

1999

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

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
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990132

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KRISTINE S. SCHREIBER,

Petitioner,

vs.

LABOR COMMISSION OF UTAH  
and JORDAN SCHOOL DISTRICT,

Respondents.

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Case No.: 990132-CA

Priority No. 7

BRIEF OF APPELLANT

APPEAL FROM ORDER OF THE LABOR COMMISSION GRANTING  
RESPONDENT'S MOTION FOR REVIEW, ENTERED JANUARY 27, 1999.

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**FILED**

Utah Court of Appeals

MAY 19 1999

Julia D'Alesandro  
Clerk of the Court

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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KRISTINE S. SCHREIBER,

Petitioner,

vs.

LABOR COMMISSION OF UTAH  
and JORDAN SCHOOL DISTRICT,

Respondents.

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## STATEMENT SHOWING JURISDICTION

The Court of Appeals has jurisdiction to review orders of the Industrial Commission (now the Utah Labor Commission) pursuant to former Utah Code Ann. § 35-1-86 (1996) (repealed effective July 1, 1997); Utah Code Ann. § 34A-1-303(6) (1997)).<sup>1</sup>

## STATEMENT OF THE ISSUES

1. Whether the Labor Commission erred in interpreting former Utah Code Ann. § 35-1-45 (repealed effective July 1, 1997) by overturning the Administrative Law Judge, and concluding that Ms. Schreiber did not sustain an injury "arising out of and in the course of her employment" with Jordan School District on April 3, 1996. The Court of Appeals reviews the Commission's interpretation of § 35-1-45 under a correction-of-error standard. E.g., Crapo v. Industrial Commission, 922 P.2d 39 (Utah Ct. App. 1996).

2. Whether the Labor Commission erred in overturning the conclusion of law reached by the Administrative Law Judge where it was held that the combination of getting hit, and the bodily reaction, considered together constitute an unusual and extraordinary exertion or stress, and therefore based upon the facts met the required test. This issue involves the application of law to facts, which is reviewed under a correction-of-error standard. Drake v. Industrial Commission, 939 P.2d 177 (Utah 1997).

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<sup>1</sup>The entire Utah Workers' Compensation Act was repealed and recodified effective July 1, 1997, and the Industrial Commission was replaced by the Labor Commission. This brief refers primarily to the Act as it was in effect on April 3, 1996, the date of the applicant's claimed injury. In addition, the brief refers to the "Industrial Commission," or simply the "Commission."



## **APPLICABLE STATUTES**

Utah Code Ann. §34A-2-401 (formerly § 35-1-45).

(1) 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.

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

## **STATEMENT OF THE CASE**

### **I. Introduction**

This is a Petition for Review of an Order by the Utah Labor Commission denying Ms. Schreiber's application for workers' compensation benefits. The Labor Commission overturned the administrative law judge's order awarding Mrs. Schreiber temporary total disability and permanent partial disability. The administrative law judge correctly found that the stress or exertion from being kicked in the back with a soccer ball is extraordinary or unusual. The combination of getting hit and the bodily reaction to getting hit, must be considered together in determining whether a resulting injury was the result of an unusual and extraordinary exertion or stress.

## **II. Procedural History**

The Petitioner Kristine S. Schreiber (the "applicant") instituted these proceedings before the Labor Commission of Utah on July 18, 1997, when she filed an Application for Hearing seeking workers' compensation benefits from her employer, Jordan School District, and its insurer, for injuries she sustained on April 3, 1996. (R. 2). Jordan School District denied liability on the grounds that the accident sustained on April 3, 1996, was not the legal cause of the applicant's back problems and the incident was not unusual or extraordinary. (R. 12-16).

The matter went to a hearing in front of the Honorable Benjamin A. Sims, Administrative Law Judge, on January 12, 1998. (R. 121; Hearing transcript). After the hearing, Judge Sims sent the case to a medical panel for a determination of whether the applicant's surgery and back problems were medically caused by her being struck in the back, by the soccer ball. (R. 71-75). The medical panel found that the applicant's back surgery in March of 1997 was medically caused by the soccer ball, and that there was a significant effect from being struck on the back by the ball. (R. 78-84). Thereafter, Judge Sims issued his Findings of Fact, Conclusions of Law, and Order holding that the stress or exertion from being kicked in the back with a soccer ball was extraordinary or unusual, and that the combination of getting hit and the bodily reaction to getting hit, must be considered together to determine whether a resulting injury was the result of an unusual and extraordinary exertion or stress. As a result, Judge Sims awarded the applicant temporary total disability and permanent partial disability. (R.85-93; Findings of fact, conclusions of law and order, attached hereto as Exhibit 1).

Respondent Jordan School District filed a Motion for Review with the Industrial Commission on September 18, 1998. (R. 97-103). The Commission, on January 27, 1999 entered an Order, granting Jordan School District's Motion for Review, thereby denying Ms. Schreiber's application for workers' compensation benefits. (R. 114-116; Order Granting Motion for Review attached hereto as Exhibit 2). Mrs. Schreiber filed a Petition for Review on February 11, 1999, and a Docketing Statement on March 4, 1999.

### **III. Uncontested Facts**

Petitioner, Kristine Schreiber, was injured on January 18, 1997, while working as a playground supervisor for the Jordan School District, when one of the students kick a soccer ball into her back. (R. 2). At the time of the accident, Ms. Schreiber was working as a playground supervisor for Jordan School District at the Riverton Elementary School. (R.121, hearing transcript page 13, lines 7-12). On the day of the accident, during recess on April 3, 1996, one of the boys went behind her and intentionally kicked a soccer ball into her back. (R. 2; R. 86; R. 121, hearing transcript page 14 line12, page 15 line11). Ms. Schreiber had no warning that she was about to be hit by the ball, which was traveling at approximately 35 mph. (R. 114). The unexpected impact of the soccer ball produced a sudden jerking movement that caused the applicant's back to jerk in a back and forward movement. (R.86; R. 115). Ms Schreiber felt immense pain immediately after being hit by the soccer ball. (R.121, hearing transcript page 15 lines 21-24). The pain was so intense that it actually brought Ms. Schreiber to tears. (R.121, hearing transcript page 15 lines 21-24). Along with the intense pain, Ms. Schreiber began to experience numbness down into her legs. (R.121, hearing transcript page 20 lines 7-11).

The applicant had a pre-existing back problem that required surgery in 1992. (R. 121, hearing transcript page 16, lines 2-16). The applicant went through a normal healing process after a successful fusion surgery. (R. 121 hearing transcript page 17 lines 19-21). After the back fusion in 1992, the applicant's back problems subsided, and in fact, it was reported that the applicant had not been experiencing any type of back pain prior to the accident. (R. 86; R. 78-84, Report of medical panel attached hereto as Exhibit 3). The sudden, unexpected impact of the soccer ball and the jerking movements caused by being struck in the back caused the fusion at the L4-5 level, completed in 1992, to break. (R. 2; R. 86). Ms. Schreiber underwent back surgery in March of 1997, which was necessitated by being struck in the back by the soccer ball. (R. 81).

### **SUMMARY OF THE ARGUMENT**

Ms. Schreiber's injury was the result of an accident that arose out of and in the course of her employment with Jordan School District. Being kicked in the back by a soccer ball traveling at a speed of approximately 35 mph, thereby causing a sudden jerk or unexpected bodily reflex is not a usual everyday occurrence. The fact that Ms. Schreiber was kicked in the back by the soccer ball combined with the totally unexpected, sudden reflective bodily movement that the impact caused, clearly constituted an unusual exertion. Therefore, there certainly existed a causal connection between Ms. Schreiber's injury and her employment. As such, the Commission incorrectly overturned the Administrative Law Judge in finding there was not a causal connection between Ms. Schreiber's injury and her employment.

## ARGUMENT

### **I. MS. SCHREIBER'S INJURY WAS THE RESULT OF AN ACCIDENT THAT AROSE OUT AND IN THE COURSE OF HER EMPLOYMENT WITH JORDAN SCHOOL DISTRICT.**

An employee is entitled to compensation for an injury which occurs as a result of an “accident arising out of and in the course of his [or her] employment,” Utah Code Annotated § 34A-2-401, even though the employee suffers from a pre-existing condition. Hilton Hotel and Pacific Reliance Insurance v. Industrial Commission, 897 P.2d 352 (Utah Ct. App. 1995)(quoting Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986)). Allen established a two prong analysis for determining whether an employee suffering from a pre-existing condition is entitled to compensation.

#### **A. Ms. Schreiber's injury occurred as a result of an “accident.”**

The first prong required in Allen is that the applicant must show that the injury occurred by “accident.” Id. at 18. An accident is defined as “an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events . . . and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly fall within the definition of an accident.” Id. It is undisputed that Ms. Schreiber suffered an “accident,” thereby satisfying the first prong of the analysis set forth in Allen.

#### **B. The accident arose out of and in the course of Ms. Schreiber's employment.**

“Arising out of” and “in the course of” one's employment are separate legal tests, each of which must be met before workers' compensation benefits can be awarded.

Commercial Carriers v. Industrial Commission, 888 P.2d 707 (Utah Ct. App. 1994). The test for whether or not the accident occurred “in the course of” employment is met if the injury occurs within the period of employment, at the location at which the worker reasonably may be in performance of her duties, and while she is performing her duty. Walls v. Industrial Commission, 857 P.2d 964 (Utah Ct. App. 1993). All three criteria, time, place and circumstances, must be satisfied in order for an employee to recover benefits. Id. Likewise, it is undisputed that Ms. Schreiber was in the course of her employment when the accident occurred as she was rendering service as a playground supervisor. Ms. Schreiber was clearly acting within her employment as a playground supervisor when she was injured. (See R. 121, hearing transcript page 13 lines 7-12).

An accident is said to “arise out of” employment for workers’ compensation purposes when there is a causal relationship between the injury and the employment. Buczynski v. Industrial Commission, 934 P.2d 1169 (Utah Ct. App. 1997). This requirement is satisfied if the injury occurs while the employee is rendering service to her employer which she was hired to do, or doing something incidental thereto, at the time when, and the place where, she was authorized to render such service. Walls v. Industrial Commission, 857 P.2d 964 (Utah Ct. App. 1993). Under the two pronged Allen test, there is no question that Ms. Schreiber suffered an injury that arose out of and in the course of her employment.

## **II. THE COMMISSION INCORRECTLY OVERTURNED THE ADMINISTRATIVE LAW JUDGE IN FINDING THERE WAS NOT A CAUSAL CONNECTION BETWEEN MS. SCHREIBER’S INJURY AND HER EMPLOYMENT.**

In overturning the Administrative Law Judge, the Commissioner found that there was not a causal connection between the injury and the employment as the Commissioner felt that

the higher legal causation standard required when one suffers from a pre-existing condition was not met, i.e., a showing of unusual or extraordinary exertion. In order to demonstrate the necessary causal connection, Allen established a two-part requirement of legal causation and medical causation. Medical causation requires a showing that "the disability is medically the result of an exertion or injury that occurred during a work-related activity." Id. at 27. The parties do not dispute medical causation; we therefore address only the legal causation prong.

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. Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986). "This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life." Id. 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. Id.

The findings of fact of the Administrative Law Judge clearly establish that Ms. Schreiber was kicked in the back by a soccer ball traveling at a speed of approximately 35 mph, which caused a sudden jerk or unexpected bodily reflex. (See Finding of fact, conclusions of law, and order attached hereto as Exhibit 1). This is not a usual, everyday occurrence. Therefore, there clearly existed a causal connection between Ms. Schreiber's injury and her employment, and compensation should be awarded.

**III. THE SUDDEN IMPACT OF THE SOCCER BALL COMBINED WITH THE SUDDEN JERKING MOVEMENT CAUSED BY THE IMPACT CONSIDERED TOGETHER CONSTITUTES AN UNUSUAL AND EXTRAORDINARY EXERTION OR STRESS THEREBY MEETING THE LEGAL CAUSATION REQUIREMENT.**

The sudden unexpected impact of the soccer ball, which was traveling at approximately 35 mph, into the small of Ms. Schreiber's back along with the unexpected and sudden jerk that it caused considered together constitutes an unusual and extraordinary exertion or stress under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). Allen sets out the test for determining whether a workplace injury and its resulting disability is compensable. A claimant must prove both legal and medical causation. Id. at 25-27. As stated above, the medical panel found that medical causation was established, therefore, the focus is on the legal causation prong, specifically whether there was an unusual or extraordinary exertion. The question that needs to be addressed is whether or not being kick by a soccer ball, traveling over 35 miles per hour, causing a sudden jerk and unexpected movement is an "unusual exertion or stress."

To meet the legal causation requirement, "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." Id. at 26. The question of whether the employment activities of a given employee are sufficient to satisfy the legal standard of unusual or extraordinary involves two steps. First, the agency must determine as a matter of fact exactly what were the employment activities of the injured employee. Second, the agency must decide whether those activities amounted to an unusual or extraordinary exertion. Hilton Hotel and Pacific Reliance Insurance v. Industrial Commission, 897 P.2d 352 (Utah Ct. App.



1995). The comparison between usual and unusual exertion is an objective standard with the focus on what typical non-employment type activities are generally expected of people in today's society, and not what this particular claimant is accustomed to doing. Smallwood v. Board of Review, 841 P.2d 716, 719 (Utah Ct. App. 1992). To put it another way, in order to establish legal causation, a claimant with a pre-existing condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. Such condition must take the form of an exertion greater than that of non-employment life. Sisco Hill v. Industrial Commission, 766 P.2d 1089 (Utah Ct. App. 1988). In other words, the claimant's injury must have been the result of an exertion which is unusual or extraordinary in comparison to typical non-employment activities and exertions expected of late 20<sup>th</sup> century men and women. American Roofing Company v. Industrial Commission, 752 P.2d 912 (Utah Ct. App. 1988). Being kicked in the back by a soccer ball traveling at a speed of approximately 35 mph is not a usual everyday occurrence. The fact that Ms. Schreiber was kicked in the back by the soccer ball combined with the unexpected reflective bodily movement that the impact caused, clearly was an unusual exertion.<sup>2</sup>

The question of whether the employment activities of Ms. Schreiber are sufficient to satisfy the legal standard of unusual or extraordinary involves two steps. First, the agency must determine as a matter of fact exactly what were the employment related activities of the

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<sup>2</sup> In determining whether it is an everyday occurrence, one may ask if being struck by an object traveling in excess of 35 mph is not an normal everyday occurrence and would be considered "unusual."

injured employee. Second, the agency must decide whether those activities amounted to unusual or extraordinary exertions. Price River Coal Company v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986). In Price River Coal Company, the Supreme Court noted that the concept of unusual or extraordinary exertion remains to be flushed out over time. Id. at 1084. This is one of those times that the concept of “unusual or extraordinary exertion” needs to be flushed out. Being kicked in the back by a soccer ball traveling at a speed of approximately 35 miles per hour along with the totally unexpected, sudden reflective bodily movement clearly is an “unusual or extraordinary exertion” based on the cases that have addressed the issue of an unusual exertion.

In Workers’ Compensation Fund v. Industrial Commission, 761 P.2d 572 (Utah Ct. App. 1988), the applicant suffered a heart attack as he was driving a truck from Denver to Salt Lake City. The applicant drove a truck from Salt Lake to Denver, then after a five hour layover in Denver, the applicant began returning to Salt Lake. Shortly after leaving Denver, the applicant suffered a heart attack. The Court determined that the activities amounted to an unusual or extraordinary exertion. Id. Likewise, in Stauffer Foods v. Industrial Commission of Utah, 801 P.2d 179 (Utah Ct. App. 1990), it was determined that an injury caused from gripping a high pressure water hose was an unusual exertion.

In Briar Cliff College v. Lois Campolo, 360 N.W.2d 91 (Iowa 1984), an employee who had a pre-existing heart condition died of cardiac failure shortly after his participation in an intramural basketball game. The Iowa Supreme Court found that playing basketball for approximately forty minutes with a five minute break in the middle was an unusual exertion. Id. at 95.

Additional cases have that lifting objects that weigh between 40 and 50 lbs. cannot alone be relied upon in determining whether an activity is considered an unusual exertion. Smith & Edwards v. Industrial Commission, 770 P.2d 1016 (Utah Ct. App. 1989). However, it has generally been held that when an employee suffers an injury as a result of lifting various objects, the Courts also look at other factors associated with the lifting. See Sisco Hill v. Industrial Commission, 766 P.2d 1089 (Utah Ct. App. 1988) (Court held that although the weight alone was not enough to render the activity unusual, considered with the dimensions of the plates and the manner that they had to be moved and lifted constituted an exertion beyond what is typically demanded by contemporary non-employment life). In Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah Ct. App. 1990), the Court held that where the employee was lifting and carrying tubes that weighed between 15 and 40 lbs., the activity was considered an unusual exertion based upon the number of times the applicant was lifting and moving these tubes throughout the day. Id.

One could very well consider that the act of being kicked in the back by a soccer ball traveling at approximately 35 mph could alone be considered an unusual or extraordinary exertion that does not occur in contemporary non-employment (every day) life. Being struck unexpectedly in the back by an object traveling 35 mph is not a usual (every day) occurrence. One could ask the question how often or the last time that one is unexpectedly hit by a soccer ball traveling in excess of 35 mph in every day life.

This Court has previously held that the sudden unexpected jolt and bodily movement as a result of being hit by the ball must also be considered in determining whether or not an activity is unusual. In American Roofing v. Industrial Commission, 752 P.2d 912 (Utah Ct. App. 1988), an employee injured his back when he was unloading a 30 lb. bucket of debris

out of the back of his truck. Apparently, as the employee leaned over the bed to lift the bucket out, the bucket snagged on something and it resulted in an injury to the employee's lower back. In its ruling, the Court determined that the weight of the bucket alone was not considered unusual, but coupled with the manner in which the employee was lifting the bucket out of the truck, and the fact that the bucket snagged something as he was lifting it out, it was concluded to be an unusual exertion.

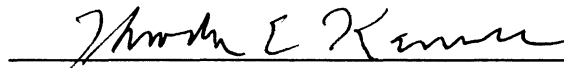
The facts involved in American Roofing are actually very similar to the case at hand. The Court considered the snagging of the bucket, (which undoubtedly would have produced a similar unexpected jerking reflex to that experienced by Ms. Schreiber) as an unusual exertion. Therefore, if the jerking reflex caused by the bucket being snagged results in an unusual exertion, then the similar unexpected impact of the soccer ball traveling 35 mph along with the sudden jerking bodily reflex caused by the impact, should also be considered an unusual exertion.

### **CONCLUSION**

For the foregoing reasons, petitioner, Kristine Schreiber respectfully requests that the Labor Commission be overturned and the conclusion of the Administrative Law Judge be reinstated where it was held that the combination of getting hit, and the bodily reaction, considered together constituted an unusual and extraordinary exertion or stress, and therefore based upon the facts met the required test. As such, the award for temporary disability and permanent partial disability payments should be reinstated.

DATED this the 19 day of May, 1999.

**PLANT, WALLACE CHRISTENSEN & KANELL**

A handwritten signature in cursive script, appearing to read "Theodore E. Kanell", written over a horizontal line.

THEODORE E. KANELL

ROBERT C. OLSEN

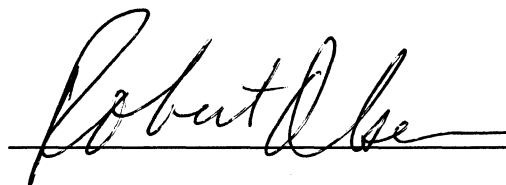
Attorney for Plaintiff/Appellant

### CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the Appellant's Brief on Appeal was mailed on the 19<sup>th</sup> day of May to the following by first class mail postage prepaid.

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A handwritten signature in cursive script, appearing to read "Robert D. Lee", is written over a horizontal line.

## ADDENDUM

### Exhibit #

Findings of Fact, Conclusions of Law, and Order .....	1
Order Granting Motion for Review .....	2
Medical Panel Report .....	3

**Tab 1**



UTAH LABOR COMMISSION  
PO BOX 146615  
SALT LAKE CITY, UTAH 84114-6615

KRISTINE S. SCHREIBER,                   \*  
  \*  
                  Petitioner,               \*  
  \*  
v.   \*     FINDINGS OF FACT,  
  \*  
  \*     CONCLUSIONS OF LAW,  
JORDAN SCHOOL DISTRICT,               \*  
  \*  
  \*     AND ORDER  
                  Respondent.           \*  
\* \* \* \* \*

HEARING:                               January 12, 1998.

BEFORE:                                Benjamin A. Sims, Law Judge

REPRESENTATION:                      Theodore Kanell for the petitioner.

  Thomas Sturdy for the respondent.

STATEMENT OF THE CASE:

The petitioner Kristine S. Schreiber is requesting medical expenses, recommended medical care, temporary total disability compensation, permanent partial impairment compensation, and travel expenses due to an injury to her back incurred when she was hit by a soccer ball on April 3, 1996. The respondent school district denies that it is responsible claiming that the kicked soccer ball could not have further damaged Mrs. Schreiber's already greatly injured back. After a hearing, the case was sent to a medical panel due to conflicts in the medical evidence. No objections had been received by the date of this order and the case was ready for an order on July 22, 1998.

FACTS:

1. Mrs. Schreiber the petitioner was a playground supervisor at an elementary school in the Jordan School District. On April 3, 1996, she was on the playground of the

school, facing the school building. She was struck in the middle of the back by a rubber soccer ball kicked by a second grade boy who was 8.5 years old at the time. Due to the impact, she bent forward, and then reflexed backward to maintain her balance. As a result, Mrs. Schreiber claims that a titanium cage fusion at the L4-L5 region in her lower back which had been completed in 1992 was broken as a result of the impact of the ball and her body movements in response, forced her to have surgery to repair the damage in March 1997, and caused her to be off of work from March 1997 when she had her fusion repair to the present.

2. Mrs. Schreiber was born on February 4, 1949. She normally worked 17 hours per week as a playground supervisor earning \$6.53 per hour. She was married with one dependent child under age 18 at the time of her injury.

3. She had her back fusion in 1992, and by 1994 she was essentially 95 percent pain free. The medical records show she has had a preexisting back problem and continued to have pain which was classified as chronic prior to the April 3, 1996 incident. However, she says prior to the incident she was feeling "great". She testified that immediately after being hit with the ball, she felt pain. By the time she got home, she says her leg was numb, and she had pain in her lumbar region.

4. The opposing parties agree that Mrs. Schreiber was hit in the back by a kicked soccer ball. They disagree on all the other critical issues. Based upon a preponderance of the evidence after observing the witnesses, their ability or inability to observe the events to which they testified, and bias or reason to testify in a particular manner, it is found that the young second grade boy was about 20-25 feet from the petitioner at the time he kicked the ball. Getting hit with a soccer ball is not an unusual or extraordinary event on a playground for child participants in a kick ball or soccer game.

5. The facts show that Mrs. Schreiber had her back turned to the kicker, and was not expecting to be hit with

the ball. She may have reacted more violently precisely because of the hit from the unexpected missile, and because she was consciously or unconsciously trying to protect her previously injured back. She testified that she contorted forward and then backward as a result of the ball hitting her.

6. There were two expert witnesses who testified as to the force of the impact. One expert testified on behalf of the petitioner. He was a biomedical engineer, had several degrees, including a master's degree, and was occupationally engaged in building medical scientific instruments. The other expert had a Ph.D., testified on behalf of the respondent, and was a biomedical motion expert. The motion expert conducted motion tests to determine the velocity of the kicked ball.

7. The first expert (for the petitioner) determined most of his data as a result of information from the petitioner based upon her belief as to the distance of the second grade kicker from her. She believed he was no more than ten feet from her, and that he was upset with her. Further, the expert believed his kick was more forceful because of his being mad. The first expert calculated the speed of the soccer ball to be 53 miles per hour based upon the assumption allegedly observed that the child could kick the ball a distance of approximately 120 feet. The witness' observation of the distance was admittedly a guess.

8. The motion expert (for the respondent) performed kicking tests with the child in August 1996, some four months after the incident. He had the child kick the ball four times as hard and as far as he could. The greatest distance measured was 78 feet. The velocity of the ball was measured by having the child kick a ball against a wall and using sound measuring instruments to calculate the speed. The speed of the ball was calculated at 35 miles per hour. The ball was made of rubber and was sized for elementary school children (Class 5 ball). It would have hit Mrs. Schreiber with a 3 or 4 inch diameter contact point since it was flexible, and part of its energy would have been absorbed

when Mrs. Schreiber went forward. The motion expert testified that this would have caused her back muscles to possibly get sore, but would have not been a sufficient force to cause a fully solid cage fusion to fracture. (The respondents provided four exhibits describing titanium cage fusions and devices for the medical panel review which was sent to them).

9. Dr. Bauman her treating physician states his belief that when the ball hit her it "caused her back to jerk violently and that was enough to break the type of cage fusion that she had." Note of Dr. Bauman on 1/7/97.

10. Another school worker indicated that the child was at a greater distance from Mrs. Schreiber (20-25 feet). It is likely that this is the distance from which the child kicked the ball into Mrs. Schreiber. Thus, the calculations of Mrs. Schreiber's expert should be reduced to show less force, and the calculations of the motion expert were probably closer to being correct. The real variable in this case is the reaction of Mrs. Schreiber. Both the impact of the ball, and her lurching forward and backward upon being hit, must be factored into the equation. When the event is considered based upon the total circumstances, and when considered with regard to the requirements of Allen, the evidence shows that the stress of being hit unexpectedly on a previously injured back, and her reaction to it, was reasonably unusual and extraordinary. This conclusion only deals with legal causation, and the medical panel was required to answer the issues dealing with medical causation.

11. There was a medical conflict in this case. Dr. Thomas D. Bauman the treating physician states that he believes to a high degree of medical certainty that Mrs. Schreiber's fusion repair was necessitated by being hit with the ball and her reaction to it. Note from Dr. Bauman dated 1/7/97. Contrarily, Dr. E. Paul France, Ph.D. believes that the ball strike would not have been likely to produce any significant aggravation of her prior low back condition or to break the fusion based upon his biomechanical and injury analysis. Tab 50, Vol II of medical reports. Dr. Warren

Stadler also noted that "a ball which is kicked into her back could not cause a structural problem with a CDR cage." Medical record at 319. Dr. Reed Fogg reported that Dr. Charles Burton the surgeon who did the 1992 surgery and placed the cages had reviewed the medical films and had determined that the fusion was solid on July 23, 1996. Medical record at 339.

12. The case went to a medical panel (panel) consisting of a neurologist and orthopedist as members. The panel examined the petitioner, the file, and the medical films. It issued its report on July 2, 1998. The panel used the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, as modified, and concluded in terms of reasonable medical probability:

A. The petitioners surgery in March 1997 was necessitated by being struck in the back by a soccer ball on April 3, 1996.

B. The petitioner has reached medical stability as of May 21, 1998.

C. She has a 20 percent whole person permanent partial impairment of which five percent is attributable to the April 3, 1996 injury.

D. She may need infrequent orthopedic follow-up. The screws may need to be removed. She may need injection therapy, and if she cannot be managed without abuse of narcotics, she may need to be sent for a pain clinic for evaluation and treatment. She might need psychological counseling as well as instruction in exercises and self-procured symptomatic medication and counsel.

13. The medical panel report is thorough and well reasoned. In the absence of objections, it is adopted.

14. She is entitled to receive a workers' compensation wage per week of \$92 (\$131 times .667 equals \$87 plus \$5 equals \$92).

KRISTINE S. SCHREIBER, ORDER

15. She is qualified to receive temporary total disability compensation of \$92 for the period from March 7, 1997 to the date of medical stability which was May 21, 1998 which is 63.143 weeks for a total of \$5,809.14 less any wages or salary received during this period computed at the temporary total or temporary partial rate, as appropriate.

16. She is qualified to receive permanent partial impairment compensation for 15.6 weeks beginning on May 21, 1998 in a weekly amount of \$92, and in a total amount of \$1,435.60.

CONCLUSIONS OF LAW:

1. The test is not whether the event is unusual or extraordinary, but is, rather, whether the stress or exertion from the event is extraordinary or unusual. The combination of getting hit, and the bodily reaction, must be considered to determine whether a resulting injury was the result of an unusual and extraordinary exertion or stress. Because the petitioner had a preexisting back problem, Allen requires that the petitioner experience an unusual and extraordinary exertion or stress. Based upon the facts, she met this requirement. Accord Allen v. Ind. Comm'n, 729 P.2d 15 (Utah 1986).

2. She is entitled to receive compensation based upon 20 hours per week. U.C.A. Sect. 34A-2-409(1)(e)(ii) renumbered from U.C.A. Sect. 35-1-75.

3. Permanent partial impairment compensation is authorized by U.C.A. Sect. 36-1-66, and temporary total disability compensation is authorized by U.C.A. Sect. 36-1-65.

4. Medical expenses and compensation are authorized by U.C.A. Sect. 35-1-45.

ORDER:

IT IS HEREBY ORDERED that the Jordan School District pay to Kristine S. Schreiber temporary total disability

KRISTINE S. SCHREIBER, ORDER

compensation of \$5,809.14. This amount is accrued and will be paid in a lump sum with interest of eight percent per annum from the dates when the payments were due.

IT IS FURTHER ORDERED that the Jordan School District pay to Kristine S. Schreiber permanent partial impairment compensation of \$1,435.60. Accrued amounts will be paid in a lump sum with interest of eight percent per annum from the dates when the payments were due.

IT IS FURTHER ORDERED that the Jordan School District pay to Theodore Kanell, attorney for Mrs. Schreiber, an attorney's fee of \$1,448.95 plus 20 percent of the interest paid to Mrs. Schreiber. The amount paid to Mr. Kanell will be deducted from the amount to be paid to Mrs. Schreiber and shall be sent directly to Mr. Kanell.

IT IS FURTHER ORDERED that the Jordan School District pay the medical and travel expenses of Kristine S. Schreiber for the surgical repair of her back fusion done on March 7, 1998 caused by the incident on April 3, 1996. These expenses will be paid with interest at eight percent per annum from the date when the medical providers first billed for the expenses.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. In the event a Motion for Review is timely filed, the parties shall have 15 days from the date of filing with the Commission, in which to file a written response with the Commission in accordance with U.C.A. Section 63-46b-12(2). In case a Motion for Review is filed, it will be reviewed by the Commissioner of the Labor Commission unless a specific request in writing is made by the filing party to have the case reviewed by the

KRISTINE S. SCHREIBER, ORDER

Appeals Board. The opposing party to a Motion for Review has 20 days to file its request for action by the Appeals Board under U.C.A. Section 34A-2-801.

DATED this 23<sup>rd</sup> day of July 1998.

A handwritten signature in cursive script, appearing to read "Benjamin A. Sims".

Benjamin A. Sims  
Law Judge



Tab 2

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**UTAH LABOR COMMISSION**

**KRISTINE S. SCHREIBER,**

**Applicant,**

**v.**

**JORDAN SCHOOL DISTRICT,**

**Defendant.**

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**ORDER GRANTING  
MOTION FOR REVIEW**

**Case No. 97-0608**

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Jordan School District (hereafter "the District") asks the Utah Labor Commission to review the Administrative Law Judge's award of benefits to Kristine S. Schreiber under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

**ISSUE PRESENTED**

Were Ms. Schreiber's work activities and exertions "unusual or extraordinary," thereby meeting the test for legal causation set forth in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

**FINDINGS OF FACT**

The Commission finds the following facts relevant to its determination of the issue of legal causation.

Mrs. Schreiber concedes that as of April 3, 1996, the date of her work accident, she suffered from a preexisting chronic low back problem that had been surgically treated with a titanium cage fusion at the L4-5 region.

On April 3, 1996, while employed as a playground supervisor by the district, an eight year old student kicked a rubber ball into the small of Mrs. Schreiber's back. Mrs. Schreiber had no warning she was about to be hit by the ball, which was traveling at approximately 35 miles per hour. 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

ORDER GRANTING MOTION FOR REVIEW  
KRISTINE S. SCHREIBER  
PAGE 2

"jump," "jerk," or "back and forward" movement. Mrs. Schreiber remained standing, despite the ball's impact and her startled response to the blow.

**DISCUSSION AND CONCLUSION OF LAW**

The Utah Workers' Compensation Act provides benefits to workers injured by accident "arising out of and in the course of" employment. Utah Code Ann. §34A-2-401. To qualify for benefits under the foregoing standard, an injured worker must establish that his or her work was **both** the "legal cause" and the "medical cause" of the injury in question. Allen v. Industrial Commission at 25. The central issue in Mrs. Schreiber's claim is whether the events at her work on April 3, 1996 are the legal cause of the back injury for which she now claims workers' compensation benefits.

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:

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.)

Mrs. Schreiber concedes she suffered from a preexisting back condition at the time of her work accident. She must therefore meet the "higher" Allen test for legal causation in order to qualify for workers' compensation benefits.

To determine whether a particular work activity meets the higher Allen test of an "unusual or extraordinary exertion," the Commission compares the work activity to other typical activities and exertions experienced by men and women in modern nonemployment life. Allen at 26. In this case, the 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 a uneven sidewalk.

The foregoing exertions, whether considered separately or together, do not constitute an unusual or extraordinary exertion when compared to the typical exertions of modern nonemployment life. The Commission therefore finds that Mrs. Schreiber's work activities on April 3, 1996 do not

**ORDER GRANTING MOTION FOR REVIEW**  
**KRISTINE S. SCHREIBER**  
**PAGE 3**

meet the Allen test for legal causation. Consequently, Mrs. Schreiber has failed to establish that her current back problems arise out of and in the course of her employment at the District, as required by the Act.

**ORDER**

In light of the foregoing, the Labor Commission sets aside the decision of the ALJ and denies Mrs. Schreiber's application for workers' compensation benefits. It is so ordered.

Dated this 27<sup>th</sup> day of January, 1999.

  
R. Lee Ellertson  
Commissioner

**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.

**ORDER GRANTING MOTION FOR REVIEW  
KRISTINE S. SCHREIBER  
PAGE 4**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Kristine S. Schreiber, Case No. 97-0608, was mailed first class postage prepaid this 27<sup>th</sup> day of January, 1999, to the following:

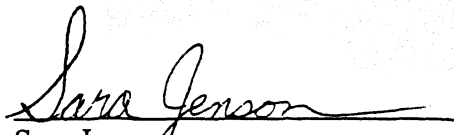
KRISTINE S. SCHREIBER  
10066 S JORDAN CREST CIR  
SO JORDAN UT 84095

JORDAN SCHOOL DISTRICT  
9361 SOUTH 300 EAST  
SANDY UT 84070

PINNACLE RISK MANAGEMENT SERVICES  
136 EAST SOUTH TEMPLE #2300  
SALT LAKE CITY UT 84111

THEODORE KANELL, ESQ.  
4 TRIAD CENTER #500  
P O BOX 2970  
SALT LAKE CITY UT 84180

THOMAS STURDY, ESQ  
77 WEST 200 SOUTH #400  
SALT LAKE CITY UT 84101

  
Sara Jenson  
Support Specialist  
Utah Labor Commission

Tab 3

MADISON H. THOMAS, M.D.  
8TH AVENUE & C STREET  
SALT LAKE CITY, UTAH 84143

Benjamin A. Sims  
Presiding Administrative Law Judge  
Labor Commission of Utah  
P.O. Box 146615  
Salt Lake City, UT 84114-6615

Date of Panel: 21 May 1998

Re: Kristine S. Schreiber  
Inj: 3 April 1996  
IC#: 97608

### REPORT OF MEDICAL PANEL

A medical panel consisting of Drs. Glenn Momberger and Madison H. Thomas, with the latter as chairman, have evaluated the case of Kristine S. Schreiber, with reference to an injury reported to have occurred on 3 April 1996.

The file made available to the panel was reviewed by the panel members. The history was reviewed in detail with the petitioner, using as a general outline the information contained in the letter appointing the panel. The petitioner was examined by the panel members and available X-rays were reviewed.

When asked to outline her current problems related to her back, the petitioner indicates she continues to have pain in the lower back. This is bothered by weather or activities, such as vacuuming, washing clothes, standing in lines when shopping, etc. She finds it difficult to sit for more than an hour, as for example, in church and at home she gets up about every 30 minutes to move around. She has learned to bend down to pick things up rather than bending her back. She is trying to maintain a 20 pound lifting level given her by Dr. Bauman. She describes her sleeping as being like "musical beds" in that she moves from one bed to a couch and to another bed and then to another couch during the night.

The petitioner maintains her household and does cooking and shopping. She has help from her husband and boys for ironing, vacuuming, and doing the kitchen floor, etc. The pain she experiences is across the lower back and spreads down through the right hip region and the lateral aspect of the right thigh and leg, to the ankle and lateral foot region.

She has physical therapy about three times a week for a couple of hours, using a bicycle, doing exercises, and walking on the treadmill, which is more difficult for her than regular walking, which she gets along better with. She has some massage. Medications include Mevacor, Valium, Zolof, Nortriptyline, and a stomach medicine, and two or three Lortabs per day.

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Tylenol does not seem to help, but a TENS unit does help somewhat. She uses a heating pad. She feels somewhat tired generally and thinks some of this may be from her medications.

She has been seeing a psychologist, Dr. Johnson, about stress since last October, which she relates to her 25-year-old son having had a stroke and developing diabetes herself. She does not attribute the stress to her back problem, however. She recalls seeing Dr. Michael Hess about three times after which he referred her to Dr. Bauman at the Salt Lake Clinic.

The petitioner made a pain diagram which shows aching sensations across the low back at her belt line, spreading down the lateral posterior thigh to the lateral calf and ankle and lateral foot region on the right. There is also an area of stabbing pain on the posterior lateral thigh.

The petitioner indicates that prior to the events of 3 April 1996, she had been working regularly at her part-time job at the school. She had intermittent leg pain, but found this did not interfere with her work. If she overdid, she would have pain in the lateral thigh, but no back pain. Occasionally, she would take Darvocet, but this was mostly taken for headache symptoms. Except for routine follow-ups, she had not seen a doctor about her back for approximately two years.

One of her duties at the school was to supervise activities on the playground. She describes having to reprimand a second grade boy who was taking two balls to play with rather than sharing one of them. Her back was turned to him and she was suddenly aware of being struck from behind by the ball he had kicked. She had immediate pain, which brought tears to her eyes, in the low back. She managed to finish the remaining half hour of the day before going home, and by that time her right leg was becoming numb and more painful. She called the school and was referred to the Riverton Clinic and then in turn was sent to Alta View for X-rays. She continued to have pain and was given a muscle relaxant.

Subsequent to the 30 March 1997 surgery, she had continued physical therapy and was kept off work.

The file has been reviewed on a page-by-page basis, but will not be summarized in detail at this point. It is noted she has had extensive medical and surgical problems in the past. In 1987, she was struck on the head by a falling board at a lumbar yard and attributes subsequent headaches and symptoms to that event. In 1987, she was in an auto accident with subsequent cervical strain, and in 1993, she began having symptoms of vertigo, with nausea, and subsequently had multiple efforts to close a fistula, and in May 1994 had a right vestibular nerve section. In 1980, she had a left carpal tunnel release and in 1981 a vaginal hysterectomy. In 1993 she was noted as having been depressed for long periods of time and having treatment for that, with this in association with a sister's death and other problems. In 1989, she had an MMPI which suggested somatization and was thought to have recurring hyperventilation syndrome symptoms.



In 1992 she reported she had been injured about five years previously and also had fallen on her buttocks and had back pain. A fusion using cages was done at L4-5 and L5-S1. Procedures were done by Dr. Ray, and he saw her at six month intervals for follow-up, with an impression that they were well satisfied with the solidity of the fusion and her improvement therefrom.

The petitioner has extensive medical records from when she was living in the east. She subsequently moved to Salt Lake City and was followed for her multiple problems, which have included follow-up on her vestibular symptoms, hayfever attributed to allergies, constipation, decreased hearing on the right, etc. Subsequent to her March 1997 surgery by Dr. Bauman when a fixation at both levels was done, she was seen in follow-up by him and cautioned about lifting, etc.

The petitioner indicates most of these symptoms are relatively quiescent at this time.

The petitioner indicates her height is 62 inches and her weight was previously up to 160, but she reports it is now 130. She denies the use of alcohol or tobacco. She is married and has had three children, with one boy at home now. She has had three years of college.

#### EXAMINATION:

Focussed examination shows a woman who appears in good health and is slender. She has a 17 cm midline lumbar scar, plus bone graft site scars.

Cervical spine showed normal configuration. Lateral bending was 24 to the right and 30 to the left, with flexion 38°, extension 20°, and rotation 20° to the right and 40° to the left. There was no paraspinal or midline tenderness, but compression of the head caused discomfort in the lower back.

The lumbosacral spine had a normal configuration. There was tenderness in the lumbar paraspinal areas, but no sciatic notch tenderness. Straight leg raising was 45° on the right and 80° on the left, with back discomfort on straight leg raising on the right. There was radiation to the hip and back region on the right, but discomfort in the calf on stretching on the left. Sitting straight leg raising was 90° on each side. The back muscles felt tight bilaterally. The hips had 50° of flexion and 10° of extension. The right hip was slightly weak, but normal on the left. Internal and external rotation and adduction were normal.

The leg lengths were 83 1/2 on each side. She could walk on heels and toes and stand on the ball of the foot five times in succession. There was 4/5 quadriceps strength and hamstring strength was the same on the right, with 5/5 for these two on the left. On the toes, dorsiflexion of the great toe was 4/5 on the right and satisfactory on the left. Plantar flexion had a similar pattern. Extensor longus was slightly weak on the right and normal on the left. Calf measured

32 on each side. Peripheral pulses were normal bilaterally. The feet and ankles showed normal configuration.

Biceps, triceps, knee jerks, ankle jerks, and radial periosteals were all 2+ and symmetrical. Babinski was downward on each side.

Tuning fork was normal at the knee and ankle. The medial and lateral aspects of the right thigh were more sensitive than the left. The medial aspect and the lateral aspect of the calf were reported as being more sensitive to the sharp object on the right than on the left. The foot and the toes were reported as symmetrical. The medial aspect of the left heel and the lateral foot on the left were slightly more sensitive, but all of these were subjective and slightly variable in pattern.

A review of the X-rays available included those taken on the day of the 3 April 1996 injury, a lumbosacral spine. This showed on the right oblique view, a radiolucent line under the cage at L4-5 and also slight spaces noted, in addition to sacroiliitis. Subsequent studies on 23 July, 4 December 1996 and 21 April 1997 continued to show signs of non-union at L4-5.

An MRI, reported to have been done on approximately 3 July 1996 was requested for review by the panel. When this became available, it was noted to give clear confirmation of the non-union at L4-5.

The various considerations included in the letter appointing the panel have been reviewed. It is noted that it has been concluded that the occurrence meets the requirements of the Allen decision from the legal point of view.

The AMA Guide to Evaluation of Permanent Impairment Fourth Edition, as modified, was used as a reference.

Assuming but not deciding that the petitioner was involved in circumstances as outlined, the panel concludes in terms of reasonable medical probability as follows:

- 1) The petitioner's surgery in March 1997 was necessitated by being struck in the back by a soccer ball on 3 April 1996.

Comment: The panel, from its interpretation of the imaging evidence on the date of the 3 April 1996 event, notes that there was indication that the fusion was not completely solid at the L4-5 level at that point, based on the above noted appearance. It is further noted that the cages were not symmetrically placed and that the interpretation as to the stability of the fused joints is difficult because of that and the angulations involved. It appears to the panel that there had been a fibrous replacement of tissue, and that on the

day of being struck, the petitioner was therefore more vulnerable to significant consequences than if there had been a solid bony fusion at the time. The physical impact of the ball against the back probably would not have had a major impact on the slightly unstable joint, but the abrupt hyperextension in response to being struck by surprise would more likely have caused the change in the status of the fused area, which led very promptly to acute symptoms which had not been present before. Thus, this combination of the internal vulnerability, plus the immediate consequences leads the panel to conclude that there was a significant effect from being struck on the back by the ball.

- 2) The petitioner has reached medical stability.
- 3) The petitioner has reached stability as of the current date, based on the current history and clinical examination, although she continues to have symptoms.
- 4) Permanent partial impairment is as shown on the following tabulation:

% WHOLE PERSON IMPAIRMENT

	% Whole Person Impairment	3 April 1996	Pre-existing and/or Subsequent
Surgically treated spinal impairment, with fusion and radiculopathy	20%*	5%	15%#

*Current rating	#Rating prior to 3 Apr 1996
II-A 10%	II-A 10%
I-C 2%	II-D 3%
II-D 3%	II-E 2%
II-E 2%	15%
II-F 3%	
20%	

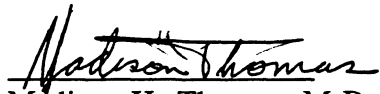
- 5) Additional medical treatment reasonably required in the future is continuing infrequent orthopedic follow-up. There may be reasonable anticipation that the screws may ultimately need to be removed. There may be injection therapy, or if it is not possible to manage her without abuse of narcotics, there may be need for a pain clinic evaluation and treatment. It does not seem reasonable that psychologic treatment would be directly related to the injury, but the need for it would be based on other factors. She will need continuing counsel about self utilization of exercises, and self-procured symptomatic medication and counsel as to appropriate activities in the future.


Judge Benjamin A. Sims  
21 May 1998  
page 7

Re: Kristine S. Schreiber

Members of the panel will be happy to try and respond to any additional questions if it would be helpful.

Respectfully submitted,

  
Madison H. Thomas, M.D.  
Panel Chairman

  
Glenn Momberger, M.D.  
Panel Member

MHT:csw

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