

2005

Vaeleen Roberts v. Labor Commission of Utah,
Kindercare Learning Centers, Inc., American
Assurance Co. : Brief of Petitioner

Utah Court of Appeals

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Phillip B. Shell; Day Shell and Liljenquist, L.C..

Dori Petersen, Bret Gardner; Blackburn and Stoll, L.C.; Alan Hennebold; Office of Legal Counsel.

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IN THE COURT OF APPEALS, STATE OF UTAH

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VAELEEN ROBERTS

:

Petitioner,

:

Court of Appeals

v.

Case No 20050695-CA

LABOR COMMISSION OF UTAH,
KINDERCARE LEARNING

:

Labor Commission Case No. 03-1164

CENTERS, INC., and/or AMERICAN
ASSURANCE CO.,

:

Priority No. 7

:

Respondents.

----oo0oo----

BRIEF OF PETITIONER VAELEEN ROBERTS

**PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR
COMMISSION**

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FILED
UTAH APPELLA
FEB 23

IN THE COURT OF APPEALS, STATE OF UTAH

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VAELEEN ROBERTS	:	
	:	Court of Appeals
Petitioner,	:	Case No 20050695-CA
v.	:	
LABOR COMMISSION OF UTAH,	:	
KINDERCARE LEARNING	:	Labor Commission Case No. 03-1164
CENTERS, INC., and/or AMERICAN	:	Priority No. 7
ASSURANCE CO.,	:	
	:	
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JURISDICTION OF THIS COURT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §63-46(b)-16 (1988) and Utah Code Ann. §34A-2-801(1997),

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issue presented in this matter is whether the Labor Commission erred in concluding that the appellant's Treating Physician's Summary of Medical Record form was not sufficient to create a conflicting medical report that would justify a referral of the case to a medical panel. The issue concerning the adequacy of the form was raised at the Labor Commission in Appellant's Motion for Review. (R. at 43-46).

Whether there are conflicting medical reports is a question of fact.

Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997)

The Labor Commission's findings of fact regarding medical causation "will be affirmed if they are supported by substantial evidence when viewed in light of the whole record. Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Department of Air Force v. Swider, 824 P.2d 448, 451 (Utah App. 1991).

CONSTITUTIONAL OR STATUTORY PROVISIONS

None.

STATEMENT OF THE CASE

PROCEDURE

In November of 2003, Ms. Vaeleen Roberts filed an Application for Hearing with the Utah Labor Commission in connection with seeking benefits for a low back injury that she claims is related to cumulative trauma from her job duties with Respondent Kindercare Learning Centers, Inc. over a 14 year period. Her claim is based on cumulative trauma and alleges alternative legal theories under the Workers' Compensation Act and the Occupational Disease Act (R. at 1-7).

The matter subsequently went to hearing before Administrative Law Judge Richard LaJeunesse, who issued his Findings of Fact, Conclusions of Law and Order on December 29, 2004. The order was unfavorable to Ms. Roberts and dismissed her claim with prejudice based on the finding that there was no supportive medical opinion in the record to confirm a causal relationship between Ms. Roberts' employment activities and her low back problems. (R. at 36-42).

The Petitioner filed a timely Motion for Review that was ruled on by the Labor Commission in its Order Denying Motion for Review on July 21, 2005. (R. at 60-63).

The Petitioner filed a Petition for Review with the Utah Court of Appeals on August 17, 2005. (R. at 64-65).

FACTS

1. The facts are generally not in dispute except for the issue of medical causation.
2. Vaeleen Roberts worked for Kindercare from 1989 to June 2, 2003 as a teacher of pre-school aged children. In addition to teaching, her duties included driving children in a school van, cooking meals for the children, washing dishes, and caring for infants. (R. at 37).
3. She would spend from three to four hours per day, two days per week, working in the kitchen. In order to wash the dishes, she would have to

bend over a deep-set sink at waist height. She testified that it bothered her back to bend over this way. (R. at 37).

4. She would weekly put food orders away in the kitchen. This involved moving cereal, frozen food and canned goods. (R. at 37).

5. For three to four days per week, Ms. Roberts worked in the infant room. She would be there anywhere from one to four hours per day where she had responsibility for four infants. Each infant would be lifted three to four times per hour in order to feed or comfort or change diapers. The weight of the children ranged from 10 to 35 lbs each, depending on the age and size of the child. Ms. Roberts testified that lifting the children also caused her to experience low back pain. (R. at 38).

6. There was no single event that occurred to injure her back, but she stopped working on June 2, 2003 due to increasing complaints of lower back pain. (R at 66, Medical Exhibit, at 176).

7. In his Findings of Fact, Conclusions of Law and Order, the Administrative Law Judge found that Ms. Roberts' medical records show the following:

On January 29, 1991 Dr. Gordon Affleck M.D. took x-rays of Ms. Roberts' lumbar spine that revealed: "[a] mild lumbar scoliosis with mild rotational abnormalities but nothing to serious." [Exhibit J-1" at 81]. On November 23, 1994 Dr. Dennis Remington annotated Ms. Roberts' complaints of severe low back pain. [id. at 194]. On August 7, 2001 Dr. Jeffery Oka M.D. recorded:

Approximately five days ago for no known reason she began

having some mild low back pain. It progressed over the week to become rather intense with some radiation into the left lower extremity. [id. at 170].

Dr. Oka diagnosed Ms. Roberts with “left lumbar strain” on August 7, 2001. [id.]. Then on November 13, 2002 Dr. Oka recorded that Ms. Roberts “[w]as bending over and sneezing and had instantaneous back pain.” [id. at 172]. Dr. Oka assessed Ms. Roberts with:

IMPRESSION: 1. Acute lumbar strain.
2. Probable lipoma of the lumbar region. [id.].

On March 24, 2003 Dr. Oka stated that:

Over the past four weeks she has had a recurrence of back pain from what she feels to be some increased physical work at Kindercare. [id. at 173].

Dr. Oka diagnosed Ms. Roberts on March 24, 2003 with: “Acute low back pain, unknown etiology.” [id.]. Dr. Richard Pope M.D. took x-rays of Ms. Roberts’ lumbar spine on March 24, 2003 that revealed:

IMPRESSION: Degenerative changes L4-L5 and also *L5-S1* in patient with rotary scoliosis convex left. [id. at 4].

Ms. Roberts underwent an MRI scan of her lumbar spine performed by Dr. Richard Hartvigsen M.D. on May 12, 2003 that disclosed:

IMPRESSION: 1. Small broad-based disk bulges at L3-4 and *L4-5*.
2. Herniated disk, central and left lateral at *L5-S1*. Findings consistent with an inferiorly extruded fragment. [id. at 15].

On June 12, 2003 Dr. Douglas Bankhead M.D. concluded that Ms. Roberts suffered from: *L5-S1* disk herniation, left sciatic pain.” [id. at 19].

On November 11, 2003 Dr. Oka completed a Treating Physician’s Summary of Medical Record. [id. at 182]. Dr. Oka did not circle the yes option when specifically asked, “Is there a medically demonstrative causal relationship between the industrial accident (repeated lifting of children and heavy kitchen work) and the problems you have been treating?” [id.].

Dr. Richard Knoebel M.D. opined on April 5, 2004 that:

[I]t cannot be stated with a reasonable degree of medical probability that the patient's low back and left leg pain beginning, by history, in about 3/03 and noted as an industrial claim on 6/2/03 were caused, contributed to or permanently aggravated by her work. [id. at 128].

(R at 39-40).

8. As a part of these medical records cited by the Labor Commission as found in the Medical Exhibit, the Medical Exhibit contains a one-page Treating Physician's Summary of Medical Record form that was filled out and signed by the treating physician, Dr. Jeffrey R. Oka. It is dated November 11, 2003 and is referred to by the ALJ in the recitation of medical records set forth above. However, it specifically states the following responses to certain questions contained in the Summary form:

a. When asked in question one how long the patient would need to be off from work "**due to the industrial accident**" Dr. Oka answered by writing in "11-25-03."

b. In response to question three, when asked, "Does the patient have permanent restrictions **due to the accident**?" Dr. Oka wrote, "Yes, lifting restrictions."

c. In question five, when asked, "Did the **industrial accident** **aggravate** any pre-existing condition?" Dr. Oka wrote, "We don't know of a pre-existing disk herniation."

d. Finally, in question six, when asked, "what further treatment will be required **as a result of the industrial accident?**" Dr. Oka wrote, "Job modification, occasional medications, home exercise program." (Emphasis added).
(R at 66, Medical Exhibit at 182).

SUMMARY OF THE ARGUMENT

The Labor Commission concluded that no medical opinion exists to confirm or establish a causal relationship between the employment exertions and the low back problems that Ms. Roberts suffers from. The Commission concluded that the Summary of Medical Record form completed and signed by Dr. Oka was at best unclear or ambiguous (R at 66, Medical Exhibit at 182) and hence Ms. Roberts did not submit enough evidence to show a dispute on medical causation. For this reason, the case was not sent to a medical panel under Rule R602-2-2, Utah Administrative Code, but was rather dismissed.

Whether or not Dr. Oka's report stated a medical opinion or creates a dispute on medical causation is a question of fact.

While the Labor Commission is given broad deference in determining questions of fact, its conclusions here are not supported by substantial evidence based on the record as a whole.

We submit that while the report does not have "yes" circled as to the question of whether a medically demonstrative causal relationship exists

between the industrial accident and the low back injury, the doctor did not circle “no” either. However, the way the doctor answered the questions in the report overall clearly shows that Dr. Oka found that Ms. Roberts had a herniated disk at L5-S1 because of the cumulative effect of her work activities. The matter should have been sent to a medical panel.

ARGUMENT

POINT I

The Labor Commission erred in concluding that the appellant’s Treating Physician’s Summary of Medical Record form was not sufficient to create a conflicting medical report that would justify a referral of the case to a medical panel

The only question before the Court in this case is whether the November 11, 2003 Treating Physician’s Summary of Medical Record of Dr. Jeffrey R. Oka creates a significant issue regarding medical causation.

Rule R612-2-2, Utah Administrative Code, provides in part:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1. conflicting medical opinions related to causation of the injury or disease;...

To support its denial of medical causation, the respondents submitted a report of an independent medical examination from Dr. Richard Knoebel that concludes that Ms. Roberts’ low back problems were not caused, contributed

to or even permanently aggravated by her work. (R at 66, Medical Exhibit at 123-134). We agree that without a supportive medical opinion, in light of the evidence in the record of pre-existing conditions and in light of the unfavorable opinion of Dr. Knoebel, the case would fail and the Labor Commission would have been justified in denying the referral to the Medical Panel. Hence, the only question is whether the record contains a medical opinion supporting the issue of medical causation.

The medical exhibit in this matter includes all of Ms. Roberts' medical records and admittedly shows that she has pre-existing conditions in her lower back. Her medical records document occasional prior complaints of and treatment for lower back pain that even pre-date her employment with Respondent Kindercare. There is also evidence of degenerative disk disease. These things are not disputed.

In support of her claim for workers' compensation or occupational disease benefits, Ms. Roberts submitted the Treating Physician's Summary of Medical Record form of Dr. Oka. (R at 66, Medical Exhibit at 182).

Had the Treating Physician's Summary of Medical Record form merely answered the question of medical causation by the doctor's circling the word "yes," the case would clearly have been sent by the Labor Commission to a medical panel for consideration of the workers' compensation and occupational

disease issues presented in the claim due to the conflicting medical opinions of Dr. Knoebel and Dr. Oka. See Willardson v. Industrial Commission of Utah, 904 P.2d 671 (Utah 1995).

Because there was no direct “yes” response to the question at issue, the Labor Commission in its consideration of the Treating Physician’s Summary of Medical Record form felt that the form was unclear or ambiguous. It found for this reason that there was no supportive medical opinion in contrast to Dr. Knoebel’s unfavorable opinion that would justify sending the matter to a medical panel, and hence dismissed the case instead of allowing medical panel review.

We submit that while it would certainly have been preferable to have that issue more specifically stated on the Summary of Medical Record, Ms. Roberts’ doctor did not say “no” as to medical causation. More importantly, however, the way the doctor completed the whole report clearly shows that he found being medical causation between the lifting and bending at work and the low back injury.

Each question on the form is asked with reference to the industrial accident. In no place did the doctor indicate no industrial accident or no causation. Rather, when the response is read as a whole sentence, including the handwritten portions inserted by Dr. Oka, the plain language does not

reflect any ambiguity or lack of clarity, despite the Labor Commission' factual finding to the contrary. For example:

#3. "Does/will the patient have permanent restrictions due to the accident? Yes."

#5. "Did the industrial accident aggravate any pre-existing condition? If so, please explain: We don't know of a pre-existing disk herniation."

#6. "What further treatment will be required as a result of the industrial accident? Job modification, occasional medications, home exercise program."

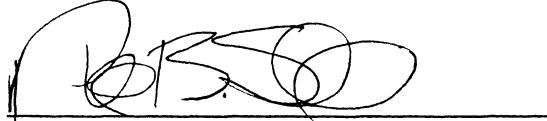
The Treating Physician's Summary of Medical Record form provides a supportive medical opinion and as such provides the basis for the sending of this case to a medical panel under Rule R602-2-2 of the Utah Administrative Code for consideration of whether and to what extent, if any, Ms. Roberts' low back problems were caused, contributed to or aggravated by her work activities. The Labor Commission's findings to the contrary were clearly erroneous and are not supported by substantial evidence when viewed in light of the whole record.

CONCLUSION

The Order Denying Motion for Review issued by the Labor Commission against the Petitioner in this matter should be reversed and the

matter should be sent back to the Labor Commission with directions that the case go to a medical panel for consideration of the medical issues.

Dated this 22nd day of February 2006.

A handwritten signature in black ink, appearing to read 'P.B. Shell', is written over a horizontal line.

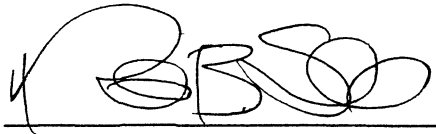
Phillip B. Shell
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of February, 2006, I caused to be mailed by first class mail, postage pre-paid, two (2) copies of the foregoing BRIEF OF APPELLANT to the following:

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Utah Labor Commission
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Salt Lake City, UT 84114-6615



ADDENDUM

- A. Findings of Fact, Conclusions of Law and Order
- B. Order Denying Motion for Review
- C. Treating Physician's Summary of Medical Record

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

VAELEEN ROBERTS,

Petitioner,

vs.

**KINDERCARE LEARNING CENTERS
INC. and/or AMERICAN HOME
ASSURANCE CO.,**

Respondent,

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 20031164

Judge Richard M. La Jeunesse

HEARING: Room 332 Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on July 1, 2004 at 8:30 a.m. Said Hearing was pursuant to Order and
Notice of the Commission.

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

APPEARANCES: The petitioner, Vaeleen Roberts, was present and represented by her
attorney Phillip Shell Esq.

The respondents, Kindercare Learning Centers Inc. (Kindercare) and
American Home Assurance, were represented by attorney Bret Gardner
Esq.

I. STATEMENT OF THE CASE.

The petitioner, Vaeleen Roberts, filed an "Application for Hearing" with the Utah Labor Commission on June 2, 2003 and claimed entitlement to the following workers' compensation benefits: (1) medical expenses; (2) recommended medical care, and; (3) temporary total disability compensation. Ms. Roberts' plead her claim for workers' compensation benefits alternatively as either an occupational disease or industrial accident resultant from the repetitive physical exertions of her employment for 14 years at Kindercare from 1989 through June 2, 2003. The respondents denied that Ms. Roberts' exertions at Kindercare medically caused her low back problems at issue in the present matter.

II. ISSUE.

Did Vaeleen Roberts' exertions at Kindercare medically cause her low back problems at issue in the present matter?

III. FINDINGS OF FACT.

A. Employment.

Kindercare employed Ms. Roberts from 1989 to June 2, 2003.

B. Compensation Rate.

At the time Ms. Roberts terminated employment with Kindercare on June 2, 2003 due to her low back problems she was not married and had no dependent children. Ms. Roberts' compensation with Kindercare on June 2, 2003 equaled \$8.28 per hour, 40 hours per week average, for a temporary total disability compensation rate of \$221.00 per week. [$\$8.28/\text{hour} \times 40 \text{ hours/week} = \$331.20/\text{week} \times 2/3 = \$221.00/\text{week}$].

C. Vaeleen Roberts' Work Exertions at Kindercare.

As noted in Section III.A. Kindercare employed Ms. Roberts from 1989 to June 2, 2003. Up to July of 2002 Ms. Roberts worked as a teacher of pre-school aged children. In June of 2002 Kindercare promoted Ms. Roberts to assistant director. As assistant director Ms. Roberts' worked in the office, drove the children in the Kindercare van, cooked, washed dishes, staffed the infant room, and taught a phonics class.

Ms. Roberts spent three to four hours per day, two days per week, in the kitchen. Ms. Roberts washed dishes two times per week, which took her on average four hours when accounting for interruptions. Ms. Roberts had to bend over a deep set sink at waist height when she washed the dishes. Ms. Roberts complained that washing the dishes hurt her low back.

On Fridays of each week Ms. Roberts worked in the kitchen putting food orders away. The food orders consisted of cereal, frozen food, and canned goods. The heaviest canned goods weighed three pounds.

Ms. Roberts also prepared meals when she worked in the kitchen. Ms. Roberts served all of the meals off of carts. None of the meal items weighed over one pound.

For three to four days per week Ms. Roberts worked in the infant room at Kindercare from between one and four hours per day. Ms. Roberts had responsibility for four infants when she worked in the infant room. Ms. Roberts had to lift each infant from three to four times per hour in order to feed, change and comfort the children. The infants tended by Ms. Roberts weighed between ten and thirty-five pounds depending on the age and size of the child. Ms. Roberts complained that lifting the children also caused her low back pain.

D. The Nature and Cause of Vaeleen Roberts' Low Back problems.

On January 29, 1991 Dr. Gordon Affleck M.D. took x-rays of Ms. Roberts' lumbar spine that revealed: "[a] mild lumbar scoliosis with mild rotational abnormalities but nothing to serious." [Exhibit J-1" at 81]. On November 23, 1994 Dr. Dennis Remington annotated Ms. Roberts' complaints of severe low back pain. [id. at 194]. On August 7, 2001 Dr. Jeffery Oka M.D. recorded:

Approximately five days ago for no known reason she began having some mild low back pain. It progressed over the week to become rather intense with some radiation into the left lower extremity. [id. at 170].

Dr. Oka diagnosed Ms. Roberts with "left lumbar strain" on August 7, 2001. [id.]. Then on November 13, 2002 Dr. Oka recorded that Ms. Roberts "[w]as bending over and sneezing and had instantaneous back pain." [id. at 172]. Dr. Oka assessed Ms. Roberts with:

IMPRESSION: 1. Acute lumbar strain.
2. Probable lipoma¹ of the lumbar region. [id.].

On March 24, 2003 Dr. Oka stated that:

Over the past four weeks she has had a recurrence of back pain from what she feels to be some increased physical work at Kindercare. [id. at 173].

Dr. Oka diagnosed Ms. Roberts on March 24, 2003 with: "Acute low back pain, unknown etiology." [id.]. Dr. Richard Pope M.D. took x-rays of Ms. Roberts' lumbar spine on March 24, 2003 that revealed:

IMPRESSION: Degenerative changes L4-L5 and also L5-S1 in patient with rotary scoliosis convex left. [id. at 4].

Ms. Roberts underwent an MRI scan of her lumbar spine performed by Dr. Richard Hartvigsen M.D. on May 12, 2003 that disclosed:

¹ Clumps of fat cells that form a tumor.

IMPRESSION: 1. Small broad-based disk bulges at L3-4 and L4-5.
2. Herniated disk, central and left lateral at L5-S1. Findings consistent with an inferiorly extruded fragment. [id. at 15].

On June 12, 2003 Dr. Douglas Bankhead M.D. concluded that Ms. Roberts suffered from: L5-S1 disk herniation, left sciatic pain.” [id. at 19].

On November 11, 2003 Dr. Oka completed a Treating Physician’s Summary of Medical Record. [id. at 182]. Dr. Oka did not circle the yes option when specifically asked “Is there a medically demonstrative causal relationship between the industrial accident (repeated lifting of children and heavy kitchen work) and the problems you have been treating?” [id.].

Dr. Richard Knoebel M.D. opined on April 5, 2004 that:

[i]t cannot be stated with a reasonable degree of medical probability that the patient’s low back and left leg pain beginning, by history, in about 3/03 and noted as an: industrial claim on 6/2/03 were caused, contributed to or permanently aggravated by her work. [id. at 128].

In sum, no medical opinion existed that confirmed a causal relationship between Ms. Roberts’ employment exertions at Kindercare and her low back problems at issue in this case. Accordingly, Ms. Roberts’ claim for workers’ compensation benefits from Kindercare must be denied.

IV. CONCLUSIONS OF LAW.

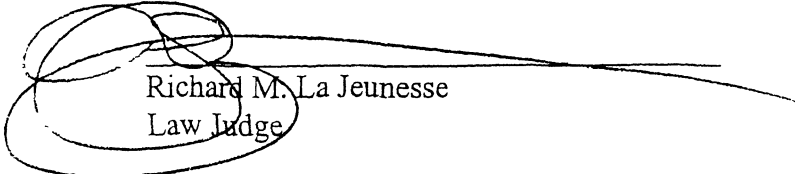
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B. Compensation Rate.

At the time Ms. Roberts terminated employment with Kindercare on June 2, 2003 due to her low back problems she was not married and had no dependent children. Ms. Roberts’ compensation with Kindercare on June 2, 2003 equaled \$8.28 per hour, 40 hours per week average, for a temporary total disability compensation rate of \$221.00 per week. [$\$8.28/\text{hour} \times 40 \text{ hours/week} = \$331.20/\text{week} \times 2/3 = \$221.00/\text{week}$].

DATED December 29, 2004.


Richard M. La Jeunesse
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 date 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 request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on December 29, 2004, to the persons/parties at the following addresses:

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Centerville UT 84014

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Murray UT 84107

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UTAH LABOR COMMISSION

A handwritten signature in black ink, appearing to read "Kara Rush", is written over a horizontal line.

Clerk
Adjudication Division

UTAH LABOR COMMISSION

VAELEEN ROBERTS,

Petitioner,

vs.

KINDERCARE LEARNING CENTERS
INC. and AMERICAN HOME
ASSURANCE CO.,

Respondents.

ORDER DENYING
MOTION FOR REVIEW

Case No. 03-1164

Vaeleen Roberts asks the Utah Labor Commission to review Administrative Law Judge La Jeunesse's denial of Ms. Roberts's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Roberts filed an application for hearing with the Commission on June 2, 2003, to compel Kindercare Learning Centers and its insurance carrier, American Home Insurance (referred to jointly as "Kindercare" hereafter) to pay either workers' compensation benefits or, alternatively, occupational disease benefits, for back problems that Ms. Roberts attributed to her work at Kindercare.

Judge La Jeunesse held a hearing on Ms. Roberts claim on July 1, 2004. On December 29, 2004, Judge La Jeunesse issued his decision denying the claim for lack of evidence of a medical causal connection between Ms. Roberts' work and her back problems. Ms. Roberts now asks the Commission to review Judge La Jeunesse's decision. Specifically, Ms. Roberts contends she submitted sufficient evidence of a medical causal connection between her work and her back injury to warrant referral of her claim to a medical panel.

DISCUSSION AND CONCLUSION OF LAW

The Utah Workers' Compensation Act provides benefits to workers injured by accident arising out of and in the course of their employment. The Utah Occupational Disease Act provides

ORDER DENYING MOTION FOR REVIEW

Vaeleen Roberts

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benefits to workers who become disabled by reason of an occupational disease. Under either of these Acts, it is the worker's burden to establish a medical causal connection between his or her work and the medical problem for which benefits are sought.

Section 34A-2-601 of the Workers' Compensation Act permits the Commission to refer the medical aspects of a claim for workers' compensation or occupational disease benefits to an impartial medical panel. In Rule 602-2-2, the Commission has established standards for use of medical panels. In summary, Rule 602-2-2 provides that a medical panel will be appointed when there are conflicting medical opinions on a significant medical issue.

In judging whether Ms. Roberts' claim should be referred to a medical panel, the Commission acknowledges that the issue of medical causation is a significant medical issue. The only remaining question is whether there is also a conflict of medical opinion on that issue.

Dr. Knoebel has stated his opinion that no medical causal connection can be established between Ms. Roberts' work at Kindercare and her low back problems. The only medical opinion that might be viewed as contrary to Dr. Knoebel's view is found in Dr. Oka's answers to a questionnaire entitled "Treating Physician's Summary of Medical Records." Several of the questions asked by the questionnaire are awkwardly phrased so as to assume the existence of a work-related accident. Dr. Oka's answers to these questions are ambiguous and can be taken as suggesting a relationship between Ms. Roberts' work and her back problems. However, the questionnaire also asks the specific question of whether there is a medically demonstrative causal relationship between Ms. Roberts' work duties and her medical problems. The question calls for a yes or no answer, but Dr. Oka has marked neither. Instead, he merely states his diagnosis of Ms. Roberts' medical condition.

At best, Dr. Oka's answers to the foregoing questions are unclear or ambiguous. This lack of clarity has been apparent from November 11, 2003, the date Dr. Oka completed the questionnaire. Likewise, the significance of the ambiguity has been plain since at least December 22, 2003, when, as part of its answer to Ms. Roberts' claim, Kindercare stated as its "Fifth Defense" that Ms. Roberts' claim should be denied for lack of medical causation. Likewise, in its Pre-Trial Disclosures, Kindercare reiterated its defense of "no medical causation."

With the question of medical causation plainly in dispute, Ms. Roberts had several months to either obtain additional medical opinion establishing medical causation, or to obtain clarification from Dr. Oka on that issue. But Ms. Roberts submitted no such opinion or clarification. Under these circumstances, the Commission concurs with Judge La Jeunesse that Ms. Roberts did not submit enough evidence to show a dispute on medical causation. Consequently, Judge La Jeunesse properly declined to appoint a medical panel and correctly determined that Ms. Roberts had not met her burden of proving medical causation.

ORDER DENYING MOTION FOR REVIEW

Vaeleen Roberts

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ORDER

The Commission affirms Judge La Jeunesse's decision and denies Ms. Roberts' motion for review. It is so ordered.

Dated this 21st day of July, 2005.

A handwritten signature in black ink, appearing to read "R. Lee Ellertson", is written over a horizontal line.

R. Lee Ellertson

Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission 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

Vaeleen Roberts

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CERTIFICATE OF MAILING

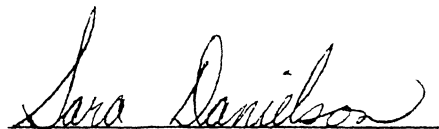
I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Vaeleen Roberts, Case No. 03-1164, was mailed first class postage prepaid this 21st day of July, 2005, to the following:

Vaeleen Roberts
P O Box 666
Centerville UT 84014

Kindercare Learning Centers Inc
518 N 400 W
Centerville UT 84014

Phillip Shell, Esq.
45 E Vine St
Murray UT 84107

Dori Petersen, Esq.
257 E 200 S Ste 800
Salt Lake City UT 84111

A handwritten signature in cursive script, reading "Sara Danielson", written over a horizontal line.

Sara Danielson
Utah Labor Commission

TREATING PHYSICIAN'S SUMMARY OF MEDICAL RECORD

EVALUATION FOR: VaeLeen Roberts

DATE OF INJURY: 6-2-03 (Cumulative Trauma)

EMPLOYER: Kindercare

1. Patient was/will be required to be off work from _____ to 11-25-03 due to the industrial accident.

2. Is there a medically demonstrative causal relationship between the industrial accident (repeated lifting of children and heavy kitchen work) and the problems you have been treating? If so, explain as necessary: Yes / No (Circle One)

Documented Lumbar disk herniation L5-S1, clinical lumbar radiculopathy.

3. Does/will the patient have permanent restrictions due to the accident? yes If so, describe fully: lifting restrictions

4. If there is permanent impairment (and a rating can be given or projected at this time):

A. **due to the industrial accident**, give your estimate in terms of loss of percentage of function (use AMA 4th Guidelines): _____

B. **due to pre-existing conditions**, also give your estimate thereof: _____

C. **due to ALL causes and conditions**, including the industrial accident, give the overall impairment rating indicated by the AMA 4th guidelines: _____

5. Did the industrial accident aggravate any pre-existing condition? If so, please explain:

We don't know of a pre-existing disk herniation

6. What further treatment will be required as a result of the industrial accident?

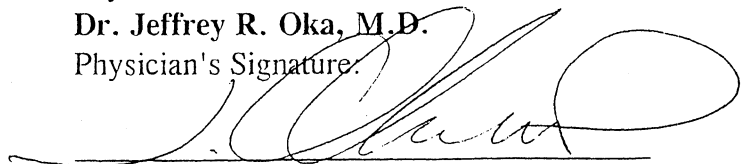
Job modification, occasional medications, Home exercise program.

Dated this 11 day of November, 2003.

Physician's Name:

Dr. Jeffrey R. Oka, M.D.

Physician's Signature:



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