

1994

Keith v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



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.

Jay A. Meservy; Attorney for Petitioner.

J. Angus Edwards; Purser & Edwards; Attorneys for Respondents.

Recommended Citation

Brief of Respondent, *Keith v. Industrial Commission of Utah*, No. 940346 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5991

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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

CASE NO.

940346

IN THE UTAH COURT OF APPEALS

CHARLES KEITH,

Petitioner/Applicant,

v.

INDUSTRIAL COMMISSION OF UTAH,
R.P. SCHERER CORPORATION,
and FIREMAN'S FUND INSURANCE
COMPANY inclusive,

Respondents/Defendants.

Case No. 940346-CA

Priority No. 7

BRIEF OF RESPONDENTS

Petition for Review of the Utah Industrial
Commission's Order Dated May 12, 1994, Denying
Petitioner's Motion for ReviewJ. Angus Edwards
PURSER & EDWARDS, L.L.C.
39 Market Street, Third Floor
Salt Lake City, Utah 84101-2104
Attorneys for Respondents
R.P. Scherer Corporation and
Fireman's Fund Insurance Co.Jay A. Meservy
1610 South Main, Suite E
Bountiful, Utah 84111
Attorney for Petitioner

FILED

FEB 17 1995

COURT OF APPEALS

CHARLES KEITH,
Petitioner/Applicant,
v.
INDUSTRIAL COMMISSION OF UTAH,
R.P. SCHERER CORPORATION,
and FIREMAN'S FUND INSURANCE
COMPANY inclusive,
Respondents/Defendants.

Case No. 940346-CA
Priority No. 7

**Petition for Review of the Utah Industrial
Commission's Order Dated May 12, 1994, Denying
Petitioner's Motion for Review**

Jay A. Meservy
1610 South Main, Suite E
Bountiful, Utah 84111
Attorney for Petitioner

TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF APPELLATE JURISDICTION	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW	1-2
DETERMINATIVE STATUTES, RULES AND REGULATIONS	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENTS	5
ARGUMENT	6
I. NO CREDIBLE EVIDENCE SHOWS THAT CLAIMANT'S 1989 SURGERY WAS THE DIRECT AND NATURAL RESULT OF THE ORIGINAL 1982 INDUSTRIAL INJURY	6
II. CLAIMANT'S 1988 INJURIES WERE THE RESULT OF HIS OWN INDEPENDENT, INTERVENING CONDUCT IN LIFTING HEAVY OBJECTS	13
III. THERE WAS NO REASONABLE DOUBT RESPECTING CLAIMANT'S RIGHT TO COMPENSATION FOR THE 1982 INJURY	16
CONCLUSION	17
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

CASES CITED	PAGE
<u>Allen v. Industrial Comm'n,</u> 729 P.2d 15 (Utah 1986)	9, 10, 15
<u>Intermountain Health Care, Inc. v. Board of Review,</u> 839 P.2d 841 (Utah App. 1992)	8, 15, 16, 18
<u>Mountain States Casing Servs. v. McKean,</u> 706 P.2d 601 (Utah 1985)	8, 15, 18
<u>Perchelli v. Industrial Comm'n,</u> 25 Utah 2d 58, 475 P.2d 835 (1970)	11, 16, 18
<u>Tasters, Ltd. v. Dep't of Employment Sec.,</u> 819 P.2d 361 (Utah App. 1991)	1, 2
<u>Willardson v. Industrial Comm'n,</u> 856 P.2d 371 (Utah App. 1993)	1, 2, 12, 17
 STATUTES CITED	 PAGE
Section 35-1-82,53(2), Utah Code Ann.	1
Section 35-1-86, Utah Code Ann.	1
Section 63-46b-16, Utah Code Ann.	1
Section 63-46b-16(4)(g), Utah Code Ann.	1,2
Section 78-2a-3, Utah Code Ann.	1
 AUTHORITIES CITED	 PAGE
1 Larson, Workmen's Compensation Law, §13.11(a) (1992)	9, 10, 11, 12, 18

STATEMENT OF APPELLATE JURISDICTION

Petitioner seeks review of the Industrial Commission of Utah's order denying Petitioner's Motion for Review dated July 26, 1993. The Utah Court of Appeals has jurisdiction in this matter pursuant to §§ 35-1-82.53(2), 35-1-86, 63-46b-16, and 78-2a-3, Utah Code Ann.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether the Industrial Commission of Utah erred in finding no causation between Claimant's surgery on July 27, 1989 and an industrial accident on September 15, 1982? The standard of appellate review: this Court will not change a factual finding unless it is not supported by substantial evidence when viewed in light of the whole record before the Court. Utah Code Ann. § 63-46b-16(4)(g) (1989); Tasters, Ltd. v. Dep't of Employment Sec., 819 P.2d 361 (Utah App. 1991); Willardson v. Industrial Comm'n, 856 P.2d 371 (Utah App. 1993).

2. Whether the Industrial Commission erred in finding that Applicant's 1988 injuries were the result of unusual and extraordinary exertion in moving heavy objects? The standard of appellate review: this Court will not change a factual finding unless it is not supported by substantial evidence when viewed in light of the whole record before the Court. Utah Code Ann. § 63-

46b-16(4)(g); Tasters, Ltd. v. Dep't of Employment Sec., 819 P.2d 361; Willardson v. Industrial Comm'n, 856 P.2d 371.

3. Whether there was any material doubt respecting the Claimant's right to compensation? The standard of appellate review: this Court will not change a factual finding unless it is not supported by substantial evidence when viewed in light of the whole record before the Court. Utah Code Ann. § 63-46b-16(4)(g); Tasters, Ltd. v. Dep't of Employment Sec., 819 P.2d 361; Willardson v. Industrial Comm'n, 856 P.2d 371.

DETERMINATIVE STATUTES, RULES, AND REGULATIONS

None.

STATEMENT OF FACTS

Claimant injured his back in an industrial accident on September 15, 1982 while employed by R.P. Scherer Corporation. (R. at 1 and 96.) Back surgery was performed by Dr. Kirkpatrick a short time later in 1982. (R. at 2, 5, and 96.) Claimant suffered a back strain in an industrial accident on June 11, 1985 while employed by Salt Lake County. (R. at 1 and 96.)

Applicant filed claims before the Industrial Commission of Utah for the back injuries, a medical panel was convened, and the panel's determination that Claimant had a 15% permanent impairment of from the 1982 injury was adopted by the Commission. The 1987 medical panel found no evidence of a herniated disc. The

Commission further found that Applicant was medically stable as of June 11, 1986. (R. at 1, 96, and 101.)

Claimant was diagnosed with a low threshold for back pain from lumbar strain, nervous tension, and obesity. (R. at 101.) Claimant knew the probability of further back injury from moving heavy objects because his 1982 industrial injury occurred while moving heavy items. (R. at 101.)

During 1988, the Applicant suffered back pain after lifting boxes for his mother and the pain continued until a more "serious episode of pain" after he was cleaning his yard. (R. at 206-207 and 209.)

On July 21, 1988, Claimant was moving a concrete block of the type used as barriers in parking lots while cleaning up his yard. Applicant had a bar under the cement barrier and, with his two sons, "scooted it over out of the way so he could use his parking space." Claimant noticed that his back "started hurting pretty bad" and went to the hospital emergency room. (R. at 6, 208-209, and 264.)

The Applicant's first examination after the July 21 accident was the next day at Utah Valley Regional Medical Center on July 22, 1988. (R. at 6 and 264.) The Emergency Center physician, Dr. Keith Hooker, reported that Claimant "has had no pain in the last several months, maybe up to a year and a half." (R. at 6 and 264.)

Dr. Hooker explained that Applicant was injured when "[h]e was lifting a cement slab for somebody yesterday and now has pain down the left hip, lumbosacral area and the buttock. Doesn't really truly radiate as it did when he had his disc, he states." (R. at 6 and 264.) Dr. Hooker examined Claimant for back pain on or about July 28 and August 1, 1988. Dr. Hooker was suspicious of Applicant's use of Percodan and referred him for a CT scan. (R. at 5.)

On August 2, 1988, Dr. Charles Smith first examined Applicant and reported that Claimant's "present episode occurred while cleaning up around his apartment doing some furniture moving, etc." (R. at 11 and 265.) Dr. Smith ordered a CT scan of the lumbar spine which was performed at Utah Valley Regional Medical Center and showed a bulging disc and focal herniated disc at L5-S1. (R. at 10, 11, 15, 260, and 266.) In the next examination on August 9, 1988, Dr. Smith described Claimant's medical history in more detail:

A CT scan done in 1985 revealed a bulging disc but no evidence of focal herniation. His present herniation occurred while apparently working around the house, pushing or pulling, no significant lifting. It appeared to be secondary to the activities of associated daily living. The patient pushed one piece of cement out of the way in conjunction with several other people.

(R. at 10 and 263.)

In a letter dated October 14, 1988, from Dr. Smith to the Division of Health Care Financing, Dr. Smith stated that "having reviewed the patient's history, this appears to be secondary to the original problem[,]" but a "second opinion referral of the patient will be made...." (R. at 9 and 251.)

On October 26, 1988, Claimant was examined by Dr. Creig MacArthur for a second opinion concerning Applicant's low back and left leg pain. (R. at 248.) Dr. MacArthur stated that Applicant had "done reasonably well until just recently, more particularly in July when, about the 26th, he had a recurrence of his symptoms subsequent to a moving-type of injury when he was moving heavy objects about." (R. at 248.)

Dr. Smith's pre-operative report entitled History and Physical stated that Applicant did "reasonably well in the interval" after his 1982 surgery "until 1988 in July when he was doing a lot of moving of boxes and so on when they were moving from one site to another. The combination of lifting and twisting with repetitive bending apparently was the underlying cause for the problem." (R. at 245.)

Applicant's second back surgery was performed by Dr. Smith on July 27, 1989. (R. at 2, 246-247, and 273.) Following the 1989 surgery, Dr. Smith concluded that Claimant had a 14% rating for the permanent impairment to Applicant's back. (R. at 2 and 3.)

Neither party requested a medical panel and Applicant expressly disavowed a panel claiming that none was required. (R. at 97 and 99.)

SUMMARY OF ARGUMENTS

I. The 1988 injuries were not the natural result of the compensable primary injury, since the causative chain between the original and subsequent injuries was broken by Applicant's exertion lifting boxes and cement barriers. The progression of a back injury remains compensable as long as the worsening is not shown to have been produced by an independent, nonindustrial cause. Unlike instances where a sneeze or picking up a four month-old baby were not conduct that constituted an independent, intervening cause, all Applicant's physicians reported that Claimant did reasonably well for a long period of time before he was injured while moving heavy objects in 1988.

II. The ALJ and Commission found that Applicant's efforts in lifting boxes and concrete barriers were not common, day-to-day, and ordinary activities. Claimant's exertion was found to be unusual and extraordinary to distinguish the authority which provides that the causation between an original injury and later medical complications may be broken by an employee's independent, intervening conduct.

III. Applicant was paid all available workers' compensation benefits following the 1982 industrial injury. Claimant argues that reasonable doubt respecting Claimant's right to compensation for the injury should be resolved in his favor. However, this rule of construction is inapplicable to an attempt to reopen a claim and recover additional benefits for a subsequent nonindustrial injury. Applicant alleges that there are doubts respecting Applicant's right to compensation, but these doubts are based on speculation and inadmissible evidence.

ARGUMENT I

NO CREDIBLE EVIDENCE SHOWS THAT CLAIMANT'S 1989 SURGERY WAS THE DIRECT AND NATURAL RESULT OF THE ORIGINAL 1982 INDUSTRIAL INJURY

The direct cause of Applicant's 1988 injury was the exertion of lifting boxes and a cement parking barrier the day before Claimant was examined at the emergency room. The emergency room physician, Dr. Hooker, reported that a day earlier Claimant had lifted a cement slab resulting in back pain and that the patient had not experienced back pain for as long as 1½ years before the examination. This is consistent with the medical evidence that Applicant was stable by 1986. More than six years elapsed from the time of the 1982 back surgery, caused by a compensable industrial injury at R.P. Scherer, and the nonindustrial injuries while lifting heavy objects during 1988.

In Mountain States Casing Servs. v. McKean, 706 P.2d 601 (Utah 1985), the claimant's arm was severed and reattached after an industrial accident. The injured worker's hand sensations had grown back gradually and he was advised to continue to use his hand to restore use. The applicant sought payment of medical expenses for subsequent treatment of burns on his hand resulting from use in daily activities. Payment of medical expenses was denied on the grounds that the burns were unrelated to the original accident. The court held that "[a] subsequent injury is compensable if it is found to be a natural result of a compensable primary injury." *Id.* at 602. In particular, the court explained that the injured worker was "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 hand injury." *Id.* (citations omitted). The court concluded that the burns to the worker's hand were a natural consequence of his industrial injury, since "the chain of causation between the first and second injuries" was not broken by his activities. *Id.* at 602-03.

In Intermountain Health Care, Inc. v. Board of Review, 839 P.2d 841 (Utah App. 1992), the court relied on the holding in McKean and other authority for a more precise definition of the "compensability test." Claimant injured her back while lifting at

work. Two years later, Applicant attempted to lift her four month-old grandchild from a baby walker when she suffered another back injury that required surgery. Applicant filed a claim for medical and disability benefits and a medical panel was convened by the Industrial Commission. The Commission adopted the determination of the panel that the surgery was 70% the result of the industrial injury and 30% the result of the incident lifting the grandchild. The court noted that the ALJ relied on the medical conclusion of the panel and then applied the "compensability test" described by Professor Larson in his treatise. "The applicable test includes an analysis of the facts surrounding the subsequent injury and an analysis of the connection between the subsequent injury and the original compensable industrial injury. *Id.* (relying on 1 Larson, Workmen's Compensation Law, § 13.11(a) (1992)). The court characterized that ALJ's application of the compensability test as the determination of a factual circumstance surrounding an industrial injury that must be ruled on by the ALJ. *Id.*

Professor Larson distinguishes the causation rules for primary injuries and for the range of compensable consequences from the original injury. The causation rules for primary injuries are the standard issues of legal and medical causation: whether the injury arose out of or in the course of employment and was a result of exertion during work-related activity. Allen v. Industrial Comm'n,

729 P.2d 15 (Utah 1986). However, "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 claimant's own conduct as an independent intervening cause." 1 Larson, §13.11 at 3-154.

Claimant argues that the threshold issue is proof of legal and medical causation. By contrast, Utah case law and the leading commentator describe the differing causation rules for the range of compensable consequences from a primary injury, especially medical complications following an initial injury. In this claim, there is absolutely no dispute that the Applicant's exertion while moving heavy objects in 1988 was nonindustrial and did not arise in the course of employment or occur during work-related exertion.

The direct and natural results rule involves two broad classes of claims. First, are cases where "an initial medical condition itself progresses into complications more serious than the original injury; the added complications are of course compensable." 1 Larson, § 13.11(a) at 3-155. The second group of medical-causation claims are those where an independent medical condition is exacerbated by a compensable injury. The present claim is contained in the former classification and Professor Larson specifically discusses back injuries. In particular, "once the

work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent, nonindustrial cause." 1 Larson, § 13.11(a) at 3-156. Indeed, the paradigmatic case described by Professor Larson is Perchelli v. Industrial Comm'n, 25 Utah 2d 58, 475 P.2d 835 (1970).

In Perchelli and in the present appeal, the claimant suffered a back injury while engaged in nonemployment activities. The difference between this claim and Perchelli is that the claimant in Perchelli was hardly engaged in any exertion at the time of the subsequent injury, since the applicant was at home on a Sunday morning combing his hair when he sneezed and herniated a disc. The medical testimony was that the original back injury would have eventually required surgery regardless of the exertion. Thus, the court reversed the decision of the Commission that the sneeze was the independent cause of the applicant's disability and Professor Larson characterizes this result as "clearly correct." 1 Larson § 13.11(a) at 3-158. Professor Larson concluded as follows:

The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication flowing from a compensable injury. If the herniation had occurred while claimant was asleep in bed, his characterization as a mere sequel to the compensable injury would have seemed obvious. The case should be no different if the triggering episode is some non-employment exertion like

raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

§ 13.11(a) at 3-158.

The primary issue on this appeal is whether Claimant's original, compensable back injury directly and naturally progressed for six years into a more serious injury that required surgery in 1989. This dispute was resolved by the Commission under the range of compensable consequences causation rules, not the primary causation rules.

The overwhelming evidence from the three physicians shows that the 1988 nonindustrial injuries were not caused by the 1982 industrial accident. Applicant argues that selected portions of the medical records suggest that Claimant's own conduct was not the independent intervening cause of the 1988 nonindustrial injury. However, "[t]he ALJ has a responsibility to resolve factual conflicts." Willardson v. Industrial Comm'n, 856 P.2d at 375 (citing Lancaster v. Gilbert Dev., 736 P.2d 237 (Utah 1987)). Moreover, this supposed factual dispute concerning whether Claimant's 1988 back injuries were caused by the direct progression of the industrial injury six years earlier is unsupported by the medical records.

In 1988, Dr. Hooker was the first physician to treat Applicant following the nonindustrial accidents. Dr. Hooker reported that a day earlier Claimant had lifted a cement slab and now had back pain. Dr. Hooker noted that Applicant had not had back pain for as long as 1½ years. Dr. Hooker examined Applicant three times and referred the patient for a CT scan. The CT scan showed a bulging and a focal herniated disc in the lumbosacral spine. The prior CT scan before the 1988 nonindustrial accidents only showed a bulging disc in the lumbosacral spine.

Dr. Smith next treated Claimant and likewise reported that he had done reasonably well until the 1988 injuries. Dr. Smith had several versions of the cause of Applicant's herniation. Initially, the injury was described as the result of cleaning up the house and moving furniture. Next, the back pain followed work around the house and pushing or pulling a piece of cement with several other people. Last, moving a lot of boxes and the combination of lifting and twisting with repetitive bending was said to be the underlying cause of the herniation. Dr. Smith referred Claimant to Dr. MacArthur for a second opinion. Similarly, Dr. MacArthur reported that Applicant had done well until July 1988 when back pain reoccurred after Claimant had been moving heavy objects about.

There is no dispute among the three physicians that Applicant was largely pain-free for several years before the 1988 lifting accidents, the industrial injury was six years before the 1988 accidents, there was no herniation during the six years prior to 1988, there was no medical treatment for back pain for many years before 1988, and Claimant sought emergency medical care the day after moving a concrete barrier. The lack of medical care before 1988 is more significant where Applicant had a diagnosed low threshold for back pain from lumbar strain, nervous tension and obesity. These facts are sufficient to support the findings of the ALJ and Commission that the 1988 injuries and surgery were not the direct and natural consequence of the 1982 industrial injury.

The ALJ and Commission found Applicant's testimony inconsistent concerning the exertion that preceded the 1988 injuries. Specifically, Claimant claimed he was very careful when lifting boxes and minimized the amount of effort used to move the concrete parking barrier. Claimant knew the probability of a herniation if he lifted heavy objects, especially where he had a substantial permanent impairment to his lumbosacral spine from the 1982 injury. The ALJ found that physicians must rely on patients for an accurate history and all three doctors reported that Applicant was injured while moving heavy objects. Moreover, the most reliable report of the accident from the patient would be the

history taken closest to the day of the injuries. The emergency room doctor noted that Claimant had injured his back lifting a cement slab one day earlier.

Therefore, there is no credible evidence that Applicant's 1988 back injuries were the direct and natural result of the original 1982 compensable industrial injury.

ARGUMENT II

CLAIMANT'S 1988 INJURIES WERE THE RESULT OF HIS OWN INDEPENDENT, INTERVENING CONDUCT IN LIFTING HEAVY OBJECTS

Applicant argues that the Commission erroneously concluded that the exertion necessary to move the concrete parking barrier was unusual and extraordinary within the meaning of Allen v. Industrial Comm'n. However, the findings by the ALJ and Commission that Claimant's efforts to move heavy objects in 1988 were unusual and extraordinary met the direct and natural results test of Mountain States Casing Servs. v. McKean, not the legal-cause requirement for the primary injury in 1982. In the findings of fact, the ALJ explicitly distinguished the Intermountain Health Care opinion from this claim, since lifting boxes and concrete barriers were not common, day-to-day, and ordinary. Specifically, the ALJ found that in I.H.C. the subsequent nonindustrial injury occurred during a common and ordinary activity, since lifting a four month-old baby out of a walker should not have required extraordinary effort. Conversely, Applicant's activities lifting

boxes and moving concrete barriers were held to require unusual and extraordinary exertion. In particular, the factual findings were that concrete barriers are heavy, difficult to move, and the mere fact that three family members were required to move the concrete block left little doubt that it was not an object that could be moved with moderate effort. The ALJ noted that the records of Drs. Smith and MacArthur showed Claimant did reasonably well until the strenuous exertion of lifting in 1988 reinjured his lumbosacral spine.

The ALJ and Commission ruled that the causative chain between the 1982 surgery and the 1988 herniation cannot be broken by ordinary, nonstrenuous, day-to-day activities. The direct and natural results doctrine provides that the causation between an original injury and later medical complications is broken by an employee's independent, intervening conduct. The I.H.C. and Perchelli cases and Professor Larson agree that intentional or negligent conduct by a claimant will break the chain of causation.

In this claim, Applicant had a permanent impairment caused by a lifting injury and was well aware of the probability of reinjury from lifting heavy objects. Claimant's 1988 injuries were not the result of a natural progression that became symptomatic after sneezing or attempting to pick up a four month-old baby. In 1988, Claimant knowingly and willingly exceeded the physical limitations

inherent in a 15% permanent impairment of the low back by activity which was unusual and extraordinary.

Applicant claims that the terms "unusual and extraordinary" used by the Commission do not refer to exertion, but only mean that few of us ever attempt to move a concrete barrier. In addition, Claimant asserts that there is no evidence in the record as to the weight of the concrete block. However, Applicant's failure to offer testimony at the hearing to describe the weight of the parking barrier does not entitle Claimant to argue on appeal that he was engaged in normal activities or did not exceed his physical restrictions. Applicant must prove his claim by a preponderance of medical evidence. Willardson v. Industrial Comm'n, 856 P.2d at 376. Finally, the allegation by counsel for the Applicant that he was able to move a parking barrier in his office parking was not offered at the hearing, where it would have been inadmissible, and is improper argument on appeal.

Therefore, the finding by the ALJ and Commission that Claimant's knowing and intentional efforts to lift boxes and move parking blocks required uncommon and extraordinary exertion was supported by the evidence. Applicant's lifting and moving of boxes and barriers was unusual and extraordinarily strenuous activity which broke the chain of causation and were deemed independent and intervening causes by the ALJ and Commission.

ARGUMENT III

THERE WAS NO REASONABLE DOUBT RESPECTING CLAIMANT'S RIGHT TO COMPENSATION FOR THE 1982 INJURY

Defendants do not dispute that the Workers' Compensation Act should be liberally construed in favor of an award of compensation where there is reasonable doubt. However, in this claim, there is no doubt that Applicant was paid full workers' compensation benefits after the 1982 industrial injury. Applicant has already received all medical expenses and disability benefits from the original injury at R.P. Scherer in 1982. Claimant was not medically stable until 1986. Thus, Defendants paid medical expenses and compensation until four years after the compensable injury. Presumably, any doubt for full workers' compensation benefits was resolved in Applicant's favor from 1982 through 1987.

Defendants do not agree that Applicant is entitled to a liberal construction of any doubt in his favor where he attempts to reopen his original claim to recover additional compensation for a nonindustrial injury six years later. In the McKean, I.H.C., and Perchelli decisions and in § 13 of Professor Larson's treatise, there is no mention of a rule of construction which requires any doubt to be construed in favor of a finding that a subsequent nonindustrial injury was the direct and natural result of the original industrial injury. Claimant seeks to use a well-settled

rule of construction as a subterfuge to overlook the undisputed evidence that moving heavy objects caused the 1988 injuries.

The rule of construction requires reasonable and material doubt respecting Applicant's right to compensation. Claimant asserts doubts based on speculation and inadmissible evidence. For example, Applicant's counsel refers to tests of the exertion needed to move a parking barrier performed in his office parking lot after the filing of this appeal. Additionally, Claimant cites to "Post-It Notes" in the record on appeal that allegedly support improper influence, bias, or prejudice of an unidentified ALJ. The Post-It Notes are inadmissible on appeal, since they were not admitted at the hearing, were not authenticated, lack foundation and constitute hearsay. Finally, Applicant speculates that Dr. MacArthur agreed with the opinion of the Division of Health Care Financing that the 1988 injuries were secondary to the 1982 injury. There is no evidence to support this allegation and Dr. MacArthur's opinion is nothing but rank supposition.

CONCLUSION


Applicant's uncommon and extraordinary activities break the chain of causation between the original compensable industrial injury in 1982 and the nonindustrial injuries in 1988. Applicant failed to show that the 1988 injuries were a direct and natural consequence of the primary injury in 1982. All three physicians

agreed in the medical records that the 1988 injuries were caused by independent, nonindustrial lifting of boxes and concrete barriers. No doctor stated that Applicant's bulging disc naturally progressed into a herniated disc. Claimant was largely pain-free for a number of years before the 1988 lifting accidents, the original injury was six years before the nonindustrial accident, there was no herniation until the strenuous exertion during 1988, and Applicant sought emergency medical care the day after moving a concrete barrier. The ALJ and Commission found that Applicant's activities were unusual and extraordinary to distinguish mere medical complications of an original injury that arise during normal, day-to-day activities such as sneezing or lifting a four month-old baby.

Finally, all doubts respecting Claimant's rights to full compensation for the 1982 injury were resolved in his favor. There may be doubts concerning Claimant's right to recover under the direct and natural results rule for the nonindustrial accident six years later, but they are not reasonable and are based on speculation and inadmissible evidence.

Therefore, Defendants request that the Applicant's appeal be dismissed and the Findings of Fact, Conclusions of Law, and Order of the ALJ and Commission be affirmed.

RESPECTFULLY SUBMITTED this 16 day of February, 1995



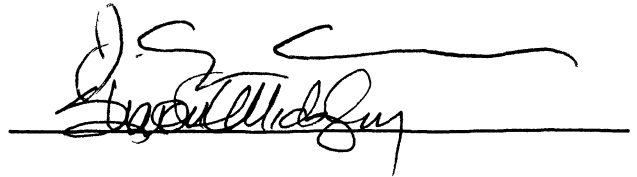
J. Angus Edwards
PURSER & EDWARDS, L.L.C.
39 Market Street, Third Floor
Salt Lake City, Utah 84101-2104
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of February, 1995, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENTS, to be deposited in the U.S. mails, postage prepaid, addressed to the following:

Jay A. Meservy
1610 South Main, Suite E
Bountiful, Utah 84010

Industrial Commission of Utah
Legal Division
160 East 300 South, 3rd Floor
P.O. Box 146600
Salt Lake City, Utah 84114-6600

A handwritten signature in dark ink, appearing to read "J. S. Meservy", is written over a horizontal line.