

2000

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Alan L. Hennebold; Robert Lieberman appellee pro se.

Henry K. Chai II, Kristy L. Bertelsen; Blackburn & Stoll; attorney for appellants.

---

### Recommended Citation

Brief of Respondent, *McKesson Corp v. Lieberman*, No. 20000800 (Utah Court of Appeals, 2000).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/2902](https://digitalcommons.law.byu.edu/byu_ca2/2902)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

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

---

BRIEF OF RESPONDENT, LABOR COMMISSION OF UTAH

---

Petition for Review from the  
Labor Commission of Utah

---

Henry K. Chai, II  
Kristy L. Bertelsen  
BLACKBURN & STOLL, LC  
77 West 200 South, Suite 400  
Salt Lake City UT 84101-1609  
Attorneys for Petitioners

Alan Hennebold  
UTAH LABOR COMMISSION  
160 East 300 South, 3<sup>rd</sup> Floor  
P O Box 146600  
Salt Lake City, Utah 84114-6600

Robert Lieberman, pro se  
5981 Lakeside Drive  
Salt Lake City UT 84121

**FILED**  
Utah Court of Appeals

JAN 29 2001

Paulette Stagg  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

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

---

BRIEF OF RESPONDENT, LABOR COMMISSION OF UTAH

---

Petition for Review from the  
Labor Commission of Utah

---

Henry K. Chai, II  
Kristy L. Bertelsen  
BLACKBURN & STOLL, LC  
77 West 200 South, Suite 400  
Salt Lake City UT 84101-1609  
Attorneys for Petitioners

Alan Hennebold  
UTAH LABOR COMMISSION  
160 East 300 South, 3<sup>rd</sup> Floor  
P O Box 146600  
Salt Lake City, Utah 84114-6600

Robert Lieberman, pro se  
5981 Lakeside Drive  
Salt Lake City UT 84121

## TABLE OF CONTENTS

JURISDICTION .....	1
ISSUES AND STANDARDS OF REVIEW .....	1
1.    Where a worker has suffered a compensable work-related injury, what standard is applied to determine the worker’s right to additional compensation for a subsequent exacerbation of the primary injury? .....	1
2.    Has the Appeals Board reasonably applied the correct legal standard to Mr. Lieberman’s claim? .....	2
DETERMINATIVE STATUTE .....	3
STATEMENT OF THE CASE .....	4
Nature of the Case .....	4
Course of Proceedings .....	4
Statement of Facts .....	4
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	7
POINT ONE: THE WORKERS’ COMPENSATION ACT IS LIBERALLY CONSTRUED IN FAVOR OF COMPENSATION .....	7
POINT TWO: UNDER PRIOR DECISIONS OF UTAH’S APPELLATE COURTS, MR. LIEBERMAN’S NON-WORK INJURY IS COMPENSABLE IF IT IS THE <u>DIRECT AND NATURAL RESULT</u> OF A COMPENSABLE PRIMARY INJURY. ....	9
POINT THREE: THE <u>ALLEN</u> TEST FOR LEGAL CAUSATION DOES NOT APPLY TO MR. LIEBERMAN’S CURRENT CLAIM. ....	11
POINT FOUR: THE COMMISSION REASONABLY CONCLUDED THAT THE EXACERBATION OF MR. LIEBERMAN’S CERVICAL SPINE INJURY WAS THE NATURAL AND DIRECT RESULT OF HIS PRIMARY WORK- RELATED INJURY. ....	12
CONCLUSION .....	15

## TABLE OF AUTHORITIES

### CASE LAW

Allen v. Industrial Commission	
729 P.2d 15 (Utah 1986) .....	5, 6, 11, 12
Burgess v. Siaperas Sand & Gravel	
965 P.2d 583 (Utah App. 1998) .....	8
Chandler v. Industrial Commission	
184 P. 1020 (Utah 1919) .....	7
Drake v. Industrial Commission	
939 P.2d 177 (Utah 1997) .....	2, 3
Esquivel v. Labor Commission	
7 P.3d 777 (Utah 2000) .....	2
Heaton v. Second Injury Fund	
796 P.2d 676 (Utah 1990) .....	8
Intermountain Health Care v. Industrial Commission	
839 P.2d 841 (Utah App. 1992) .....	6, 9, 10, 11, 12
Maryland Cas. Co. v. Industrial Comm.	
12 Utah 2d 223, 364 P.2d 1020 (Utah 1961) .....	7
Olsen v. Samuel McIntyre Inv. Co.	
956 P.2d 257 (Utah 1998) .....	8
Osman Home Improvement v. Industrial Commission	
958 P.2d 240 (Utah App. 1998) .....	5
Park Utah Consol. Mines v. Industrial Commission	
84 Utah 841, 36 P.2d 979 (Utah 1934) .....	7
Walls v. Industrial Commission	
857 P.2d 964 (Utah App. 1993) .....	8

### STATUTES

Utah Code Ann. §34A-2-401(1) .....	1, 3, 5
Utah Code Ann. §34A-2-801(8) .....	1
Utah Code Ann. §78-2a-3(2)(a) .....	1

### OTHER

1 Larson's Workers' Compensation Law §10.01 .....	9, 11
---	-------

## **JURISDICTION**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(a) and Utah Code Ann. §34A-2-801(8).

## **ISSUES AND STANDARDS OF REVIEW**

**1. Where a worker has suffered a compensable work-related injury, what standard is applied to determine the worker's right to additional compensation for a subsequent exacerbation of the primary injury?**

Section 34A-2-401(1) of the Utah Workers' Compensation Act ("the Act" hereafter) provides medical and disability benefits to workers "injured by accident arising out of and in the course of" employment. Here, Mr. Lieberman injured his cervical spine while employed by McKesson. He then exacerbated the cervical spine injury in a subsequent non-work accident. This Court is asked to identify the correct legal standard to be used to determine if Mr. Lieberman is entitled to workers' compensation benefits for the non-work exacerbation of his work-related injury.

Preservation of Issue For Appeal: McKesson raised this issue in its motion for review to the Appeals Board of the Utah Labor Commission, thereby preserving the issue for judicial appellate review. (See McKesson's motion for review to the Appeals Board, included as Addendum B in McKesson's initial brief.)

Standard of Review: Appellate courts are vested with the authority to determine the law. Consequently, this Court will not defer to the Appeals Board's selection of the legal

standard to apply to Mr. Lieberman's claim, but will instead apply a "correctness" standard and determine the proper legal standard for itself. Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah 1997); Esquivel v. Labor Commission, 7 P.3d 777, 780 (Utah 2000).

**2. Has the Appeals Board reasonably applied the correct legal standard to Mr. Lieberman's claim?**

Assuming the Appeals Board selected the correct legal standard for evaluating Mr. Lieberman's claim, has the Appeals Board reasonably applied that standards to the facts of the claim?

Preservation of Issue For Appeal: By necessary implication, this issue was raised in McKesson's motion for review to the Appeals Board, thereby preserving the issue for appellate judicial review. (See McKesson's motion for review to the Appeals Board, set forth as Addendum B in McKesson's initial brief.)

Standard of Review: In Drake v. Industrial Commission, 939 P.2d at 182, a workers' compensation case requiring the application of the "special errand rule," the Utah Supreme Court stated:

. . . a trial court's or agency's application of the law to the facts may, depending on the issue, be reviewed by an appellate court 'with varying degrees of strictness, falling anywhere between a review for 'correctness' and a broad 'abuse of discretion' standard.

(Citations omitted.) The Court then concluded that in cases where: 1) the issue in dispute is fact-intensive and 2) there are only a limited number of appellate decisions to provide

guidance, it is appropriate to extend “heightened deference” to the Commission’s application of law to fact. *Id.*

As in Drake, the issues presented by Mr. Lieberman’s claim are fact-intensive. Also as in Drake, Utah’s appellate courts have had few occasions to address the particular facts of other claims similar to Mr. Lieberman’s claim. Consequently, the same considerations that prompted the Utah Supreme Court to give “heightened deference” to the Commission’s application of law to fact in Drake support a similar deference to the Commission’s application of law to the facts of Mr. Lieberman’s claim.

#### **DETERMINATIVE STATUTE**

Section §34A-2-401(1) of the Utah Workers’ Compensation Act<sup>1</sup> establishes the general standards by which an injured worker can qualify for benefits under the Act:

Each employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee’s employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse and hospital services and medicines, and, in the case of death, such amount of funeral expenses, as provided in this chapter.

---

<sup>1</sup>

The Utah Workers’ Compensation Act was recodified effective July 1, 1997, 21 months after Mr. Lieberman’s work accident. However, the 1997 recodification made no substantive changes to the material provisions of the Act. The Commission’s brief will refer to the current version of the Act.



## STATEMENT OF THE CASE

Nature of the Case: McKesson seeks review of the Commission's award of benefits to Mr. Lieberman. Specifically, McKesson challenges 1) the legal standard selected by the Commission to determine whether Mr. Lieberman is entitled to benefits and 2) the Commission's application of that standard to the facts of Mr. Lieberman's claim.

Course of Proceedings: On September 25, 1995, Mr. Lieberman accidentally injured his cervical spine while working for McKesson. McKesson accepted liability under the Utah Workers' Compensation Act and paid benefits accordingly. (Addendum A, p. 3)

On May 22, 1999, Mr. Lieberman exacerbated his work-related injury in a non-work accident. (Addendum A, p. 4) McKesson denied Mr. Lieberman's claim for additional benefits. (R. 7, 8) Mr. Lieberman then filed an Application For Hearing with the Commission. (R. 1)

On May 24, 2000, the ALJ awarded benefits to Mr. Lieberman (Addendum A; R. 21-32) McKesson filed a motion for Commission review of the ALJ's decision. (R. 33-42) On August 30, 2000, the Commission denied McKesson's motion for review and affirmed the ALJ's decision. (Addendum B; R. 51-55) McKesson then filed a timely petition for appellate judicial review of the Commission's decision with this Court.

Statement of Facts: In denying McKesson's motion for review, the Commission adopted the ALJ's findings of facts *in toto*. McKesson has not raised the Commission's findings of fact as an issue for appellate review. Specifically, McKesson has not identified

any factual error nor attempted to marshal the evidence against any of the Commission's findings. Consequently, the Commission's findings of fact are conclusive for purposes of this proceeding. Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 241, footnote 1 (Utah App. 1998).

Nevertheless, the "statement of facts" set forth in McKesson's brief is not an entirely accurate representation of the facts as determined by the Commission. The Commission therefore respectfully refers this Court to Addendum A, attached, which contains the complete text of the ALJ's findings, as adopted by the Commission.

### SUMMARY OF ARGUMENT

Section 34A-2-401(1) of the Act requires payment of medical and disability benefits to workers "injured by accident arising out of and in the course of" their employment. In this case, Mr. Lieberman suffered a compensable work-related injury while employed by McKesson. He then exacerbated that work-related injury in a subsequent non-work accident. The ultimate question before this Court is whether Mr. Lieberman, who has received benefits for his primary work-related injury, is also entitled to additional benefits for the subsequent non-work exacerbation of that injury.

McKesson argues, incorrectly, that Mr. Lieberman's claim for benefits for the exacerbation of his work-related injuries should be judged under the test for legal causation set forth in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The Allen test for legal causation determines the compensability of a **primary** work accident; the Allen test

is not properly applied in a case such as this, where the issue is the compensability of a non-work **exacerbation** of the compensable primary injury.

While the Allen test does not apply to Mr. Lieberman's current claim, prior decisions of Utah's appellate courts have set out the test that does apply. The courts have held secondary injuries to be compensable if they are the "direct and natural result" of a compensable primary injury. Intermountain Health Care v. Industrial Commission, 839 P.2d 841 (Utah App. 1992)

In applying the "direct and natural result" test to Mr. Lieberman's claim, the Appeals Board relied on uncontroverted medical evidence that Mr. Lieberman's initial work accident left him with a failed cervical fusion. This failed cervical fusion was then exacerbated by a non-work accident. The uncontroverted medical evidence also established a medically demonstrable causal relationship between Mr. Lieberman's primary work-related accident and his current symptoms. The Appeals Board also carefully considered the circumstances and conditions of Mr. Lieberman's non-work accident and found that Mr. Lieberman's actions were not negligent so as to cut the chain of causation between his primary work injuries and the subsequent exacerbation of those injuries.

In summary, the Appeals Board applied the correct legal standard to the uncontroverted facts of Mr. Lieberman's claim. Consistent with the long-established principle that the Utah Workers' Compensation Act is to be liberally construed in favor of

compensation, the Appeals Board reasonably concluded that Mr. Lieberman's current injuries are compensable as the direct and natural result of his earlier work-related injury.

## **ARGUMENT**

### **POINT ONE: THE WORKERS' COMPENSATION ACT IS LIBERALLY CONSTRUED IN FAVOR OF COMPENSATION.**

The Utah Workers' Compensation Act is liberally construed in favor of coverage and compensation. In Chandler v. Industrial Commission, 184 P. 1020, 1021 (Utah 1919), decided only a few years after enactment of the Utah Employers' Liability Act (predecessor to the Utah Workers' Compensation Act), the Utah Supreme Court applied this principle of liberal construction, stating: "Upon the question that the Employers' Liability Act should be liberally construed so as to effectuate its purposes, all courts agree." (Citation omitted.)

After Chandler, Utah's appellate courts continued to apply the principle. For example, in Park Utah Consol. Mines v. Industrial Commission, 84 Utah 841, 36 P.2d 979, 981 (Utah 1934), the Utah Supreme Court stated:

If there is any doubt "respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be."  
(Citing Chandler v. Industrial Commission, *supra*.)

Likewise, in Maryland Cas. Co. v. Industrial Comm., 12 Utah 2d 223, 364 P.2d 1020, 1022 (Utah 1961), the Utah Supreme Court explained the policy reasons behind the principle of liberal construction:

These purposes inhere in (the Act): that injuries suffered in employment should be spread throughout and be borne by industry; and that compensation should be provided to alleviate economic hardship falling on injured workers

and their dependents, which in turn has a beneficial effect in stabilizing the economy. . .

To accomplish its salutary purposes, the Act should be liberally construed in favor of coverage of the claimant.

More recently, in Heaton v. Second Injury Fund, 796 P.2d 676, 679 (Utah 1990), the

Court stated:

It is the duty of the courts and the commission to construe the Workers' Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction.

Recently, both the Utah Supreme Court and this Court have reaffirmed the continued vitality of the principle of liberal construction: See Olsen v. Samuel McIntyre Inv. Co. 956 P.2d 257 at 260 (Utah 1998); see also Burgess v. Siaperas Sand & Gravel, 965 P.2d 583, 588 (Utah App. 1998).

So, for the last 80 years, Utah's appellate courts have enforced "the common law principle of liberal construction in favor of injured employees that is at the heart of the Act." Burgess, 965 P.2d at 588.

The Commission recognizes that this principle of liberal construction does not mean that compensation should be allowed in every claim. Walls v. Industrial Commission, 857 P.2d 964, (Utah App. 1993). However, in cases such as Mr. Lieberman's, where a natural and direct connection exists between his employment at McKesson and the injuries for which he seeks compensation, the principle of liberal construction supports the Commission's conclusion that Mr. Lieberman is entitled to compensation.

**POINT TWO: UNDER PRIOR DECISIONS OF UTAH'S APPELLATE COURTS, MR. LIEBERMAN'S NON-WORK INJURY IS COMPENSABLE IF IT IS THE DIRECT AND NATURAL RESULT OF A COMPENSABLE PRIMARY INJURY.**

There is no dispute that Mr. Lieberman is entitled to workers' compensation benefits for injury to his cervical spine arising from his work-related accident at McKesson on September 25, 1995. What is in dispute is Mr. Lieberman's right to additional benefits for the exacerbation of his cervical spine injury that resulted when he hit his head on the door frame of his pickup truck. This Court is asked to determine the proper standard to be applied in adjudicating Mr. Lieberman's current claim for additional benefits.

This is not an entirely new issue. 1 *Larson's Workers' Compensation Law*, §10.01 ("Direct and Natural Consequence Rule") has compiled decisions on the issue and arrived at following conclusion:

A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. . . . But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "**direct and natural results**," and of the claimant's own conduct as an independent intervening cause.

(Emphasis added.)

This Court's decision in Intermountain Health Care, 839 P.2 841, also identifies the "direct and natural result" standard as applicable to claims such as Mr. Lieberman's. In that case, Taylor, the applicant, injured her back while working for Intermountain Health Care

("IHC"). IHC accepted liability and paid workers' compensation benefits. Two years after her primary accident, Taylor experienced severe pain when, while at home, she attempted to lift her grandchild. IHC refused to pay additional workers' compensation benefits on the grounds that the injuries Taylor experienced after her non-work accident were not sufficiently related to her earlier work accident.

This Court rejected IHC's argument and affirmed the Commission's award of benefits, stating:

We do not agree with IHC that the correct standard for determining employer liability for subsequent injuries occurring after an industrial injury essentially amounts to a "but for" analysis. In *Mountain States Casing Servs. v. McKean*, 706 P.2d 601 (Utah 1985), the Utah Supreme Court stated that "[a] subsequent injury is compensable if it is found to be a *natural result* of a compensable primary injury." *Id.* at 602 (emphasis added). A claimant "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 the subsequent injury. *Id.* (Emphasis added). *McKean* and *Perchelli* both draw from Larson's statement of the general rule regarding workers' compensation, which provides in pertinent part:

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. (Citing 1 Larson, *Workmen's Compensation Law*, §13.11 (1992).

Intermountain Health Care, 839 at 845.

Thus, this Court's decision in Intermountain Health Care answers the fundamental question raised in McKesson's petition for review. Mr. Lieberman's subsequent injury is compensable if it is the direct and natural result of his compensable primary injury.

**POINT THREE: THE ALLEN TEST FOR LEGAL CAUSATION DOES NOT APPLY TO MR. LIEBERMAN'S CURRENT CLAIM.**

McKesson argues that Mr. Lieberman's claim must be evaluated under the standards for legal causation set forth in Allen v. Industrial Commission, 729 P.2d at 25. However, McKesson's argument is unsupported by the Allen decision itself and is inconsistent with post-Allen precedent.

The Allen decision: The Allen decision is a seminal case in Utah's workers' compensation jurisprudence. But in defining the term "accident" and establishing the requirements of medical and legal causation, the Allen court defined the standards to be applied to a worker's **primary** injuries. The issue now before this Court--the compensability of a worker's exacerbation of a work-related injury, was not considered in Allen.

The difference between the issues presented in Allen and the issue presented in Mr. Lieberman's claim is important. In the words of Professor Larson: "A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment." 1 *Larson's Workers' Compensation Law*, §10.01. The Allen decision sets forth standards applicable to the former question; this Court's decision in Intermountain Health Care, 839 P.2d 841, addresses the latter question.

Post- Allen precedent: McKesson argues that the Allen decision, issued in 1986, changed Utah law for determining whether a subsequent injury is compensable following



a compensable primary injury. Specifically, at page 14 of its initial brief, McKesson contends “(t)he Commission improperly selected and applied the law pre-dating the Allen decision.” However, McKesson itself has failed to address, or even cite, this Court’s decision in Intermountain Health Care,<sup>2</sup> issued six years **after** the Allen decision and directly relevant to the facts of Mr. Lieberman’s claim.

In fact, McKesson has not identified any post-Allen decisions which have applied the Allen test of legal causation to cases such as Mr. Lieberman’s. The Commission submits that appellate precedent represented by this Court’s decision in Intermountain Health Care provides the proper standard for adjudication of Mr. Lieberman’s claim.

**POINT FOUR: THE COMMISSION REASONABLY CONCLUDED THAT THE EXACERBATION OF MR. LIEBERMAN’S CERVICAL SPINE INJURY WAS THE NATURAL AND DIRECT RESULT OF HIS PRIMARY WORK-RELATED INJURY.**

As noted above, this Court has previously held that a subsequent injury is compensable if it is the “direct and natural result” of a compensable primary injury. In Intermountain Health Care, 839 P.2d at 846, this Court explained the manner in which the “direct and natural result” should be applied. “The applicable test includes an analysis of the facts surrounding the subsequent injury and analysis of the connection between the subsequent injury and original compensable injury.”

With respect to Mr. Lieberman’s claim, the ALJ’s findings of fact, adopted by the Commission, sets out the circumstances surrounding Mr. Lieberman’s injuries.<sup>2</sup> On

---

<sup>2</sup>

The ALJ’s decision is attached as Addendum A. The following statements of fact are found

September 25, 1995, while Mr. Lieberman was working for McKesson, a case of lotion weighing 14 pounds fell on his head. Dr. Hood diagnosed Mr. Lieberman's injuries from the accident as a herniated intervertebral disc at the C6-7 level and spondylosis at the C5-6 level.

On March 19, 1996, Dr. Hood performed surgery on Mr. Lieberman's cervical spine, including microsurgical anterior discectomy, decompression, allograft. fusion and plate fixation. However, Mr. Lieberman continued to suffer neck pain and stiffness. Ultimately, it was determined that Mr. Lieberman had suffered a non-union of the attempted cervical fusion. He continued to experience progressive neck pain with periods of temporary total disability from his industrial accident.

Then, on May 22, 1999, as Mr. Lieberman was entering his pickup truck at his home, he forcefully hit the top of his head on the door frame. The blow stunned him and he fell to his knees. When Mr. Lieberman hit his head on his pickup door, he exacerbated his pre-existing cervical spine injury. In the words of Dr. Chung: "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." (See R.65, Medical Records Exhibit, Tab #8, page12 U) Dr. Hood agreed. "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." (S. R. 65, Medical Records Exhibit, Tab #10, page 24 E) Dr. Hood further concluded that a medically demonstrative causal relationship exists between Mr.

Lieberman's current medical problems and his work-related injuries of September 25, 1995, and has recommended additional surgery to remove the old hardware associated with the failed fusion and to make another effort to accomplish the fusion. (R. 65, Medical Record Exhibit, Tab #10, page 24 E)

In summary, it was Mr. Lieberman's primary work-related accident at McKesson that required the first attempt to surgically fuse his cervical spine. That first fusion attempt failed. The incident of May 22, 1999, when Mr. Lieberman hit his head on his pickup door, merely exacerbated the symptoms of an already-failed fusion.

McKesson argues that Mr. Lieberman was negligent for hitting his head on his pickup door, thereby breaking the chain of causation between his work-related accident and his current injuries. The Appeals Board addressed that argument in its decision denying McKesson's motion for review:

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, . . . 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.

. . . .

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.

As noted by the Appeals Board, when Mr. Lieberman hit his head on May 22, 1999, he was not behaving in a foolhardy manner, nor was he undertaking a rash act. Rather, he was attempting to perform the ordinary task of entering and sitting in the driver's seat of a pickup truck, a task perhaps made more difficult by the work-related cervical injuries Mr. Lieberman had suffered. It is not uncommon for any individual, even those without cervical injuries, to bump their heads on shelves, cabinet doors, or automobile door frames. Such accidents do not necessarily establish negligence.

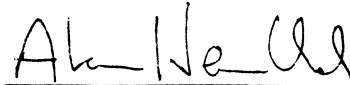
The underlying circumstances of this case support the Appeals Board's specific finding that Mr. Lieberman's conduct in entering his pickup truck on May 22, 1999, was not negligent and did not break the chain of causation between his work-related accident and his current medical problems.

### CONCLUSION

The Labor Commission respectfully requests this Court to affirm the Appeals Board's award of additional workers' compensation benefits to Mr. Lieberman, on the grounds that

Mr. Lieberman's current injuries are the direct and natural result of his work-related accident at McKesson.

Dated this 29<sup>th</sup> day of January, 2001.

A handwritten signature in cursive script, appearing to read "Alan Hennebold", written over a horizontal line.

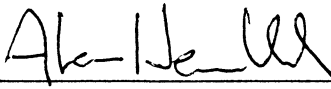
Alan Hennebold  
General Counsel  
Utah Labor Commission

## CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the Respondent, Utah Labor Commission's Brief was mailed on the \_\_\_\_ day of January, 2001, to the following by first class mail postage prepaid:

ROBERT LIEBERMAN  
5981 LAKESIDE DRIVE  
SALT LAKE CITY UT 84121

HENRY K. CHAI, II  
KRISTY L. BERTELSEN  
BLACKBURN & STOLL, LC  
77 WEST 200 SOUTH #400  
SALT LAKE CITY UT 84101-1609

  
\_\_\_\_\_

Tab A

UTAH LABOR COMMISSION

Case No. 99885

ROBERT P. LIEBERMAN,	*	
	*	FINDINGS OF FACT,
	*	
Petitioner,	*	CONCLUSIONS OF LAW,
	*	
vs.	*	AND ORDER
	*	
MCKESSON CORP.,	*	
	*	Judge: Richard M. La Jeunesse
Respondents,	*	
	*	

\*\*\*\*\*

**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 discectomy, 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 disectomy 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).



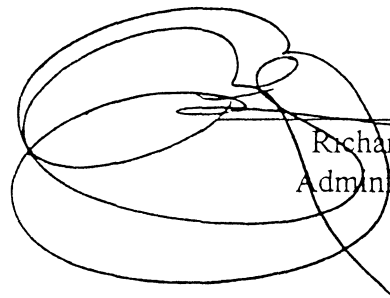
## VI. ORDER

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,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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.

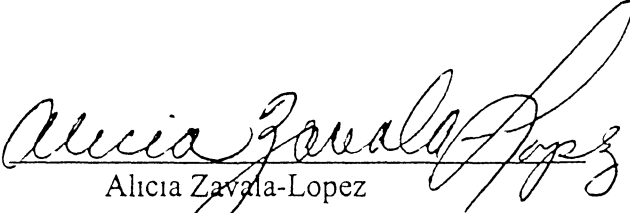
CERTIFICATE OF MAILING

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

---

APPEALS BOARD  
UTAH LABOR COMMISSION

ROBERT P. LIEBERMAN,

Applicant,

v.

MCKESSON CORP.,

Defendant.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

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 diskectomy, 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.)

---

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."

ORDER DENYING MOTION FOR REVIEW  
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.

---

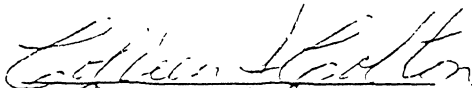
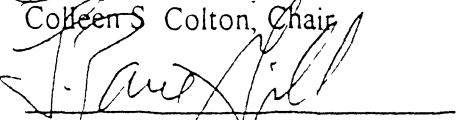

<sup>2</sup> In using the term "quasi course," Professor Larson refers to ". . . activities undertaken by the employee following upon his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, 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

ORDER DENYING MOTION FOR REVIEW  
ROBERT P. LIEBERMAN  
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

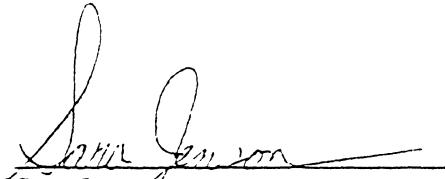
CERTIFICATE OF MAILING

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:

ROBERT P. LIEBERMAN  
5981 LAKESIDE DRIVE  
SALT LAKE CITY UT 84121

HENRY K. CHAI II, ATTORNEY  
BLACKBURN & STOLL  
77 WEST 200 SOUTH #400  
SALT LAKE CITY UT 84101

MCKESSON CORP  
ONE POST STREET  
SAN FRANCISCO CA 94104

  
Sara Jensen  
Support Specialist  
Utah Labor Commission