

2000

McKesson Corp. [Employer], and C.W. Reese Co.  
[Insurance Carrier for Employer] v. Robert P.  
Lieberman, and the Utah Labor Commission :  
Brief of Appellant

Utah Court of Appeals

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**PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT  
AND THAT THIS CASE BE REPORTED.**

MCKESSON CORP. [Employer], and C.W. REESE CO. [Insurance Carrier for Employer],	:	Court of Appeals Case No.: 20000800-CA
	:	Priority 7
Petitioners/Appellants,	:	
vs.	:	
ROBERT P. LIEBERMAN, and the UTAH LABOR COMMISSION,	:	Labor Commission No.: 99-0885
Respondents/Appellees.	:	

## Appeal from the Utah Labor Commission

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**PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT  
AND THAT THIS CASE BE REPORTED.**

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**IN THE UTAH COURT OF APPEALS**

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MCKESSON CORP [Employer], and C W	:	Court of Appeals
REESE CO [Carrier for Employer],	:	Case No.: 20000800-CA
 Petitioner/Appellants,	:	 Priority 7
 vs.	:	
 ROBERT P. LIEBERMAN, and the	:	
UTAH LABOR COMMISSION,	:	Labor Commission No.: 99-0885
 Respondents/Appellees.	:	
	:	

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**JURISDICTION OF THE COURT OF APPEALS**

This Petition for Review by appellants McKesson Corporation and C.W. Reese Company is from a final order of the Labor Commission of Utah dated August 30, 2000. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a) (2000).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether the Commission applied the appropriate legal standard in analyzing this matter based upon proximate causation? This is a matter of law, reviewed for correctness, see below. This issue was preserved at R., 33-42.



2. If the Allen legal causation test is the correct standard to apply, whether Lieberman's act of forcefully jumping into his truck while grabbing the steering wheel meets the higher legal causation standard, thus relieving the McKesson of liability? The appropriate legal standard is correctness review; however, whether the claimant's activity meets the higher legal standard is reviewed for reasonableness and rationality. See AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶6, 388 Utah Adv. Rep. 21. This issue was preserved at R. 33-42, 65 p.26.
3. If the proximate causation test applies, whether the May 22<sup>nd</sup> non-industrial accident constitutes the direct and natural cause of the claimant's current medical condition so as to make the employer liable for workers' compensation benefits resulting from the non-industrial accident? This issue involves a legal matter, reviewed for correctness, see below. This issue was preserved at R. 33-42, 65 p. 5, 26.

### **Standard of Review**

These issues involve the interpretation and application of the Utah Workers' Compensation Act (the "Act"), section 34A-2-401 et. al. In Esquivel v. Labor Comm'n, 2000 UT 47, 396 Utah Adv. Rep. 3, the Court recently articulated the proper standard of review for administrative proceedings. It stated:

matters of statutory construction are questions of law, reviewed for correctness. . . . An exception to this general rule exists if the legislature has either explicitly or implicitly granted discretion to the agency. However, absent a grant of discretion, an agency's interpretation or application of a statutory term should be reviewed under the correction of error standard.

Id. at ¶¶13-14 (emphasis added). The court proceeded to hold that section 34A-1-301 does not give a broad grant of discretion to the Commission for questions of law, although subsection 301 gives the Commission discretion to determine the facts and apply the law in the chapter. See id. at ¶17.<sup>1</sup> Accordingly, because neither sections 34A-2-401 (the statute authorizing compensation) nor 34A-1-301 connote a general grant of discretion for determination of the correct legal standard to apply in this case, a matter of law, this Court should review the Labor Commission's ruling for correctness.

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<sup>1</sup> This Court must affirm the Labor Commission's factual findings if it determines that the agency abused the discretion delegated to it by statute. See Utah Code Ann. § 63-46b-4 (h)(i) (2000).

## DETERMINATIVE LAW

The determinative law is Utah Code Ann. § 34A-2-401 (2000) (Utah “Workers Compensation Act”), the provision authorizing workers’ compensation for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines . . . .

Utah Code Ann. § 34A-2-401 (2000).

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986), to require a claimant to prove both medical and legal causation. Particularly, “where a claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, a usual or ordinary exertion is sufficient.” Id. at 26.

Under Utah law pre-dating Allen, the court stated that when there are two accidents, the claimant must show that industrial injury for which he seeks benefits is the direct and natural result of the disability (a.k.a., proximate causation). See Aetna Life Ins. v. Industrial Comm’n, 231 P. 442, 444 (Utah 1924); see also Mountain States Casing Serv. v. McKean, 706 P.2d 601, 602-03 (Utah 1985); Perchelli v. Utah Ind. Comm’n, 475 P.2d 835, 837-38 (Utah 1970); Fruehauf Trailer Co. v. Industrial Comm’n, 396 P.2d 409, 410 (Utah 1964).

## **STATEMENT OF THE CASE**

### **Nature of the Case and Course of the Proceedings**

This case presents the question whether a September 25, 1995 industrial accident or a subsequent May 22, 1999 non-industrial accident is the legal and medical cause of Mr. Lieberman's need for surgery that arose after May 22, 1999 and his inability to work beginning about May 22, 1999.

Lieberman sustained an industrial injury while working for McKesson Corporation ("McKesson") on September 25, 1995 when a fourteen pound case of lotion fell on his head. On March 19, 1996, Lieberman underwent neck surgery. See R., 64 at p.5-7. On September 28, 1996, the parties entered into a Compensation Agreement confirming McKesson's payment of temporary total disability compensation (TTD) for the period of September 26, 1995 to September 18, 1996, permanent partial disability compensation (PPD), and medical expenses.

On July 3, 1997, Lieberman filed an Application for Hearing seeking additional TTD benefits from January 8, 1997 through April 28, 1997 and medical expenses. See R., 1-9. McKesson denied liability asserting that Lieberman's condition did not change after the Compensation Agreement. The ALJ agreed with Lieberman. On April 10, 1998 the ALJ ordered an additional award of benefits to Lieberman. Neither party appealed this order and McKesson paid the benefits ordered.

On May 22, 1999, Lieberman suffered a severe non-industrial (during non-work time) neck injury when he pulled on the steering wheel and jumped into his pickup truck striking his head on the door frame, knocking him out. See R., 65 p.13-14, 64 p.24B-E. As a direct consequence of the symptoms he immediately developed after the May 22<sup>nd</sup> accident, Dr. Robert Hood recommended removal of the hardware in his neck and a repeat fusion and plate fixation at C6-7. See R., 64 p.24D. McKesson denied liability for the medical care and lost time for work that resulted from the May 22<sup>nd</sup> accident on the ground that it was legally and medically caused by the May 22<sup>nd</sup> accident, not the September 25, 1995 accident. In support of this position, McKesson argued that had the May 22<sup>nd</sup> injury, occurred while in the course and scope of employment, it would constitute a new and compensable injury. See R., 65, p.5, 25-26.

On September 17, 1999, Lieberman filed a second application for hearing with the Labor Commission seeking medical care and TTD compensation arising after the May 22<sup>nd</sup> accident. See R., 1-9. In the application, Lieberman attributes his current medical condition to the September 1995 accident. McKesson filed an answer denying liability on the basis that the May 22<sup>nd</sup> accident was legally and medically responsible for Lieberman's current problems. See R., 12-13. A hearing on this matter was held before Administrative Law Judge Richard M. La Jeunesse on February 29, 2000. See R., 65. On May 24, 2000, the ALJ ruled that the September 25, 1995 accident was the cause for Lieberman's medical care and temporary total disability following the May 22<sup>nd</sup> accident. See R., 21-32; attachment A.

McKesson and its carrier filed a Motion for Review of the ALJ's order on June 21, 2000 with the Utah Labor Commission ("Commission"). See R. 33-42, attachment B. Lieberman, *pro se*, filed his response arguing that the intervening event on May 22<sup>nd</sup> was not the direct and natural cause for benefits he seeks. See R., 43-49; attachment C. On August 30, 2000, the Commission issued an order denying the Motion for Review, ruling in favor of Lieberman, affirming the award of workers' compensation benefits following the May 22<sup>nd</sup> non-industrial accident. See R. 51-55, attachment D.

McKesson and its carrier filed a Petition for Review with this court on September 18, 2000 seeking review from the final order of the Labor Commission. See R., 57-63. A Docketing Statement was filed on September 21, 2000.

### **Statement of Facts**

Robert Lieberman worked for McKesson, a drug company, as a warehouse person. During the course of his work activities on September 25, 1995 Lieberman attempted to lift a case of lotion off of a six-foot high shelf. See R., 1-9. While doing this, two cases tipped over and one fell onto his head. See R., 1-9. On March 19, 1996, Lieberman underwent a microsurgical anterior discectomy, decompression, allograft, fusion and plate fixation on his cervical spine at C5-6, C6-7. See R., 64 p.5-7.

McKesson accepted liability under the Utah Workers' Compensation Act (the "Act") for Lieberman's injuries resulting from the September 25, 1995 accident. It paid benefits accordingly. On September 28, 1996 the parties entered into a Compensation Agreement confirming McKesson's payment to Lieberman of 48.6 weeks of temporary total disability

compensation (TTD) for the period between September 26, 1995 and September 18, 1996. McKesson also agreed to pay Lieberman permanent partial impairment compensation (PPI) for 37 weeks and all medical expenses arising from this accident.<sup>2</sup>

Immediately before May 22, 1999, Lieberman was working full-time as a laborer. Lieberman was only having “minor problems” with his cervical spine. See R., 64, p.24A. Similarly, Dr. Hood observed on June 7, 1999 that Lieberman was “minimally symptomatic” until the May 22<sup>nd</sup> accident. See R., 64, p.24B.

On May 22, 1999, Lieberman was at home getting into his truck. He pulled on the steering wheel and jumped into his pickup truck, forcefully striking the vertex of his scalp on the door frame with such force that he was knocked to the ground and perhaps unconscious. See R., 65 p.12-14. Lieberman attempted unsuccessfully to return to work on May 24<sup>th</sup>. He was unable to perform his job duties because of his neck symptoms arising after the May 22<sup>nd</sup> accident. He has not worked since May 24, 1999.

Dr. Hood acknowledged that Lieberman hit his head “quite forcefully, stunning him with immediate worsening of his neck and upper back pain radiating down to the trapezii. He describes this now as a burning sensation. . . .” R. 64, p.24B. As a direct consequence

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<sup>2</sup> Lieberman subsequently filed his first application for hearing on July 3, 1997 seeking additional TTD benefits from January 8, 1997 through April 28, 1997 and additional medical expenses arising from the September 1995 accident. McKesson filed its Answer, asserting that because Lieberman suffered no change after the compensation agreement, there was no basis to award additional compensation. The ALJ agreed with Lieberman.

of the symptoms that developed immediately after the May 22<sup>nd</sup> accident, Dr. Hood recommended surgery at the C6-7 level. See R.64, p.24D.

Lieberman sought coverage for the medical care and lost time from work resulting from the May 22<sup>nd</sup> injury. McKesson denied coverage for any injuries or lost time relating to the May 22<sup>nd</sup> accident on the ground that Lieberman's condition directly and naturally resulted from a new accident on May 22<sup>nd</sup>. On September 17, 1999, Lieberman filed an Application for Hearing seeking medical care and TTD compensation arising after the May 22<sup>nd</sup> accident. See R., 1-9.

On February 29, 2000 a hearing was held on this matter before Administrative Law Judge La Jeunesse. See R. 65. On May 24, 2000, the ALJ ruled that the September 25, 1995 accident was the legal cause for Lieberman's medical care and TTD following the May 22<sup>nd</sup> accident. See R., 21-32. McKesson filed a Motion for Review of this order with the Labor Commission on June 21, 2000 arguing that (1) Lieberman forcefully struck his head on May 22<sup>nd</sup>; (2) the May 22<sup>nd</sup> accident, if occurring during work time of another employer, would qualify as a compensable industrial accident, thereby fully relieving McKesson of liability; (3) alternatively, the subsequent injury constitutes an superceding event relieving McKesson of liability; and, (4) the consequences of the ALJ's order will lead to erroneous decisions in future cases. See R., 33-42.

On August 30, 2000, the Commission issued an order denying the McKesson's Motion for Review ruling in favor of Lieberman, awarding him workers' compensation benefits resulting from injuries arising from the May 22<sup>nd</sup> non-industrial accident. See R.,



51-55. Specifically, the Commission ruled that when there are two accidents and the second accident is not a quasi-course activity<sup>3</sup>, the second accident is responsible only when it results from the intentional or negligent conduct of the employee. See id. Applying this law, the Commission held that Lieberman's act of entering his pickup truck was not "negligent" so as to break the chain of causation between the September 1995 and the medical care and lost time occurring after the May 22<sup>nd</sup> accident. See id. Accordingly, the Commission held that the injuries for which Lieberman now seeks benefits are a "natural result" of his primary injury of September 1995 and are therefore compensable. See id.

On September 18, 2000, McKesson filed a Petition for Review from this final order. See R., 57-63.

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<sup>3</sup> A "quasi-course activity" is one undertaken by an employee in furtherance of his medical care for the industrial accident such as trips to a doctor's office or for medicine.

## **SUMMARY OF THE ARGUMENT**

The Labor Commission erred in awarding Lieberman workers' compensation benefits arising from injuries following the May 22<sup>nd</sup> non-industrial accident. The Commission applied the wrong legal standard in this case when it applied the proximate causation test of cases pre-dating the Allen v. Industrial Commission decision. The proper legal test is the higher legal causation test articulated in Allen. Under this test, Lieberman's prior neck condition constitutes a pre-existing condition, triggering the higher legal causation standard. Accordingly, because Lieberman's act of forcefully grabbing the steering wheel and jumping into the vehicle is an unusual or unanticipated event, sufficient to satisfy the higher legal causation standard, see Green v. American Roofing, 752 P.2d 912 (Utah Ct. App. 1988), the necessary chain of causation is broken, relieving McKesson of liability. The fact that the second injury occurred in a non-work setting should not change the fact that the higher legal causation test must be applied in this instance.

Alternatively, even if the proximate causation test applies here, the Commission incorrectly applied the test in this case using essentially a "but for" causation analysis. Moreover, Lieberman's act of jumping into his pickup truck, with full knowledge of his medical limitations, is not a direct and natural consequence of the September 25, 1995 injury. Lieberman's own misconduct does not arise from a "quasi course activity" such as receiving medical treatment and instead, constitutes an intervening, superceding event that breaks the chain of causation. If the proximate causation analysis should apply, Lieberman's

carelessness constitutes negligence, breaking the chain of causation, therefore relieving McKesson of liability.

The Commission's ruling constitutes legal error and must be reversed and remanded for a determination of whether, under these facts, the higher legal causation standard is met here. Alternatively, this Court should apply the proximate causation test and reverse the Commission's ruling.

### **ARGUMENT**

#### **THE LABOR COMMISSION ERRONEOUSLY CONCLUDED THAT LIEBERMAN WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS ARISING FROM THE MAY 22<sup>ND</sup> NON-INDUSTRIAL ACCIDENT**

1. **The Commission applied the wrong legal standard in analyzing this matter based upon proximate causation and negligence.**

Petitioners respectfully submit that the Labor Commission applied the wrong legal standard in analyzing this workers' compensation matter.

Under Utah's Workers Compensation Act, a person is entitled to workers' compensation benefits if he proves by a preponderance of the evidence that he is an employee that was injured by accident arising out of and in the course of the his employment. See Utah Code Ann. § 34A-2-401 (2000).<sup>4</sup> The "arising out of" and "in the

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<sup>4</sup> This section provides in relevant part:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for

course of employment” language of section 34A-2-401 has been interpreted by the Utah Supreme Court to require that the medical condition for which the claimant is seeking workers’ compensation is the medical and legal cause of the claimed industrial injury. See Allen v. Industrial Comm’n, 729 P.2d 15 (Utah 1986) (leading case requiring establishment of legal and medical causation before benefits are awardable to a claimant).

Utah appellate cases decided after the Allen decision state that proximate causation is used primarily in tort law and “is not appropriate for workers’ compensation cases.” Large v. Industrial Comm’n, 758 P.2d 954, 956 (Utah Ct. App. 1988) (stating “although proximate causation is not an appropriate standard, the Utah Supreme Court has, nevertheless, required proof of a causal relationship to awarding workers’ compensation benefits”); Stokes v. Board of Rev. of Ind. Comm’n, 832 P.2d 56 (Utah Ct. App. 1992) (proof of proximate cause and fault are not required in workers’ compensation cases). This is because proximate causation involves the analysis of foreseeability, negligence, and intervening causes which are not present in the workers’ compensation system, which normally excludes considerations of fault. See Large, 758 P.2d at 956; see also 99 C.J.S. Workmen’s Compensation §10 (stating “the principles applicable in torts, such as the concept of proximate causation or the effect of independent or intervening cause . . . have no application to workmen’s compensation claims”).

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medical, nurse, and hospital services . . . [and] medicines . . . .  
Utah Code Ann. § 34A-2-401 (2000).

In this case, the Commission awarded workers' compensation benefits for injuries resulting from the May 22<sup>nd</sup> non-industrial accident. In so ruling, the Commission concluded that Lieberman's act of getting into his pickup truck did not constitute fault and/or "negligence." The Labor Commission stated:

the chain of causation may be broken by either intentional or negligent claimant misconduct. As to what constitutes negligence for purposes of the foregoing standard often takes the form of rashly undertaking a line of action with knowledge of the risk created by the weakened member. . . . Next it is necessary to determine whether Mr. Lieberman's act of getting into his pickup was "negligent" so as to break the chain of causation between his work accident of September 25, 1995, and his current injuries. . . . The Appeals Board concludes Mr. Lieberman was not negligent . . . .

Based upon Large and Stokes it is evident that the Commission erred in selecting the appropriate law to apply to this matter. The Commission improperly selected and applied the law pre-dating the Allen decision. McKesson urges this Court to vacate the Commission's legal conclusion on this matter and apply the correct law articulated below.

**2. The proper legal standard to apply in analyzing the legal effect of the May 22<sup>nd</sup> accident is the Allen higher legal causation test.**

As previously stated, the correct legal standard applicable in Utah workers' compensation matters after the 1986 Allen decision is not based upon proximate causation or employee negligence. See Large, *supra*; Stokes; *supra*. Rather, the appropriate legal standard requires the Allen analysis of legal causation. Specifically, where a claimant suffers from a pre-existing condition which a second accident exacerbates, the second accident is the legal cause of the exacerbation if the second accident meets the Allen higher legal

causation standard. See Allen, 729 P.2d at 26; Green v. American Roofing, 752 P.2d 912, 914-15 (Utah Ct. App. 1988) (holding extraordinary exertion when bucket unexpectedly snagged). Based upon Allen and its progeny, the higher legal causation test is the appropriate way to determine whether the May 22<sup>nd</sup> accident is legally responsible for Lieberman's medical care and lost work time that followed the May 22<sup>nd</sup> accident.

The sound reasoning of this conclusion becomes even more obvious when one considers the three possible scenarios that could arise with Lieberman's two accidents by varying only the employment/non-employment setting for Lieberman's two accidents.

First, assume that both of Lieberman's accidents occurred on the job with two different employers -- the first employer being McKesson.<sup>5</sup> The September 25, 1995 accident is compensable under the Allen test just as McKesson accepted liability for it. Now assume that the May 22, 1999 accident had happened on his job with another employer rather than nonindustrially at home. Obviously, the Labor Commission would apply the higher legal causation standard to the second accident because Lieberman had a pre-existing cervical condition. Striking his head forcefully while getting into the truck would unquestionably meet the higher legal causation standard making the second accident a

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<sup>5</sup> The higher legal causation standard of Allen does not apply when a preexisting condition is caused by a prior work related injury incurred in the same workplace. See generally Fred Meyer v. Industrial Comm'n, 800 P.2d 825 (Utah Ct. App. 1990).

compensable industrial accident. The Labor Commission would not have considered Lieberman's negligence at all under this scenario.<sup>6</sup>

Second, assume that the first accident had happened nonindustrially at home while the second accident had happened at work. As with the first scenario, the second accident would be analyzed under the higher legal causation standard with no consideration whatsoever of Lieberman's negligence. And again, the Labor Commission would have properly concluded that the second accident met the higher legal causation standard and awarded benefits against the employer at the time of the second accident.

Third, the scenario is as actually happened. The first accident was at work while the second accident was nonindustrial, at home. Logically, the same analysis should apply as in the first two scenarios. Causation generally does not change based on the employee's employment status.<sup>7</sup> Negligence, which is irrelevant under the first two scenarios, does not become the controlling factor. McKesson urges this court to rule that the Allen legal causation test, not a proximate cause/negligence analysis, applies here.

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<sup>6</sup> The first employer is absolved of liability and the second employer is solely liable under the last injurious exposure rule. See Duane Brown Chevrolet Co. v. Industrial Comm'n, 511 P.2d 743, 745 (Utah 1973) (stating no apportionment between employers/carriers in non-permanent total disability cases because Utah follows the last injurious exposure rule); see also Mountain States Steel Co. v. Industrial Comm'n, 535 P.2d 1249, 1250-51 (Utah 1975) (same); Holt v. Majestic Airlines, Labor Comm'n Case No. 92-1337 (Dec. 7, 1993) (same).

<sup>7</sup> See supra note 5 (noting legal causation analysis differs when the employee is reinjured in the same workplace).

3. **Lieberman's act of forcefully jumping into his truck and injuring himself meets the higher legal causation standard making the May 22<sup>nd</sup> accident legally responsible for the subsequent injuries.**

Recognizing that the proper test to apply is the Allen legal causation test, Lieberman's act of forcefully jumping into his truck and hitting his head meets the higher legal causation test and, therefore, relieves McKesson of liability for any compensation or medical expenses resulting from the second accident.

It is well-settled that the higher standard legal causation test is met when a claimant's injury is the result of an exertion which is unusual or extraordinary in comparison to typical nonemployment activities and exertions expected of late twentieth century men and women. See Green, 752 P.2d at 915. Utah courts have held that the following activities amount to unusual or extraordinary exertions: (1) lifting a 30 pound bucket of debris which snagged, See id. (2) a maid's slip-and-fall in a hotel bathtub, see Delores v. University Park Hotel, Labor Comm'n Case No. 94-464 (Feb. 21, 1995); and, (3) a worker's act of jumping into an eight-foot hole from a four-foot platform at thirty-minute intervals, see Miera v. Industrial Comm'n, 728 P.2d 1023, 1024-25 (Utah 1986).

Petitioners submit that under the above strictures, Lieberman's act of grabbing his steering wheel and forcefully jumping into his pickup truck and being knocked unconscious meets the higher legal causation test. This is supported by Lieberman's testimony at the hearing:

[Defense Counsel]: [W]as it about three days later on May 22 when you hit your head again?



[Lieberman]: Uh-huh . . . Yes.

[Defense Counsel]: Did you hit your head really hard on the doorjam?

[Lieberman]: Yeah. It seemed like I did, you know.

[Defense Counsel]: Did you see a flash when you hit your head?

[Lieberman]: Yes.

[Defense Counsel]: Did you fall to the ground?

[Lieberman]: I went down to my knees.

. . . .

[Defense Counsel]: Were you knocked out for a moment?

[Lieberman]: It hurt. I'm not really sure that I was actually knocked out. I felt like I was, because it hurt. . . .

[Defense Counsel]: Would you say that on May 22 you hit your head rather hard?

[Lieberman]: It seemed like it.

[Defense Counsel]: Did you at one time estimate that as you were getting into the truck, you hit your head with about 120 pounds of thrust?

[Lieberman]: Yeah. Yes, I did. I came to that conclusion by stepping on a scale, pushing down on it. 120 is a lot.

R. 65, p.12-15. He testified similarly in a recorded statement, and the Commission adopted the finding of forcefulness. See R. 51-55.

Under Allen, Lieberman's striking his head forcefully is not the type of activity that is expected of persons in non-employment activities in this century. McKesson urges this court to conclude that the May 22<sup>nd</sup> accident met the Allen higher legal causation standard

thus placing responsibility for the subsequent medical care and lost time from work on the May 22<sup>nd</sup> accident and not the September 25<sup>th</sup> accident .

**4. Assuming that the proximate causation test applies, the September 25, 1995 accident did not naturally cause the May 22, 1999 accident**

Under Utah law pre-dating the Allen decision, Utah appellate courts often applied a proximate causation test in workers' compensation cases when there were two injuries and the court was required to determine whether the claimed industrial injury was the direct or proximate cause of the medical condition for which the claimant was seeking benefits.<sup>8</sup> See Aetna, 231 P. at 444. Even if this test applies here, we submit that the Commission incorrectly applied the test to the facts of this case.

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<sup>8</sup> Although the proximate causation test is not applied in the evaluation most workers' compensation cases after the Allen decision, like medical and legal causation, the Utah Supreme Court has evaluated proximate causation (i.e., the effect of intervening and superceding accidents) in the workers' compensation context in a number of cases when there has been two accidents and a determination must be made regarding which accident to attribute the disability. See generally Mountain States Casing Serv. v. McKean, 706 P.2d 601, 602-03 (Utah 1985); Perchelli v. Utah Ind. Comm'n, 475 P.2d 835 (Utah 1970); Fruehauf Trailer Co. v. Industrial Comm'n, 396 P.2d 409, 410 (Utah 1964); Nielson v. Industrial Comm'n, 236 P.2d 346 (Utah 1951); Aetna Life Ins. v. Industrial Comm'n, 231 P. 442, 444 (Utah 1924); Continental Casualty Co. v. Industrial Comm'n, 221 P. 852 (Utah 1923) ("Sabey" case). But see Large v. Industrial Comm'n, 758 P.2d 954, 956 (Utah Ct. App. 1988) (stating proximate cause analysis is generally only appropriate in tort cases because the factors of foreseeability, negligence and fault do not apply in the workers' compensation system); Stokes v. Board of Rev. of Ind. Comm'n, 832 P.2d 56, 62 (Utah Ct. App. 1992) (same).

Several commentators, including Professor Larson in his well known treatise on this subject have approved of the proximate causation analysis in the context of workers' compensation cases when courts must determine which of two injuries resulted in a certain medical condition. See 82 Am.Jur.2d Workers Compensation §§ 251, 368; 1 Larsons, Workers Compensation §§ 10.01 to 10.09; 99 C.J.S. Workmen's Compensation §180.

In Aetna, the court stated that in Utah,

[t]he rule that the consequences of injury and disability must be attributed to the proximate cause is of universal application. Very often it is difficult to decide what is the proximate cause. “Where there are two accidents, the question of whether the disability should be attributed to the first or second accident depends on the circumstances of the particular case.”

Id. (quoting 1 Honnold, 135, p. 516).

Utah cases that apply a proximate cause analysis hold that when two injuries occur, compensation will only be attributable to the first compensable injury if the subsequent injury is causally connected to the first. See Mountain States Casing Serv. v. McKean, 706 P.2d 601, 602-03 (Utah 1985); Aetna, 231 P. at 444. In one Utah workers’ compensation case the Utah Supreme Court stated:

Proximate cause is defined to be:

An act which directly produced or concurred directly in producing the injury; an immediate, direct, or efficient cause of injury; that cause which naturally led to, and which might have been expected to produce, the result; that from which the effect might be expected to follow without the concurrence of any unusual circumstances; that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that which, in a natural and continuous sequence unbroken by a new cause, produces that event, and without which that event would not have occurred; that which stands next in causation to the effect—not necessarily in time or space, but in causal relation; the efficient cause; the one that necessarily sets the other causes in operation; the first direct cause producing the injury; the nearest, the immediate, the direct cause; the cause that sets another or other causes in operation, or dominant cause.

Aetna, 231 P. at 444 (emphasis added).

Similarly, in Makoff Co. v. Industrial Comm'n, 368 P.2d 70 (Utah 1962), the Court held that “a subsequent aggravation . . . of a previous injury is compensable [and attributable to the first injury only] if it is demonstrated that there was a causal relation between the two.” Id. at 72; see also 99 C.J.S. Workmen’s Compensation at § 180(b); 82 Am.Jur.2d Workers’ Compensation at § 251. If there is no causal connection between the original and subsequent injury, the latter will constitute an independent intervening cause, which is not compensable. See C.J.S. at § 180(b); Am.Jur.2d at § 251.

Utah courts have held that a “causal connection” between two injuries exists if the second injury is the “natural result” or consequence of the first injury. See Mountain States, 706 P.2d at 602 (stating “a subsequent injury is compensable if it is found to be a natural result of a compensable primary injury”). This includes *medical complications* associated with a compensable injury. See, e.g., Perchelli, 475 P.2d at 837-38; Larsons at § 10.01 (providing examples). For instance, a sneeze that occurs after a claimant sustains a lower back injury at work does not break the chain of causation. See Perchelli, 475 P.2d at 837-38. Nor does a blister to one’s right thumb after reattachment surgery of the arm below elbow break the chain of causation because it was natural consequence of first injury. See Mountain States, 706 P.2d at 602. And, the development of a pulmonary emboli following surgery does not break the chain of causation as it was a natural risk associated with the claimant’s injury. See Fruehauf, 396 P.2d at 410 (surgery to gall bladder after knee injury and later development of pulmonary embolus requiring vena cava ligation did not break chain of causation as it was natural risk associated with claimant’s injury); Am.Jur.2d at §§

251, 368; Larsons at § 10.01 (stating “basic rule is that a subsequent injury whether an aggravation or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury”).

In these cited cases, the second accident naturally followed the first. Such is not true here with Lieberman’s May 22<sup>nd</sup> accident. Under no circumstances can it be said that a natural risk of cervical surgery is striking one’s head on a truck door with such force as to knock one to the ground perhaps unconscious. Yet the Labor Commission did so by changing the test to a “but for the first injury” analysis. Essentially, the Labor Commission concluded that but for the prior cervical fusion, he would never have had a failed fusion. Under this standard, the first accident will always be liable for the consequences of the second accident.

Using this same logic, an employer on a second accident could easily argue that “but for” a pre-existing condition, the employee would not have required the requested medical care. Take the hypothetical case of an employee with a prior non-industrial low back fusion which fails when he slips and falls to a cement floor at work. Obviously the fusion would not have failed but for the prior fusion surgery. Would the Labor Commission conclude that the first accident and not the subsequent fall is responsible for the benefits? It would not. Why not? Because the slip was not a natural consequence of the first injury. McKesson urges this court to reverse the Labor Commission’s legal conclusion that the second accident was a natural risk of the prior injury.

5. Assuming that the proximate causation test applies and that the May 22<sup>nd</sup> accident was a natural result of the September 25<sup>th</sup> accident, Lieberman was negligent in causing the May 22, 1999 accident

Assuming for argument's sake that striking one's head on a truck door is a natural result of neck surgery, the pre-Allen cases provide that the chain of causation can be broken by a superceding, intervening event. For instance, when a subsequent injury is attributable to the claimant's own negligence, fault, or unusual conduct, the claimant's act is deemed to be a superceding, intervening event which breaks the chain of causation. See Mountain States, 706 P.2d at 603 (stating negligence, unreasonable conduct or intentional misconduct break chain of proximate causation, relieving the employer of workers' compensation liability); Am.Jur.2d at § 368 (citing Singletary v. Mangham Constr., 418 So.2d 1138, later proceeding at 471 So.2d 635 (Fla. App.)); Larson at § 10.06[3]. Professor Larson, the leading scholar on this area of law states that:

When the injury following the initial compensable injury arises out of a quasi course activity, such as a trip to the doctor's office, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct which may be regarded as expressly or impliedly prohibited by the employer.

When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, as when a claimant with an injured hand engages in a boxing match, the chain of causation may be deemed broken by either intentional or negligent claimant misconduct.

Larsons, at § 10.05 (emphasis added).

Professor Larson has specifically stated that the following amount to negligent acts or misconduct on the part of a claimant, breaking the chain of causation: (1) “rashly undertaking a line of action with knowledge of the risk created by the weakened member” such as driving a vehicle with knowledge of condition that knee locks up, walking with a heavy load of trash down cellar stairs and having one’s pre-existing weak knee collapse and breaking one’s jaw, and, jumping off of a truck; (2) going to a witch doctor; (3) engaging in a boxing match with injured hands; and, (4) lighting a cigarette in violation of doctor’s orders when having a hand wrapped in alcohol soaked bandages. See Larsons at 10.06[3] (citing cases).

Here, the Labor Commission concluded that Lieberman’s act of forcefully hitting his head while entering his pickup truck on May 22<sup>nd</sup> exacerbated his pre-existing neck condition. It also concluded that Lieberman was not “negligent” in so doing. Specifically, the Commission stated:

As to what constitutes “negligence” for purposes of the foregoing standard, Professor Larson indicates it “often takes the form of rashly undertaking a line of action with knowledge of the risk created by the weakened member.” Larson at 10.06(3), p.10-18.

Applying the foregoing standard to Mr. Lieberman’s current claim, the evidence establishes that Mr. Lieberman’s work accident and injury in 1995 resulted in a weakened condition of his neck. Specifically, Mr. Lieberman was left with continuing neck and back pain as well as a failed graft and fusion at the C6-7 level of his spine. Mr. Lieberman’s non-work accident in 1999, when he hit his head on his pickup door frame, acted on the weakened neck and exacerbated the pre-existing condition.

Next, it is necessary to determine whether Mr. Lieberman's action in getting into his pickup truck was "negligent" so as to break the chain of causation between his work accident of September 25, 1995, and his current injuries. There is no indication that Mr. Lieberman's [sic] acted in a rash or foolhardy manner in entering his pickup; rather, the event appears to be a simple accident brought on by ordinary error or unintended miscalculation. The Appeals Board concludes that Mr. Lieberman was not negligent and that his non-work accident in 1999 does not break the chain of causation between his 1995 work accident and his current injuries.

Petitioner respectfully submits that even if the proximate causation test is the proper test to apply here, the Labor Commission incorrectly applied this test in this instance. Lieberman forcefully hit his head on the door frame of his pickup truck. He did not intend for it to happen. Nor did he want it to happen. However, it happened through his inattention and carelessness. Inattention and carelessness is negligence. It is no different from the driver who crashes into another vehicle while trying to change a CD in his player. Nor is it any different than the person using a radial saw who cuts off a finger while looking up to talk to a co-employee. Although unanticipated, unfortunate, and unwanted, the injuries in each case result from negligent conduct.<sup>9</sup>

Accordingly, if this court concludes that the proximate cause analysis applies here and that striking one's head is the natural result of a prior neck injury, McKesson urges it to hold

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<sup>9</sup> In understanding how the Labor Commission could have ignored what appears so obvious, it seems to have cited one example of negligence given by Professor Larson and then assumed that negligence could not occur other than the example given by Professor Larson. See attachment D, page 3.



that the Labor Commission legally erred in finding that Lieberman was not negligent when he forcefully struck his head on his truck while entering it.

### **CONCLUSION**

This Court should hold that the Labor Commission applied the wrong test in analyzing whether the May 22<sup>nd</sup> accident was legally responsible for Lieberman's medical care and lost time from work that immediately followed his May 22<sup>nd</sup> accident.

Instead, this Court should hold that the Allen higher legal causation test applies and that the May 22<sup>nd</sup> accident (when Lieberman struck his head so forcefully that he was knocked to the ground perhaps unconscious) meets that higher legal causation test.

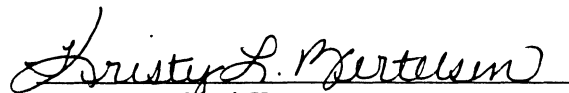
If this Court chooses to use a proximate cause analysis for the May 22<sup>nd</sup> accident, this Court should hold that the Labor Commission erred in legally concluding that the May 22<sup>nd</sup> accident was a natural risk of his prior injury.

And if this Court applies a proximate causation analysis and concludes that the May 22<sup>nd</sup> blow to the head was a natural risk of Lieberman's prior injury, this Court should hold that the Labor Commission erred in legally concluding that Lieberman was not negligent when he struck his head.

For these several independent reasons, this Court should reverse the Labor Commission Order awarding Lieberman medical expenses and lost time from work following his May 22<sup>nd</sup> accident.

Respectfully submitted this 28<sup>th</sup> day of November, 2000.

BLACKBURN & STOLL, LC

A handwritten signature in cursive script, reading "Kristy L. Bertelsen", written over a horizontal line.

Henry K. Chai II

Kristy L. Bertelsen

Attorneys for Appellants McKesson Corp. and  
C.W. Reese Co.

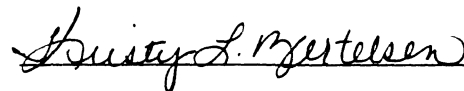
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 28<sup>th</sup> day of November, 2000, to:

Utah Court of Appeals Scott M. Matheson Courthouse 450 South State Street P.O. Box 140230 Salt Lake City, Utah 84114-0230	(8 copies, one w/ original signature)
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Robert P. Lieberman 5981 Lakeside Drive Salt Lake City, Utah 84121	(1 copy)
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Alan L. Hennebold, General Counsel Labor Commission of Utah 160 East 300 South P.O. Box 1466 Salt Lake City, Utah 84114-6615	(1 copy)
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## ADDENDUM

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|--------------|--|
| Attachment A | Findings of Fact, Conclusions of Law and Order of Administrative Law Judge Richard M. La Jeunesse, dated May 24, 2000. |
| Attachment B | McKesson Corporation's Motion for Review of the ALJ's order, dated June 21, 2000                                       |
| Attachment C | Lieberman's Response to McKesson's Motion for Review of the ALJ's order  |
| Attachment D | Labor Commission's Order denying McKesson's Motion for Review, dated August 30, 2000                                   |

Tab A

# **ATTACHMENT A**

RECEIVED

MAY 25 2000

H. K. G.

UTAH LABOR COMMISSION

Case No. 99885

ROBERT P. LIEBERMAN,

Petitioner,

vs.

MCKESSON CORP.,

Respondents,

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FINDINGS OF FACT,

CONCLUSIONS OF LAW,

AND ORDER

Judge: Richard M. La Jeunesse

\*\*\*\*\*

**HEARING:** Room 336, Labor Commission, 160 East 300 South, Salt Lake City, Utah,  
on February 29, 2000, at 10:00 a.m. Said Hearing was pursuant to Order  
and Notice of the Commission.

**BEFORE:** Richard M. La Jeunesse, Administrative Law Judge.

**APPEARANCES:** The petitioner was present and represented himself pro se.

The respondents were represented by attorney Henry K. Chai II

**I. STATEMENT OF THE CASE**

The petitioner, Robert Lieberman, filed an "Application For Hearing" on September 17, 1999, and claimed entitlement to: payment of medical expenses; payment for recommended medical care, and; temporary total compensation. Mr. Lieberman's claim for workers' compensation benefits arose from an injury to his neck which he sustained on September 25, 1995.

The respondent, McKesson Corporation admitted that Mr. Lieberman injured his cervical neck which injury arose out of and within the course of his employment at McKesson. However, McKesson argued that the disabilities for which Mr. Lieberman currently claims compensation resulted from an intervening nonindustrial injury that occurred on or about May 22, 1999.

## II. ISSUES.

Were Mr. Lieberman's injuries for which he currently seeks workers' compensation benefits caused by the industrial accident of September 25, 1995, or an intervening nonindustrial accident on or about May 22, 1999?

## III. COURSE OF PROCEEDINGS.

On September 28, 1996, Mr. Lieberman and McKesson entered into a "Compensation Agreement" whereby McKesson agreed to pay Mr. Lieberman 48.6596 weeks of temporary total disability compensation for various periods between September 6, 1995, and September 18, 1996, in the total amount of \$13,965.35. The parties stipulated that \$287.00 per week constituted the compensation rate for Mr. Lieberman's temporary total disability.

McKesson also agreed to pay Mr. Lieberman \$10,707.84 in total permanent partial disability compensation at the rate of \$286.00 per week for 37.44 weeks derived from a 12% impairment to the whole person. Finally McKesson agreed to pay \$10,392.04 in medical bills incurred by Mr. Lieberman. On October 15, 1996, Judge Benjamin Sims issued a "Lump Sum Order" that accelerated the payment of the permanent total disability compensation. No dispute existed that McKesson paid all of the sums agreed to in the "Compensation Agreement."

On July 3, 1997, Mr. Lieberman filed an "Application For Hearing" with respect to his September 25, 1995 injury. Mr. Lieberman requested the payment of additional medical expenses and temporary total compensation. Mr. Lieberman claimed further temporary total disability from January 8, 1997, through April 28, 1997.

McKesson denied additional liability for Mr. Lieberman's temporary total disability between January 8, 1997, and April 28, 1997. McKesson asserted that Mr. Lieberman suffered no change in condition after the "Compensation Agreement" between the parties and therefore, the Labor Commission lacked jurisdiction to award additional, temporary total disability compensation.

On April 10, 1998, Judge Barbara Elicerio issued "Findings Of Fact, Conclusions Of Law, And Order" with respect to Mr. Lieberman's July 3, 1997 claim. Judge Elicerio found that Mr. Lieberman suffered neck pain and numb arms caused by the September 25, 1995 industrial accident that resulted in Mr. Lieberman's temporary total disability from January 8, 1997, through April 28, 1997. Consequently Judge Elicerio ordered McKesson to pay Mr. Lieberman 15.857 additional weeks of temporary total disability compensation for the period between January 8, 1997, through April 28, 1997, in the total amount of \$4,550.96. Judge Elicerio determined that \$287.00 per week constituted the compensation rate for temporary total disability. Neither party appealed Judge Elicerio's Order.



On September 17, 1999, Robert Lieberman, filed an "Application For Hearing" and claimed further entitlement to: payment of medical expenses; payment for recommended medical care, and; temporary total compensation.

#### IV. FINDINGS OF FACT

##### A. Employment, Compensation Rate, And Injury.

The parties stipulated that on September 25, 1995, Mr. Lieberman suffered two herniated disks at C5-6 and C6-7, when a 14 pound case of lotion fell from between six and seven feet onto the top of Mr. Lieberman's head. McKesson acknowledged that Mr. Lieberman's accident of September 25, 1995, arose out of and within the course of his employment with McKesson. The parties agreed, and Judge Elicerio determined, that Mr. Lieberman's rate of temporary total compensation equaled \$287.00 per week.

Dr. Robert Hood M.D. diagnosed Mr. Lieberman's injuries suffered from the accident of September 25, 1995, as: "herniated intervertebral disk at C6-7 ... Spondylosis C5-6 right." [Exhibit "J-1" p. 5]. On March 19, 1996, Dr. Hood performed the following operation to address the problems incurred by Mr. Lieberman as a result of his industrial accident:

Microsurgical anterior diskectomy, decompression, allograft, fusion and plate fixation and C5-6, C6-7. [Exhibit "J-1" p. 5].

On July 3, 1996, Dr. Hood reported that :

Rob is now three and one-half months post-op ACD, allograft interbody fusion and plate fixation C5-6-7. He is working, but the company has basically put him back to regular duty with repetitive overhead reaching and lifting, contrary to my restrictions which said no overhead repetitious lifting. In the last several days this has aggravated his neck pain ....[Exhibit "J-1" p. 20].

On April 21, 1997, Dr. Hood observed that Mr. Lieberman still suffered: "neck pain and stiffness when he has to look upward or when using his arms and hands above his head." [Exhibit "J-1" p. 23]. On February 10, 1999, Dr. Hood suspected that Mr. Lieberman had a non-union of his fusion but that his ongoing neck and shoulder pain resulted from soft tissue fatigue caused by his new job. [Exhibit "J-1" p. 24A]. Judge Elicerio in her Order of April 10, 1998, concluded as a matter of law that Mr. Lieberman suffered over three months of post-surgical, temporary total disability as a result of his industrial accident.

The uncontested evidence in this case confirmed that Mr. Lieberman suffered a nonunion of his surgical fusion and continued to experience progressive neck pain with periods of temporary total disability from his industrial accident.

**B. Subsequent Injury.**

Mr. Lieberman admitted that on two occasions, May 19, 1999, and May 22, 1999, he struck his head on the door frame of his pickup truck. Mr. Lieberman stated that the first instance on May 19, 1999, amounted to little more than a bump with no serious pain. Mr. Lieberman testified that on May 22, 1999, he hurriedly pulled himself into his pickup truck and hit his head hard on the door frame. Mr. Lieberman stated he saw a flash and fell to his knees. Mr. Lieberman could not recall whether he lost consciousness.

Mr. Lieberman submitted into evidence Exhibits "P-1" and "P-2," photographs of Mr. Lieberman entering the driver's side door of his pickup truck. Exhibits "P-1" and "P-2," illustrated that fact that given Mr. Lieberman's natural height, and the height of the truck door frame, Mr. Lieberman could easily strike his head on the door frame while routinely entering the truck. The hearing produced no evidence that the accident of May 22, 1999, resulted from Mr. Lieberman's intentional acts, recklessness, or even negligence.

Mr. Lieberman recounted that after he hit his head on May 22, 1999, he went into his house and laid down because of the pain. Mr. Lieberman averred that the pain he suffered on May 22, 1999, resembled the pain he suffered from the accident of September 25, 1995.

On June 7, 1999, Dr. Hood observed that:

He has suspected nonunion at C6-7 but was minimally symptomatic until about May 20 when he was getting into his truck, rose up and hit the edge of the door with the vertex of his scalp. The first time he hit it mildly and a few days later he hit it quite forcefully, stunning him with immediate worsening of his neck and upper back pain radiating to the upper trapezii ...He has been unable to work since May 24 at my request. [Exhibit "J-1" p. 24B].

On June 28, 1999, Dr. Michael Chung M.D. stated that:

Based upon the subjective reported history and medical records, Mr. Robert Lieberman had a significant pre-existing cervical spine disease. After an industrial injury on 9-26-95 where a box landed on his head, he suffered 2 herniated disks at the C5-6 and C6-7 levels. Unfortunately, after a conservative treatment course, his symptoms remained unchanged. On 3-19-96 Dr. Robert Hood performed an anterior cervical discectomy and fusion surgery. For 2 to 3 years after the surgery the patient appeared to have done quite well, although occasionally he would have some symptoms. With Dr. Hood, on 2-10-99, he was noted to have a nonunion at the C6-7 level. This nonunion pre-existed the 5-20-99 home incident. In my opinion, it is reasonable to assume the 5-20-99 home incident exacerbated his pre-existing cervical spine condition. [Exhibit "J-1" p. 12S].

On August 2, 1999, Dr. Hood stated:

Rob has failed to improve despite physical therapy ... Because of his failure of relief and documented non-union C6-7, I have suggested re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7. [Exhibit "J-1" p. 24D].

On September 10, 1999, Dr. Hood completed a "Summary Of Medical Record" which determined that:

There was a non-union of the fusion. About 5-20-99 patient bumped his head which caused exacerbation of the symptoms related to the non-union. [Exhibit "J-1" p. 24E].

Dr. Hood opined that a medically demonstrative causal relationship existed between Mr. Lieberman's present symptoms and the industrial injury of September 25, 1995. [Exhibit "J-1" p. 24E]. Dr. Hood concluded that because of the exacerbation of symptoms related to the non-union, Mr. Lieberman remained temporarily totally disabled from employment ongoing from May 24, 1999. [Exhibit "J-1" p. 24E]. Dr. Hood recommended additional surgery to correct the problems endured by Mr. Lieberman. [Exhibit "J-1" p. 24E].

The undisputed medical evidence in this case demonstrated that Mr. Lieberman's industrial accident of September 25, 1995 caused herniated disks at C5-6 and C6-7. On March 19, 1996, Mr. Lieberman underwent a microsurgical anterior discectomy, decompression, allograft, fusion and plate fixation at C5-6, C6-7. Mr. Lieberman suffered a non-fusion at C6-7, and remained intermittently symptomatic until May 22, 1999, when he bumped his head on the door frame of his pickup truck. The unrefuted medical evidence in this case established that the incident of May 22, 1999, caused an exacerbation of the symptoms that resulted from Mr. Lieberman's non-fusion at C6-7. The accepted medical evidence in this case revealed that Mr. Lieberman's symptoms were ultimately, causally related to his industrial accident of September 25, 1995.

**C. Recommended Medical Treatment.**

On June 28, 1999, Dr. Chung suggested that a correct diagnosis of Mr. Lieberman's problems would dictate the course of his treatment. [Exhibit "J-1" p. 12V]. On August 2, 1999, Dr. Hood, Mr. Lieberman's surgeon and treating physician, recommended that:

Because of his failure of relief and documented non-union C6-7, I have suggested re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7. [Exhibit "J-1" p. 24D].

Dr. Hood repeated this recommendation on September 10, 1999.

The undisputed medical evidence in this case confirmed that because of the nonunion at C6-7, re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7 were medically reasonable and necessary to treat Mr. Lieberman's cervical neck problems. As already established herein, Mr. Lieberman's industrial accident of September 25, 1995 caused herniated disks at the C5-6 and C6-7 levels. A surgical attempt to repair the herniated disks resulted in a nonunion of the fusion at C6-7. The incident of May 22, 1999, exacerbated the symptoms suffered by Mr. Lieberman because of the nonunion and the original injury of September 25, 1995.

**D. Period Of Temporary Total Disability.**

Dr. Hood concluded that because of the exacerbation of symptoms related to the nonunion, Mr. Lieberman remained temporarily totally disabled from employment ongoing from May 24, 1999. [Exhibit "J-1" p. 24E]. Dr. Hood recommended additional surgery to correct the problems endured by Mr. Lieberman. [Exhibit "J-1" p. 24E]. The unchallenged medical evidence in this case disclosed that Mr. Lieberman remained temporarily totally disabled from May 24, 1999 through the date of the hearing, and needed surgery to address his symptoms.

## **V. CONCLUSIONS OF LAW**

### **A. Employment, Compensation Rate, And Injury.**

On September 25, 1995, Mr. Lieberman suffered two herniated disks at C5-6 and C6-7, when a 14 pound case of lotion fell from between six and seven feet onto the top of Mr. Lieberman's head. Mr. Lieberman's herniated disks at C5-6 and C6-7 arose out of and within the course of his employment with McKesson. Mr. Lieberman's rate of temporary total compensation equaled \$287.00 per week.

### **B. Subsequent Injury.**

Mr. Lieberman's industrial accident of September 25, 1995 caused herniated disks at C5-6 and C6-7. On March 19, 1996, Mr. Lieberman underwent a microsurgical anterior discectomy, decompression, allograft, fusion and plate fixation at C5-6, C6-7. Mr. Lieberman suffered a non-fusion at C6-7, and remained intermittently symptomatic until May 22, 1999, when he bumped his head on the door frame of his pickup truck. The incident of May 22, 1999, caused an exacerbation of the symptoms that resulted from Mr. Lieberman's non-fusion at C6-7.

McKesson alleged that the incident of May 22, 1999, where Mr. Lieberman bumped his head, constituted an independent, intervening, superseding cause of Mr. Lieberman's current medical problems and disability. Therefore, McKesson argued that Mr. Lieberman was not entitled to recover any workers' compensation benefits for his present problems and disability.

Utah Code § 34A-2-401 states in relevant part that:

- (1) An employee ... who is injured ... 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 ....
  - (b) The amount provided in this chapter for;
    - (i) Medical, nurse, and hospital services;
    - (ii) medicines....

The statute plainly decrees an employee's entitlement to recover compensation for loss sustained on account of an industrial accident.

The Utah Supreme Court historically adopted the position that:

incapacity which is caused or aggravated by a second injury, received while the employee is suffering from another injury which he had received in his employment, is a result of the first injury, \*\*\* and consequently compensation may be recovered therefor. Continental Casualty Co. v. Industrial Commission, 63 Utah 59, \_\_\_, 221 P. 852, \_\_\_ (1923).

The Utah Supreme Court applied the principles enunciated in Continental Casualty on several occasions. In one case the employee, Perchelli, sustained an industrially related back injury while lifting a bucket of wet cement. Perchelli v. Utah State Industrial Commission, 25 Utah 2d 58, 59, 475 P. 2d 835, \_\_\_ (1970). Perchelli continued to endure intermittent pain after the initial industrial accident. Id. Almost two years later Perchelli suffered an aggravation to his low back pain after a sneezing episode at home. Id. Perchelli's doctors diagnosed him with a herniated disc at L5 S1 after the sneezing incident. Id. The Utah Supreme Court in Perchelli found that:

[t]here is a reasonable medical probability had he not sneezed some other major or minor episode would have triggered the actual disc herniation requiring surgery.

\*\*\*\*\*

[i]n the case of a progressive back disorder, there may be a direct causal relationship between an industrial accident and a subsequent disability, although some other episode may represent the point of time when the industrial accident ripened into a compensable injury. Perchelli v. Utah State Industrial Commission, 25 Utah 2d at 60, 475 P. 2d. at \_\_\_.

In another relevant case, the employee Palfreyman, developed thrombophlebitis after an industrial accident wherein he injured his right knee. Fruehauf Trailer, Co. v. Industrial Commission Of Utah, 16 Utah 2d 95, 96, 396 P. 2d 409, \_\_\_ (1964). Over two years after the injury to his knee, Palfreyman underwent gall bladder surgery and developed a pulmonary embolus during the operation. Id. Fruehauf argued that the gall bladder surgery constituted the direct intervening and independent cause of the pulmonary embolus and therefore Palfreyman should not recover any additional workers' compensation benefits as a result of the condition. Id. The Utah Supreme Court in Fruehauf Trailer held:

[t]he aggravating cause which flares up a previous injury need not be the result of an accident which is independently employment related. Fruehauf Trailer, Co. v. Industrial Commission Of Utah, 16 Utah 2d at 96-97, 396 P. 2d at \_\_\_.

In the present case Mr. Lieberman's industrial accident of September 25, 1995 directly caused his herniated cervical disks at C5-6 and C6-7. Mr. Lieberman's industrial accident of September 25, 1995 necessitated the microsurgical anterior discectomy, decompression, allograft, fusion and plate fixation at C5-6, C6-7. Mr. Lieberman suffered a nonfusion at C6-7 and remained intermittently symptomatic with neck pain from September 25, 1995 through May 22, 1999, when he bumped his head on the door frame of his pickup truck.

Even after the exacerbation of May 22, 1999, the medical evidence attributed the original injury of September 25, 1995 as the underlying and principle cause of Mr. Lieberman's current problems. [Exhibit "J-1" pp. 12T and 24E]. This is demonstrated by the fact that Dr. Hood's recommended medical treatment for Mr. Lieberman's present condition consisted of re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7, or a repair of the first operation. Based on Utah case law, the incident of May 22, 1999, failed to constitute an event that would relieve McKesson of liability for Mr. Lieberman's current disability and medical needs.

**C. Recommended Medical Treatment.**

Because of the nonunion at C6-7, re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7 are medically reasonable and necessary to treat Mr. Lieberman's cervical neck problems. Mr. Lieberman's industrial accident of September 25, 1995 caused herniated disks at the C5-6 and C6-7 levels. A surgical attempt to repair the herniated disks resulted in a non-union of the fusion at C6-7.

**D. Temporary Total Disability Compensation.**

Mr. Lieberman remained temporarily totally disabled from May 24, 1999 through the date of this order and ongoing. Mr. Lieberman requires additional surgery to correct the problems disabling him. Accordingly, Mr. Lieberman is entitled to receive from McKesson \$14,924.00 in temporary total disability compensation for the time period May 24, 1999 through the date of this order. [52 weeks x \$287.00/week = \$14,924.00]. McKesson should then continue to pay Mr. Lieberman \$287.00 per week ongoing until such time as he either: is medically no longer temporarily totally disabled, or; reaches medical stability, or; receives the maximum 312 weeks temporary total disability payments allowed under Utah Code § 34A-2-410 (1)(b).

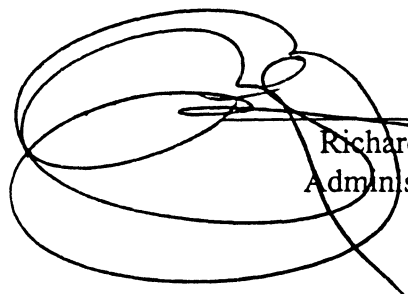
## VI. ORDER

IT IS THEREFORE ORDERED that McKesson Corporation shall pay Robert P. Lieberman temporary total disability compensation from May 24, 1999 through the date of this order, at the rate of \$287.00 per week for 52 weeks, for a total of \$14, 924.00, under Utah Code §34A-2-410. That amount is accrued, due and payable in a lump sum, plus interest at eight percent (8%) per annum, under Utah Code §34A-2-420 (3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that McKesson Corporation shall continue to pay Robert P. Lieberman temporary total disability compensation at the rate of \$287.00 per week ongoing until such time as he either: is medically no longer temporarily totally disabled, or; reaches medical stability, or; receives the maximum 312 weeks temporary total disability payments allowed under Utah Code § 34A-2-410 (1)(b).

IT IS FURTHER ORDERED that McKesson Corporation shall pay all medical expenses reasonably related to Robert Lieberman's industrial accident of September 25, 1995, including, but not limited to, re-exploration, removal of hardware, repeat interbody fusion and plate fixation at C6-7. All medical expenses shall be paid according to Utah Code § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and any travel allowances under Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, under Utah Code § 34A-2-420 (3) and Utah Administrative Code, Rule 612-2-13.

Dated this 24<sup>th</sup> day of May 2000,



Richard M. La Jeunesse  
Administrative Law Judge



**NOTICE OF APPEAL RIGHTS**

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

CERTIFICATE OF MAILING

I, Alicia Zavala-Lopez, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Findings of Fact, Conclusions of Law, And Order in the case of Robert P. Lieberman v. McKesson, Corporation, Case No. 99885 on the 24<sup>th</sup> day of May 2000, to the following:

ROBERT LIEBERMAN  
5981 LAKESIDE DRIVE  
SALT LAKE CITY UT 84121

HENRY K CHAI II ESQ  
77 WEST 200 SOUTH  
SUITE 400  
SALT LAKE CITY UT 84101

MCKESSON CORP  
ONE POST STREET  
SAN FRANCISCO CA 94104

  
Alicia Zavala-Lopez

Tab B

# **ATTACHMENT B**

HENRY K. CHAI II [606]  
KRISTY L. BERTELSEN [8148]  
BLACKBURN & STOLL, LC  
Attorneys for Respondent  
77 West 200 South, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 521-7900

10/10/00

6:01:00

---

**THE LABOR COMMISSION  
STATE OF UTAH**

---

Robert P. Lieberman,

Petitioner,

vs.

McKesson Corp

Respondent.

**RESPONDENT'S MOTION FOR REVIEW**

Honorable Richard M. La Jeunesse

Case No. 99-885

---

Respondent, McKesson Corp. moves the Labor Commission for the review of the Findings of Fact, Conclusions of Law and Order entered by administrative law judge Richard M. La Jeunesse on May 24, 2000 because Petitioner had an intervening accident that was the direct and natural cause for the benefits he now claims.

**STATEMENT OF FACTS**

1. Petitioner suffered an industrial injury to his cervical neck on September 25, 1995 while working for Respondent. The injury occurred when a fourteen pound case Petitioner lifted off a shelf fell on his head.
2. On March 19, 1996, Petitioner underwent a microsurgical anterior diskectomy, decompression, allograft, fusion and plate fixation at C5-6, C6-7. [Exh. J-1, p.5].

3. On September 28, 1996, the parties entered into a “Compensation Agreement” whereby Respondent paid Petitioner 48.6596 weeks of temporary total disability compensation for the period of September 6, 1995 to September 18, 1996. Respondent also paid Petitioner permanent partial disability compensation and medical expenses.
4. On July 3, 1997, Petitioner filed his *first* “Application For Hearing.” He claimed temporary total disability benefits from January 8, 1997 through April 28, 1997 and medical expenses. Respondent asserted that because Petitioner suffered no change in his condition after the “Compensation Agreement,” there was no basis to award additional total disability compensation. On April 10, 1998 the administrative law judge ordered Respondent to pay Petitioner an additional 15.857 weeks of temporary total disability for the period of January 8, 1997 through April 28, 1997. Respondent paid the benefits ordered.
5. On May 19, 1999, Petitioner struck his head on the door frame of his pickup truck. This did not require any medical treatment or a loss of work.
6. Immediately prior to May 22, 1999, Petitioner said that he was only having “minor problems.” [Recorded Statement, 10]. Similarly, Dr. Hood observed on June 7, 1999 that Petitioner was “minimally symptomatic” until the May 22<sup>nd</sup> accident. [Exh. J-1, p.24B]
7. On May 22, 1999 Petitioner suffered a severe cervical neck injury when he “pulled [on the steering wheel] and jumped” into his pickup truck, striking his head on the door frame with 120 pounds of thrust. [Recorded Statement, 5]. The blow to the head “knocked [Petitioner] out.” [Recorded Statement, 3.]

8. Dr. Hood agreed that Petitioner hit his head “quite forcefully, stunning him with immediate worsening of his neck and upper back pain radiating to the trapezii. He describes this now as a burning sensation....” [Exh. J-1, p.24B]
9. As a direct consequence of the symptoms that developed immediately after the May 22<sup>nd</sup> accident, Dr. Hood recommended surgery. [Exh. J-1, p.24D]
10. Petitioner was working full time in a physical labor job prior to May 22, 1999. After the May 22<sup>nd</sup> accident he tried to work on May 24<sup>th</sup> unsuccessfully. He has not worked since May 24, 1999.
11. Respondent denied coverage for the medical care and lost time for work that resulted from the May 22<sup>nd</sup> accident on that ground that it was directly and naturally caused by the May 22<sup>nd</sup> accident and not the September 25, 1995 accident.
12. On September 17, 1999 Petitioner filed his *second* “Application For Hearing” seeking medical care and temporary total compensation arising after the May 22<sup>nd</sup> accident.
13. On May 24, 2000, the Judge La Jeunesse ruled that the September 25, 1995 accident was the ultimate cause for Petitioner’s medical care and temporary total disability following the May 22<sup>nd</sup> accident.

## **ARGUMENT**

### **POINT I PETITIONER FORCIBLY STRUCK HIS HEAD ON MAY 22<sup>nd</sup>**

Only two witnesses testified at the evidentiary hearing: Petitioner and Bonnie Rockwood, the claims adjustor.

In his testimony, Petitioner admitted striking his head on the truck door while attempting to enter his vehicle. He testified that he hit his head really hard, saw a flash, and fell to his knees. He estimated that his head hit the door with 120 pounds of thrust. His son had to assist him into his house where Petitioner laid down to recover. He also testified that he was not sure that he was knocked unconscious, but he felt like he was. He denied that he was jumping into the truck at the time of the accident.

Ms. Rockwood testified that she took Petitioner's recorded statement on June 2, 1999. This was eleven days after the May 22<sup>nd</sup> accident. Petitioner did not challenge the accuracy of the transcript and Ms. Rockwood said that it was accurate. As Petitioner explained the accident to Ms. Rockwood, he "jumped up into the truck and hit [his] head this time really hard on the door jam." He saw a flash and went to the ground. And he thought the blow to his head knocked him out. [Recorded Statement, 3.] Petitioner also said that he hit his head "rather hard" [Recorded Statement 4], he "jumped up" [Recorded Statement 4,], he grabbed the steering wheel "and pulled and jumped at the same time to get into the truck" [Recorded Statement 5], and he struck his head with "120 pounds of thrust" [Recorded Statement 5].

Comparing Petitioner's testimony at the hearing with his recorded statement taken by Ms. Rockwood shortly after the accident, the only factual conflict is whether Petitioner was jumping into



his truck when he struck his head. In his recorded statement given eleven days after the accident, Petitioner said at least three times that he jumped. [Recorded Statement, 3 (line 4), 4 (line 24), and 5 (line 3).] Furthermore, Petitioner's testimony that he struck his head really hard with 120 pounds of thrust so that it knocked him out and to the ground is totally consistent with his recorded statements that he jumped into the truck.

The evidence unquestionably establishes that on May 22<sup>nd</sup> Petitioner grabbed the steering wheel of his truck and jumped up with about 120 pounds of force. During this motion, he unfortunately struck his head on the truck's door frame so hard that he saw a flash, immediately fell to the ground, and was knocked out for a moment. He had to have assistance to return to his home where he laid down to recover. In view of these facts, the administrative law judge erred in finding that the May 22<sup>nd</sup> injury was merely a "bump" to Petitioner's head. [Order, 7].

## **POINT II**

### **THE MAY 22<sup>nd</sup> INCIDENT WOULD QUALIFY AS A COMPENSABLE INDUSTRIAL ACCIDENT**

Assume that the May 22<sup>nd</sup> accident occurred on the job. Would this have made the May 22<sup>nd</sup> accident a compensable industrial injury? The blow to the head was an unintended occurrence thus making it an accident. Both Drs. Hood and Chung opined that the May 22<sup>nd</sup> accident medically caused the symptoms, lost time from work, and need for surgery which Petitioner now seeks. This leaves only the question of legal causation. Since Petitioner had a pre-existing cervical condition, the May 22<sup>nd</sup> accident must satisfy the higher legal causation standard. A blow to the head with 120 pounds of thrust certainly satisfies that standard.

### POINT III

#### THE ADMINISTRATIVE LAW JUDGE ERRED IN APPLYING THE CORRECT LEGAL STANDARD

The Utah Supreme Court has evaluated proximate causation in the workers' compensation context in a number of cases.<sup>1</sup> In Utah,

[T]he rule that the consequences of injury and disability must be attributed to the proximate cause is of universal application. Very often it is difficult to decide what is the proximate cause. "Where there are two accidents, the question of whether the disability should be attributed to the first or second accident depends on the circumstances of the particular case."

*Aetna*, 231 P. at 444 (quoting 1 Honnold, 135, p. 516).

It is well settled under Utah law that when two injuries occur, compensation will only be attributable to the first compensable injury if the subsequent injury was caused by the first accident.

*Mountain States*, 706 P.2d at 602-03. In *Aetna*, the Court said:

An act which directly produced or concurred directly in producing the injury; an immediate, direct, or efficient cause of injury; *that cause which naturally led to, and which might have been expected to produce, the result*; that from which the effect might be expected to follow *without the concurrence of any unusual circumstances*; that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; *that which, in a natural and continuous sequence unbroken by an new cause, produces that event*, and without which that event would not have occurred; that which stands next in causation to the effect—not necessarily in time or space, but in causal relation; the efficient cause; the one that necessarily sets the other causes in operation; the first direct cause producing the injury; the nearest, the immediate, the direct cause; the cause that sets another or other causes in operation, or dominant cause.

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<sup>1</sup> See generally *Mountain States Casing Serv. v. McKean*, 706 P.2d 601 (Utah 1985); *Perchelli v. Utah Ind. Comm'n*, 475 P.2d 835 (Utah 1970); *Fruehauf Trailer Co. v. Industrial Comm'n*, 396 P.2d 409 (Utah 1964); *Nielson v. Industrial Comm'n*, 236 P.2d 346 (Utah 1951); *Aetna Life Ins. v. Industrial Comm'n*, 231 P. 442 (Utah 1924); *Continental Casualty Co. v. Industrial Comm'n*, 221 P. 852 (Utah 1923) ("Sabey" case). Several commentators have also discussed this subject. See 82 Am. Jur. *Workers Compensation* §§ 251, 368; 1 Larsons, *Workers Compensation* §§ 10.01 to 10.09; 99 C.J.S. *Workmen's Compensation* §180.

*Aetna*, 231 P. at 444 (emphasis added). And in *Makoff Co. v. Industrial Comm'n*, 368 P.2d 70 (Utah 1962) the court held that “a subsequent aggravation ... of a previous injury is compensable [and attributable to the first injury only] if it is demonstrated that there was a causal relation between the two”.

A causal connection between two injuries exists if the second injury is the “natural result” or consequence of the first injury. Thus, a blister to right thumb after reattachment surgery of the arm below the elbow did not break chain of causation because it was natural consequence of first injury. *Mountain States*, 706 P.2d at 602. Nor does a sneeze break the chain of causation. *Perchelli v. Utah Ind. Comm'n*, 475 P.2d 835 (Utah 1970). And the development of pulmonary emboli following surgery does not break chain of causation as it was natural risk associated with claimant’s injury. *Fruehauf Trailer Co. v. Industrial Comm'n*, 396 P.2d 409 (Utah 1964). However, when a subsequent injury is attributable to the claimant’s own negligence or fault, the claimant’s act is deemed to be a superceding, intervening event which breaks the chain of causation. See Am.Jur.2d at § 368; Larson at § 10.06[3]; see also *Mountain States*, 706 P.2d at 603.

Before further evaluating the application of the workers compensation proximate cause test in this case, it must be observed that this test distinguishes which exacerbations are of such legal significance as to shift liability from the first to the second event. The underlying assumption of this test is that the injury caused by the second event is always ultimately and causally connected to the injury caused by the first event. Thus it does not advance the analysis to state the obvious that the subsequent injury ultimately and causally follows the first injury.

The administrative law judge ruled that although the May 22<sup>nd</sup> injury caused a permanent and significant exacerbation of Petitioner’s cervical condition, Respondent was responsible because the

underlying cervical condition was ultimately caused by the September 25, 1995 accident. This is not the test required by the court. This only states the obvious problem created by the May 22<sup>nd</sup> accident. The correct test is whether the medical condition after the May 22<sup>nd</sup> accident directly and naturally followed the May 22<sup>nd</sup> accident or the September 25, 1995 accident.

Immediately prior to the May 22<sup>nd</sup> accident Petitioner was working full-time with minimal problems. He did not need surgery. Immediately after the May 22<sup>nd</sup> accident Petitioner had a permanent exacerbation of his symptoms. He could no longer work and needed surgery. Nothing shows that he would have stopped working or needed surgery had he not forcibly struck his head on May 22<sup>nd</sup>. The May 22<sup>nd</sup> accident was a significant event caused by Petitioner's fault. It was of sufficient magnitude that it would have constituted a new industrial injury had it happened on the job. And the May 22<sup>nd</sup> blow to the head with 120 pounds of thrust was certainly more significant than the blow to the head from a fourteen pound box falling from a shelf while being lifted. All this requires the conclusion that post May 22<sup>nd</sup> problems were not the direct and natural result of the September 25, 1995 accident. Rather, they were the direct and natural result of the May 22<sup>nd</sup> accident.

The administrative law judge analogized to *Perchelli* and *Fruehauf* in support of his decision. In *Perchelli* the court understandably found that a reinjury following a sneeze was a natural medical risk of the . However a sneeze is certainly far different from a substantial blow to the head. In *Fruehauf*, the employee developed pulmonary emboli which are a natural medical risk of the employee's lower extremity surgery. Again, this has no relationship to a new accident involving a severe blow to the head.

#### POINT IV

#### THE NATURAL CONSEQUENCES OF THE ORDER WILL LEAD TO ERRONEOUS DECISIONS IN FUTURE CASES

The administrative law judge ruled that the May 22<sup>nd</sup> accident did not constitute a legally sufficient intervening event that would relieve Respondent of responsibility for the medical care and lost time caused by the May 22<sup>nd</sup> accident. To more clearly see the problem with this legal conclusion simply assume that the September 25, 1995 injury when the fourteen pound box fell on Petitioner's head *happened at home*. Next assume that the May 22<sup>nd</sup> accident while jumping into a truck *happened at work*. Would the Labor Commission allow an employer to deny liability for the May 22<sup>nd</sup> blow to the head with 120 pounds of thrust on the ground that the injury was "ultimately, causally related" to the September 25<sup>th</sup> event? Certainly not. Or assume that the both accidents had happened at work. Would the Labor Commission allow the second employer to avoid liability for the same reason? It would not.

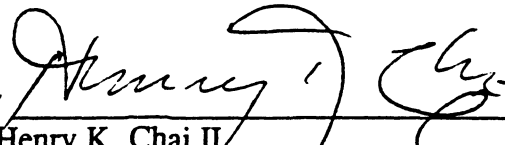
If the Labor Commission upholds the administrative law judge's legal analysis, it would be difficult, if not impossible, for a subsequent accident to the same body part (whether industrial or not), to ever be compensable. To distinguish this case from the next on the basis of whether the second accident happened at work would be specious because causation has nothing to do with employment. And it would be very difficult to distinguish this case from the next on the basis of the severity of the event since any new event would need to exceed the severity of a blow to the head with 120 pounds thrust. The Labor Commission must reverse the administrative law judge's legal analysis or face an onslaught of "ultimate, causally related" denials for pre-existing conditions.

### CONCLUSION

Petitioner had a severe accident on May 22<sup>nd</sup> totally independent by way of cause from his September 25, 1995 accident. This new accident caused a permanent aggravation of Petitioner's pre-existing condition. He could no longer work and he needed surgery. The May 22<sup>nd</sup> accident constitutes a new intervening event that is the direct and natural cause of the permanent aggravation. Respondent is not responsible for the medical expenses and lost time resulting from this new event. The Labor Commission should reverse the May 24, 2000 Findings of Fact, Conclusions of Law, and Order and, in its stead, issue an order denying the benefits Petitioner now seeks.

DATED this 21<sup>st</sup> day of June 2000.

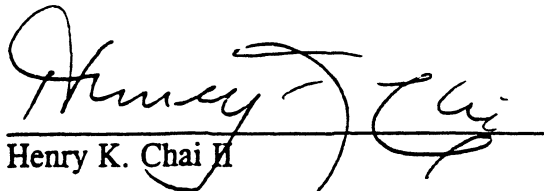
BLACKBURN & STOLL, LC

By   
Henry K. Chai II  
Attorneys for Respondent

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of RESPONDENT'S MOTION FOR REVIEW was mailed, first class, postage prepaid on June 21, 2000, to:

Robert P. Lieberman  
5981 Lakeside Drive  
Salt Lake City, UT 84121

  
Henry K. Chai II

Tab C

# **ATTACHMENT C**



Robert P. Lieberman  
5931 Lakeside Dr.  
SLC, UT 84121  
Telephone (801) 963-0353  
Page 1

RECEIVED

JUL 10 2000

H. K. C.

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THE LABOR COMMISSION  
STATE OF UTAH

---

Robert P. Lieberman,

Petitioner's Response to:

Respondents Motion for review.

VS.

Case No. 99-885

McKesson Corp.

Respondent.

---

I Robert P. Lieberman (Petitioner)

If I may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review.

In response to Respondent's. statement of facts. They are not all factual.

The interviewing accident I had on the 22<sup>nd</sup> of May, 1999 is not the Direct

And natural cause for benefits I now claim. Direct means having no

compromising or impairing elements. Natural: means without artificial aid.

I was in pain on the 22<sup>nd</sup> of May, 1999 when I struck my head on the door jam of my Dodge Ramcharger.

Petitioner's response to Respondents so called Facts.

STATEMENT OF FACT

**FACT 1:** It was a 14 pound case that was stacked on another 14lb Case. Which fell after I was on the ground 7" feet below. I was looking at 14 Pound case I was holding. I had a baseball hat on and did not see or hear Case fall. It was a 2or 3 second delay

**2. FACT: RIGHT**

**3. FACT: RIGHT**

**4. FACT:**

Suffered no change Respondent states Dr Hood report on 1-08-97  
{EXH. JJ records page 020,022,023} McKesson failed to go by Dr Hood's  
orders. No over head reaching. Dr. Chung said although he was provided  
work restrictions to avoid overhead activities, unfortunately  
by his employer (McKesson), did not accommodate. {EXH. Index medical records  
page 12Q} I was in pain.

**5. FACT:**

No medical treatment. I already had an appointment with Dr. Hood for the 7<sup>th</sup> of June,  
1999 because of the NON-UNION. I was in pain.. I can feel it moving at C6-7:  
Dr Hood {EXHJJ 24A.} I think there maybe a NON-UNION.  
Retrospectively this has never looked quite as solid a C5-6 and on flexion views, I believe that  
there is movement of the spinous processes at this level.  
Under this comment; I would not recommend re-operation with repeat fusion at C6-7 at this  
time but, if any Hardware failure does occur or his symptoms markedly increase, this may  
have to be considered in the future. He will be seen, for follow -up in about three months.

**5. FACT:**

Minor problems can be paralysis, sharp pain and stiffness. {EXH. I.TM.R  
Page 023,24A} Minimally symptomatic but, do to the plate cadaver bone and screws in my  
neck, this is the causation for my increasing Pain.

**7. FACT:**

It is May 22, 1999 And not May 22, 2999 that I got into my Dodge Ramcharger striking  
the my head on the top of the door frame with a 120 pounds of thrust at the ground. I  
estimated this by lunging forward with my 160 pound body.  
Recorded statement I was never asked if I was on medication. I was, because I was in  
Pain. Jumped. I don't think so. See {EXH. Picture 1 AND Picture 2.}

**8. FACT:**

It was powerful and motivating, making me aware of my **NON-UNION**. And the seriousness of my pre-existing cervical problems. The strength or energy exerted brought to bear a cause of motion or change and a exacerbation of the symptoms related to the **NON-UNION**.

**9. FACT:**

Is it all that direct? Having No Compromising or impairing element. was there any artificial aid? Did Dr. Hood say as a direct consequence of the symptoms that developed immediately after the May. 22<sup>nd</sup> accident that I needed surgery? {EXH. PAGE 24D.} We, need to look at {EXH. PAGE 24A, 24B, 24C AND 24D.}

**10. FACT**

**11. FACT**

**12. FACT**

**ARGUMENT POINT 1**

I came to conclusion of 120 pounds by putting foot on a scale and thrusting forward. I weigh 160 pounds, Scale went up to 120. That's ground force. My son assisting me, I said he did his best for a 40 pound 6 year old he was concerned.

When I gave Ms. Rockwood my taped interview by telephone. I was heavily medicated at the time and I was in a lot of pain. I said jump, but I did not jump.

The judge said merely a bump for the May 19, 1999 accident not the May 22, 1999 see conclusions of law and order page 4 subsequent injury.

### POINT 11

Dr. Chung in my opinion, it is reasonable that the 5-20-99 home incident exacerbated his pre-existing cervical spine disease. {EXH. Index to medical records page 12 T.} The respondent say, Dr. Hood and Chung opined that the May 22<sup>nd</sup> accident medically caused the symptoms, lost time from work and need for surgery. Where does it say this Mr. Chai? Don't waste my time and others money. Fact is Fact, what you want to believe is another thing. How much more pain and causation do you need? Dr. Hood because of his failure of relief and **DOCUMENTED NON-UNION** at C6-7 I have suggested re-exploration. {EXH. Index to medical records page 24D}

### POINT 111

A sneeze is certainly far different from a blow to the head. When you sneeze there is a G- force involved, about 3Gs: Everytime I sneeze I see flash and lay down. There are natural medical risks in day to day living, like a 6 year old hitting you in the head with a pillow.

### POINT IV

Let's assume I had a neck that was supported by a plate <sup>3</sup>/<sub>4</sub> of a inch by 2 inches with 5 screws holding my neck together, Broke, the natural result and causation would be paralysis. Would C.W Reese or McKesson want to pay for expenses? Which would include items like, Ramps, custom wheelchairs, beds and retrofitting a car so I could get around. Not to mention the priceless time that I spend with my children, which would be lost. They would not

### CONCLUSION

Respondent wants to be, released from all responsibilities. The Appeals Board of Commission, should not reverse the May 24<sup>th</sup>, 2000 finding of Fact.

Tab D

# **ATTACHMENT D**

RECEIVED

APPEALS BOARD  
UTAH LABOR COMMISSION

AUG 31 2000

ROBERT P. LIEBERMAN,

Applicant,

v.

MCKESSON CORP.,

Defendant.

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H. K. C.  
ORDER DENYING  
MOTION FOR REVIEW

Case No. 99-0885

McKesson Corp. asks the Appeals Board of the Utah Labor Commission to review the Administrative Law Judge's award of benefits to Robert P. Lieberman under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

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

**ISSUE PRESENTED**

Is Mr. Lieberman entitled to receive workers' compensation benefits for his current neck condition, which condition arises from a non-work accident that exacerbated a prior work related injury?

**FINDINGS OF FACT**

The Appeals Board adopts the findings of fact set forth in the ALJ's decision, summarized as follows.

While employed by McKesson on September 25, 1995, Mr. Lieberman was involved in an accident that resulted in injuries to his neck. McKesson accepted liability under the Utah Workers' Compensation Act for Mr. Lieberman's injuries and paid benefits accordingly. Mr. Lieberman underwent surgery on March 19, 1996, consisting of discectomy, decompression, allograft, fusion and plate fixation at the C5-6 and C6-7 levels of his spine. After the surgery, Mr. Lieberman continued to experience some neck and back pain. Ultimately, it was determined that the graft and fusion had been successful at the C5-6 level of his spine, but unsuccessful at the C6-7 level. Nevertheless, Mr. Lieberman returned to work for a new employer prior to the events of May 22, 1999, described below.

**ORDER DENYING MOTION FOR REVIEW**  
**ROBERT P. LIEBERMAN**  
**PAGE 2**

On May 22, 1999, while entering his pickup truck at his home, Mr. Lieberman forcefully hit his head on the top of the door frame.<sup>1</sup> The blow stunned him and he experienced immediate worsening of his neck and back pain. Dr. Hood, Mr. Lieberman's treating physician, has described the relationship between Mr. Lieberman's original work injuries and his current condition as follows:

Patient underwent surgery 3-19-96 for original injury; however, there was non-union of the fusion. About 5-20-99 patient bumped his head which caused exacerbation of the symptoms related to the non-union.

Dr. Chung, who examined Mr. Lieberman on behalf of McKesson, agreed that Mr. Lieberman's non-work accident of May 22, 1999, exacerbated Mr. Lieberman's work-related neck condition.

As a result of the foregoing events, Dr. Hood has recommended additional surgery to fuse Mr. Lieberman's spine at the C6-7 level. Because of his neck injury and need for surgery, Mr. Lieberman has been unable to work since May 24, 1999.

**DISCUSSION AND CONCLUSIONS OF LAW**

Section 34A-2-401 of the Utah Workers' Compensation Act requires employers and their insurance carriers to provide workers' compensation benefits for employees injured by accident arising out of and in the course of employment. Thus, McKesson is liable for workers' compensation benefits arising from Mr. Lieberman's work accident and injuries of September 25, 1995. What is in question is whether McKesson is also liable for the exacerbation of Mr. Lieberman's injuries that resulted from his non-work accident of May 22, 1999.

The Utah Supreme Court considered a similar situation in Mountain States Casing Services v. McKean, 706 P.2d 601 (Utah 1985). There the Court stated the following principle:

A subsequent injury is compensable if it is found to be a natural result of a compensable primary injury. McKean is not required to show that his original tragedy was the sole cause of a subsequent injury, but only that the initial work-related accident was a contributing cause of his subsequent . . . injury. (Citations omitted.)

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The Appeals Board notes Mr. Lieberman's statement that his head hit the door frame with 120 pounds of thrust. However, Mr. Lieberman's method for computing the exact force of impact has not been established as scientifically valid. Consequently, while the Appeals Board accepts Mr. Lieberman's testimony that he "forcefully" hit the door frame, the Appeals Board does not accept his testimony that he hit the door frame with "120 pounds of thrust."



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**ROBERT P. LIEBERMAN**  
**PAGE 3**

In Larson's Workers' Compensation Law, §10.15, p. 10-12, Professor Larson reviews decisions from several states, including Utah, and concludes the following test should be applied to claims such as Mr. Lieberman's:

When . . . the injury following the initial compensable injury does not arise out of a quasi-course activity,<sup>2</sup> . . . the chain of causation may be deemed broken by either intentional or negligent claimant misconduct.

As to what constitutes "negligence" for purposes of the foregoing standard, Professor Larson indicates it "often takes the form of rashly undertaking a line of action with knowledge of the risk created by the weakened member." Larson at §10-06(3), p. 10-18.

Applying the foregoing standard to Mr. Lieberman's current claim, the evidence establishes that Mr. Lieberman's work accident and injury in 1995 resulted in a weakened condition of his neck. Specifically, Mr. Lieberman was left with continuing neck and back pain as well as a failed graft and fusion at the C6-7 level of his spine. Mr. Lieberman's non-work accident in 1999, when he hit his head on his pickup door frame, acted on the weakened neck and exacerbated the pre-existing condition.

Next, it is necessary to determine whether Mr. Lieberman's action in getting into his pickup was "negligent" so as to break the chain of causation between his work accident of September 25, 1995, and his current injuries. There is no indication that Mr. Lieberman acted in a rash or foolhardy manner in entering his pickup; rather, the event appears to be a simple accident brought on by ordinary error or unintentional miscalculation. The Appeals Board concludes Mr. Lieberman was not negligent and that his non-work accident in 1999 does not break the chain of causation between his 1995 work accident and his current injuries.

In summary, the Appeals Board concludes that the injuries for which Mr. Lieberman now seeks benefits are a natural result of his primary compensable injury and are therefore compensable.

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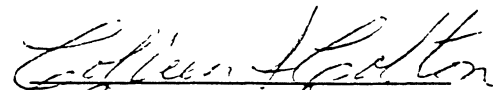
<sup>2</sup> In using the term "quasi course," Professor Larson refers to ". . . activities undertaken by the employee following upon his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury." Quasi-course activities included activities such as trips to doctors' offices, taking medicine and similar activities. See Larson's Workers' Compensation, §10-05, p. 10-11


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**PAGE 4**


**ORDER**

The Appeals Board affirms the decision of the ALJ and denies McKesson's motion for review. It is so ordered.

Dated this 30<sup>th</sup> day of August, 2000.

  
Colleen S. Colton, Chair

  
L. Zane Gill

  
Patricia S. Drawe

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW  
ROBERT P. LIEBERMAN  
PAGE 5

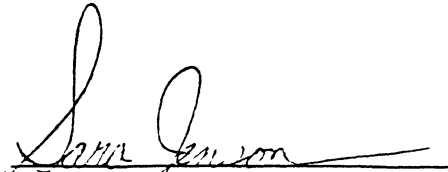
CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Robert P. Lieberman, Case No. 99-0885, was mailed first class postage prepaid this 20 day of August, 2000, to the following:

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