation. (R. at 12.) A hearing was held before Administrative Law Judge Benjamin A. Sims on January 12, 1998. (R. at 17.) Following the hearing, the case was referred by Judge Sims to a

medical panel appointed by the Labor Commission to evaluate the issue of medical causation. (R. at 71-75.) Following the receipt of the medical panel's report, Judge Sims entered an order on July 23, 1998, granting Mrs. Schreiber workers compensation benefits. (R. at 85-92.)

Pursuant to an Order Granting Extension of Time, Respondent Jordan School District filed a timely Motion for Review of Judge Sim's Order with the Labor Commission on September 18, 1998. (R. at 97-102.) Mrs. Schreiber filed a memorandum in opposition to Respondents' motion on October 5, 1998. (R. at 104-111.) On January 27, 1999, the Labor Commission issued an Order Granting Motion for Review, finding that the particular facts of Mrs. Schreiber's alleged accident case did not constitute an unusual or extraordinary exertion. The Commission accordingly entered an order, setting aside Judge Sims' order and dismissing Mrs. Schreiber's claim for workers compensation benefits. (R. at 114-117.)

Mrs. Schreiber filed a Petition for Review with this Court on February 11, 1999, a Docketing Statement on March 4, 1999, and a brief on May 19, 1999. The parties agreed to an extension to the filing of Respondent's brief, extending the deadline to Wednesday, July 21, 1999.

Statement of Facts

Kristine Schreiber worked for Jordan School District at the Riverton Elementary School as a playground supervisor. (R. at 86, 114; 121, p. 13³.) At recess on April 3, 1996, a second grade student kicked an air filled rubber ball which accidentally struck Mrs. Schreiber in the small of her back.⁴ (R. at 114; 121, pp. 82, 97.) The young child was standing approximately 20-25 feet away from Mrs. Schreiber. (R. at 86.) Mrs. Schreiber was turned away from the child and had no warning that the ball was going to hit her. (R. at 86-87, 114.) Mrs. Schreiber claims that she suffered a back injury, requiring surgery, as a result of this incident. (R. at 2.)

At the time of the accident, Mrs. Schreiber suffered from “a pre-existing chronic low back condition that had been surgically treated with a titanium cage fusion at the L4-5 region” in 1992. (R. at 114.) Although she reported recovering well from this procedure, the medical records document continued pain which was classified as chronic prior to the April 3, 1996 incident. (R. at 86.) The parties submitted conflicting medical opinions concerning the medical cause of Mrs. Schreiber's need for additional back surgery subsequent to the April 3, 1996 incident. Based upon this dispute, the case was

³The entire transcript of the hearing is marked in the Record as page “121.”

⁴While Mrs. Schreiber claims that the young eight year old intentionally kicked the ball into her back, there was no evidence that the incident was intentional. In fact, right after the ball hit Mrs. Schreiber, rather than run away Derrick came over to her. (R. at 89.) He was nervous and laughed because he knew he would be in trouble. (R. at 89.)

referred to a medical panel for evaluation.⁵

The Labor Commission made the following factual findings⁶ concerning the April 3, 1996 incident:

Given the speed and mass of the ball, its momentum was sufficient to cause Mrs. Schreiber's body to lurch forward, somewhat like being jostled in a crowd.

In addition to the movement caused by the momentum of the ball, the unexpected nature of the impact produced a reflexive movement from Mrs. Schreiber, variously described as a "jump," "jerk," or "back and forward" movement. Mrs. Schreiber remained standing, despite the ball's impact and her startled response to the blow.

(R. at 114-115.)

The Labor Commission's factual findings were based upon the review of the testimony of several witnesses, including two expert witnesses who testified concerning the force of impact from the ball. Administrative Law Judge Sims concluded that the calculations provided by Paul France, Ph.D., the expert who testified on behalf of Jordan School District, "were probably closer to being correct." (R. at 88.) Dr. France, a biomechanical engineer met with Derrick Shields, the 8 year old second grader who kicked the ball. Dr. France measured the ball's velocity by taking measurements as

⁵The Labor Commission's medical panel ultimately concluded that Mrs. Schreiber had satisfied her burden of medical causation.

⁶Petitioner has not challenged the factual findings of the Labor Commission.

Derrick kicked the ball a number of times. (R. at 121, pp. 108-110.) He also measured the compressibility of the ball and determined the area over which the force of impact of the ball would be spread. (R. at 121, pp. 111.) Finally, Dr. France reviewed Mrs. Schreiber's deposition and medical records and considered her weight in making his calculations. (R. at 121, pp. 111-117.) Based on this information, Dr. France determined the actual force exerted on Mrs. Schreiber from the air-filled rubber ball, concluding that it was minimal. (R. at 121, pp. 117-119.) Specifically, he found that it was an eighth to a quarter of the force developed when a person bends over to tie her shoe. (R. at 121, pp. 117.) Dr. France explained that the force of the impact would be the equivalent of being jostled in a crowd. (R. at 121, pp. 118.) Notably, Dr. France testified that sitting down and back in a chair exerts 3 to 4 times more force than the ball that hit Mrs. Schreiber. (R. at 121, pp. 118.)

Based upon this a review of the testimony and evidence presented at the hearing, the Labor Commission found that “the direct force Mrs. Schreiber experienced from being hit by the ball was **relatively minor, comparable to the jostling one frequently encounters in a crowd.**” (R. at 115.) The Labor Commission further considered Mrs. Schreiber's reaction to being hit by the ball, finding that “it appears that she stepped or lurched forward, then backward, without falling.” (R. at 115.) The Commission found that this type of movement was comparable to a the ordinary event of a momentary loss of balance similar to “the everyday event of tripping on a rug or an uneven sidewalk.” (R. at 115.)

SUMMARY OF THE ARGUMENT

The Labor Commission properly concluded that the alleged industrial incident did not meet the higher standard of legal causation which Mrs. Schreiber was required to meet based upon her pre-existing low back condition. This Court's review of the Labor Commission's Order is governed by an abuse of discretion standard. Unless this Court is able to conclude that the Labor Commission's conclusion was irrational and unreasonable, it must affirm the Labor Commission's Order.

Pursuant to Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), employees such as Mrs. Schreiber who bring a pre-existing condition to the work site must demonstrate by a preponderance of the evidence that the claimed industrial injury resulted from unusual or extraordinary exertion in the course of their employment. This standard is referred to as the higher standard of legal causation. Whether an exertion is usual or unusual is defined according to an objective standard, compared to the normal, everyday activities of men and women in the latter half of the twentieth century.

In the present case, the Labor Commission found that the impact of the air-filled rubber playground ball, kicked accidentally into Mrs. Schreiber's back by the second grad student was a minor event, comparable to jostling in a crowd. The Labor Commission further found that Mrs. Schreiber's startled reaction was comparable to a momentary loss of balance, like tripping over a rug or an uneven sidewalk. The Labor Commission concluded, in considering each of these elements on an individual basis and combined

together, that the forces involved in the alleged accident were not extraordinary or unusual. The Labor Commission's conclusion is a reasonable and rationale application of the Allen standard to the particular facts of this case.

ARGUMENT

THE LABOR COMMISSION PROPERLY CONCLUDED THAT MRS. SCHREIBER'S ALLEGED INDUSTRIAL INCIDENT FAILED TO SATISFY THE HIGHER STANDARD OF LEGAL CAUSATION REQUIRED UNDER ALLEN v. INDUSTRIAL COMMISSION.

A. The Proper Standard of Review of the Labor Commission's Order Is an Abuse of Discretion.

Mrs. Schreiber has erroneously asserted that this Court's review of the Labor Commission's Order is governed by a correction of error standard. (Petitioner's Brief at 1.) Whether an activity during employment is "sufficient to satisfy the legal standard of unusual or extraordinary effort so as to constitute a compensable industrial accident is a "mixed question of law and fact." Stouffer Foods v. Industrial Comm'n, 801 P.2d 179, 181 (Utah Ct. App. 1990). In 1994, the Utah Legislature amended the Utah Workers Compensation Act, expressly granting the Industrial Commission⁷ broad discretion to "determine the facts and apply the law" governing workers' compensation. See Act of Industrial Commission Authority, Ch. 207, § 1, 1994 Utah Laws 972; codified at Utah

⁷In 1997, the Industrial Commission was renamed the Labor Commission.

Code Ann. § 35-1-16 (1994) (currently codified at Utah Code Ann. § 34A-1-301 (1998), a copy of which is attached hereto in the Addendum). Mrs. Schreiber's alleged industrial accident occurred on April 3, 1996.

This explicit grant of discretion changed the standard of review from a correction of error standard to an abuse of discretion standard. See Johnson Bros. Constr. v. Labor Comm'n, 967 P.2d 1258, 1259 (Utah Ct. App. 1998); Jacobsen v. Labor Comm'n, 1999 UT App 073, Case No. 981284-CA, fn. 1 (Unpublished Memorandum Decision, March 11, 1999). (A copy of this opinion is attached hereto in the Addendum). Accordingly, for injuries arising after the 1994 Amendment, this Court is to review the Labor Commission's application of the Allen standard under an abuse of discretion standard, or in other words, "whether the agency decision exceeded the bounds of reasonableness and rationality." Osman v. Industrial Comm'n, 958 P.2d 240, 242 (Utah Ct. App. 1998).

In adopting the higher standard of legal causation in Allen, the Utah Supreme Court stated that "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." 729 P.2d at 26. Shortly thereafter, in Price River Coal v. Industrial Commission, 731 P.2d 1079, 1081 (Utah 1986), the Supreme Court declared that "[t]he concept of 'unusual or extraordinary' exertion remains to be fleshed out over time. Of necessity, the process of pouring specific content into that concept will rely heavily upon the Commission's expertise in and familiarity with the work environment."

This Court has also recognized the Labor Commission's central role in defining the scope of activities which will be viewed as “unusual and extraordinary.” See Smith & Edwards Co. v. Industrial Comm'n, 770 P.2d 1016 (Utah Ct. App. 1989). Accordingly, both the Utah Legislature, through its statutory grant of authority, and the appellate courts, through case law, have repeatedly recognized that the Labor Commission serves an invaluable and central role in defining the scope of activities which will be considered “unusual and extraordinary” for purposes of applying the higher standard of legal causation under Allen.

In Sisco Hilte v. Industrial Commission, 766 P.2d 1089 (Utah Ct. App. 1988), this Court rejected the adoption of a bright line test to determine what constitutes unusual or extraordinary exertion. Rather, this Court declared that what constitutes “unusual or extraordinary” exertion depends upon the unique facts and circumstances of the employment activity that is required. Id. Consequently, **significant deference and discretion are afforded to the Labor Commission in its application of the Allen standard to the particular set of facts in each case.** See, e.g., Drake, 939 P.2d at 182 (deference is afforded to Commission's decision on scope-of-employment issues because of its highly fact-dependent nature).

B. The Labor Commission Properly Concluded That The Alleged Industrial Incident Did Not Subject Mrs. Schreiber to Unusual or Extraordinary Exertion.

The case of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), is the seminal case concerning legal causation in workers compensation cases. In Allen, the claimant was working in a confined cooler located at his place of employment. The claimant was stacking crates from the floor onto a cooler shelf. Each crate contained four to six gallons of milk and weighed approximately fifty (50) pounds. While lifting one crate to about chest level, he suddenly felt a sharp pain in his lower back. Subsequently, the claimant obtained a myelogram which revealed a herniated disc. Id. at 17.

In Allen, the claimant testified he had a history of prior back injuries. The sole issue on appeal was whether the claimant, who had suffered pre-existing back problems and was injured as the result of an exertion usual and typical for his job, was injured "by accident arising out of or in the course of employment" as required by the Workers' Compensation Act. Id. at 18. See Utah Code Ann. § 34A-2-401 (1998).

In order to arise out of and in the course of employment, a causal connection between the injury and employment must exist. The standard of proof for establishing a causal connection is "by a preponderance of the evidence." Allen, 729 P.2d at 23. The court explained,

To meet the legal causation requirement, a claimant with a pre-existing condition must show that **the employment contributed something substantial to increase the risk he**

already faced in every day 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, and serves to offset the pre-existing condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk factor rather than exertions at work.

Id. at 25 (emphasis added). In other words, "where the claimant suffers from a pre-existing condition which contributes to the injury, an **unusual or extraordinary exertion** is required to prove legal causation. Where there is no pre-existing condition, a usual or ordinary exertion is sufficient." Id. at 26 (emphasis added).

Whether an exertion is usual or unusual is defined according to an **objective standard**. The comparison does not involve an employee's normal employment exertion and the exertion at the time of injury; rather, the Commission must compare the exertion at the time of injury with the exertion required in normal activities non-employment life of men and women in the latter half of the 20th century. Id. Typical activities cited in Allen as requiring normal exertion of men and women in the latter part of the 20th century 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." Id. The Utah Supreme Court explained that in adopting an "objective standard, the case law would (eventually) define a standard for typical, 'non-employment activity' in much the way case law has developed a standard of care for the reasonable man in tort law." Id. at 25.

Following Allen, the appellate courts and the Labor Commission have reviewed numerous cases which reflect a breadth of activities found to involve usual or ordinary exertion for men and women in the latter part of the Twentieth Century. One of the activities which have **not** met the higher standard of legal causation include lifting, turning, and moving boxes weighing 47-1/2 lbs., Smith & Edwards v. Industrial Commission, 770 P.2d 1016 (Utah Ct. App. 1989), and yet Mrs. Schreiber would have this Court find that the minor impact of being hit by a rubber playground ball kicked by a second grade student, coupled with a startled reaction, would be found to meet the higher standard of legal causation. Indeed, Respondent submits that it would come as a great surprise to the parents of thousands of grade school age children who play with balls during recess at school or who participate in youth soccer that their children are in danger because of the unusual and extraordinary nature of their play.

Mrs. Schreiber alleges that the Labor Commission erred in its conclusion, posing the rhetorical question to the court, "how often or [when was] last time that [you were] unexpectedly hit by a soccer ball traveling in excess of 35 mph in every day life." (Petitioner's Brief at 12.) The incident, described in this subjective manner, does appear at first glance to be unusual or extraordinary. However, when the incident was objectively evaluated by the biomechanical expert, the actual impact and force involved in this incident was far from the cruise missile depicted by Mrs. Schreiber. Instead, the actual exertion or force of the air-filled rubber ball which hit Mrs. Schreiber was minor. The Labor Commission found that it was comparable to being jostled in a crowd. This

finding has not been challenged by Mrs. Schreiber and is supported by substantial evidence in the Record. Consequently, in this Court's review of the matter is limited to whether Labor Commission's conclusion is reasonable and rational.

In addition to the impact of the rubber ball, Mrs. Schreiber has alleged that her surprised reaction to being hit made the incident unusual or extraordinary. Specifically, Mrs. Schreiber has compared her startled reaction to the facts of the case of American Roofing v. Industrial Commission, 752 P.2d 912 (Utah Ct. App. 1988). In American Roofing, the employee leaned over the bed of a truck to lift up a 30-pound bucket of debris. The bucket snagged, and the employee injured his back. The court affirmed the Labor Commission, finding that evidence of the weight, together with the manner in which the employee lifted the bucket, and the fact that the bucket snagged, all combined to characterize the employee's action as unusual or extraordinary under the Allen definition.

The facts of the present case cannot reasonably be compared to the facts in American Roofing. Mrs. Schreiber was not lifting anything at the time of the incident. She was not in an awkward position. She was not bent over or straining to perform a task in any way. Rather, she merely had a startled response to being hit in the back by an air-filled rubber playground ball kicked by an eight year old child. The impact from this ball was found to negligible and her startled reaction to being hit was found to be comparable to a momentary catch of one's balance, like tripping on a rug or an uneven sidewalk. There was no actual fall, but a slight "jerk," "jump," or "back and forward" movement.

A more reasonable comparison is made with the case of Bigler v. TW Services, Inc., Case No. 950838-Ca (Memorandum Decision August 8, 1996); Labor Commission Case No. 94-0273 (Industrial Commission Sept. 29, 1995). In Bigler, the claimant was a cafeteria cashier. She was standing at the register when a copy of the daily menu began to fall from the counter to the floor. Ms. Bigler lunged and twisted to catch the falling menu. The Labor Commission reversed the ALJ's award of benefits, concluding that Ms. Bigler's movement in trying to catch the falling menu was not unusual, but similar to ordinary events of daily life such as reaching to catch a tipped glass of milk, swatting flies, or grabbing for the safety of a small child. This Court affirmed the Labor Commission's Order, finding that "[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." (A copy of this Court's Memorandum Decision and the Labor Commission's decision are attached in the Addendum.)

In the present case, the Labor Commission properly and thoroughly reviewed the facts and circumstances surrounding Mrs. Schreiber's alleged industrial accident. Specifically, the Labor Commission received testimony from numerous witnesses, including two expert witnesses who provided scientific calculations of the forces involved in the alleged incident. This objective analysis allowed the Commission to appropriately compare the exertion and/or forces involved in the alleged incident with the exertion or forces involved in ordinary events of non-employment life, rather than simply rely upon

the subjective description of the incident provided by Mrs. Schreiber. The Labor Commission properly exercised its discretion in concluding as follows:

[T]he direct force Mrs. Schreiber experienced from being hit by the ball was relatively minor, comparable to the jostling one frequently encounters in crowds. As to Mrs. Schreiber's surprised reaction to being hit by the ball, it appears that she stepped or lurched forward, then backward, without falling. This type of movement does not appear to be different from the everyday event of tripping on a rug or an uneven sidewalk.

(R. at 115.)

Having concluded that Mrs. Schreiber failed to meet her burden of legal causation, the Labor Commission properly dismissed her claim for workers compensation benefits. This Court should affirm the Commission's dismissal as a reasonable and rationale application of the Allen standard to the facts of this case.

CONCLUSION

The facts as found by the Labor Commission have not been challenged by Mrs. Schreiber. Rather, she challenges the Labor Commission's application of the legal causation standard established in Allen v. Industrial Commission to the particular facts of this case. Because of the fact-sensitive nature applying the Allen standard, the Utah Legislature and the appellate courts have recognized that the Labor Commission's integral role in evaluating whether an activity involved unusual or extraordinary exertion.

In the present case, the Labor Commission properly evaluated the unique facts of Mrs. Schreiber's alleged industrial accident. The Labor Commission reviewed and evaluated the testimony supplied by numerous witnesses, including two expert witnesses who supplied a scientific evaluation of the forces involved in the accident. The Labor Commission properly concluded that based upon the objective analysis of Mrs. Schreiber's alleged accident, the impact of the air-filled rubber ball was minor and Mrs. Schreiber's startled response was not unusual. This Court should affirm the Labor Commission's Order dismissing Mrs. Schreiber's claim.

Respectfully submitted this 19th day of July, 1999.

BLACKBURN & STOLL, LC

A handwritten signature in cursive script, appearing to read "Dori Petersen", is written over a horizontal line.

Thomas C. Sturdy

Dori K. Petersen


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CERTIFICATE OF SERVICE

I certify that **two** true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 19th day of July, 1999, to:

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_____

ADDENDUM

PART 3

ADJUDICATIVE PROCEEDINGS

34A-1-301. Commission jurisdiction and power.

The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers. 1997

34A-1-302. Presiding officers for adjudicative proceedings — Subpoenas — Independent judgment — Consolidation — Record — Notice of order.

- (1) (a) The commissioner shall authorize the Division of Adjudication to call, assign a presiding officer, and conduct hearings and adjudicative proceedings when an application for a proceeding is filed with the Division of Adjudication under this title.

(b) The director of the Division of Adjudication or the director's designee may issue subpoenas. Failure to respond to a properly issued subpoena may result in a contempt citation and offenders may be punished as provided in Section 78-32-15.

(c) Witnesses subpoenaed under this section are allowed fees as provided by law for witnesses in the district court of the state. The witness fees shall be paid by the state unless the witness is subpoenaed at the instance of a party other than the commission.

(d) A presiding officer assigned under this section may not participate in any case in which the presiding officer is an interested party. Each decision of a presiding officer shall represent the presiding officer's independent judgment.

(2) If, in the judgment of the presiding officer having jurisdiction of the proceeding the consolidation would not be prejudicial to any party, when the same or substantially similar evidence is relevant and material to the matters in issue in more than one proceeding, the presiding officer may:

- (a) fix the same time and place for considering each matter;
- (b) jointly conduct hearings;
- (c) make a single record of the proceedings; and
- (d) consider evidence introduced with respect to one proceeding as introduced in the others.

(3) (a) The commission shall keep a full and complete record of all adjudicative proceedings in connection with a disputed matter.

(b) All testimony at any hearing shall be recorded but need not be transcribed. If a party requests transcription, the transcription shall be provided at the party's expense.

(c) All records on appeals shall be maintained by the Division of Adjudication. The records shall include an appeal docket showing the receipt and disposition of the appeals.

(4) A party in interest shall be given notice of the entry of a presiding officer's order or any order or award of the commission. The mailing of the copy of the order or award to the last-known address in the files of the commission of a party in interest and to the attorneys or agents of record in the case, if any, is considered to be notice of the order.

(5) In any formal adjudicative proceeding, the presiding officer may take any action permitted under Section 63-46b-8.

1997

34A-1-303. Review of administrative decision.

(1) A decision entered by an administrative law judge under this title is the final order of the commission unless a further appeal is initiated under this title and in accordance with the rules of the commission governing the review.

(2) (a) Unless otherwise provided, a person who is entitled to appeal a decision of an administrative law judge under

this title, may appeal the decision by filing a motion for review with the Division of Adjudication.

(b) Unless a party in interest to the appeal requests in accordance with Subsection (3) that the appeal be heard by the Appeals Board, the commissioner shall hear the review in accordance with Title 63, Chapter 46b, Administrative Procedures Act. A decision of the commissioner is a final order of the commission unless set aside by the court of appeals.

(c) (i) If in accordance with Subsection (3) a party in interest to the appeal requests that the appeal be heard by the Appeals Board, the Appeals Board shall hear the review in accordance with:

(A) Section 34A-1-205; and

(B) Title 63, Chapter 46b, Administrative Procedures Act.

(ii) A decision of the Appeals Board is a final order of the commission unless set aside by the court of appeals.

(3) A party in interest may request that an appeal be heard by the Appeals Board by filing the request with the Division of Adjudication:

(a) as part of the motion for review; or

(b) if requested by a party in interest who did not file a motion for review, within 20 days of the date the motion for review is filed with the Division of Adjudication.

(4) (a) On appeal, the commissioner or the Appeals Board may:

(i) affirm the decision of an administrative law judge;

(ii) modify the decision of an administrative law judge;

(iii) return the case to an administrative law judge for further action as directed; or

(iv) reverse the findings, conclusions, and decision of an administrative law judge.

(b) The commissioner or Appeals Board may not conduct a trial de novo of the case.

(c) The commissioner or Appeals Board may base its decision on:

(i) the evidence previously submitted in the case; or

(ii) on written argument or written supplemental evidence requested by the commissioner or Appeals Board.

(d) The commissioner or Appeals Board may permit the parties to:

(i) file briefs or other papers; or

(ii) conduct oral argument.

(e) The commissioner or Appeals Board shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions.

(5) (a) A member of the Appeals Board may not participate in any case in which the member is an interested party. Each decision of a member of the Appeals Board shall represent the member's independent judgment.

(b) If a member of the Appeals Board may not participate in a case because the member is an interested party, the two members of the Appeals Board that may hear the case shall assign an individual to participate as a member of the board in that case if the individual:

(i) is not an interested party in the case; and

(ii) was not previously assigned to preside over any proceeding or take any administrative action related to the case.

(6) If an order is appealed to the court of appeals after the party appealing the order has exhausted all administrative appeals, the court of appeals has jurisdiction to:

FILED

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IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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Jessica D. Jacobsen,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 981284-CA
v.)	
)	F I L E D
Labor Commission, Salt Lake)	(March 11, 1999)
Hilton, and United Pacific)	
Reliance Insurance,)	
)	1999 UT App 073
Respondents.)	

Original Proceeding in this Court

Attorneys: M. David Eckersley, Salt Lake City for Petitioner
Stuart L. Poelman and Dori K. Petersen, Salt Lake
City, for Respondents Salt Lake Hilton and United
Pacific Reliance Insurance
Alan Hennebold, Salt Lake City, for Respondent Labor
Commission

Before Judges Greenwood, Davis, and Jackson.

DAVIS, Judge:

This case is before this court for a second time. See Hilton Hotel v. Industrial Comm'n, 897 P.2d 352 (Utah Ct. App. 1995). Jessica D. Jacobsen petitions this court for review of the Utah Labor Commission's (Commission) ruling that her employment activity was not an unusual or extraordinary exertion, and its resulting order reversing the administrative law judge's award of workers' compensation benefits. We affirm.

Whether an employment activity is "sufficient to satisfy the legal standard of unusual or extraordinary effort so as to constitute a compensable industrial accident" is a "mixed question of law and fact." Stouffer Foods Corp. v. Industrial Comm'n, 801 P.2d 179, 181 (Utah Ct. App. 1990). Because the statute governing compensation for work-related injuries "'does not expressly or impliedly grant discretion to the [Labor] Commission in construing the specific language of the statute,'

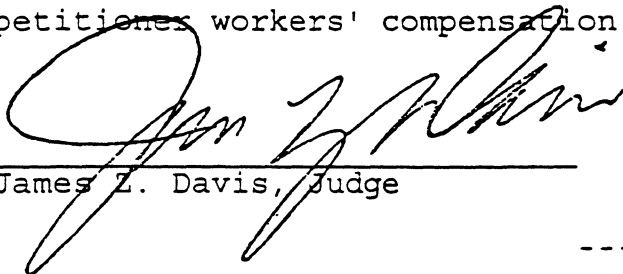
[w]e . . . review for correctness the [Commission's] application of the statute to these facts." Stokes v. Board of Review, 832 P.2d 56, 58-59 (Utah Ct. App. 1992) (quoting Cross v. Board of Review, 824 P.2d 1202, 1204 (Utah Ct. App. 1991)); accord Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997); see Utah Code Ann. § 34A-2-401(1) (1997); and see Smallwood v. Board of Review, 841 P.2d 716, 719 (Utah Ct. App. 1992) (stating this court reviews a legal causation ruling by "review[ing] the agency's record to determine whether the agency erroneously interpreted or applied the law so as to substantially prejudice" the injured employee). Because the issue of whether an employment activity amounts to an unusual or extraordinary exertion is highly fact-sensitive, we "'convey[] a measure of discretion to [the Commission] when applying that standard to a given set of facts.'" Drake, 939 P.2d at 182 (quoting State v. Pena, 869 P.2d 932, 939 (Utah 1994)).

Here, the Commission ruled that petitioner's exertion at work which precipitated her injury was not an unusual or extraordinary exertion meeting the legal causation prong of the test established in Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986). Petitioner's claim for workers' compensation benefits was therefore denied. While petitioner does not necessarily disagree with the Commission's ruling, she argues that because her "injurious exertion is subject to fair debate as to whether it was unusual or extraordinary, the Commission must, consistent with the previously enunciated law of this State, resolve that issue in favor of the injured worker." We disagree. "'[W]here inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.'" V-1 Oil Co. v. Division of Env'tl. Response and Remediation, 962 P.2d 93, 94 (Utah Ct. App. 1998) (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989)). Additionally, our supreme court recognized that "[t]he concept of 'unusual or

1. In 1994, the Legislature granted the Commission broad discretion to "determine the facts and apply the law" governing workers' compensation. See Act of Industrial Commission Authority, ch. 207, § 1, 1994 Utah Laws 972; codified at Utah Code Ann. § 35-1-16 (1994) (currently codified at Utah Code Ann. § 34A-1-301 (1997)). This explicit grant of discretion created a different standard of review. See Johnson Bros. Constr. v. Labor Comm'n, 967 P.2d 1258, 1259 (Utah Ct. App. 1998). However, because petitioner's case arose before the effective date of this statutory change, we do not apply the current standard of review. See Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 675 (Utah 1997) ("[I]n workers' compensation claims, the law existing at the time of the injury applies in relation to that injury.").

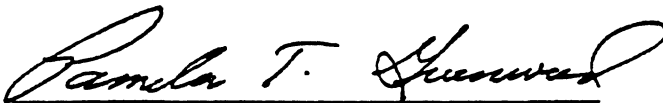
extraordinary' exertion [must be] fleshed out over time. Of necessity, the process of pouring specific content into that concept will rely heavily upon the Commission's expertise in and familiarity with the work environment." Price River Coal Co. v. Industrial Comm'n, 731 P.2d 1079, 1084 (Utah 1986). If this court were to compel the Commission to hold in favor of the employee each time there is a "fair debate" whether an exertion is unusual or extraordinary, we would defeat the Commission's delegated role in the administrative review process.

Because we agree with the Commission that petitioner's exertion of lifting the tray is similar to "the kinds of activities that are commonly experienced in modern nonindustrial life," we hold that the Commission correctly interpreted and applied the Allen test of legal causation. See Smallwood, 841 P.2d at 720. We therefore affirm the Commission's order denying petitioners workers' compensation benefits.

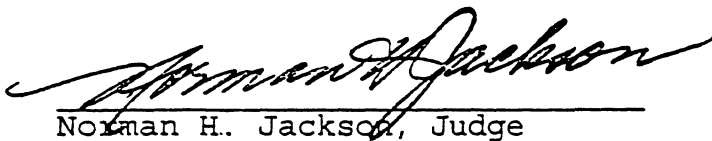


James L. Davis, Judge

WE CONCUR:



Pamela T. Greenwood,
Associate Presiding Judge



Norman H. Jackson, Judge

CERTIFICATE OF MAILING

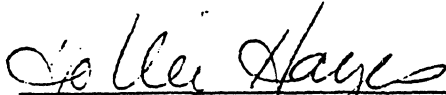
I hereby certify that on the 11th day of March, 1999, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

M. DAVID ECKERSLEY
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CITY CENTER I STE 900
SALT LAKE CITY UT 84111

STUART L. POELMAN
DORI K. PETERSEN
BLACKBURN & STOLL LC
77 W 200 S STE 400
SALT LAKE CITY UT 84101-1609

and a true and correct copy of the attached MEMORANDUM DECISION was placed in Interdepartmental Mailing to be delivered to:

ALAN HENNEBOLD
LABOR COMMISSION
160 E 300 S STE 300
PO BOX 146600
SALT LAKE CITY UT 84114-6600



Judicial Secretary

AGENCY CASE NO.: 92-0817
APPEALS CASE NO.: 981284-CA

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COURT OF APPEALS

May Bigler,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	
v.)	Case No. 950838-CA
)	
Industrial Commission of Utah;)	
T.W. Services, Inc.; and)	F I L E D
Transportation Insurance Co.,)	(August 8, 1996)
)	
Respondents.)	

Original Proceeding in this Court

Attorneys: Phillip B. Shell, Salt Lake City, for Petitioner
 Alan L. Hennebold, Salt Lake City, for Respondent
 Industrial Commission
 Michael E. Dyer and Dori K. Peterson, Salt Lake City,
 for Respondents

Before Judges Bench, Billings, and Wilkins.

PER CURIAM:

It is undisputed that Bigler suffers from preexisting back problems. Thus, she must prove legal causation--"that the employment contributed something substantial to increase the risk [she] already faced in everyday life because of [her] condition." Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986). In other words, she must prove that the workplace incident involved "an exertion greater than that undertaken in normal, everyday life." Id.

Having reviewed and considered the record, we conclude that the Commission properly denied benefits. 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. Thus, the legal causation prong of Allen is not met. Having reached this conclusion, we need not consider the medical causation prong.

Accordingly, the Commission's order is affirmed.

Russell W. Bench
 Russell W. Bench, Judge

Judith M. Billings
 Judith M. Billings, Judge

Michael J. Wilkins
 Michael J. Wilkins, Judge

COVER SHEET

CASE TITLE:

May Bigler,
Petitioner,

v.

Case No. 950838-CA

Industrial Commission of Utah;
T.W. Services, Inc; and
Transportation Insurance Co.,
Respondents.

August 8, 1996. MEMORANDUM DECISION (Not For Official Publication).

Memorandum Decision by PER CURIAM.

CERTIFICATE OF MAILING

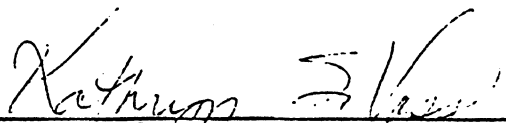
I hereby certify that on the 8th day of August, 1996, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the parties listed below:

Phillip B. Shell
Day & Barney
45 East Vine Street
Murray, UT 84107

Michael E. Dyer
Dori K. Peterson
Blackburn & Stoll
77 West 200 South #400
Salt Lake City, UT 84101

and a true and correct copy of the attached MEMORANDUM DECISION was placed in Interdepartmental Mailing to be delivered to the party listed below:

Alan Hennebald
Industrial Commission of Utah
160 East 300 South
P.O. Box 146600
Salt Lake City, Utah 84114-6600



Judicial Secretary

TRIAL COURT:

Industrial Commission Case No. 94-0273