2009

Henderson v. Labor Commission : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
450 S. State, PO Box 140210, Salt Lake City, UT 84114, 801/578-3907, Fax 801/578-3999

JOAN HENDERSON, Petitioner/Appellant, vs. LABOR COMMISSION, WORKFORCE STAFFING SERVICES and/or WORKER'S COMPENSATION FUND, Respondents/Appellees.	)	**BRIEF OF APPELLANT** **Case No. 20091091-CA** **(Labor Commission Case No. 09-0053)**

APPEAL FROM "ORDER DENYING REQUEST FOR RECONSIDERATION"

BY THE UTAH LABOR COMMISSION,

DATED NOVEMBER 30, 2009, LABOR COMMISSION CASE 09-0053

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

PROCEEDINGS

This is an appeal from the "Order Denying Request for Reconsideration," dated November 30, 2009, by Administrative Law Judge Debbie Hann of the Utah Labor Commission, of a final administrative order.

JURISDICTION AND GROUNDS FOR REVIEW

The Petition for Review served December 28, 2009 was filed December 30, 2009, within thirty days after the November 30, 2009 decision by the Commissioner, as allowed by U.C.A. §34A-2-801(8).

ISSUE PRESENTED FOR REVIEW

Whether Petitioner Joan Henderson was injured May 2, 2007 "by accident arising out of and in the course of" her employment, as contemplated by U.C.A. §34A-2-401(1), when she fell on the highway and became incoherent while working as a flagger.

DETERMINATIVE STATUTE

U.C.A. §34A-2-401. Compensation for industrial accidents to be paid.

> (1) An 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;
>
> (a) compensation for loss sustained on account of the injury or death;
>
> (b) the amount provided in this chapter for:
>
> (i) medical, nurse, and hospital services;
>
> (ii) medicines; and
>
> (iii) in case of death, the amount of funeral expenses.
>
> (2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:

(a) on the employer and the employer's insurance carrier; and
(b) not on the employee.

(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission.

Compensation and medical care is owed for an injury "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."

REVIEW STANDARD

The Standard for Appellate Review is stated in U.C.A. §63G-4-403 in the Utah Administrative Procedures Act, which allows review of the whole record. The Board's findings "will be affirmed only if they are 'supported by substantial evidence when viewed in light of the whole record before the Court.' This 'substantial evidence test' grants appellate courts greater latitude in reviewing the record. . ." Grace Drilling v. Board of Review, 776 P.2d at 67 (Utah 1984), quoting U.C.A. §63G-4-403(4)(g), formerly §63-46b-16(4)(g). Besides believing substantial evidence in light of the whole record justifies a reversal, Appellant believes the agency erroneously interpreted or applied the law under Sub-Part 4(d). The Court may review an agency's interpretation of its statutorily-granted powers and authority as a question of law and may grant relief based upon an agency's erroneous interpretation of law. Bevans v. Industrial Comm., 790 P.2d 573 (Utah Ct.App. 1990) and Savage Indus., Inc. v. Utah State Tax Comm., 811 P.2d 664 (Utah 1991).

STATEMENT OF THE CASE

NATURE OF CASE AND COURSE OF PROCEEDINGS

Petitioner Joan Henderson was denied Workers' Compensation benefits because the Administrative Law Judge (ALJ) found that instead of tripping and falling, Petitioner most likely fainted and therefore could not show a medical causal connection between her occupation as a highway traffic flagger and her resulting injuries from a fall May 2, 2007. The ALJ relied on Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986).

COURSE OF PROCEEDINGS

The Order from which the appeal is taken was November 30, 2009. It advised that any party could appeal by filing a Petition for Review to the Utah Court of Appeals within thirty days. The Petition for Review was served to the Court of Appeals December 28, 2009. The Findings of Fact, Conclusions of Law and Order by the Labor Commission was signed July 8, 2009. It allowed thirty days for a Motion for Review to the Adjudication Division or to the Appeals Board. Petitioner's Motion for Review to the Adjudication Division of the Labor Commission was served August 5, 2009. The "Order Affirming Administrative Law Judge's Decision" was signed October 14, 2009. It allowed twenty days to file a Request for Reconsideration with the Labor Commission. Petitioner's Request for Reconsideration was served November 2, 2009 to the Labor Commission by mail and facsimile. This is not an interlocutory appeal. Petitioner has exhausted her administrative remedies and appeals the

final order. No claims presently remain to be decided at the Labor Commission. When and if the case is remanded, the Labor Commission will need to make further findings and orders.

RELEVANT FACTS

Wednesday, May 2, 2007 Petitioner was directing traffic a little after 8:00 a.m., as a flagger in Smithfield, Cache County, Utah for the Utah Highway 91 reconstruction. Petitioner was at the job site at 6:50 a.m. and began work at 7:00 a.m. She testified at her June 17, 2009 hearing that immediately before she fell and injured her head, back, and arms, she was walking backwards to make room for traffic and caught the heel of her boot on the base of a traffic barrel, which tripped her, and she fell. She hit her head at least once, suffered a concussion, was incoherent and taken to the hospital by ambulance. In her incoherent condition, she tried to get up, but fell again, perhaps twice. She has not recovered. About the fall, Petitioner remembers only tripping, reaching for her helmet because it was coming off, and coming home from the hospital. She does not remember whether she tried to get up and then fell again. She does not remember conversations of that day after the fall. There were no witnesses to the beginning of her fall. Water truck driver "witness", Cameron Moser sitting in a truck doing paperwork, said he looked up and saw Petitioner already falling, after she had begun to fall. She was already part way down when he first saw her. Because of claims Petitioner fainted or had a "syncope" event, medical causation was found to be absent. Evidence of such a fainting event all arose from

statements attributed to Ms. Henderson after she fell by persons unidentified and known. The Medical Record contains no evidence of fainting or syncope events before May 2, 2007.

Prior to May 2, 2007, Petitioner worked several months at a time as a flagger at two different construction sites without health problems or accidents, before and after she was in a March 2006 automobile accident.

May 2, 2007 was Petitioner's first day on this job.

Because of her fall May 2, 2007, Petitioner became incoherent. After the fall, she had no short-term memory about the events of her fall. She argues that any statements she made after the concussion were neither reliable nor remembered by her.

Water truck driver Cameron Moser, whose name was absent from the police investigation report of that day, testified at the June 17, 2009 hearing that he was "not sure" if Petitioner was close enough to have tripped over a traffic barrel. Smithfield police officer Salvador Toscano testified it was a hot day, and he saw lots of traffic.

SUMMARY OF ARGUMENT

Even if Petitioner fainted May 2, 2007, her fainting was not due to pre-existing conditions, but happened because of her presence at work May 2, 2007. Her Medical Record contains no evidence of any suspected fainting episode prior to May 2, 2007. Petitioner meets both legal and medical causation standards set for in Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986).

ARGUMENT

I.

Petitioner Joan Henderson suffered an injury by accident arising out of and in the course of her employment, as contemplated by U.C.A. §34A-2-401(1), when she fell while working as a flagger May 2, 2007.

The first challenged Findings of Fact is from the first full paragraph on Page 3 of the July 8, 2009 Administrative Law Judge's Findings of Fact, Conclusions of Law, and Ordere (the "decision") that Petitioner's testimony she caught her heel on the base of a four-foot traffic barrel which caused her to trip and stumble, and then fall backwards as she tried to grab her hard hat as it fell off her head "is not credible because it is not consistent with her earlier statements and is not consistent with (the) preponderance of witness testimony and medical evidence that the Petitioner suffered syncopal episode."

Petitioner invites the Court to look at all the facts (testimony and medical records) that support the Administrative Law Judge's finding, and the facts from testimony and the medical records that challenge the findings, then agree it is not supported by substantial evidence in the record. The Administrative Law Judge (ALJ) first relied on witness Cameron Moser:

> Cameron Moser, a water truck driver employed by Staker Parsons, who was on the jobsite, observed the petitioner fall down to her left side. She then gathered her hard hat and stood back up but she was teetering and she then fell forward onto her hands and knees into traffic. Mr. Moser then observed the Petitioner stand up again and then fall backwards "stiff as a board" and land on her back. Mr. Moser observed the Petitioner was not standing close enough to a traffic barrel to have tripped over it. (Decision P.3, 2nd full paragraph)

Testimony about what Cameron Moser said begins at Page 105 of the Transcript of Hearing ("transcript"), conducted June 17, 2009 before ALJ Debbie Hann. In response to the question on Line 20 ". . .Did you have an occasion to witness an incident involving a flagger on that job? Mr. Moser answered Yes." The testimony proceeded as follows:

> Q Tell us what you saw.
>
> A I was sitting in my truck filling out some paperwork and I just glanced up and noticed the flag girl fall down to her side.
>
> Q (Transcript P.106) Okay. Let me stop you there. Which side did she–well, what was she doing just before she fell, do you know?
>
> A I really wouldn't, because I wasn't looking at her, but– ...–I was faced south, she was–she was in the–flagging the southbound lanes. And I was to the north of her facing south.
>
> Q And what did you see?
>
> A I seen her fall down to the–throw her sign down and fall down. I thought to myself, That was kind of embarrassing she fell over, you know, so I focused on her.
>
> Q Now, when she fell, did she fall backwards? Forwards? To the side?
>
> A Side.
>
> Q Which side did she fall?
>
> A Left.
>
> Q To her left?
>
> A To her left.
>
> Q Okay. And then what did you see?

A She stood back–I think she gathered her hat on –put her helmet back on, stood back up and I could see something was wrong. She started teetering, she fell into traffic on her hands and knees.

Q (Transcript P. 107) So she fell forward--

A Forward--

Q --the second time?

A --the second time.

Q Okay. And then what?

A Then I thought I better get out and help, so I started getting out of my truck. She stood up and I could see she was teetering and she fell backwards like a stiff board. Her legs didn't buckle or nothing.

Q So the third time she fell flat on her back?

A Backwards. Backwards.

Q Okay. When you say "helmet," you're talking about the hard hat?

A Hard hat.

Q Okay. And did you get to her at some point?

A Yeah. Well, after she fell and hit her--she hit on her--flat and her hard hat went flipping. And by this time I was on my way to her and another lady had pulled through the cones and got out and ran to her. And she got to me right at the same time and we lifted her legs up and put her--I think it was her lunch bucket and put her legs on that. And this lady told me she was on her way to Logan Regional Hospital, she was an ER nurse.

...

Q (Transcript P. 108, Line 13) ...Was Mrs. Henderson talking at that point in time?

A Not talking, no.

Q Okay. At some point did you have any conversation with Ms. Henderson there?

A Huh-uh, no, but I listened to her.

Q Okay. Did you overhear a conversation that she--

A Yes, I did.

Q Okay. Who was she talking with?

A The first--first responder come--EMT come, started checking her over. And I kind of backed up a few steps. And I don't know what time when an ambulance came. And the guys rushed out of the ambulance with their little box, sat down and when the EMT said, "We have, like, a 51-year-old female that's apparently fainted, she says she has forgotten to take her blood pressure medicine."

Q Did you hear any other conversation (inaudible)?

A I kind of backed off right then and let them take care of it all.

Cross-examination of Mr. Moser began on Page 109:

Q , Cameron Todd Moser, you say you were not watching whatever started--whatever happened before she began to fall the first time?

A I saw her halfway through her fall, yeah.

Q So she could have tripped?

A Well, sidewards? ... I don't think she was by-- ...--that close to it. I don't think she was close to the barrel to trip over the barrel.

Q (Transcript P. 110, Line 1) But you said you weren't watching?

A No. I had my head down doing paperwork and I looked up and saw her fall.

Q Okay. So you saw her go down once, get up and go down again and get up and go down a third time?

A Yes.

Q But you didn't see what happened until halfway through the first fall?

A Uh-huh (Yes.)

...

Q So is it possible she could have fallen a time before the first one you saw--

A No.

Q ...Why is that not possible?

A Because I was writing, looking up, writing, looking up. And that was all in a 15-second time. She would have never had time to do that.

Q (Transcript P. 111, Line 1) Okay. But you know at least the third time she went down that she hit her head--

A Yes.

Q --on the back of her head?

A Yes.

...

Q (P.112, line 5) So what did she say about blood pressure?

A The EMT told the ambulance worker... “We have a 51-year-old female that’s apparently fainted and she says she has forgotten to take her blood pressure medicine this morning.”

Q So this is an EMT guy... who you’re overhearing say to someone else?

A Yes. ...Saying to the ambulance EMT guy. He’s like a first responder, but he got there before the ambulance.

Q And so he’s the one who’s saying he thinks she forgot to take her blood pressure–

A No, he said she told him she forgot.

Q Okay. Did it appear to you that Joan was coherent when you observed her?

A When she–the EMTs were asking her questions, she was talking back to them.

Q But you don't know if she was aware of what she was saying, do you?

A No.

...

Q (P. 113, Line 6) Just to be clear, your ... truck was parked, right?

A Yes.

Q And you were doing paperwork?

A Yes.

Q And you looked up about every 15 seconds?

A Yeah, just write something down and look up, write.

Q So it could well be that when you looked up and saw Joan, it had been 15 seconds before then that you looked up the time before that, right?

A Yeah.

Cross-examination concluded on page 113.

The ALJ concluded from the above that the Petitioner fainted and did not trip and was not close enough to the traffic barrel to have tripped. The above testimony proves other conclusions should have been reached. Of greatest significance is that Cameron Moser did not see what the Petitioner was doing immediately before he saw her fall, which was after Ms. Henderson was already falling. He admits he did not see what she was doing for up to 15 seconds before he looked up.

The woman referred to by Mr. Moser who he said told him she worked at the emergency room at Logan Regional Hospital was never named, never located, and did not testify.

The emergency medical services (EMT) and ambulance technicians were not at the hearing and did not testify.

The ALJ found on Page 3 in Paragraph 4 of the Decision that Officer Salvador Toscano of the Smithfield City Police Department was on scene "within one minute of receiving the dispatch call and was the first to arrive." The ALJ found (P.3, ¶4 Decision) "Officer Toscano had been told by the dispatcher that a female flagger had passed out and hit her head on the cement." The ALJ found (P.3, ¶5, Decision) Officer Toscano spoke to Petitioner's co-workers and witnesses who reported the Petitioner had passed out.

Officer Salvador Toscano's testimony begins on Page 114 of the Transcript of Hearing. From his direct examination, Page 115, Line 8:

> Q What was the purpose of the dispatch to that location?
>
> A To a medical dispatch relayed to me over the radio that a female flagger had passed out and hit her head on the cement.
>
> Q And did you go to that site?
>
> A I did.
>
> Q And when you got there, what did you observe?
>
> A I observed a female flagger laying in the--on the roadway.
>
> Q Was there anyone around her?

A There was, co-workers and the witnesses.

Q Okay. No emergency medical people at that time?

A Not that I can recall.

Q Do you recall--what time did you get the call to go out to that site, do you remember?

. . .

A (P. 116, Line 3) I arrived on scene at 0813 hours.

Q (P.116, Line 7) Okay. And what did you do once you got to the scene?

A I got to the scene and I went to the--Ms. Henderson that was lying on the ground. I asked her if she was okay.

Q Was she able to respond to you?

A From what I can recall, yes, but she was not very coherent.

...

Q (P. 116, Line 23) ... Did you have any other conversations with either Ms. Henderson at that time or any of the emergency technicians or witnesses?

A I asked Ms. Henderson what her name was. She told me her name was Joan Henderson out of Nibley.

Q Did she say anything else to you?

A Not that I can recall.

Q Do you have any recollection of other conversations you had with people that were there at that time?

A Yeah, I was asking co-workers and witnesses and they had said that she had passed out and she has a history of high blood pressure.

Q But you don't know that?

A I don't know that.

...

Cross-examination began on Page 119:

Q (P. 119, Line 8) Do you have any recollection that there were no barrels on the construction site?

A There was barrels.

Q You don't have any knowledge that the barrel was not involved, do you?

A I don't.

...

Q (P. 19, Line 23) But it is correct, isn't it, there were–there were not witnesses that you noted at the time; is that right?

A I spoke with some witnesses and some co-workers, but names were not gathered.

Q Names were not gathered?

A No.

Q Do you recall Cameron Moser who testified, whether you spoke with him before or not?

A I don't.

Q Okay. So why not gather names?

A I didn't gather names because of the scene. I needed to get traffic moving, needed to get people out of the area. I therefore failed to gather names of witnesses and–co-workers.

Q (P. 120, Line 15) --so you couldn't even give a name of anyone who said anything about high blood pressure?

A No.

Q Nor could you give an opinion as to whether she really did or didn't have blood pressure, that it was too (inaudible)--

A No.

Q --or was or wasn't taking medication?

A No.

Q Did you--did you ask her anything about medications or pills?

A No.

Q Were you present when the first responders were trying to talk with her?

A No. I was there--correction. I was present, but I was busy. Once they started tending to the patient, I then started conducting traffic control.

Q So if there was a conversation between Joan Henderson and first responders, you weren't close enough to observe it or hear it.

A No.

Q How busy was the traffic?

A Very.

...

Q (P.121, Line 20) Do you recall--was it a particularly warm day?

A Very hot day.

Q How do you recall that?

A Sweating profusely.

...

Q (P.122, Line 21) Do you recall how close she was to any traffic cone?

A No.

The ALJ relied on these two witnesses and alleged medical evidence to conclude Petitioner did not trip on a traffic barrel, and suffered a syncopal episode (P.3, ¶1 Decision).

However, neither Moser nor Toscano saw Ms. Henderson begin her fall or actually hear Joan Henderson say anything about fainting. Both these witnesses confirm that Petitioner was incoherent.

Joan Henderson's testimony begins on Page 19 of the Transcript of Hearing, Line 2:

> Q ...Since when have you been a flagger for construction jobs?
>
> A I flagged for two years.
>
> Q Where did you flag before May of 2007?
>
> A Through SOS Temporary Services.
>
> Q Do you remember what job sites?
>
> A I worked up Logan Canyon, worked down in Kaysville. I've worked all over.
>
> Q Have you worked in Randolph?
>
> A I worked in Randolph.
>
> Q How steadily did you work at these jobs when you were a flagger?
>
> A I worked straight for three months in Nibley–out in Nibley. That's in Logan.
>
> ...
>
> Q (Page 21, Line 22) What do you remember was the start time for your work on May 2, 2007?
>
> A 7:00
>
> Q Do you recall what time you got there?
>
> A Yes. I got there about a quarter to 7:00. I was out on the street by ten to 7:00.

Q Did you have to bring any special equipment?
A Yes.

Q What was that?

A My stop sign, my hard hat. I had levis and shoes on.

Q Was any of this equipment supplied by the job site, like the stop sign and the hard hat?

A No, that was my own equipment.
...
Q (P.22, Line 15) Did you have a water bottle or lunch with you?

A Yes.

Q Did you leave any of that stuff in the car?

A I had my water bottle right on the street with me.
...
Q (P.23, Line 11) Do you recall whether you were–what lanes you were working in, northbound or southbound or some other areas?

A I was in the middle of the street.

Q Okay. What were you doing?

A I was flagging.

Q How long were you flagging before you fell?

A About an hour or 45 minutes.

Q What do you remember about the traffic right before you fell?

A There was a lot of traffic going on, going south and north.

Q How close to the traffic were you?

A Just standing by the barrel and I was just a couple feet from the barrel.

Q (P.24, Line 1) What happened just before you fell?

A I was trying to–okay. Two lanes, one running north and one running south. I was in the closest lane to the south and a person on the north lane was stopping, the way my sign was. And both lanes should have been going back and forth, but the way my sign was it was showing that it was stopping on the north lane. So I was waving her–that person to go, because the other side was going on the south side of me. And I had to step back because the traffic was close. And I stepped back and tripped over the–the rubber part of the barrel. And I was turning my sign around and I dropped my sign, because I stumbled, and my hat was coming off. And I reached back to grab my hat, because it fell off, and I fell to the ground.

Q Do you remember hitting the ground?

A Yes. I hit–

Q What part of your body hit the ground?

A My whole back. I went back like this. But my hat had already come off.

Q Do you remember what happened after you hit the ground?

A No.

Q Do you remember trying to get up?

A No. No.

Q What do you remember next?
...
A I remember the ambulance ride.
...
Q (P.28, Line 18) Okay. Joan, had you had any other problems in the month before this injury of May 2, 2007? Had you tripped and fallen?
...
A No.

Q Had you fainted?

A No.

Q Were you on--were you taking any medication?

A That day?

Q That day.

A I had a Lortab 10.

Q Why did you have a Lortab 10 that day?

A Because of my arthritis.

Q How long had you been taking Lortab 10 on a daily basis?

A I have taken them for quite a while. ...A couple of years, two years.

Q And is that after you had had a motor vehicle accident?

A Yes.

Q And was that for pain in--from the motor vehicle accident?

A Yes.

Q In what part of your body?

A My neck.

Q Did the Lortab keep you from being able to drive?

A No.

Q Did they keep you from being able to walk?

A No.

Q Did they keep you from being able to do yard work?

A No.

Q (P. 30, Line 2) Did you do all those things in the month before May 2, 2007?

A Yes.

Q Did you take any more or less Lortab May 2, 2007 than you normally took?

A No.

Q Was the Lortab prescribed for you?

A Yes.

Q Were you taking any other medications, such as blood pressure medication?

A No.

Q Had you previously taken some blood pressure medication for a time?

A Yes.

Q (P.30, Line 1) What can you recall about that?

A Well, I had a bad side effect--one bad side effect to it in March of '07, which landed me in Davis County Hospital.

...

Q (P.31, Line 1) ...When did a doctor tell you to try taking blood pressure medication and what was it for?

A I believe it was the end of '06.

Q And do you recall who the doctor was?

A Dr. Welter. ...

Q Dr. Welter?

A Yes.

Q And what was the symptom that he was trying to treat?

A High blood pressure.

Q Who diagnosed the high blood pressure?

A Dr. Welter.

Q Did anyone else?

A No.

Q So did you take the blood pressure medication as he prescribed it, from '06 to sometime in March of '07?

A Yes.

Q Did you ever refill the prescription?

A Yes.

Q How many times?

A I only filled it once that I can recall.

Q Did you refill it after that?

A After March?

Q No. After you got the initial prescription, did you run out of pills and then refill it?

A (P.32, Line 2) Yes.

Q Okay. I've got a bottle of pills that you brought. Identify that, please. Is this the blood pressure medication?

...

A (Line 12) This is the blood pressure medicine, yes, that I had a side effect to.

Q And is that one of the refills--the refill you said you got?

A Yes.

Q Okay. When was the last time you took any of those pills?

A It was March 14, '07. And that's when I had a bad side effect that landed me in the emergency room at North Davis Hospital that I was so sick I wanted to die.

Q All right. Do you recall how long you were in the North Davis Hospital?

A About an hour, hour-and-a-half, maybe.

Q Do you know what they did to treat you?

A (P.33, Line 1) The (sic) just give me some fluids and took an MRI and they told me to not take these blood pressure pills no more.

Q Have you taken them anymore?

A No.

Q Do you need them anymore?

A No.

Q Do you have high blood pressure?

A No.

Q Did you have high blood pressure?

A I--well, by what my doctor said--he said. But as it turned out to be, no, I didn't ever need blood pressure medicine.

...

Q (P.34,Line 8) Now, Joan, what was the side effect on March 14, 2007?
A I had vomiting and blurry vision, and that's-- that's all I had. But it scared me enough to go to the hospital.

Q And is it your understanding, from what was said to you there, that the problems you had were from this medication?

A Yes.

Q So was there any other medication that had been prescribed for you on May 2, 2007 that you either were or were not taking? You've mentioned the Lortab. You mentioned the blood pressure, which you were not taking. Was there anything else that had ever been prescribed for you as of May 2, 2007?

A That's all I can recall.

Q Okay. Now, had you had any fainting episodes?

A No.

Q Not ever?

A Never.

...

Q (P.45, Line 15) When you had gone to Dr. Welter and he said you've got high blood pressure, had you gone to him for blood pressure issues?

A No. He said that–I had gone to him for being my general practitioner and to get a physical and a pap smear, and he never gave me one. He never gave me one. He never, ever treated me for–for my work injury or–the only thing he treated me for was COPD and said I had high blood pressure. And he put me on high blood pressure medicine which, come to find out when I had that one side effect in Davis County, I didn't need blood pressure medicine.

Q And someone in Davis County told you that?

A The doctors down there told me that I didn't need high blood pressure medicine. And I told Dr. Welter that.

Q What did he–

A And I told him that I went off of them. And he's stating that he never, ever received any information from Davis County Hospital, so–

Q Was it okay with him that you went off the blood pressure medication?

A Was it okay with Dr. Welter?

Q Yeah.

A I guess it was. He's still got me on record that I still have high blood pressure. But I wouldn't go back to him for...

Q Okay. So these pills that we've got here, they've just been sitting around since then and–

A Correct.

Q –as far as you're concerned, they could be thrown away; is that right?

A Correct.

Q And this is a prescription that you were not taking May 2nd?

A This is a prescription that I would throw away, because if I took one of those I would actually kill myself, which I wanted to a few times.

Q (P.47, Line 3)You're using that as a figure of speech, I assume?

A Figure of speech.

Q Has there ever been a time in your life when you remember that you fainted or passed out?

The Court: That's been asked and answered...
...
Q (P. 47, Line 14) Do you recall this car wreck a couple years before May of 2007?

A yes.

Q What parts of your body were hurt in that car wreck?

A The neck.

Q Anything else? ...

A My back. It went from my neck down to my back.

Q Were you unable to work for a period of time after the car wreck?

A Yes.

Q How long?

A After the car wreck I did physical therapy for about six to eight weeks and I got to where I could go back to work and I went back to work in September of '06.

...

Q (P. 48, Line 24) And did you do a flagging job then?

A Yes.

Q (P.49, Line 1) And that's the one you went to for three months until the job shut down for the winter?

A Yes.

Petitioner's direct testimony ended and cross-examination began on Page 49. Cross-examination by Respondent's counsel confirmed what Ms. Henderson said about her fall:

Q (Page 51, Line 2) Okay. So how tall are the barrels?

A I believe they were four feet tall.

Q And they're made out of rubber, like you just said; is that right?

A Yes.

Q And they have a base that's black and it's made out of rubber, too; correct?

A Yes.

Q Okay. So you have your flag in your hand and you're walking backwards?

A Yes.

Q And you step on a base of one of these barrels? Is that what happened?

A Not quite stepped on, but kind of caught my heel on it.

Q Okay. So which heel?

A Right.

Q So your right heel catches on the base of one of these barrels and then what happens to you?

A Well, as I–I had my heel there, then I tripped--I tripped and kind of stumbled. I was turning my sign and dropped it because I stumbled off balance and I fell back. And tried to grab my hat, because it was flying off of my head.

Q (P.52, line 1) So after your heel caught, you stumbled, you dropped your sign and then you ultimately fell backkwards? Is that your testimony?

A Yes.

Q And you just fell the one time; correct?

A Yes.

Q And you landed flat on your back?

A Yes.

Q And you hit your head the way you described for Mr. Malouf; correct?

A Yes.

Q And as a result of this you hurt your lower back and your neck?

A Yes.

Q And you also hurt your head?

A Yes.

Q And you said you have some problems with your arms? Did I understand that correctly?

A Yes.

Q Both arms?

A Yes.

...

Q (P.52, Line 24) And when you say "arms," are you talking your upper arm? Your entire arm? Where's the pain?

A Well, from my shoulders down to my fingertips.

Q Okay. Shoulders all the way to your fingers on both arms?

A Yes.

Q And those are the injuries you believe you suffered from this--physical injuries you suffered from this fall?

A Could you repeat that?

Q And so those are the physical injuries you suffered because of this fall?

A Yes.

Q Okay. And you also talked about depression.

A Yes.

Q And it's your belief that you now suffer from depression because of this fall?

A Yes.

Q I want to ask you some questions about the time that you went to the Davis Hospital in March of '07 because you said you were having problems with--you were having headache; is that right?

A No, I had--

Q No headache?

A --a side effect.

Q Right, but what was the side effect from the--

A From the blood pressure medicine.

Q Tell me what the side effect was.

A (P.54, Line 1) It was vomiting and blurry vision.

Q No headache?

A No.

Q Okay. Did you have any weakness in your left arm and left leg when you went to the hospital on that day?

A Not that I can recall.

Q Did anyone ever tell you you had a stroke that day?

A Not that I can recall.

Q And that's your testimony that after that incident in–on March 14, 2007, when you went to Davis Hospital, after that day you stopped taking your blood pressure medication; is that right?

A Yes.

Q And you didn't tell the emergency technicians at the time of the accident that you just cut your medications in half?

A I can't recall.

Q Okay. Tell me--before you had this fall in May 22 --on May 2, 2007, how long had you been treating with Dr. McKay?

A He treated me for my car accident, my work injury. And prior to that he treated me for some arthritis in my back.

Q (P.55, Line 2) Okay. He's treated you for--would you agree with me that he's treated you for shoulder and neck, back pain all the way since January of 1999?

A No, not all that. Just back pain and maybe shoulder pain from '99.

Q When you say "back," are you including your neck in that?

A No.

Q When you say "back," you're just referring to your lower back; is that right?

A That's right.

Q So is it your testimony that Dr. McKay was not treating you for neck problems as far back as April of 2000?

A No. My car accident was in 2006, and that's when he started treating me for my neck.

Q Okay. But you had another car accident in July of 1998.

A That was not really a car accident, it was a rock that went through the windshield. The wing window, a rock went through that and hit me in the arm. It wasn't a car accident, it was just--like a state truck with the gravel rock--dump truck full of rocks in it that hit the wing window and went through and hit me in the arm.

...

Q (P.57, Line 17) Do you remember the first time that you went back to see Dr. McKay after you fell on May 2, 2007?

A Yes, because my husband told me I had an appointment on the 4th of 2007.

Q The notes say you actually went to see him on May 7, 2007.

A May 7th?

Q So five days later.

A (Inaudible.)

Q (P. 58, Line 1) Does that sound right?

A Yes, that's correct.

Q And when you went to Dr. McKay, did you always tell him how you were feeling and what was going on with you?

A Yes.

Q Did you tell him about tripping over the barrel?

A Yes.

Q And did you tell him about these new symptoms you were having because of that?

A Well, at that time I kinda--my memory wasn't all there, so that you would probably have to ask my husband, because at that time I--

Q So it's your testimony that five days after the accident you were already having memory problems?

A (P.58, Line 17) Yes.

When the whole record is considered the best conclusion is, whether Petitioner tripped or fainted, that this was an industrial accident as contemplated by U.C.A. §34A-2-401. The injuries to Petitioner Joan Henderson, that still keep her from work, resulted from this industrial accident May 2, 2007. Utah cases support this conclusion going back to at least 1944, as follows:

Tavey v. Industrial Comm., 106 Utah 489, 150 P.2d 379 (1944). It is an accident for a woman to suddenly fall and strike her head against the floor or some hard object. A bookstore employee fainted at work and struck her head on a bookshelf, causing a concussion. Accident is usually taken to mean an unforeseen happening or unexpected mishap ". . . not within one's foresight and expectation resulting in a mishap or causing injury.". . . The injury was compensable where it resulted from a fall and the striking of Plaintiff's head against a hard object, such as a bookshelf, although the cause of the fall may have been physical weakness or illness unrelated to the duties or conditions of employment. If the immediate cause of the injury was an accident, it is immaterial that the cause of the fall was a fainting spell or that (the) accident would not have happened but for illness of claimant.

Tavey (P.381) was cited for the definition of the term "accident," on Page 377 in McKay Dee Hospital v. Industrial Comm., 598 P.2d 375 (Utah 1979):

> The term "accident" is not defined by the statute, but this court has held it connotes an unanticipated, unintended, occurrence different from what would normally be expected to occur in the usual course of events (*citing Graybar Elec. Co. V. Industrial Comm., 73 Utah 568 (276 P. 161 (1929)) and Carling v. Industrial Comm., 16 Utah 2nd 260, 399 P.2d 202, 203 (1965))* This basic definition was explained in *Tavey v. Industrial Comm., 106 Utah 489, 150 P.2d 379, 381 (1944)*. In evaluating an injury resulting from the fainting spell of an employee, the Court explained:
>
> > "Accident" is usually taken to mean an unforeseen happening or unexpected mishap. It has been defined by the court as "an event not within one's foresight and expectation resulting in a mishap causing injury.

> An event happening without any human agency or happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happened.

Tavey was also followed in Kennecott Corp. v. Industrial Comm. of Utah, 675 P.2d 1187 (Utah 1983). Kennecott followed the "idiopathic fall" rule recognized by Tavey which held that in defining an "accident" within the definition of the statute, the weakness that precipitated the fall need not have been work-related.

> We hold there was an injury caused by accident, and the Plaintiff is entitled to compensation regardless of the fact that the cause of the fall may have been physical weakness or illness unrelated to the duties or conditions of the employment. Compensation in Utah can not be denied merely because the remote cause of the injury was an idiopathic condition not due to the employment. ... If the immediate cause of the injury was an accident, as here, it is immaterial under our statute that the cause of a fall was a fainting spell or that the accident would not have happened but for the illness of the claimant. "An accident is not the less an accident because the remote cause was the idiopathic condition of the employee." (Citing Tavey and other references. Id. At 1192.)

According to Carling v. Industrial Comm., 16 Utah 2nd 260, 399 P.2d 202 (1965), "Accident" . . . connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. How to apply this definition is debated in the Church of Jesus Christ v. Latter-Day Saints v. Industrial Comm., 590 P.2d 328 (Utah 1979). The majority opinion distinguished a custodian's injuries, alleged sustained while working, and denied compensation. The dissent by Judge Wilkins referred to the prior interpretation by the Utah Supreme Court, in Carling, of the term "accident." Judge Wilkins wrote:

> Perhaps the most common incident to qualify as an accident is where an employee is struck by an object or where he falls and strikes a portion of his body against an object. An incident need not, however, include contact by an object with the employee's body in order to constitute an accident. It is settled beyond question that an internal failure brought about by over-exertion in the course of employment may qualify as an accident within the meaning of the Act. Referring to Carling and Jones v. California Packing Corp., 121 Utah 612, 244 P.2d 640 (Utah 1952).

Carling is cited in the dissenting opinion of Schmidt v. Industrial Comm., 617 P.2d 693 (Utah 1980) at 697 for the proposition that:

> . . .There similarly should be no misunderstanding or confusion on the proposition that the term "accident" imports that there must be some unanticipated event or occurrence different from what would normally be expected to occur in the usual course of events. (Referring to Tintic Milling Co. v. Indus. Comm., 206 P. 278, and Carling.[1]

The differences between Tavey and Carling on the one hand and Schmidt on the other is somewhat explained at Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981), where the court affirmed the ALJ decision to award compensation for a back injury, finding that because the Labor Commission finding was not arbitrary or capricious and wholly without substantial evidence to support it. It referred to Carling as "the leading case on the meaning of accident." Id. At 890. The Court said in the past it has applied the Carling definition of

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[1] Schmidt v. Industrial Comm., 617 P.2d 693 (Utah 1980) is questioned in the Allen decision, 729 P.2d 15. Schmidt stands for the proposition that an internal failure brought about by exertion in the course of employment may be an accident without the requirement that the injury resulted from incident which happened suddenly and is identifiable at a definite time and place; however, there must be a causal connection between the injury and the employment.

accident (unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events) and wrote at 891:

> . . .even though a back injury is related to a pre-existing deficiency or disease, "if there is an incident, properly regarded as an accident in the course of work which adds to or aggravates that condition, any resulting injury is compensable." Id. At 801.

The majority opinion in Kaiser explained that the court had been sharply divided on whether or not each of the nine back injuries that he considered within the prior thirty months was an "accident" or merely the consequence of a pre-existing condition, and listed Scmidt as one of those back cases. Chief Justice Hall's concurring and dissenting opinion in Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986) at page 28, has an interesting discussing involving both Carling and Schmidt. He wrote that Schmidt was an aberration and Carling is still the rule, and that the majority opinion in Allen seemed to rule the word "injury" out of the statute, which he said was an unwarranted decision.

Notwithstanding Allen, Carling was followed in Specialty Cabinet Co., Inc. v. Montoya, 734 P.2d 437 (Utah 1986). Justice Zimmerman's majority opinion explains the rationale how all these cases define "accident," in Specialty Cabinet Co. at 439. He acknowledged there were two lines of argument and the Court was trying to state a clear standard about how a precipitating event resulting in internal bodily failure in a work setting can be classified as an "injury by accident". He said after argument:

> ...we accepted this challenge to untangle the confusion and to clarify the proper standard of a compensable accident. In Allen v. Industrial Comm., 729 P.2d 18 (Utah 1986), we held that "an accident is an unexpected and unintended

> occurrence that may be *either* the cause *or* the result of an injury. Id. at 20. In other words when "either the cause of the injury *or* the result of an exertion was different than what would normally be expected to occur, the occurrence was unplanned, unforeseen, unintended, and therefore, "by accident." Id. Thus, we have chosen not to retain the standard urged by the state insurance fund but have relied upon the definition of "accident" which is articulated in Carling v. Industrial Comm., 16 Utah2d 260, 399 P.2d 202 (1965) where we held that a compensable accident includes "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 coverage of section 35-1-45. Id. 399 P.2d at 203.

Following this analysis in Specialty Cabinet, Justice Zimmerman wrote for the Court that even though the two workers involved, Montoya and Marchant, did not intend they should develop respective problems in the course of performing job duties, and neither did their employers, "under the standard of Allen, their injuries were the unexpected and unintended result of exertions that occurred at work and in the course of their employment." Id. At 439.

One final requirement remained for Montoya and Marchant to get benefits, and that was causation. Judge Zimmerman wrote for the Court in Specialty Cabinet:

> As we explained in Allen, the second element of a compensable accident requires proof of the causal connection between the injury and the worker's employment duties" and in cases involving internal failures, the key issue is usually one of causation. (Citing Allen at 20 and 21.) This requirement of causation is necessary to prevent an employer from becoming the insurer of all its employees for injuries which coincidentally happen at work without any connection of work conditions or activity. Id. at 22.
>
> The test of causation requires the proof of both legal cause and medical cause. In discussing legal cause, we concluded in Allen that "where the claimant suffers from a pre-existing condition, an unusual or extraordinary exertion is required to provide legal causation. Where there is no pre-existing condition, a usual or ordinary exertion is sufficient. Id. at 21, 22 (footnote omitted).

> There is no indication or claim that either Montoya's or Marchant's injuries are related to any pre-existing conditions. Therefore, the exertions involved here, even if they were usual or ordinary, meet the test of legal caustion.

The Court concluded that in these two cases, medical causation was adequately supported by the record. The opinion concluded that legal and medical causation had been met, and affirmed the Labor Commission decision.

The Schmidt v. Industrial Comm., 617 P.2d 693 (Utah 1980), an internal failure brought about by exertion in the course of employment was held to be an accident without the requirement that the injury resulted from incident which happened suddenly and is identifiable at a definite time and place; however, there must be a causal connection between the injury and the employment.[2]

Painter Motor Co. v. Ostler, 617 P.2d 975 (Utah 1980) was the very next decision following Schmidt. It followed the Carling definition of accident,[3] that an accident is an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events; thus, if an employee incurs unexpected injuries, including internal failures caused by the duties of his employment, he is eligible for compensation under this section. Id. At 976. Painter was a quick affirmation of what the Administrative Law Judge decided, finding the decision was not arbitrary or capricious.

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[2] Schmidt was questioned in Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986), as discussed above.

[3] See discussion in Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986), *infra*.

Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986) is the case relied on by Ms. Henderson's Administrative Law Judge. It held that an accident is an unexpected or unintended occurrence that may be either the cause or a result of an injury . . . Although proof of an unusual event may be helpful in determining causation, it is not required as an element of "by accident". Id. at 22.

II.

Petitioner meets both causation requirements as enunciated by the Allen decision.

The Allen decision was about a low back injury that happened while stacking crates with four to six gallons of milk in each crate in a confined cooler space. It was an unanticipated sudden onset injury. The case was remanded for further Findings of Fact about medical causation because it was unclear whether the doctors were aware of the incident in the cooler. The majority opinion faulted the case for it not having been submitted to a Medical Panel. A strong and well-reasoned dissent by Justice Stewart raises interesting questions about how to apply the unusual exertion standard adopted by Allen. He said previously-injured persons who are then injured by an industrial accident are discriminated against by having to meet the majority's legal cause requirement (729 P.2d 30). Joan Henderson meets the higher legal standard adopted by Allen v. Industrial Comm., even if the standard is arbitrary.

Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) developed and states the applicable standards for whether an injury is by accident. An injury is an accident if it is "an

unexpected or unintended occurrence that may be *either* the cause *or* the result of an injury", Id. at 22 (emphasis in original); and there is "a causal connection between the injury and the worker's employment duties." Id. at 22. Cause is subdivided into the two-part test of legal causation, discussed on pages 25 and 26 of Allen; and medical causation discussed on page 27 of Allen. Regarding legal cause, the Allen decision states:

> Whether an injury arose out of or in the course of employment is difficult to determine where the employee brings to the workplace a personal element of risk, such as a pre-existing condition. Just because a person suffers a pre-existing condition, he or she is not disqualified from obtaining compensation. . . .the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable. . . To meet the legal causation requirement, a claimant with a 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. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the pre-existing 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. . . . Where there is no pre-existing condition, a usual or ordinary exertion is sufficient. Id. at 25, 26.

In Allen, it was explained that the comparison between a usual and an unusual exertion was defined according to an objective standard:

> Note that the comparison is not with *this employee's* usual exertion in *his employment*, but with the exertions of normal non-employment life of this or any other person. Id. at 26. (Emphasis in original.)

Allen explained how to evaluate typical non-employment activity:

> In evaluating typical non-employment activity, the focus is on what typical non-employment activities are generally expected of people in today's society, not what this particular claimant is accustomed to

> doing. Typical activities and exertions expected of men or women in the later part of the 20th Century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. Id. at 26.

In Ms. Henderson's case, by claiming Petitioner had a history of fainting, Respondents impliedly argue that legal causation was not accomplished. Appellant submits that even if Petitioner had a history of fainting, which is absent from the medical records, and not proven by reliable testimony, Ms. Henderson's work activities May 2, 2007 represent an unusual activity compared to non-employment activities which do not involve standing in traffic for an hour.

As to medical causation, discussed in Allen at page 27, the Petitioner need only prove that the exertion or injury occurred during a work-related activity:

> Under the medical cause test, the claimant must show by evidence, opinion, or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability. Id. at 27.

Direct and cross-examination testimony by all the witnesses supports the finding of medical causation. When considered as a whole, the Medical Record has sufficient evidence of medical causation.

III.

Medical Records relied on by the ALJ do not support the finding Petitioner's fall May 2, 2007 was not an industrial accident.

Petitioner remembered tripping, reaching for her helmet which was coming off, and coming home from the hospital. She did not remember how many times she may have tried

to get up but fell again. There were no witnesses about the initiation of the fall, except for Petitioner.

If on appeal it is determined that the Petitioner tripped then became incoherent from a concussion, clearly Petitioner is entitled to compensation. If the ALJ finding that Petitioner fainted is sustained, it doesn't follow that fainting had nothing to do with being at work.

At Page 33A of the Medical Record Exhibit (MRE), R-1 at the June 17, 2009 hearing, Brent Fonnesbeck, D.O., wrote June 9, 2009 that Joan Henderson has not been diagnosed with hypertension or ever needed blood pressure medication. Although before this May 2, 2007 accident, Petitioner was prescribed blood pressure medication, medical records do not show she needed it. The medicine had made Petitioner sick. She hadn't taken it for six weeks before the incident, since March 14, 2007. After her concussion, whether the fall was by tripping or by fainting, Petitioner was reported by others to be incoherent. Hearsay statements from unnamed others claimed Petitioner said she had not taken her blood pressure pills or said she had fainted. While hearsay can be received in administrative hearings, that does not mean it is reliable. All initial statements about fainting and blood pressure pills, according to unattributed hearsay sources, was uttered by Ms. Henderson. However, all actual witnesses testified without relying on hearsay that she was incoherent.

Even if this event was a fainting, Petitioner's medical record is devoid of any actual fainting episode prior to this event. If this event was a fainting event, this could have

resulted from standing in traffic and directing it for an hour, rather than something that would have happened anyway at home.

All references to fainting anywhere in the medical records start with the May 2, 2007 episode.

That the Petitioner probably did not faint is supported by the fact that over the prior two years, for months at a time, she had worked at other construction sites as a flagger without problem or accident.

There are no "earlier statements" contradicting Petitioner's hearing testimony, except her own statements made while incoherent after a concussion, and reported by hearsay. At the hearing June 17, 2009, the ALJ should not have found Petitioner not credible, where perveyors of the hearsay fainting claims were neither named nor present. In weighing evidence, Petitioner's memory of what happened before she fell should be given more weight then her incoherent statements made just afterwards.

Water truck driver Cameron Moser whose name is absent from the police investigation report testified he was "not sure" if Petitioner was close enough to have tripped over the traffic barrel. He admitted he did not begin to observe Petitioner until after she began her fall and was already halfway fallen down. He said he did not know if she previously fell and tried to get up before the already-in-progress fall he observed. He admitted he was doing paperwork and looked up about every fifteen seconds. The most that

should be found from Mr. Moser's testimony is that Petitioner fell and Mr. Moser does not know why.

Petitioner's memory that she tripped, then fell and got a concussion should not be disregarded. The fourth full paragraph on Page 3 of the Findings of Fact, Conclusions of Law and Order of July 8, 2009 refers to emergency medical persons, who are not named and who did not witness the event but who allegedly heard Petitioner speak, when she was incoherent. Testimony by Officer Toscano about what his dispatcher said is likewise unreliable for the truth about why Petitioner fell.

The last Page 3 Finding in the July 8, 2009 ALJ decision relies on MRE 184, the EMS report that "it was reported the patient began to feel dizzy and then fainted, then tried to get up and fainted again, tried to get up and fell a third time, presenting with confusion." Joan Henderson testified she was not dizzy before she fell. No witnesses can corroborate or verify "reports" the ALJ relied on. The ALJ should have disregarded the EMS report, since there is not an actual history of fainting problems. The weight of the evidence is that work contributed to the fall, and if she did faint, it was while doing work activities, not standing around. Officer Toscano confirmed that there was a lot of traffic and that May 2, 2007 was a hot day.

The ALJ also relied on MRE 186, about a worker on the scene that said Petitioner had high blood pressure and was taking medications. The worker who had such detailed information is not named in the police report and was not a witness at the hearing. The

evidence is Petitioner had not used her blood pressure medicine for six weeks. The weight of medical evidence is she really did not have high blood pressure. The unidentified worker's hearsay statement that "she stubbled (sic) and lost her balance," is more likely evidence Ms. Henderson tripped and fell, than evidence she fainted.

Whatever side effects Petitioner had from taking blood pressure medication stopped after she went to Davis Hospital March 14, 2007, where and when she found out she should not use the medicine, and quit. She got better. She ready for her first day of work May 2, 2007 at this new flagging job.

MRE 106, and including MRE 104-112 is not evidence of a pre-existing fainting condition. Treatment for fainting after the fact is not evidence Petitioner did not trip May 2, 2007.

Just because Dr. Welter referred to Ms. Henderson's "fainting spells" does not mean she had one, besides the one alleged May 2, 2007, if that really was a fainting episode. Dr. Welter had no evidence she fainted before May 2, 2007. As shown by Petitioner's testimony, she had a lot of pains and problems from this fall besides the concussion, for which Dr. Welter was seeing her. The mechanism of the fall was not the central focus of Dr. Welter's care.

Dr. Mathew Welter did not treat Petitioner for a car accident, yet he refers to a car accident. He did not treat Petitioner for the work injury. He did not ask Petitioner what

happened May 2, 2010. The MRE reference on Page 77, that Petitioner passed out, is an unattributed claim. There is not factual support for Dr. Welker's reference.

Petitioner's visit to the Davis Hospital March 14, 2007 helps prove Petitioner did not faint May 2, 2007. Whether or not she had high blood pressure, blood pressure pills are to reduce blood pressure. Without pills, if anything her blood pressure would have been higher May 2, 2010 than it was March 14, 2007 since May 2, 2007 she was not taking the medication. With higher blood pressure, Petitioner would have less medical reason to faint. Petitioner's testimony June 17, 2009 that she tripped is more credible than any evidence she had a history of fainting. It is more credible than what she may have said when incoherent.

Petitioner was not coherent for weeks after May 2, 2007. The ALJ's reliance on MRE 81 form Bear River Health is not evidence Petitioner's work was not a factor, or the main contributing factor, in whatever happened May 2, 2007. Petitioner was confused and did not know what she was saying for a significant period after the accident.

The ALJ interpretation of MRE 66 (Gateway Medical November 29, 2007, Dr. Welter) and MRE 65 (Gateway Medical January 22, 2008) supports the conclusion that even if Petitioner fainted May 2, 2007 because of dryness, that Petitioner's presence at work was the main factor in her being dry or dehydrated.

The main conclusion from MRE 63 should be that Petitioner had headaches and neck pains as the result of her fall suffered while working as a flagger in the traffic on a hot day.

The ALJ relied on MRE 44 in concluding Petitioner was not credible because she didn't bring up the subject of her May 7, 2010 (sic), (May 2 is written on P. 44, not May 7) injury until February 4, 2009. Dr. McKay's treatment begins with his Page 1, at MRE 61, visit August 13, 1997. Dates for visits are reported chronologically in time to Page 44, when he saw Petitioner February 4, 2009. Dr. McKay saw Petitioner May 7, 2007. However the purpose of that visit was not about what happened May 2, 2007. May 7, 2007 is part of a continuing series of appointments beginning with Dr. McKay's appointment March 6, 2006, for the low-back pain from her automobile accident, about which Petitioner testified. Dr. McKay saw Petitioner in March, April, May, November, and December 2006. In 2007, he saw her January, February, March, April, May and June. She didn't make a special appointment with Dr. McKay about her May 2, 2007 industrial accident, from which on May 7, 2007, she still had hopes she would soon recover.

Dr. McKay did not write anything May 7, 2007 that conflicts with later reports, when Petitioner told him more details about her industrial accident. Dr. McKay correctly gives an opinion on MRE 43, in which he distinguishes Petitioner's pains from May 2, 2007 from pains for other care he provided. This is adequate evidence of medical causation.

The ALJ found on Page 5 of the July 8, 2010 decision that Petitioner had a syncopal episode May 2, 2007 while working for Respondent. The ALJ statement that this did not arise out of Petitioner's employment and was not medically caused by her work is not supported by any fact from her prior-to-May 2, 2007 medical history. Given the

circumstances of Petitioner's work, ordinary work exertion on a hot day could cause a syncopal episode which would not have happened at home, if Petitioner was dehydrated, making the syncope work-related.

No medical records back up an analysis of what is speculated by the ALJ about hypokalemia at MRE 107 and 108. In fact, the records show Petitioner denied she had anorexia or an eating disorder. There certainly is no prior history of this sufficient to require Petitioner to prove she made an unusual or extraordinary exertion to meet the Allen test.

The Page 6 Finding of the July 8, 2010 Decision also relies on MRE 73 and 71, about treatment for high blood pressure. By the time the entry was made on Page 78 about events May 2, 2007, Petitioner had already ceased taking the blood pressure medication on March 14, 2007, because the medicine made her sick. Since she was not using the blood pressure medication and had not fainted before, it is not logical the absence of this medication caused Petitioner to faint May 2, 2007. Although Petitioner may have said anything about the medicine in her incoherent state May 2, 2007 after her concussion, witnesses said she was confused.

Dr. Welter verified in MRE 68, during Petitioner's medical appointment May 3, 2007, that Petitioner had fallen, had scrapes on her right knee and left elbow, and "hit her head when she fell". This was her first visit to him since December 12, 2006 (MRE 71). Her testimony was that, at that medical appointment May 3, 2007, she told Dr. Welter she had quit taking the blood pressure pills, not that they dehydrated her. Dr. Welter's opinion in

MRE 77 adds credence to Petitioner's claim that she was not taking blood pressure pills May 2, 2007. In the context of this and his other records, his letter written January 23, 2008 confirms that she fell, whether from passing out or tripping, but not because she stopped taking medication. His reference January 23, 2008 at MRE 77 to "an incident in which she passed out while on the job May 2, 2007" is consistent with what he wrote May 3, 2007, at MRE 68: "hit head when she fell. Was told she was low on sodium and potassium."

Even if she was somewhat dehydrated May 2, 2007, or low on salts, how could working as a flagger on a hot morning not be a factor in her fall? Petitioner's testimony, that she told Dr. Welter May 3, 2007 that she had quit taking blood pressure pills, is credible. It is further corroborated by the Davis County Medical Records, which confirm Petitioner did not have high blood pressure, as reflected in the vital sign entry on MRE 96. When Petitioner was at Davis County Medical Center March 14, 2007 for side effects from blood pressure medication, her blood pressure reading was 70/39. High blood pressure did not result in the Petitioner fainting March 14, 2010. At MRE 110, starting at 8:50 a.m., her blood pressure was found to be within normal limits. At 8:19 a.m., it was 110/68, per the MRE Page 185 report. This is a normal blood pressure level, that does not indicate Petitioner fainted because of low blood pressure.

The ALJ rejected Dr. Fonnesbeck's opinion, MRE 34, as insufficient to find a medical causal link between Petitioner's work and her May 2, 2007 accident. Dr. Fonnesbeck found severe chronic neck pain and headaches, with short-term memory loss attributed by Petitioner

to falling over a barrel May 2, 2007. In answering Paragraph 7, he said there is a causal relationship between the accident and the problems for which he was treating. He wrote:

> By patient history, she claims she returned to work after a motor vehicle accident in March 2006. After the work-related injury in 5/2007, her pain and memory loss have made it difficult to work.

Dr. McKay wrote February 4, 2009 at MRE 44:

> She fell over a barrel and injured her head, cervical spine, and right shoulder. She is continuing to have symptoms now for two years. She continues to have chronic aches and pains. This was definitely due to an industrial accident. She needs to have a (sic) MRI of the cervical spine, right shoulder.

The ALJ did not find facts to exclude work as the cause of the alleged fainting episode May 2, 2007. Petitioner was at her post about 6:50 a.m. There is no dispute that it was a hot day. There was heavy traffic. She was standing in the traffic flagging for an hour before she fell. This would not have happened at home. It had never happened before.

The ALJ relies on a hypertension history to support a fainting event, in her Finding in Paragraph 4 of Page 6. However, inasmuch as Petitioner was not taking the blood-pressure medication HCTZ for six weeks before May 2, 2007, from March 14, 2007 and because she had no previous fainting events, and because medical records show that HCTZ should not be a factor in why she fell, the best evidence about why Petitioner fell is Petitioner's memory, but not her memory right after the concussion because she had no memory right after she hit her head. Petitioner's memory ends after her recollection she caught her heel and tripped on the traffic barrel, began to fall, and was trying to catch her hard hat. After she hit her head, Petitioner lost memory of the impact. Even if the

concussion was caused after losing consciousness, she had been at work long enough that work cannot be ruled out as a factor.

Only speculation, incoherent statements, and unreliable (but admissible in administrative hearings) hearsay statements support findings Petitioner did not trip and fall. The greater weight should be on non-hearsay evidence that Petitioner tripped and fell. This is not inconsistent with what the witnesses actually saw, compared to what they heard others talk about after the concussion.

In the context of her testimony, Ms. Henderson's required work activities preceded the injury and the disability, all of which is consistent with medical records that show the injury was an accident arising out of her employment in the course of her employment.

It is too big a failure in logic to find no medical causation, even if the ALJ did not believe Petitioner tripped then fell. There is no question she fell. There is no question she fell at work. Whether she tripped and fell, or was dehydrated and fell, her own doctors find the fall May 2, 2007 caused her injuries after that date.

A better conclusion than was made by the ALJ, is that work contributed to Petitioner's fall May 2, 2007. Since low blood pressure was not the cause, this leaves open the probability Petitioner's testimony, that she fell after catching her right heel on a barrel and tripped is correct. What, if any, dehydration Petitioner experienced on May 2, 2007 was due to being at work, rather than no blood pressure pills. Pills or not, she had never fainted before.

CONCLUSIONS

Petitioner had an accident arising out of and in the course of her employment May 2, 2010. The factual question of whether Petitioner fell because she tripped, or fell because she fainted, raises the factual issue of whether work activities contributed to the fainting.

The Medical Record contains no evidence of any prior suspected "fainting" episode. All references in the Medical Record Exhibit that imply Petitioner had prior fainting episodes are, after all, references to whatever happened May 2, 2007. No specific fainting or syncope episode before May 2, 2007 exists.

The first part of Petitioner's fall May 2, 2007 was not witnessed by anyone. The person who saw her in the process of falling said he only looked up every 15 seconds. Petitioner's testimony, that she tripped on the bottom of a traffic barrel while walking backwards as she was flagging traffic, is credible.

The decision should be reversed and a finding made that this is a compensable industrial accident arising from and in the course of Joan Henderson's employment, for which she is entitled to medical expenses, medical care, and compensation from May 2, 2007. Alternatively, the case could be referred to a Medical Panel to review any diagnostics tests and Petitioner's actual medical history and to examine the Petitioner to apportion any of her injury to pre-existing conditions. That would be a long second choice, however, because there is no previous incident of fainting before May 2, 2007, and all of the injuries that now keep Petitioner from working happened May 2, 2007. If there were to be a Medical

Panel, it could be asked whether Petitioner's concussion is consistent with a trip and fall over a traffic barrel while walking backwards, or with fainting from dehydration caused in part by work duties.

DATED this 19th day of July, 2010.

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RAY MALOUF, Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2010, a true and correct copy of the foregoing, BRIEF OF APPELLANT, was mailed postage prepaid to the following:

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_____
RAY MALOUF

ADDENDUM

NECESSARY ATTACHMENTS, also attached to Docketing Statement (with apologies for notes written long ago on our only copies):

a. Order Denying Request for Reconsideration dated November 30, 2009;
b. Order Affirming ALJ's Decision dated October 14, 2009;
c. Findings of Fact, Conclusions of Law, and Order dated July 8, 2009; and
d. Petition for Review (conformed–our file copy already had notes written on it).