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

Utah Court of Appeals

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Larry R. White; Kirton, McConkie & Poelman; Attorney for Petitioner.

Ralph L. Dewsnup; Wilcox, Dewsnup & King; Attorneys for Lawrence Schmidt; R. Paul Van Dam; Attorney General for Utah; Attorneys for Industrial Commission of Utah; Erie V. Boorman; Attorney for Employer's Reinsurance Fund.

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DOCKET No.

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)	
Petitioner,)	Case No. 900231-CA
)	
vs.)	
)	
THE INDUSTRIAL COMMISSION OF)	
UTAH, EMPLOYERS' REINSURANCE)	Priority No. 7
FUND, and LAWRENCE SCHMIDT,)	
)	
Respondents.)	
)	

Brief in response to Petitioner's Request for Review of a unanimous Final Order of the Industrial Commission which Order sustained the decision of Administrative Law Judge Gilbert Martinez.

Erie V. Boorman, Esq.
160 East 300 South
Salt Lake City, Utah 84151-0580
Attorney for Employer's Reinsurance Fund

Ralph L. Dewsnap, Esq.
WILCOX, DEWSNUP & KING
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Respondent
Lawrence Schmidt

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Salt Lake City, Utah 84151-0580
Attorney for Employer's Reinsurance Fund

Ralph L. Dewsnup, Esq.
WILCOX, DEWSNUP & KING
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Respondent
Lawrence Schmidt

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STATEMENT OF JURISDICTION

Petitioner, IHC Affiliated Services, (the employer), appeals a final Order of the Industrial Commission which upheld, and adopted as its own, the decision of the Administrative Law Judge in favor of Respondent Lawrence Schmidt, (the employee). The Court of Appeals has jurisdiction of the case pursuant to §35-1-82.53, Utah Code Annotated, 1953, as amended, §63-46b-16, Utah Code Annotated, 1953, as amended, and Rule 14 Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUE 1: Whether the Industrial Commission overturned or sustained the decision of the Administrative Law Judge.

Standard of Review: Interpretation of an order presents a legal issue which is reviewed under a correction of error standard. Utah Dept. of Admin. Services v. Public Service Commission, 658 P.2d 601, 608 (Utah 1983); Traylor Bros. Inc./Frunin-Colnon v. Overton, 736 P.2d 1048, 1050 (Utah App. 1987).

ISSUE 2: Whether the "legal causation" test of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), was met.

Standard of Review: The findings of the Industrial Commission and Administrative Law Judge will be affirmed if they are supported by substantial evidence when viewed in light of the

whole record before the court. §63-46b-16(4)(g), Utah Code Annotated, 1953, as amended; Grace Drilling v. Board of Reviews, 776 P.2d 63 (Utah App. 1989); Zimmerman v. Industrial Commission of Utah, 785 P.2d 1127 (Utah App. 1989).

ISSUE 3: Whether the "medical causation" test of Allen v. Industrial Commission, supra, was met.

Standard of Review: The findings of the Industrial Commission and Administrative Law Judge will be affirmed if they are supported by substantial evidence when viewed in light of the whole record before the court. §63-46b-16(4)(g), Utah Code Annotated, 1953, as amended; Grace Drilling v Board of Review, 776 P.2d 63 (Utah App. 1989); Zimmerman v. Industrial Commission of Utah, 785 P.2d 1127 (Utah App. 1989).

ISSUE 4: Whether the admission of evidence on the employee's travel schedule and travel fatigue which immediately preceded the occurrence of his injury was improper.

Standard of Review: The admission of evidence of the type in question is a discretionary function of the judge which is reviewed under an abuse of discretion standard. Hester v. South Ogden City, 660 P.2d 243 (Utah 1983);

ISSUE 5: Whether the post-Hearing evidence was admitted and, if so, whether its admission prejudiced the outcome of the case.

Standard of Review: The determination of whether the post-Hearing evidence was admitted is a question of law which is reviewed under a correction of error standard. Utah Dept of Admin. Services v. Public Service Commission, 658 P.2d 601, 608 (Utah 1983); Traylor Bros. Inc./Frunin-Colnon v. Overton, 735 P.2d 1048, 1050 (Utah App. 1987). The determination of whether its admission, if any, unduly prejudiced the outcome is reviewed under the abuse of discretion and harmless error standards. Hester v. South Ogden City, 660 P.2d 243 (Utah 1983); Worker's Comp. Fund v. Industrial Commission, 761 P.2d 572 (Utah App. 1988); Olsen v. Industrial Commission of Utah, 776 P.2d 937 (Utah App. 1989).

DETERMINATIVE AUTHORITY

Respondent Lawrence Schmidt submits that the interpretation of §35-1-45, Utah Code Annotated, 1953, as amended, is determinative of this case. Said statute reads as follows:

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance

carrier and not on the employee.

The pivotal portions of the foregoing statute have been interpreted in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). Plaintiff submits that no questions of constitutional import arise in connection with this case.

STATEMENT OF THE CASE

This is a Worker's Compensation case in which Respondent, Lawrence Schmidt (employee) claims entitlement to compensation benefits as a result of a back injury which he sustained while engaged in work-related activities for his employer, IHC Affiliated Services.

At the Worker's Compensation Hearing, Mr. Schmidt presented evidence relating to the background and circumstances leading up to the actual lifting event which produced injury. He also produced medical evidence on the cause of his injury. Mr. Schmidt admitted that he had a pre-existing back injury.

The Administrative Law Judge who conducted the Hearing entered Findings of Fact and Conclusions of Law that held Mr. Schmidt to be entitled to compensation benefits from both the Employers Reinsurance Fund and his self-insured employer, IHC Affiliated Services. The Employer's Reinsurance Fund did not appeal the decision and has since paid the amounts it was required to pay. The employer asked the Industrial Commission to Review the

Order of the Judge.

The Industrial Commission sustained the Findings and Decision of the Administrative Law Judge, (a fact disputed by IHC), and adopted them as its own. The employer (IHC) appealed.

STATEMENT OF FACTS

Prior to the time of his employment with IHC Affiliated Services, Lawrence Schmidt had sustained a back injury which had produced a ten percent impairment of his person. (R. 333.) This pre-existing injury impairment rating was established by Dr. Joseph Charles Rich, Neurosurgeon, and was undisputed by the employer. (R. 333,34.)

Lawrence Schmidt began working for IHC Affiliated Services in late February, 1988. (R. 38.) In his position as Product Information Manager, he was required to demonstrate computer software applications for hospitals throughout the United States. (R. 36,39.) His travel schedule and presentation requirements were controlled by his employer. (R. 38-39.) His demonstrations were conducted from a standing position. (R. 49-50.)

From February 1988 through the time of his injury on May 6, 1988, Mr. Schmidt was on the road an average of three to four days per week. (R. at 38.) Sometimes his schedule was so demanding that he would leave his home on Sunday and not return until Friday. (R. 38.) While on the road he worked 10-20 hours per day. (R. 57.)

As part of his job Mr. Schmidt typically carried three bags with him when he traveled: (1) A computer case weighing approximately 18 pounds, containing a computer, power cord, P.C. viewer, phone line, cable, multiple outlet switch, transformer and batteries; (2) A personal bag weighing approximately ten pounds, containing a calendar, agendas, maps, books and papers; and (3) A garment bag weighing approximately 25 pounds, containing extra suits, underclothing, shoes, toiletries, etc. (R. 20,37,69,70.)

Mr. Schmidt frequently traveled with others. Their practice was to not check any baggage. (R. 42.) In order to comply with the airline requirements restricting carry-on baggage to two parcels, Mr. Schmidt would consolidate his computer bag and his personal bag into one 28 pound package for carrying. (R. 42.) The 25 pound garment bag constituted his second parcel.

During the week of his injury on May 6, 1988, Mr. Schmidt's travel schedule was particularly demanding. He left Salt Lake City at 12:30 p.m. to fly through Dallas-Fort Worth where he connected with another flight to Baltimore. Arrival in Baltimore was at 8:30 p.m. (R. 46.) In Salt Lake City he carried his 53 pounds of baggage from his car to the airport, through the airport and onto the plane, where he stowed it. He then unloaded it in Dallas, carried it through the airport to his connecting flight and loaded it again. He repeated the unloading and loading processes

in Baltimore, carried the baggage to a rental car, travelled to a hotel and carried the baggage to his hotel room. (R. 47.) The next morning, February 3, he arose early so as to be at a hospital to conduct a demonstration by 7:30 a.m.. (R. 47.) He carried all baggage to the car, travelled to the hospital, unloaded his bags and conducted the demonstration, which lasted until afternoon. Upon completion of the demonstration, he repacked the equipment, loaded it into the car and repeated the loading, unloading and carrying processes again in traveling by commuter airline to White Plains, New York. (R. 48)

Mr. Schmidt arrived in White Plains, New York at 6:45 p.m.. He checked into the hotel by 8:00 or 8:30 p.m.. The next day, February 4, he arose at 6:00 a.m. and left by 7:00 a.m. in a rental car to make hospital demonstrations which continued through Thursday, February 5. (R. 49, 53.) The demonstration went overtime and Mr. Schmidt had to reschedule his flight to his next destination, Oklahoma City. (R. 49.) He left White Plains, New York in a hurry, loaded his baggage and drove to the JFK Airport (approximately one and one-half hours away) where he caught a flight to Dallas and then to Oklahoma City. (R. 49.) He arrived in Oklahoma City at approximately 11:00 p.m. (R. 50.) Again he carried all his bags to and from a rental car counter, loaded the car, drove to the hotel, unloaded the car and carried the bags to

his room. (R. 50.) He never hired porters or paid bell captains because of lack of funds to do so. (R. 48.) The hotel was approximately 45 minutes from the airport. (R. 51.) By the time he arrived and got to bed, it was after 2:00 a.m. on Friday, May 6. (R. 53.)

After a few hours of sleep, Mr. Schmidt arose and traveled to a hospital with his equipment and baggage where he conducted another demonstration for approximately three-fourths of the day. (R. 51.) He was scheduled to return to Salt Lake City on a mid-afternoon flight but the demonstration went overtime and he had to reschedule. (R. 51.) After the demonstration was completed, Mr. Schmidt again packed up his equipment and carried it back to the car and the airport where he waited for his flight to take him back home. (R. 51.) While waiting, he filled out forms required by his employer. (R. 52.)

Mr. Schmidt testified that, as he sat in the airport, he "was tired . . . very tired." (R. 53-54.) He had had an awkward time carrying his baggage and moving through the airport. (R. 54.) It was hard to balance the bags on his shoulders, put them through x-ray machines, and carry them about. (R. 54.) The computer generated additional security questions and Mr. Schmidt was required to do a lot of repeated picking up and putting down of his bags. (R. 54.)

As Mr. Schmidt sat at the airport, filing out forms, he became irritated at the tobacco smoke which was being produced by the crowd of people which had begun to congregate around him. (R. 52.) He decided to move. (Id.) He reached down to again pick up his bags. He reached for the bag containing his personal effects and the computer equipment and jerked it to his shoulder. (R. 52,73,81.) The bag being lifted weighed approximately 28 pounds. (R. 73-74.) As he jerked the bag to his shoulder, he felt a sudden pull on his back which produced pain that intensified as the night progressed. (R. 74-75,77,82.) Prior to the jerking of the bag, Mr. Schmidt had not experienced any back pain. (R. 74.) He had not seen any doctors about any symptoms relating to back pain since 1986, a period of approximately two years. (R. 78-79.)

When Mr. Schmidt returned to Salt Lake City, his back was stiff and uncomfortable. (R. 54.) On Saturday and Sunday his back pain became progressively worse. (R. 55.) On Monday, May 9th, Mr. Schmidt returned to work and reported the injury to his supervisor. (R. 1, 56.) Two days later, on May 11, 1988, after continued worsening of the pain in his back, Mr. Schmidt went to the Cottonwood Hospital Emergency Room. (R. 199.) Thereafter he was treated by several doctors, culminating in the performance of back surgery upon him by Dr. Joseph Charles Rich on July 29, 1988. (R. 207-208, 284-296, 224-225.)

Mr. Schmidt's claim for Worker's Compensation Benefits was denied by his employer. (R. 2.) He, therefore, filed an application for hearing with the Industrial Commission in which he stated that his injuries occurred while he was involved in business travel for his employer. (R. 9.)

The Hearing on Mr. Schmidt's application was held on June 9, 1989. During the hearing, Exhibit A-1, which contained a medical report from Dr. Joseph Charles Rich, dated May 18, 1989, was offered into evidence and received without objection. (R. 96, 156-57, 23.) In the letter, Dr. Rich says that he found Mr. Schmidt to have a right L-4/5 disc herniation which he said was caused by the lifting episode in the airport on May 6, 1988. (R. 156.) His opinion was expressed to a reasonable medical probability. (R. 156.) He also expressed his opinion that Mr. Schmidt had a twenty percent permanent partial disability, ten percent of which was pre-existing and ten percent of which was from the lifting episode. (R. 157.) He further stated that Mr. Schmidt's traveling and lifting were enough to produce an environment in which injuries can occur. (Id.)

In an effort to narrow the issues before him at the Hearing, the Administrative Law Judge asked the attorney for the employer whether there was evidence to establish "medical causation." (R. 27.) The attorney replied that Dr. Rich's report

did that. (Id.) The attorney then stated that the basic defense was "legal causation." (Id.) At a later point in the Hearing, the Administrative Law Judge commented that it appeared that the primary issue in the case was one of legal causation. (R. 30.) The attorney for the employer agreed that such was his belief. (Id.) After further discussion with counsel, the Administrative Law Judge stated that the major issue was whether the "legal causation" requirements had been met, whereupon he ruled that he would only receive testimony relating to that issue. (R. 34.)

Following the Hearing, the Administrative Law Judge issued his Findings of Fact and Conclusions of Law holding that Mr. Schmidt's travel and work activities were unusual or extraordinary and were, therefore, sufficient to meet the "legal causation" requirements, thereby permitting him to recover Worker's Compensation Benefits. (R. 305.) The Judge ordered the employer to pay such portions of the award as related to the new injury and ordered the Employer's Reinsurance Fund to pay for aggravated pre-existing injury. (R. 306.)

Although the employer appealed the decision to the Industrial Commission, the Employer's Reinsurance Fund did not appeal. The Reinsurance Fund has made payments to Mr. Schmidt as ordered.

On March 29, 1990, the Industrial Commission entered its

order denying the employer's appeal and specifically adopting the Administrative Law Judge's Findings as its own. (R. 11-12.) The exact wording of its Order was "IT IS THEREFORE ORDERED THAT the Applicant's Motion for Review is hereby denied and the Order of the Administrative Law Judge is sustained." (R. 12.)

The employer appeals the Industrial Commission Order to this Court.

SUMMARY OF ARGUMENT

Petitioner (the employer) argues erroneously that the Industrial Commission altered the Decision of the Administrative Law Judge. Such is not the case. The Decision of the Administrative Law Judge was adopted in full, although the Commission seemed to point out, by way of explanation, that it would have applied a lesser standard which Mr. Schmidt could have met without the need to show legal causation.

When one examines all of the circumstances leading up to the event which actually produced injury to Mr. Schmidt, it can be seen that the Administrative Law Judge and the Industrial Commission did not err in concluding that Mr. Schmidt had been subjected to unusual and extraordinary exertion which had set the stage for his injury.

Medical causation was not an issue before the Administrative Law Judge, it having been conceded by the employer

before the Hearing began. However, even if it had been an issue, the evidence before the Administrative Law Judge and the Industrial Commission was sufficient to support the holding in the employee's favor.

An employer who schedules the work week for and levies unusually demanding work requirements upon his employees cannot complain of surprise that the employee relies upon such events as being contributing factors to his injury. Such factors are part and parcel of the events producing injury.

There is no indication that the Industrial Commission received or considered post-Hearing evidence in making its decision. Even if such an action had been taken, however, and had been erroneous, such an error was harmless.

ARGUMENT

Point I

The Worker's Compensation Act Should Be Liberally Construed In Favor Of Coverage Of The Employee.

It has been the policy of the Courts that the Worker's Compensation Act should be liberally construed in favor of coverage of the employee. (See North Beck Mining Co. v. Industrial Commission, 58 U. 486, 200 P. 111 (1921); Jones v. California Packing Corp., 121 U. 612, 244 P.2d 640 (1952); and Askren v. Industrial Commission, 15 U.2d 275, 391 P.2d 302 (1964). This

over-arching principle, designed to reduce the amount of expense and delay associated with resolving coverage disputes, has application in the present case. Mr. Schmidt, the respondent, submits that he has shown that he is entitled to the benefits awarded by the Administrative Law Judge and the Industrial Commission and that their decisions should be upheld.

Point II

The Utah Administrative Procedures Act Does Not Apply To Determinations Of An Employee's Eligibility For Benefits Under The Worker's Compensation Act; However, There Was Compliance With UAPA's Requirements In Any Event.

Major portions of the employer's Brief are devoted to contentions that the Industrial Commission failed to abide by the requirements of the Utah Administrative Procedures Act (UAPA). Mr. Schmidt maintains that the UAPA does not apply to the Order of the Industrial Commission, but that, even if it did, all of its requirements were met.

The scope and applicability of the Administrative Procedures Act are established by statute:

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the State of Utah and govern:

* * *

(2) The provisions of this chapter do not govern

* * *

(i) . . . the initial determination

of any person's eligibility for benefits under
Chapters 1 and 2, Title 35

(§63-46b-1, Utah Code Annotated, 1953, as amended. Emphasis added.)

The Worker's Compensation scheme in Utah is contained in Chapter 1, Title 35, Utah Code Annotated. Under that system it is the Industrial Commission that is charged with the responsibility to make determinations of a person's eligibility for benefits. (See §35-1-1, 35-1-10, 35-1-16, 35-1-46, and 35-1-82.52, Utah Code Annotated, 1953, as amended.) The Commission appoints Administrative Law Judges and, either the Commission or the Judges may preside at Hearings held to adjudicate disputes over the awarding of benefits. (§35-1-82.52, Utah Code Annotated, 1953, as amended.) The Commission may or may not follow the recommendations of the Administrative Law Judges since it is specifically empowered by the Legislature to make its investigation,

in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirit of the Workmen's Compensation Act.

(§35-1-88, Utah Code Annotated, 1953, as amended.)

The decision of an Administrative Law Judge is subject to review by the Industrial Commission. Commission Orders are final unless overturned by the Court of Appeals, §35-1-82.53, Utah Code Annotated, 1953, as amended.

The foregoing makes it clear that the initial

determination of a person's eligibility for Worker's Compensation Benefits is not completed until the Industrial Commission rules. Thus, the Utah Administrative Procedures Act does not begin to apply until the time that the Industrial Commission decision is placed for review before the Utah Court of Appeals. In the present case, the employer's arguments that the Administrative Procedures Act was not followed by the Industrial Commission, are not well taken.

Even if the Utah Administrative Procedures Act were deemed to govern the actions of the Administrative Law Judge and the Industrial Commission in the Worker's Compensation setting, it is Mr. Schmidt's position that there was compliance. The Order of the Industrial Commission denying IHC's Motion for Review contains a designation of the statute permitting its review of the ALJ's decision. It also states the issues reviewed, adopts findings and conclusions, specifically affirms the Administrative Law Judge and states the reasons for its disposition. Such an Order is in compliance with §63-46b-12(6)(c), Utah Code Annotated, 1953, as amended. (The Utah Administrative Procedures Act.)

Although its Order is not a model of clarity, the Commission specifically addresses the issues of whether the Allen tests were met and whether they needed to be met. In dicta, the Commission states its view that the Administrative Law Judge need

not have applied the Allen test. However, notwithstanding its own opinion about what could have been done, the Commission, in unmistakable language, adopted the Administrative Law Judge's Decision (including Findings of Fact and Conclusions of Law) as its own:

The Commission believes that the Administrative Law Judge did not abuse his discretion and should therefore be sustained. The Commission, adopts the Administrative Law Judge's findings as its own.

* * *

IT IS THEREFORE ORDERED THAT the Applicant's Motion for Review is hereby denied and the Order of the Administrative Law Judge is sustained.

(R. 366.)

Since the Administrative Law Judge's Decision was adopted in its entirety, there can be no legitimate argument that the Industrial Commission failed to give proper deference to the Judge's position.

In Olsen v. Industrial Commission of Utah, 776 P.2d 937 (Utah App. 1989), the Industrial Commission's decision contained statements which were incorrect and inappropriate. Those statements were dicta and were held by the Court to be harmless where they did not appear to have affected the Commission's decision. (Id. at 940, n.2.) A similar situation presents itself in the present case. Although the Commission has included arguably

incorrect views about Mr. Schmidt's pre-existing condition in its Order, those views are inconsequential and harmless due to the fact that its ultimate decision was to adopt the decision of the Administrative Law Judge.

POINT III

The Circumstances Of This Case Show That Mr. Schmidt's Employment Contributed Something Substantial To Increase The Risk That He Already Faced In Everyday Life Because Of His Pre-Existing Condition; Therefore, Legal Causation Was Shown.

Since the present case arose after the effective date of the Utah Administrative Procedures Act, the standard of review to be applied appears to require that there be substantial evidence in the whole record before the Court to support the Industrial Commission determination if it is to be upheld. (See §63-46b-16(g), Utah Code Annotated, 1953, as amended; and Zimmerman v. Industrial Commission of Utah, 785 P.2d 1127 (Utah App. 1989).) Mr. Schmidt submits that an examination of the entire record shows that the Industrial Commission's Decision should be upheld.

In Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Utah Supreme Court held that where a worker had a pre-existing condition, he could not recover damages for on-the-job aggravation of that condition unless there was some circumstance or exertion required by the employment which increased the risk of injury which the worker normally faced in his everyday life. (Id.

at 25) The Court said:

Our cases make clear that "the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable" [Citations omitted.] 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 work place is usually supplied by an exertion greater than that undertaken in normal, everyday life.

(Id. at 25. Emphasis added. Note: The Allen case interprets the requirements of §35-1-45, Utah Code Annotated, 1953, as amended.)

It is important to note that unusual exertion is one way to show an increased risk of injury. It may even be the usual way. But it is not only way. What is required is that the claimant show that the conditions of his employment were not just typical of everyday life but were usual in a way that subjected him to stresses that were greater than those experienced in the non-employment life of the average person. (Id. at 26; see also Sisco Hilte v. Industrial Commission of Utah, 766 P.2d 1089, 1090 (Utah App. 1988).)

The Administrative Law Judge's Findings of Fact and Conclusions of Law recount the grueling nature of Mr. Schmidt's travel schedule in the days preceding his injury. The transcript of the Hearing contains ample support for those Findings. Mr. Schmidt was required by his employers to leave his home on Monday

and travel by air and ground in a span of only five days from Salt Lake City, to Dallas, to Baltimore, to White Plains, New York, to JFK International Airport, to Oklahoma City and back to Salt Lake City. He made stops in each place, where he was required to lift and carry fifty-three pounds of baggage repeatedly loading and unloading it into rental cars, airport metal detectors, hotel rooms, elevators, overhead storage compartments, etc. He set up and took down equipment for demonstrations in multiple different cities. He stood on his feet all day, worked ten to twenty hours each day, sometimes got only a few hours of sleep, and then rushed to catch a plane where he was confined in an airline seat until arriving at his next destination. The night before his injury, he did not get to bed until 2:00 a.m. only to find himself with a need to awaken early so that he could spend three-fourths of the day on his feet in another demonstration. He was fatigued and spent.

Such a regimen is not something ordinarily nor typically faced by a modern day worker as part of his everyday life. The travel demands, especially with respect to lifting, carrying and transporting substantial amounts of baggage, were indeed "substantial" under the requirements of the Allen case. The lifting and pulling, tugging and toting, and nearly 24 hour per day demands of an extraordinarily vigorous travel schedule over a five day period, certainly increased the risk faced by Mr. Schmidt that

his pre-existing back injury would become aggravated.

Mr. Schmidt's employer argues that the simple lifting of twenty-eight pounds of baggage is not unusual exertion. Mr. Schmidt agrees. If that is all that he had done to become injured, he would not have made a claim. However, as the evidence shows, Mr. Schmidt did much more than simply lift twenty-eight pounds of baggage. In Smith & Edwards v. Industrial Commission of Utah, 770 P.2d 1016 (Utah App. 1989), the Court noted its past rejection of the idea that there was some sort of weight test that qualified for unusual exertion. It said that an examination of the facts and circumstances of the employment activity was required before a determination could be made about whether the activity was usual or unusual. (See Id. at 1018.) Mr. Schmidt submits that the Administrative Law Judge's holding (which was adopted by the Industrial Commission), that his injury occurred in connection with work-related duties that were "unusual or extraordinary" was correct and that legal causation under the Allen case was properly established.

This Court has previously held that "substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989). In applying the standard of review applicable to this case the Court will look at the "whole

record" and will not substitute its judgment as between two reasonably conflicting views. (Id.) There is relevant evidence which would reasonably support the conclusion that, given the totality of the circumstances, Mr. Schmidt was subject to exertions which were unusual or extraordinary in comparison to typical nonemployment activities expected of late twentieth century men and women. Therefore, this Court should affirm the decisions of the Industrial Commission and its Administrative Law Judge.

Point IV

The "Medical Causation" Test Did Not Need To Be Met
By The Employee, Given The Employer's Waiver
Of The Defense; However, The Evidence Establishes
Medical Causation, In Any Event.

A second element of the Allen test on which proof is ordinarily required of a claimant who alleges work-related injury when he has a previous history of injury, is in the "medical causation" test. To prove medical causation, a claimant must show that his injury is "medically the result of an exertion or injury that occurred during a work-related activity." Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). To do this "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 the time of the Hearing before the Administrative Law Judge, the medical causation issue was conceded by the employer.

It, therefore, was not a subject which was addressed by the Administrative Law Judge in his decision. Even if it had not been conceded, however, there was sufficient un rebutted evidence to have supported the decision that medical causation was proved by Mr. Schmidt.

Excerpts from the Hearing transcript demonstrate that the employer waived the "medical causation" issue.

THE COURT: Okay. Mr. White, if you would like to respond to these four claims and raise any defenses.

MR. WHITE: Well, the defense is raised in our Answer, and that is, we do not believe that the accident occurred, there not being legal causation, as required under the Allen case and its progeny.

THE COURT: Okay. So you are claiming no accident? Now, do we have medical evidence to establish medical causation?

MR. WHITE: I think Dr. Rich's report does that.

THE COURT: Okay. So the defense is basically legal causation then?

MR. WHITE: Right.

(See Hearing transcript, R. 27.)

Later in the record, the following exchange between the Court and counsel for the employer reinforced the previous statement:

THE COURT: It appears that the primary issue in this case is one of legal causation.

Is that correct?

MR. WHITE: That's my belief, yes.

(See Id. at 30.)

Following further exchange between the Court and counsel for both parties, the Court made the following statement:

Okay. So the major issue here is one of legal causation and today we will just receive testimony regarding that issue. And, Mr. Dewsnap, if you would like to call your witness.

See Id. at 34.

Based upon the foregoing dialogue and statements, it is clear that there was no reason for Mr. Schmidt to present extensive evidence on issues of medical causation. The introduction of such evidence, in the face of the employer's stated position, would have been outside the scope of the issues and would have been a waste of time and resources. Mr. Schmidt submits that it would be improper to allow an employer to admit that certain elements of a claim were not disputed, waive its defenses thereon, and then permit the employer to complain that those elements were not proven to the requisite degree.

Notwithstanding the fact that Mr. Schmidt need not have produced evidence on the "medical causation" issue, the record contains ample evidence to have supported a finding that it was proven satisfactorily. The letter of Dr. Joseph Charles Rich,

which was received without objection, states:

On the basis of reasonable medical probability, the fact that the patient apparently had no previous history of right leg pain or right sciatica prior to his lifting episode of May 1988, it is probable that there is a causal [sic] between his lifting episode and his right L-4/5 disc herniation.

(See record at 156-157; 332-333.)

Dr. Rich's letter was received in evidence without objection. (R. 23.) No rebutting testimony was offered by the employer. (R. 62.) No request was made that a medical panel be convened. In compliance with Allen, the claimant showed that his actual injury occurred as a result of his exertion while engaged in a work-related activity. Dr. Rich's letter squarely addressed that issue. The doctor's opinion regarding the effects of travel, when coupled with lifting, does not go to the medical causation question -- at least not directly. His opinion only lends support to the background facts and circumstances which are part of the "evidence, opinion and otherwise" which help to show that the stage was set for injury by the stresses, strains and exertions required by Mr. Schmidt's occupation. (See Allen, supra at 27.)

Point V

Evidence About Mr. Schmidt's Travel Schedule and
Travel Fatigue Was Material And Relevant
To The Occurrence Of His Injury And
Its Introduction Was No Surprise.

The employer argues that the Administrative Law Judge improperly admitted evidence of Mr. Schmidt's travel schedule and travel fatigue at the time of the Hearing. It claims that such evidence was irrelevant, immaterial and surprising.

The relevance and materiality of Mr. Schmidt's travel schedule and travel fatigue are obvious from the Allen decision and its progeny. In Allen, after explaining the standards of finding legal and medical causation, the Court said that, in order to determine whether there was legal causation, it needed more facts, such as the number of crates that the claimant had moved, the distances they were moved, the weight of the crates, the size of the area where moving took place, etc. (Allen, supra at 28.) In other words, the Court needed complete background information.

In Smith & Edwards v. Industrial Commission of Utah, 770 P.2d 1016 (Utah App. 1989), the Court rejected the proposition that it decide whether an activity was usual or unusual based on a single factor such as the weight of an object lifted. Instead, it said that "evidence of the facts and circumstances of the employment activity was required." Id. at 1018; see also Sisco Hilte v. Industrial Commission of Utah, 766 P.2d 1089, 1092 (Utah App. 1988); American Roofing Co. v. Industrial Commission of Utah, 752 P.2d 1912, 1915 (Utah App. 1988).

In the present case, the lifting incident which produced

injury was simply the culminating event in a hectic week of unusual exertion and stress. The background information on Mr. Schmidt's travel schedule and fatigue was probative and material to the precise question which was to be decided under the Allen legal causation test.

The employer's argument that it was surprised at Mr. Schmidt's introduction of evidence about his travel schedule is not well taken. Unlike Traylor Brothers, Inc./Frunin-Colnon v. Overton, 736 P.2d 1048 (Utah App. 1987), the attorney for IHC in the present case was not misled into thinking that travel was a non-issue. On the contrary, the travel issue existed from the start:

1. In Mr. Schmidt's Application for Hearing he describes the accident's occurrence with the following opening words: "While involved in business travel for my employer" (R. 2.)

2. The employer took Mr. Schmidt's deposition on May 5, 1989 at which time it had every opportunity to learn of Mr. Schmidt's reliance on travel factors.

3. The employer itself set Mr. Schmidt's travel schedule and was well aware of the demands which had been placed upon him.

4. The employer paid Mr. Schmidt's expenses for travel

and knew of the time required of him to fly, drive, transport baggage, make presentations, complete paper work, set up, take down and engage in other activities.

5. The employer's defense of "no legal causation" implies an awareness of the issues which make up a part of such defense, including the background facts and circumstances of an employee's work activities.

6. IHC may not invoke a rule as a defense and then claim that it had no notice of the very issues necessary to meet the defense which it asserted.

The employer's citation of Kennecott Corp. v. Industrial Commission of Utah, 740 P.2d 305 (Utah App. 1987), is similarly inapposite to the disposition of this case. In Kennecott the issue was whether an employer who was put on notice of a claim made for injury in 1984 should have to pay for injuries occurring in 1969 and 1976 about which it had no notice. The Court ruled that notice of the claims involving earlier injuries was required. In the present case, the question is not whether the employer had notice that it might have to pay for previous injuries, but rather whether or not notice of an injury is also notice of the facts and circumstances surrounding that injury. Mr. Schmidt submits that his employer was on notice of his claim and the circumstances which produced it.

Point VI

There Is No Indication That The Industrial Commission Received Or Considered Evidence In The Form Of A Medical Report Which Was Offered After The Decision Of The Administrative Law Judge Was Rendered; However, Even If It Had, Such An Action Would Have Been Harmless Error, If Error At All.

The last point argued by the employer is that the Industrial Commission improperly admitted evidence after the Hearing before the Administrative Law Judge. While it is true that a supplemental letter from Dr. Rich was sent to the Industrial Commission, there is no indication that the letter was received or considered. Furthermore, if the letter had been received and considered, such conduct would, at worst, be harmless error, since the Commission sustained the Findings of the Administrative Law Judge who never saw the letter.

The Hearing before the Administrative Law Judge in this matter, took place on June 9, 1989. (R. 20.) At the time of the Hearing, a letter from Dr. Joseph Charles Rich, dated May 18, 1989, was received in evidence without objection. (R. 23, 156-157.) The Administrative Law Judge's Decision, including Findings of Fact and Conclusions of Law, was entered on July 10, 1989. The Decision refers to information contained in Dr. Rich's letter of May 18, 1989. (R. 300-307.) On August 8, 1989, the employer moved for Industrial Commission Review of the Administrative Law Judge's Decision. (R. 310-311.) On September 5, 1989, the claimant's

attorney wrote to Dr. Joseph Charles Rich asking him to elaborate on certain points of his first letter (R. 359-360.) On September 8, 1989, Dr. Rich wrote a second letter in reply to the letter of claimant's attorney. (R. 356.) On October 2, 1989, the second Rich letter was submitted to the Industrial Commission and to opposing counsel pursuant to §35-1-88, Utah Code Annotated, 1953, amended, for such consideration as they deemed it appropriate to give. (R. 354-361.) On October 6, 1989, attorneys for IHC objected to the submission and asked that it be stricken. (R. 362-364.) The record does not disclose a formal ruling by the Industrial Commission on the admissability of the second letter from Dr. Rich. However, the Commission makes no reference to the letter in its Decision which was entered March 29, 1990. (R. 365-367.)

In the Order of the Commission denying employer's Motion for Review, it does make reference to the first letter of Dr. Rich. However, it makes no reference either directly or indirectly to the second letter. Furthermore, such reference as is made is of little significance since it was cited in support of a position which the Commission asserted only in dicta.

As has been pointed out in Point II, above, the actual holding of the Commission was that the Administrative Law Judge's Findings and Decision were adopted as the Commission's own. It is

undisputed that the Administrative Law Judge did not see or consider the second letter of Dr. Rich. If his Findings and Decision were adopted, then the second letter had no bearing on the Decision. Its submission, if erroneous, was harmless.

Even if the second letter from Dr. Rich had been considered by the Industrial Commission, and the consideration thereof had been erroneous, the error would have been harmless, since it addressed either (1) issues of causation which were either not before the Commission or the Administrative Law Judge due to the waiver by the employer, or (2) issues on which there was already sufficient evidence to support the Decision by the Commission and the Administrative Law Judge. (See Olsen v. Industrial Commission of Utah, 776 P.2d 937, 940, n.2 Utah App. 1989.)

CONCLUSION

It is the position of Mr. Schmidt that the Hearing process and Industrial Commission review thereof were not governed by the Utah Administrative Procedures Act. Even if they had been so governed, the proceedings were conducted properly.

The effect of the Order by the Industrial Commission was to sustain the Administrative Law Judge's Decision and adopt it as the Commission's own. There was no alteration of the findings and conclusions of the Judge even though the Commission appears inclined to have applied a different standard.

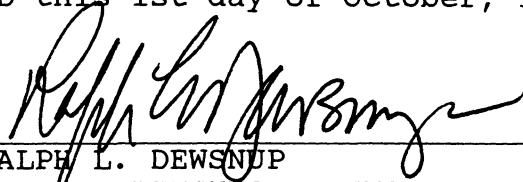
Evidence of Mr. Schmidt's travel schedule and travel fatigue was properly admitted and helped to establish both legal and medical causation under the Allen standards. Additional evidence from the first letter of Dr. Joseph Charles Rich also buttressed Mr. Schmidt's claims as to medical causation which need not have been proven given the waiver by counsel for Mr. Schmidt's employer.

Any effect of a post-Hearing submission of medical information was harmless error.

The policy of the Worker's Compensation scheme is to construe the law liberally in favor of coverage for the employee. Mr. Schmidt's undisputed injury has been construed by both an Administrative Law Judge and the unanimous Industrial Commission to

warrant coverage. This Court should affirm those Decisions
awarding benefits to Mr. Schmidt.

RESPECTFULLY SUBMITTED this 1st day of October, 1990.



RALPH L. DEWSNUP
WILCOX, DEWSNUP & KING
ATTORNEYS FOR RESPONDENT
LAWRENCE SCHMIDT (EMPLOYEE)

CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the BRIEF OF RESPONDENT on the 1st day of October, 1990, by United States mail, postage prepaid, to the following:

Larry R. White, Esq.
KIRTON, MCCONKIE & POELMAN
330 South Third East
Salt Lake City, Utah 84111

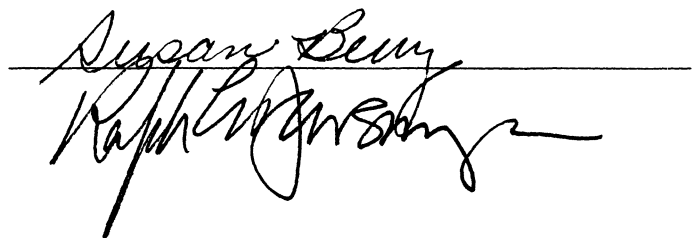
Attorneys for Petitioner

Paul R. Van Dam, Esq.
Attorney General for Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Industrial Commission
of Utah

Erie Boorman, Esq.
160 East 300 South
Salt Lake City, Utah 84154-0580

Attorney for Employer's Reinsurance Fund



ADDENDUM

Respondent Lawrence Schmidt relies upon Addendum materials contained in the brief of Petitioner.