

1990

# IHC Affiliated Services v. The Industrial Commission of Utah Employers' Reinsurance Fund, Lawrence Schmidt : Reply Brief

Utah Court of Appeals

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Case No. 900231-CA

Category No. 7

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## Defendants and Respondents.

## Attorney for Employers' Reinsurance Fund

IHC AFFILIATED SERVICES,	:	
	:	
Plaintiff and	:	Case No. 900231-CA
Appellant,	:	
	:	
vs.	:	
	:	
THE INDUSTRIAL COMMISSION OF	:	Category No. 7
UTAH EMPLOYERS' REINSURANCE	:	
FUND, and LAWRENCE SCHMIDT,	:	
	:	
Defendants and	:	
Respondents.	:	

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### INTRODUCTORY STATEMENT

This brief is filed in reply to the Defendant-Respondent Schmidt's (employee) response brief. It should first be noted that Argument Point I and Point II of the Plaintiff-Appellant's (employer) opening brief was put forward for the reason that the order of the Industrial Commission denying the employer's Motion for Review is so ambiguous that the employer was compelled to argue that if the Commission's order determined that the Allen<sup>1</sup> test, requiring satisfaction of the medical and legal causation tests, did not apply it was in error. If, however, as the employee argues and contends, the order of the Industrial Commission actually sustains the findings and conclusions of the administrative law judge (A.L.J.) that the Allen test had to be met by the employee and that the employee had pre-existing conditions, then only Points III and VI of the employee's original brief need be considered.

So far as the issues connected with the Allen case are concerned, the employer maintains that there is no medical evidence whatsoever to indicate that anything other than his one-time lift of 28 pounds of luggage caused the employee's herniated discs. And not even the employee claims that the single incident satisfies the legal causation test of Allen.

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<sup>1</sup> Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) (Allen)

It is the obligation and burden of the employee to supply proof for both the legal and medical causation tests. The employee has not satisfied either test.

#### SUMMARY OF ARGUMENT

This Court has previously held that in workers' compensation proceedings commencing after January 1, 1988 that the Utah Administrative Procedures Act applies.<sup>2</sup> Accordingly, if the confusing order on review of the Industrial Commission held that the *Allen* test did not need to be met by the employee, the employer urges that this Court apply the rationale set forth in Points I and II of the employer's original brief and hold that the applicant had to meet its burden under both the legal causation and the medical causation tests of *Allen*.

Because there is only medical causation testimony as to a one-time lift of 28 pounds, the Court should look no further than this one incident for legal causation and should find that neither the medical or the legal causation test of *Allen* was met.

Finally, the record is absolutely clear that any waiver by the employer as to the medical causation issue pertained only to the one-time lift of luggage and nothing else. Once the employee's theory of the case became clear, the employer, by its conduct at the time of the hearing withdrew any stipulation regarding medical causation.

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<sup>2</sup> *Grace Drilling v. Board of Review*, 776 P.2d 63 (Utah App. 1989).

## ARGUMENT

- I. IF THE INDUSTRIAL COMMISSION'S ORDER ON MOTION FOR REVIEW REVERSES THE ADMINISTRATIVE LAW JUDGE, THEN THIS COURT SHOULD REVERSE THE COMMISSION AND HOLD THAT THE EMPLOYEE HAD THE BURDEN OF MEETING THE ALLEN TESTS OF LEGAL AND MEDICAL CAUSATION.**

Although the employer disagrees with the employee's construction of the Utah Administrative Procedures Act (UAPA),<sup>3</sup> it finds itself in the unique position of desiring the same construction of the Industrial Commission's Order on Motion for Review as the employee. In the event that this Court determines that the effect of the Order on the Motion for Review is other than to sustain the decision and adopt the findings of fact and conclusions of law of the A.L.J., the employer urges that the Industrial Commission be found in error for the reasons set forth in the employer's original brief.

The assertion that the UAPA does not apply to the order of the Industrial Commission is absurd. As this court stated in *Grace Drilling v. Board of Review*,<sup>4</sup> , with regard to the effect of UAPA on orders of the Board of Review of the Industrial Commission in workers' compensation cases:

These proceedings were commenced after January 1, 1988, and thus our review is governed by Utah Code Ann. § 63-46b-16(4) (1988) of the Utah Administrative Procedures Act (UAPA).<sup>5</sup>

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<sup>3</sup> Utah Code Ann. § 63-46b-1 et. seq.

<sup>4</sup> 776 P.2d 63, 66 (Utah App. 1989)

<sup>5</sup> *Id.* at 66.



Because the proceedings in the instant case were commenced long after January 1, 1988,<sup>6</sup> the UAPA applies in construing the Industrial Commission's Order on Motion for Review.

The employer urges the Court to hold, as does the employee, that the effect and meaning of the Order of the Industrial Commission was merely to affirm the A.L.J. that the employee's back problems were due, in part, to his pre-existing back condition. If the Court determines this is the effect of the Order of the Commission, then only the issues raised in Points III through VI of the employer's original brief need be considered.

**II. THE EMPLOYEE FAILED TO MEET HIS BURDEN OF PROOF IN SHOWING EITHER LEGAL CAUSATION OR MEDICAL CAUSATION.**

The claimant has the burden to prove that his injury is compensable.<sup>7</sup> Although the employee in his fact statement goes into great detail about the strenuous nature of his travel activities and how this aspect of his employment added significantly to the risk he faced for back injury, there is no medical testimony stating that in fact these activities caused or contributed to the employee's herniated discs. And if the travel

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<sup>6</sup> The employee's Application for Hearing was filed March 6, 1989. See Record (R.) 8.

<sup>7</sup> *Allen v. Industrial Commission*, 729 P.2d 15, 25 (Utah 1986), *Sabo's Electronic Service v. Sabo*, 642 P.2d 722 (Utah 1982); *Redmond Warehousing Corp. v. Industrial Commission*, 454 P.2d 283 (Utah 1969); *Jensen v. U.S. Fuel Co.*, 424 P.2d 440 (Utah 1967); *Wherritt v. Industrial Commission*, 110 P.2d 374 (Utah 1941).

and exertion of the employee, other than the 28 pound lift when he felt the pop in his back, do not satisfy the medical causation proof requirement of *Allen*, whether the travel activities of the employee meet the legal causation standard is moot. There is a total absence of medical evidence stating that any exertion other than the lift of 28 pounds of luggage on one occasion caused employee's injury.

As noted in employer's original brief and as reiterated here, the medical causation burden of proof must be met by the employee through expert medical evidence to a degree of reasonable medical certainty.<sup>8</sup> As the Supreme Court stated in *Allen* at 27:

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. In the event the claimant cannot show a medical causation connection, compensation should be denied. (Emphasis added.)

Stated somewhat differently in this Court's recent decision in *Nyrehn v. Industrial Commission*:<sup>9</sup>

The Utah Supreme Court held in *Allen* that a claimant must supply proof of both "legal" and "medical" causation. "Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment'. . . [the] doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury]."<sup>10</sup> (Emphasis added.)

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<sup>8</sup> *Lancaster v. Gilbert Development*, 736 P.2d 237 (Utah 1987).

<sup>9</sup> 146 Utah Adv. Rep. 53 (Utah App. Oct. 25, 1990).

<sup>10</sup> *Id.* at 39.

Therefore, although apparently the legal causation standard may be determined by the finder of fact, only "doctors must say whether the exertion in fact caused this [injury]." The doctor in this case refused to link the injury to employee's travel activities in two responses<sup>11</sup> and linked it only to the one-time lift of 28 pounds. This surely cannot be unusual exertion since Allen specifically states that the lifting of luggage is part of the "typical activities and exertions expected of men and women in the latter part of the twentieth century."

A case very similar to the one at bar is *Chadwick v. Industrial Commission*.<sup>12</sup> There, the hospital employee claimed that he had contracted an eye infection related to his employment. In language virtually identical to the language used by the treating physician in the instant case who provided the only medical evidence on causation, the medical panel in *Chadwick* stated:

The fact that the hospital environment provides a much greater exposure to all types of infections would suggest that the applicant's eye problems could be traced to his employment.<sup>13</sup> (Emphasis added.)

The A.L.J. in that case, as he should have done in this case, declined to award benefits because he could not determine with reasonable certainty that the employee's eye condition was caused as a result of his employment. The Court went on to note

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<sup>11</sup> R. 156-157, R. 356.

<sup>12</sup> 572 P.2d 400 (Utah 1977) (*Chadwick*).

<sup>13</sup> *Id.* at 401.

that the burden of proof is upon the employee to establish his entitlement to benefits and show medical causation. In upholding the denial of benefits the Utah Supreme Court concluded:

Plaintiff's argument that the medical panel report to the effect that there was a comparatively high risk of infection in his employment and that there therefore existed the possibility that his eye infection could have come from that source is not entirely without plausibility. However, the mere fact that it could have come from that source or even that there is some likelihood that it did so, does not compel a finding that that was the fact. . . In order for this court to overturn the commission's refusal to grant plaintiff an award on the evidence herein, we would have to depart from the field of proper review and enter that of probability or conjecture, . . . .<sup>14</sup> (Emphasis added.)

This is exactly what has happened in the instant case. The Industrial Commission departed from the proper standard of proof as to medical causation and awarded benefits based on conjecture. On two separate occasions the specific question was put to Dr. Rich as to whether the traveling of the employee caused the injury. In both instances, Dr. Rich declined to state that it did and merely said that it "can" or "could."<sup>15</sup> This is insufficient to support a finding of medical causation as to the employee's travel schedule. Therefore, given the total and utter lack of evidence regarding medical causation to a degree of reasonable certainty, the A.L.J. as well as the Commission erred in finding medical causation for anything other than the one-time lift of 28 pounds, which one-time lift did not meet *Allen's*

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<sup>14</sup> *Id.* at 402.

<sup>15</sup> R. 156-157, R. 356.

legal causation standard requiring unusual exertion or increased risk of injury above what a worker normally faces in everyday life.

**III. THE EMPLOYER'S ATTORNEY OBJECTED TO AND NEVER STIPULATED TO TRAVEL OR TRAVEL FATIGUE AS A FACTOR IN MEDICAL CAUSATION. HIS STIPULATION EXTENDED ONLY TO THE 28 POUND LIFT OF LUGGAGE.**

The employer's attorney initially stipulated that there was no medical causation issue, but this stipulation pertained only to the lifting episode on May 6, 1988, when the employee lifted 28 pounds. This stipulation did not include travel fatigue or any other activity. The allegation of how the accident occurred according to the employee's Application for Hearing is as follows:

While involved in business travel for my employer, was waiting in airport. Was attempting to move to escape heavy tobacco smoke from people around me. As jerked baggage computer equipment to change seats, felt sudden pull and strain in lower back area. It became progressively more painful causing me to seek medical help a few days later.<sup>16</sup>

The record is replete with counsel's withdrawal of any stipulation to medical causation beyond the one-time baggage lifting incident. Counsel objected to testimony beyond the employee's initial allegations of the scope of this accident and thereby withdrew any stipulation based on other facts presented at the time of hearing before the A.L.J.

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<sup>16</sup> R. 8-9.

It is true that the employer took the deposition of the employee prior to the date of the hearing, but contrary to the A.L.J.'s instructions<sup>17</sup> it was never filed with the Industrial Commission and is not available as part of the record.

At the time of the hearing when claimant testified regarding his travel schedule, defense counsel immediately objected as follows:

MR. WHITE: Your Honor, I would object to this line of questioning, and the reason is, the Application for Hearing says that we had an accident on the 6th day of May, that there was one incident and it goes on to two pages. And here we have all this extraneous information about all the other activities. I have never previously seen a claim that this contributed to the problem and I think we have a notice problem here if we are going to claim that this caused it here for the first time in this hearing.<sup>18</sup> (Emphasis added.)

When claimant's counsel attempted to introduce exhibits regarding travel, defendant's counsel objected as follows:

THE COURT: These have been marked as Exhibit A-2. Mr. White, do you have any objections?

MR. WHITE: Well, yes. I will object again because I think it's not relevant. We are talking about a May 6th accident and here we are introducing all this stuff which is really not material -- not relevant.<sup>19</sup> (Emphasis added.)

This was a continuation to the objection previously noted regarding notice and the new theory that travel medically caused or contributed to the employee's injury. The A.L.J. overruled

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<sup>17</sup> R. 27-29.

<sup>18</sup> R. 42, lines 12-21.

<sup>19</sup> R. 45, lines 2-8.

the objection of the employer and his ruling was sustained by the Industrial Commission when the issue was raised on review.

In closing argument, defense counsel once again raised the medical causation and notice issues by arguing as follows:

MR. WHITE: How may I please the Court? [sic]  
[Incorrect transcription, this should be: Now, may it please the Court] Your Honor, now only after hearing the evidence, I have determined not only is there a legal causation problem here, there is also a medical causation problem. We know from Allen and its following cases, that both prongs of the test must be met, and I want to speak to both of them.

MR. DEWSNUP: Your Honor, I would object to that. He has already conceded there wasn't a medical causation question, so I didn't emphasize it in the evidence.

THE COURT: At the beginning of the hearing, I asked you if there was a medical causation problem and you indicated --

MR. WHITE: Well, that's before I heard the evidence, Your Honor. I got this report just today [referring to the report of J. Charles Rich] and I would like to speak to that and --

THE COURT: Well, let me -- well, let me finish, Mr. White. At the beginning, I asked, under the Allen case, if we had any issue on legal causation and you said, no, the only issue is legal. Strike that. If we had any problems with medical causation and you said, no.

MR. WHITE: Well, if I may also point out, I objected to the testimony on this other information because the only evidence I had when I got here this morning was that there was an allegation that this pertained to the May 6th incident. I get in here and now -- and that's in the claim, that's in the Application for Hearing, that was at the time of the deposition and now I get in here, after I made that representation, and hear new evidence, which I objected to and so I think, since evidence as to another causation other than what was alleged, other than which I had notice of at the outset of this hearing, I should --

THE COURT: Which --

MR. WHITE: Well, particularly this travel. I had never heard -- that the sole allegation, as I pointed out in the Application for Hearing, is that the May 6th incident caused this problem and now Mr. Dewsnap comes in here and opens up a new theory and says that all this travel caused this. That these long trips -- Now, that's the first I have heard about this. And so I think I should certainly be able to respond to that and I think there is definitely a medical causation question when it comes to those allegations that the trip and the travel and the moving here and in and out of the hotel and all this business, caused the problem which he is complaining of.<sup>20</sup> (Emphasis added.)

The stipulation as to medical causation pertained only to the 28 pound lift on May 6, 1988. There was no stipulation as to employee's travel schedule satisfying the medical causation standard and any stipulation regarding medical causation was withdrawn.

Furthermore, the failure to allow the employer to dispute medical causation when the theory of accident as contained in the Application for Hearing changed to a broader theory of accident would result in surprise and a denial of due process denying the employer the right to respond. This right is guaranteed under the 5th and 14th Amendments of the United States Constitution and the Utah State Constitution, Article 1, Section 7. In light of the conduct of employer's counsel subsequent to the applicant's theory of accident and legal and medical causation coming fully to light, and the fact that Dr. Rich's first letter was first

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<sup>20</sup> R. 87-89.



produced on the date of the hearing before the A.L.J.,<sup>21</sup> the employer should be permitted to dispute both legal and medical causation.

### CONCLUSION

For the purposes of construing the meaning of the order of the Industrial Commission, the employer urges that the employee's interpretation of the meaning of that order he adopted and that the order of the Commission on Review he interpreted to affirm the findings and conclusions of the A.L.J., notwithstanding inconsistent language within the order. If this is the case, it is only necessary to look to Points III through VI of the employer's original brief on appeal. However, there can be no doubt that the Utah Rules of Administrative Procedure apply to the order of the Industrial Commission. If the order does not simply affirm the A.L.J., whose findings and conclusions were based on a construction of the Allen test, then it should be overturned and construed to be consistent with the A.L.J.'s order for purposes of appeal.

As far as the legal and medical causation issues are concerned, there is no medical evidence to support the conclusion that any work activity other than the one-time 28 pound lift on May 6, 1988 caused claimant's disc herniations. Moreover, this lift does not satisfy the Allen test requiring unusual exertion or additional risk in the workplace.

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<sup>21</sup> R. 87, lines 17-29.


Finally, employer's counsel did not stipulate regarding medical causation except as to the one-time, 28 pound lift since this is the only work activity that the employee's Application for Hearing referred to. Any stipulation regarding causation and the employee's travel was withdrawn as evidenced by the repeated objections and statements of counsel at the time of the hearing. Even if it weren't withdrawn, it would be error to uphold benefits in the face of insufficient medical proof. Fundamental fairness and due process require that counsel not be prevented from arguing a defense when plaintiff's theory finally becomes clear.

Based on the foregoing, the employer urges this Court to reverse the Industrial Commission's order and deny benefits on the grounds that (1) the employee did not satisfy the burden of proof as to medical causation to a degree of reasonable medical certainty, and (2) that employee's single lift of luggage which was followed by a sudden onset of back pain requiring surgery was not unusual exertion.

Respectfully submitted,

KIRTON, McCONKIE & POELMAN

By:

  
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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed four copies of the REPLY BRIEF OF APPELLANT on the 30th day of November, 1990, by United States mail, first-class postage prepaid, to the following:

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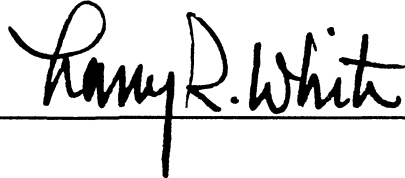
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