

1990

# Kathleen Nyrehn v. Utah State Industrial Commission, Fred Meyer Stores and/or Liberty Mutual Insurance, and Employers' Reinsurance Fund : Reply Brief

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. **900010-CA** IN THE COURT OF APPEALS, STATE OF UTAH

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KATHLEEN NYREHN,	:	
	:	Court of Appeals
Applicant/Petitioner,	:	
	:	Case No. 900010CA
vs.	:	
	:	Category No. 6
UTAH STATE INDUSTRIAL	:	
COMMISSION, FRED MEYER	:	
STORES and/or LIBERTY MUTUAL	:	
INSURANCE, and EMPLOYERS'	:	
REINSURANCE FUND,	:	
	:	
Defendants, Respondents.	:	

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REPLY BRIEF OF PETITIONER KATHLEEN NYREHN

---

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

Honorable Gilbert A. Martinez, Administrative Law Judge

---

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IN THE COURT OF APPEALS, STATE OF UTAH

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REPLY BRIEF OF PETITIONER KATHLEEN NYREHN

---

JURISDICTION

The Utah Court of Appeals has jurisdiction to review an order of the Utah State Industrial Commission pursuant to Section 35-1-86, Utah Code Ann. (1953, as amended).

NATURE OF PROCEEDINGS

This is a petition for review of an order of the Industrial Commission of Utah.

STATEMENT OF THE ISSUE

The issue presented for review on appeal is as follows:

1. Did Kathleen Nyrehn suffer a compensable industrial accident while employed by Fred Meyer Stores on January 23, 1985.

### DETERMINATIVE PROVISIONS

Utah Code Ann., Section 35-1-82.53. Review of order of administrative law judge or commission - Effect of supplemental order of administrative law judge.

(1) Any party in interest who is dissatisfied with the order entered by an administrative law judge or the commission may file a motion for review of such order. Upon the filing of such motion to review his order the administrative law judge may (a) reopen the case and enter a supplemental order after holding such further hearing and receiving such further evidence as he may deem necessary; or (b) amend or modify his prior order by a supplemental order; or (c) refer the entire case to the commission. If the administrative law judge makes a supplemental order, as provided above, it shall be final unless a motion to review the same shall be filed with the commission.

Utah Code Ann., Section 35-1-82.54. Review of cases and orders by commission - Procedure - Effect of award.

The commission, upon referral of a case to it by an administrative law judge, or upon a motion being filed with it to review its own order, or an administrative law judge's supplemental order, shall review the entire record made in said case, and, in its discretion, may hold further hearings and receive further evidence, and make findings of fact and enter its award thereon. The award of the commission shall be final unless set aside by the Supreme Court as hereinafter provided.

### SUMMARY OF ARGUMENT

Ms. Nyrehn prevailed before the Administrative Law Judge in her application for benefits. She was not required to file a Motion for Review to preserve her right to appeal.

The Utah State Industrial Commission did not apply the correct standard of legal causation when reviewing the employment activities of the applicant. The Commission ruled that an employee with a preexisting impairment had the burden of proving that an injury resulted from an unusual or



extraordinary exertion. Repetitive exertions and strains will satisfy the legal causation standard for workers with preexisting conditions as the sedentary, non-employment life of a worker does not include repetitive exertions and strains.

### ARGUMENT

#### POINT I

#### MS. NYREHN DID NOT WAIVE HER RIGHT TO APPEAL FROM THE ORDER OF THE UTAH STATE INDUSTRIAL COMMISSION.

Ms. Nyrehn prevailed before the Administrative Law Judge in her application for benefits in which she claimed that she was permanently and totally disabled as a result of an industrial accident. The Administrative Law Judge awarded to her compensation at the rate of \$78.00 per week for the remainder of her life. He also ordered the respondent to pay for reasonable medical treatment for petitioner's work related injuries. The employer has argued in its brief that Ms. Nyrehn should have filed a Motion for Review of this Order to the Utah State Industrial Commission pursuant to Section 35-1-82.53, Utah Code Ann. Section 35-1-82.53, Utah Code Ann. provides as follows:

(1) Any party in interest who is dissatisfied with the Order entered by an Administrative Law Judge may seek review of that Order with the Commission by complying with the Commission's rules governing that review.

(2) The Order of the Commission on review is final, unless set aside by the Court of Appeals.

Ms. Nyrehn was not dissatisfied with the Order entered by the Administrative Law Judge as he awarded to her precisely the benefits which she was seeking. The applicant may not have concurred with the legal foundation for the ruling of the Administrative Law Judge and she may not have concurred with the Findings of Fact made by the Administrative Law Judge. However, the result obtained was favorable to her. The Administrative Law Judge commented at the conclusion of the hearing:

One final note for the record, I recognize that the issue will be appealed and I want to caution Ms. Nyrehn to some respect. I don't want you to go out thinking you won the total war. You have just won one battle and I would imagine the bigger war will be waged at the higher courts. (R. 49)

The Workers Compensation Act does not provide that a party dissatisfied with the Findings of Fact of an Administrative Law Judge must file a Motion for Review. Such a provision, if in our statute, would further burden an already burdened system. When a Motion for Review is filed from an Order of an Administrative Law Judge, the Commission reviews the entire record and it may make its own findings of fact and enter its award thereon. U.S. Steel Corp. v. Industrial Commission of Utah, 607 P.2d 807 (Utah 1980). This matter is not controlled by the Utah Administrative Procedure Act as it was commenced prior to January 1, 1988. Accordingly, the Utah State Industrial Commission reviews the

Order of the Administrative Law Judge pursuant to Section 35-1-82.54, Utah Code Ann. (1975) (Repealed in 1987, repeal effective January 1, 1988.) U.S.X. Corp. v. Industrial Commission of Utah, 781 P.2d 883 (Utah App. 1989).

In this case, the Commission reviewed the Order of the Administrative Law Judge and reversed it and issued the following Order:

The application for hearing of the applicant, Kathleen Nyrehn, is hereby dismissed with prejudice, the applicant having failed to show that he (sic) suffered a compensable industrial accident in that he (sic) failed to establish that the injury was the result of unusual extraordinary (sic) as per Allen v. Industrial Commission where the applicant suffered from a preexisting condition.

The Industrial Commission did not make new findings of fact but adopted certain findings of fact of the Administrative Law Judge. It is from these findings of fact and the Order of the Commission that the applicant takes her appeal.

Cases cited by the employer for its position that the applicant had waived her right to appeal are those in which the applicant did not prevail before the Administrative Law Judge and was dissatisfied with the Order of the Administrative Law Judge. See, Pease v. Industrial Commission of Utah, 694 P.2d 613 (Utah 1984), U.S.X. Corp. v. Industrial Commission of Utah, supra.

## POINT II

THE APPLICANT DOES NOT HAVE THE BURDEN OF  
PROVING THAT HER INJURY RESULTED FROM AN  
UNUSUAL, EXTRAORDINARY EXERTION.

The Commission in its Order dismissed the applicant's petition for the reason that the applicant failed to demonstrate that her injury was the result of "unusual extraordinary (exertion)." The employer in its brief cites language of the Administrative Law Judge who commented at the hearing as follows:

Lifting tubs weighing 15 to 40 pounds 36 times or 72 times, is not the crucial issue. It is whether something unusual happened, some extraordinary exertion happened, and in this case, the applicant has failed to establish that. (R. 458)

In Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Utah Supreme Court adopted legal and medical causation tests to be applied in determining whether an industrial accident is compensable. Workers with preexisting conditions must show that their employment contributed something substantial to increase the risk of injury which such workers already face in everyday life because of their preexisting condition. The Utah Supreme Court adopted an objective standard of comparison. The exertion of the injured worker is compared to typical non-employment activities generally expected by people in today's society. The Supreme Court did not define the typical non-employment activities, but suggested:

The case law will eventually define a standard for typical non-employment activity in much the way case law has developed the standard of care for the reasonable man in tort law.

729 P.2d at 27.

The exertion engaged in by the worker suffering a preexisting injury need only be sufficient to demonstrate that the risk of harm faced by the injured worker at his employment is greater than the risk of harm he already faced in everyday life because of the preexisting condition. Allen v. Industrial Commission.

The Administrative Law Judge and the Utah State Industrial Commission imposed on the applicant the burden of demonstrating that she engaged in unusual, extraordinary exertion. Although it is true that unusual, extraordinary exertion satisfies the legal causation test of Allen, it is not the exclusive test for legal causation for workers with preexisting injuries.

The applicant asserts that the repetitive bending, stooping and lifting in the course of one's employment satisfies the legal causation standard for workers with preexisting conditions. Despite the forecast in Allen, the case law has yet to define a standard for typical "non-employment activity." Other jurisdictions which have adopted the dual causation standard have not required an applicant to demonstrate that the exertion causing the injury was unusual or extraordinary. Guidry v. Sline Industrial Painters, Inc.,

418 So.2d 626 (La. 1982), cited by the Utah Supreme Court in Allen v. Industrial Commission at footnote 7.

Mr. Guidry died from a heart attack while resting during a break from his employment. Mr. Guidry was employed as an industrial painter. He had a history of atherosclerotic heart disease. On the day of his death, he reported to work at 7:30 a.m. as usual. He and a co-worker:

"were assigned the task of painting large rolling doors on a warehouse. They were using a single ladder ten to twelve feet tall. The top portions of the doors which were out of reach to a painter working on the ground were painted by [Mr. Guidry's co-worker], Guidry's roll being to brace the ladder to assure [his co-worker's] safety and to move the ladder as required. The areas of the door accessible from the ground were painted by the two men. The pair had worked non-stop from 7:30 a.m. until the noon break, with only a ten minute break during that time at 10:00 a.m. The pair again commenced working after the lunch break and worked until approximately 2:00 p.m."

Guidry v. Sline Industrial Painters, Inc., 418 So.2d at 634.

During his afternoon break, Mr. Guidry suffered a heart attack.

The Supreme Court of Louisiana concluded that Mr. Guidry:

"had performed physical and fairly strenuous exertion for most of the day. He had returned to his duties right after lunch and continued to work until minutes before the attack. Our appreciation of the evidence in this case prompts us to conclude that Guidry's activities while working on the fateful day of his heart attack, were marked by stress, exertion and strain greater than that generated in everyday non-employment life, and greater than that generated in the more or less sedentary life of the average non-worker."

418 So.2d at 634.

The Supreme Court of Louisiana in Guidry focused on the activity of the decedent throughout the day and concluded that it was marked by repeated exertions and repeated strains. No one exertion was unusual or extraordinary but in combination Mr. Guidry's activities exceeded those engaged in by the average non-worker in his or her non-employment life.

In Allen, the Supreme Court noted certain typical non-employment activities, i.e., taking out the garbage cans, lifting and carrying baggage for travel, changing a flat tire, lifting a small child to chest height and climbing the stairs in buildings. Each of these activities is an isolated event which alone would not satisfy the legal causation standard. However, if one engaged in these activities regularly and repetitively throughout an eight hour day, this conduct would satisfy the legal causation standard for workers with preexisting conditions. The sedentary, non-employment life of a worker does not include repetitive exertions and strains. It includes occasional exertions and strains.

Ms. Nyrehn's employer has argued that the Administrative Law Judge considered the applicant's employment activities when ruling that her employment activities did not satisfy the legal causation standard of Allen. The Findings of Fact issued by the Administrative Law Judge and adopted by

the Utah State Industrial Commission demonstrate that the analysis engaged in by the Judge and the Commission was limited to comparing the weight of the tubs lifted by Ms. Nyrehn to the weight of the object lifted by the injured worker in Smith & Edwards Co. v. Industrial Commission, 770 P.2d 1016 (Utah App. 1989). This limited analysis is flawed. It fails to consider the repetitive activities engaged in by the applicant in her employment. It fails to compare these activities to everyday non-employment life. It is this failure that renders the decision of the Commission unreasonable.

#### CONCLUSION

Ms. Nyrehn submits that the decision of the Utah State Industrial Commission denying her benefits should be reversed and the case should be remanded to the Industrial Commission for further hearing.

DATED this 8 day of May, 1990.

WINDER & HASLAM, P.C.

By /s/  
William W. Downes, Jr.  
Attorneys for Petitioner



CERTIFICATE OF MAILING

I hereby certify that 4 true and correct copies of  
the foregoing instrument were mailed, postage prepaid, on the  
18 day of May, 1990 to the following counsel of record:

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