

1994

Hilton Hotel and Pacific Reliance Insurance v. Jessica D. Jacobsen : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HILTON HOTEL and PACIFIC
RELIANCE INSURANCE,

Petitioners/Appellants

vs.

Case No. 940594-CA

Priority 7

Case No. Below: 92-817

JESSICA D. JACOBSEN,

Applicant/Respondent

and

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF UTAH,

Respondent.

**UTAH COURT OF APPEALS
BRIEF**

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BRIEF OF PETITIONERS/APPELLANTS

*Appeal from final order of
the Industrial Commission of Utah*

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Marilyn M. Branch
Clerk of the Court

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TEXT OF AUTHORITIES

1. Utah Code Ann. §35-1-97 (1990):

(1) Any employee sustaining an injury arising out of and in the course of employment shall provide notification to his employer promptly of the injury. If the employee is unable to provide notification, the employee's next-of-kin or attorney may provide notification of the injury to the employer.

(2) Any employee who fails to notify his employer or the Commission within 180 days of the injury is barred for any claim of benefits arising from the injury.

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(a) (1994).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Was it proper for the Board of Review to determine that Jacobsen's "work activity" supported the legal cause of her injuries after inventing its own notion sua sponte of what her "work activity" was?

STANDARD OF REVIEW

The Board's application of Allen v. Industrial Com'n., 729 P.2d 15 (Utah 1986), to the facts of this case is a mixed question of law and fact subject to intermediate "reasonable and rational" review. Sisco Hilte v. Industrial Com'n. of Utah, 766 P.2d 1089 (Utah App. 1988).

PRESERVATION OF ISSUE AT ADMINISTRATIVE LEVEL

The issue was raised at R. 68-71.

STATEMENT OF THE CASE

The applicant, Jessica D. Jacobsen, worked as a waitress for the petitioner Hilton Hotel from January 16 to August 1992. (Hilton Hotel and Pacific Reliance Insurance will be collectively referred to as "Hilton"). (R. 2-3, 61-2) (A copy of the Findings of Facts and Conclusions of Law and Order is attached as "Addendum A"). She was a part-time employee. (R. 1-3).

Before working at Hilton, Jacobsen had a pre-existing history of medical problems with her neck and cervical spine. (R. 78-9) (A copy of the Order on Motion for Review is attached as "Addendum B"). She was involved in a gymnastics accident while she was a teenager, resulting in a head injury and broken arms. (R. 157). In 1971 she was diagnosed as having a congenital unstable back. (R. 215). She sustained a neck injury in 1982 from an automobile accident. (R. 158). The next year she was diagnosed with degenerative disc disease. (R. 216).

Little more than a week before she began working at Hilton, on January 6, 1992, Jacobsen visited her chiropractor, Dr. Van Slooten. (R. 216, 438). She complained of back pain, numbness in her limbs and fingertips, and a popping sensation in her back. (R. 216, 438).

On May 6, 1992, Jacobsen was lifting a tray from the service counter at Hilton when she experienced neck and back pain, a

clawing sensation in her hand, and a popping sensation in her back.¹ (R. 63, 78, 210). She lifted the tray properly and lifted it about a foot and a half upwards. (R. 64). Jacobsen changed her estimate of the tray's weight at various times during her pursuit of benefits, guessing that it weighed anywhere from thirty to fifty-five pounds (R. 118, 243). However, Jacobsen's supervisor, Susie Buecher, witnessed the May 6 incident and observed the tray Jacobsen was carrying. (R. 190). Ms. Buecher then weighed a comparable tray of food and found it to weigh 16.5 pounds. (R. 195-6).

Jacobsen went to Workcare the next day, where two treating physicians diagnosed her problem as degenerative disc disease. (R. 147). She sought another opinion from Dr. Craig McQueen, who agreed with the diagnosis and placed her in physical therapy until July 15, 1992, when she returned to work. (R. 61, 147-8).

Claiming that she was unable to perform her work, Jacobsen left employment with Hilton permanently on August 29, 1992. (R. 62-3). She applied for workers' compensation benefits, which Hilton denied. Jacobsen then commenced this proceeding with the Industrial Commission, describing her "accident" as lifting the tray on May 6. (R. 1). She later affirmed this description of

¹Jacobsen claims that she also felt back pain on April 19, 1992, as she was lifting a tub of dishes at work. (R. 61). Nevertheless, Jacobsen did not report this alleged incident to her employer as required by Utah Code Ann. §35-1-97. (R. 61, 62, 118). This alleged incident therefore cannot be considered in Jacobsen's claim for benefits.

her accident in her Memorandum in Opposition to Hilton's Motion for Review. (R. 76).

Hilton argued at the hearing before the Administrative Law Judge ("ALJ") that Jacobsen's pre-existing condition contributed² to her May 6 injury, warranting the application of the higher causation standard in Allen v. Industrial Comm'n., 729 P.2d 15 (Utah 1986).³ (R. 198-9). The Administrative Law Judge declined to apply the Allen standard and awarded Jacobsen benefits. (R. 60-7).

Upon Hilton's Motion for Review, the Board of Review found that Hilton had shown that Jacobsen's pre-existing conditions did contribute to her workplace injury.⁴ (R. 78-9). Thus, the Board

²Hilton also produced evidence that Jacobsen's pre-existing conditions constituted the sole cause of her permanent impairment, relying on an independent medical examination of Jacobsen performed by Dr. Louis Schricker in 1993. (R. 210). Dr. Schricker noted that Jacobsen's work activity only aggravated her pre-existing conditions temporarily and did not cause any permanent impairment. (R. 217-8).

³Jacobsen argued that her injury on May 6 was caused by her work and not by any pre-existing condition. In support of this argument, Jacobsen introduced a letter written to her attorney by Dr. Reichert, who examined her in 1993 for the purpose of obtaining an impairment rating. (R. 114, 154, 208-9). Dr. Reichert states without explanation in his letter that "the cause of the patient's current symptomatology is lifting injury from 7 May 1992." (R. 208). Dr. Reichert's letter does not mention that he considered or had access to Jacobsen's prior medical history (R. 208), and Jacobsen is unsure whether Dr. Reichert knew of her prior medical history. (R. 155-7).

⁴Hilton produced a supplemental medical report from Dr. Louis Schricker stating that Jacobsen's pre-existing conditions were the major cause of her temporary incapacity on May 6. (R. 72-3).

determined that the Allen case test does apply and that Jacobsen has the burden of proving that her work activity constituted both the legal and medical cause of her injury. (R. 78-9).

However, rather than addressing whether the May 6 incident of lifting the tray amounted to unusual stress or trauma so as to constitute the legal cause of her injury, the Board of Review ignored the May 6 incident that had previously been the focus of the case. Instead the Board injected a new theory into the case, one which had never before mentioned by the parties or examining physicians: that Jacobsen's actual "accident" was her "cumulative work-related exertion." (R. 79). Specifically, the Board declared that Jacobsen's "repetitious lifting of loaded serving trays" constituted exertion beyond that experienced in life's usual activities and thus supported the legal cause of her injury. (R. 79). The Board then affirmed the ALJ's award of benefits based on the Board's own conclusion that Jacobsen had satisfied the Allen requirement of legal causation. (R. 79).

SUMMARY OF ARGUMENT

The Board of Review cannot affirm an award of workmens' compensation benefits based upon a theory never raised by the parties, never presented as evidence and never suggested by examining physicians. Yet the Board did precisely that by concocting the sua sponte notion that Jacobsen suffered from cumulative work-related exertion and then declaring that it supports the legal cause of her injury. Jacobsen still has not

met her burden of proving that her work activity legally caused her injuries, despite the Board's attempt to invent a favorable theory of legal causation for her. This Court should therefore reverse the Board's decision awarding Jacobsen benefits.

ARGUMENT

POINT I

THE BOARD IMPROPERLY DETERMINED THE ISSUE OF LEGAL CAUSE BY BASING ITS DETERMINATION UPON A SUA SPONTE NOTION

A. The Allen Test Applies In This Case To Require Proof That Jacobsen's Work Activity Legally Caused Her Injury.

An injury occurring during working hours is only compensable if the employee can prove that work-related exertion or trauma contributed to or caused the injury. Allen v. Industrial Com'n., 729 P.2d 15, 24 (Utah 1986). When an employee brings a pre-existing condition to the workplace, as Jacobsen did, she must meet a two-part test under Allen to prove that the work caused her injury. Allen, 729 P.2d at 25-7. The second part of this test, medical cause, is not contested in this appeal and thus will not be discussed.

The first part of the Allen causation test compels an applicant to show that her work activity constituted the legal cause of her injury. Initially, the "work activity" of the employee must be delineated. Next, the agency must decide whether that activity amounted to unusual, extraordinary exertion

when compared to nonemployment life. Price River Coal Co. v. Industrial Com'n., 731 P.2d 1079, 1082 (Utah 1986).

The Board correctly concluded that the Allen test applies to Jacobsen's claim since her pre-existing condition contributed to her injury. However, it acted improperly by ignoring the parties' impression of what Jacobsen's work activity was and substituting its own notion of cumulative trauma.

B. The Board Improperly Attempted To Meet This Higher Causation Standard For Jacobsen By Fashioning Its Own Idea Of What Her Work Activity Was.

1. THE CUMULATIVE TRAUMA NOTION WAS NEVER MENTIONED IN THIS CLAIM UNTIL THE BOARD CHOSE TO BASE ITS JUDGMENT UPON IT.

Addressing the first portion of the legal cause requirement, designating the work activity, the Board announced that the repetitive lifting of serving trays constituted her work activity. The Board thus injected into Jacobsen's claim for the first time the suggestion that cumulative activity of her job effectively became her accident.

Neither Jacobsen nor Hilton took the position at any time during the pendency of her claim before the Commission that repetitive lifting contributed to or caused her injuries. Such a notion was never pled nor otherwise asserted. It was never addressed at the hearing before the ALJ nor was any evidence presented to support or refute it. Jacobsen first described her accident in her Application for Hearing as the lifting of the tray on May 6; she stuck to this description throughout the proceedings, including in her Opposition to Hilton's Motion for

Review. Her counsel did not suggest at the hearing before the ALJ that she was proceeding on a theory of repetitive lifting; he instead argued that there was no evidence of a pre-existing physical condition, that lifting a tray was unusual compared to nonemployment activity, and that her injury aggravated pre-existing psychological problems. (R. 203-5). Accordingly, the ALJ delineated Jacobsen's accident as her lifting of the tray on May 6, not as the repetitive lifting of trays over time. (R. 45-6).

Since the parties never contended that repetitive lifting caused Jacobsen's injuries, it is not surprising that the evidence before the ALJ and the Board did not present a case of cumulative trauma. There is no evidence of how many times she lifted trays during her employment at Hilton, how much each tray weighed, or how many times she lifted a tray each night. There is no evidence of how much of her employment duty each night was devoted to tray lifting, whether co-employees helped her carry trays to tables, or how long she held a tray above her shoulder on average while transporting it to a table. Rather than dealing with a complete description of all her nightly employment duties over time, Jacobsen's direct and cross examination focused on her May 6 lifting incident (R. 118-9, 139-143), and culminated with her admission on cross examination that she originally sustained her injury on May 6. (R. 136).

Additionally, none of her several examining physicians ever mentioned that her injuries might be traceable to repetitive lifting of trays. Dr. Schricker focuses on her May 6 injury when stating that her work activities only caused temporary aggravation of her pre-existing condition (R. 217-8), while Dr. Reichert contends that the cause "of the patient's current symptomatology is lifting injury from 7 May 1992." (R. 208). The medical panel that examined her after the hearing also did not suggest that she might have suffered from cumulative trauma of lifting trays repetitively. (R. 48-59).

Despite the parties' focus on the May 6 lifting and the lack of any insinuation in the evidence that Jacobsen's injuries were traceable to cumulative trauma, the Board nonetheless changed Jacobsen's work activity to "the repetitious lifting of loaded serving trays."⁵ (R. 79). It offered no supportive facts for

⁵A possible explanation for the Board's insistence upon introducing a theory of cumulative trauma despite lack of supporting evidence is that it thought it was **required** to consider cumulative trauma as a matter of course in every worker's compensation case involving the Allen test. The Board quotes Nyrehn v. Industrial Comm'n., 800 P.2d 330 (Utah 1990), out of context, for the proposition that Jacobsen had to demonstrate that her cumulative work-related exertion exceeds normal nonemployment exertion. (R. 79). In Nyrehn, the parties had actually broached and debated the issue of cumulative trauma, and there was evidence of cumulative trauma to the employee involved. Nyrehn, 800 P.2d at 331. While cumulative trauma was therefore a relevant legal issue for the Nyrehn court to contemplate, Nyrehn does not instruct that cumulative trauma is a consideration to be thrown perfunctorily into every workers' compensation case that happens to deal with Allen causation.

this new inference, leaving it unclear what evidence, if any, the Board relied upon to support its cumulative trauma notion.⁶

2. THE BOARD'S SUA SPONTE IDEA OF CUMULATIVE TRAUMA
IS INSUFFICIENT TO SUSTAIN THE AWARD OF BENEFITS.

The Board hinged its judgment upon a notion that was never raised by the parties or suggested by the evidence. Adjudicative bodies must be responsive to the issues as framed by parties when rendering judgments because they lack authority to render a decision on issues not presented for determination. Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984).

This Court recently extended the limitation on sua sponte decision making to administrative tribunals in Chevron U.S.A. v. State Tax Com'n., 847 P.2d 418 (Utah 1993).⁷ The petitioners in Chevron were notified by the Property Tax Division of the Commission that taxes on their refineries would be centrally

⁶Hilton disputes the Board's unsupported inference of cumulative trauma. To the extent that this inference is arguably factual as opposed to a mixed inference of law and fact, Hilton ostensibly has a duty to marshal the evidence in support of cumulative trauma. Nonetheless, when an agency fails to disclose the evidence or logic it might have employed in making a factual finding, marshalling the evidence is impossible. See Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991) (findings must include enough subsidiary facts to show clearly the evidence upon which they are grounded or the marshalling effort is futile); Adams v. Board of Review of Indus. Comm'n., 821 P.2d 1 (Utah App. 1991) (factual findings should be sufficiently detailed to disclose the steps by which ultimate factual conclusions are reached; absent this, appellant wishing to challenge agency's factual findings cannot marshal evidence).

⁷This Court again cautioned administrative tribunals against taking sua sponte action in dicta in Middlestadt v. Industrial Com'n., 852 P.2d 1012, 1013 n.2 (Utah App. 1993).

assessed by the state. They initiated formal adjudicative proceedings with the Commission, which held that the taxes should be centrally assessed pursuant to subsection (a) of a particular statute in Utah's Property Tax Act. Although the parties had raised and debated whether subsection (d) of that statute could apply to require central assessment, subsection (a) was never mentioned as a ground for central assessment until the Commission relied upon it in its final decision. This Court noted that the subject matter of subsection (a) arose only as part of the parties' presentation of evidence before the Commission and was never directly discussed as authority for central assessment. Id. at 421. Because the Commission sua sponte raised and decided an issue that had not been raised by the parties, this Court reversed the Commission's decision. Id. at 420-1. As this Court observed,

[p]reservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver.

[T]he interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead, it not having been litigated at the time of trial.

Id. at 421, quoting Girard v. Appleby, 660 P.2d 245 (Utah 1983).

This Court also faulted the Commission for merely concluding that subsection (a) applied without developing subsidiary facts supporting the application. Id. at 421 n.9.

The same problems with sua sponte decision making detailed in Chevron arise here due to the Board's creation of the cumulative trauma theory. First, the Board placed itself in the improper role of advocate for Jacobsen by devising a theory of recovery that she could have raised but did not. Second, because it announced the cumulative trauma theory for the first time on final agency judgment, Hilton was deprived of the right to compile legal authority countering the theory or to present testimony against it at the hearing before the ALJ. Hilton could not rebut the notion that repetitive lifting caused Jacobsen's injuries because the Board's unprecedented action foreclosed debate.

The third flaw in deciding Jacobsen's claim based on a theory that the parties did not raise is that the Board's theory lacks substantial evidence. The Board simply states without explanation in its Order that repetitive lifting of trays caused Jacobsen's injuries and that cumulative trauma existed in her case. It did not, as it could not, offer medical evidence to support this notion; none of her examining physicians, including those on the medical panel, attributed her injuries to progressive work-related trauma. The Board did not, as it could not, offer testimonial evidence, because cumulative trauma was never an issue at the hearing before Judge Allen. Lacking any proof, the Board did not enter subsidiary factual findings to bolster, much less explain, its bare announcement that repetitive

lifting caused her injuries. In a similar case, Price River Coal Co. v. Industrial Com'n., 731 P.2d 1079 (Utah 1986), the Industrial Commission had ruled that a worker's employment activities amounted to unusual exertion and caused his death, but failed to explain what those employment activities were. The Supreme Court reversed the agency's ruling, noting that

the "finding" of unusual exertion and stress is nothing more than a conclusion.... We cannot affirm such a mixed conclusion of fact and law when its necessary premises are not evident.

Price River Coal, 731 P.2d at 1083.

Likewise, this Court should reverse the Board's award of benefits in this case because the basis for its judgment lacks substantial evidence. Grace Drilling Co. V. Board of Review, 776 P.2d 63, 68 (Utah App. 1989) (substantial evidence standard requires agency to support findings with more than scintilla of evidence).

C. Even If The Board's Sua Sponte Action Was Proper, This Court Can Conclude That Repetitive Lifting Of Trays Is Not Extraordinarily Stressful.

After improperly defining what Jacobsen's work activity was, the Board completed the legal cause inquiry by stating that repetitive lifting constitutes unusual and extraordinary activity. This Court is free to reach the opposite conclusion that this does not constitute unusual and extraordinary activity; the Board's determination that a work activity exceeds demands in nonemployment life is accorded no particular deference. Nyrehn v. Industrial Com'n. of Utah, 800 P.2d 330, 333 n.5 (Utah App.

1990). Thus, even if this Court concludes that the Board was justified in inventing the cumulative trauma theory, it can still reverse the Board's decision if it feels that lifting trays is not extraordinarily demanding.

The Board inappropriately determined that Jacobsen had met her burden of showing her work activity legally caused her injury as required under Allen. It exceeded its authority in fashioning a sua sponte "work activity" that lacks evidentiary support in the record. Since Jacobsen has not demonstrated that her work activity constituted the legal cause of her injury, reversal of the award of benefits is warranted.

POINT II

JACOBSEN'S WORK ACTIVITY AS DEFINED BY THE PARTIES DID NOT CONSTITUTE THE LEGAL CAUSE OF HER INJURIES.

The parties defined the work activity that allegedly caused Jacobsen's injury as the lifting of the tray on May 6. It is undisputed that Jacobsen lifted the tray in the correct manner and that she lifted the tray about one and a half feet to her shoulder. The parties disputed the weight of the tray; the ALJ did not enter a finding as to the weight of the tray, but noted that Jacobsen testified it weighed thirty pounds while Hilton maintained it weighed 16.5 pounds. (R. 62).

Given these facts, Jacobsen's lifting of the tray on May 6 was not extraordinarily stressful under the Allen test.⁸ The Utah Supreme Court in Allen listed several examples of typical nonemployment activities to gauge whether a given employment activity is unusual. Included in these examples were lifting and carrying baggage for travel and lifting a small child to chest height. Allen, 729 P.2d at 26. The Court went on to quote with favor a well-known workers' compensation treatise stating that lifting twenty-pound objects such as bags of golf clubs was not unusual or extraordinary. Id. at 26 n.8, quoting Larson, Workmen's Compensation §38.83 at 7-280-81. Considering the Supreme Court's broad position in Allen on how much an individual normally lifts in nonemployment life, the tray Jacobsen lifted on May 6 was not extraordinarily heavy and could not have legally cause of her neck injury.

Despite the Board's inappropriate handling of the legal cause issue in this claim, this Court has authority to determine the legal cause issue properly. Jacobsen's actual work activity did not legally cause her injury as required under Allen.

CONCLUSION AND RELIEF REQUESTED

Jacobsen has failed to meet her burden of showing that her work activity constituted the legal cause of her neck injury.

⁸Although neither the ALJ nor the Board determined whether lifting a tray weighing 16.5 to thirty pounds constitutes extraordinary activity, this Court can evaluate that question. Nyrehn, 800 P.2d at 333, n.5.

The Board's attempt to create a favorable "work activity" for her is a nullity; it invented that work activity in disregard of the parties' consistent position and in disregard of the evidence before it. Since Jacobsen's lifting of a tray on May 6 was not extraordinarily stressful, her work activity did not constitute the legal cause of her injury. Based upon the foregoing, Hilton respectfully requests that this Court reverse the Board's award of benefits to Jacobsen.

DATED this 3d day of January, 1995.

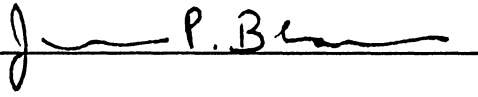
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By J. P. B.
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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing was mailed to the following, postage prepaid, this 3d day of January, 1995.

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ADDENDUM A:

FINDINGS OF FACTS AND CONCLUSIONS
OF LAW AND ORDER

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 92-817

JESSICA D. JACOBSEN,

Applicant,

vs.

HILTON HOTEL and/or UNITED
PACIFIC RELIANCE INSURANCE,

Defendants.

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FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah,
160 East Third South, Salt Lake City, Utah, on
August 20, 1993, at 8:30 o'clock a.m., the same
being pursuant to Order and Notice of the
Commission.

BEFORE: Timothy C. Allen, Presiding Administrative Law
Judge.

APPEARANCES: The applicant was present and represented by M.
David Eckersley, Attorney at Law.

The defendants were represented by Stuart L.
Poelman, Attorney at Law.

At the conclusion of the evidentiary hearing in this
matter, the case was referred to a Medical Panel appointed by the
Administrative Law Judge. The Medical Panel Report was received
and copies were distributed to the parties by registered mail.
Fifteen (15) days having elapsed since the mailing of said Panel
Report, and no objections having been received thereto; the Medical
Panel Report is hereby admitted into evidence.

Being fully advised in the premises, the Administrative Law
Judge is prepared to enter the following,

FINDINGS OF FACT:

The applicant herein, Jessica D. Jacobsen, started working for the Salt Lake Hilton Hotel in January of 1992, as a cocktail waitress. The applicant worked at the Room At The Top restaurant. On April 19, 1992, the applicant contends that she was lifting a heavy tub of dishes into the kitchen, when she experienced mid-back pain, and pain between her shoulder blades accompanied with spasm. The applicant apparently did not report that injury to anyone and continued working.

On May 6, 1992, the applicant was in the process of lifting an oval food service tray from the service counter, when she experienced clawing in her left hand and neck pain. The applicant had described the tray as weighing thirty pounds, however, the applicant's immediate supervisor testified that the service tray with four meals on it would have weighed 16.5 pounds, including the tray. At the time of her injury, the applicant's immediate supervisor was approximately two or three feet away, and noticed that the applicant had to let the tray back down to the service counter. The applicant called out to her supervisor for assistance, and informed her that "I can't feel my arm." The applicant started having neck pain, and could hardly move her head. An accident report was filled out by the supervisor, and an incident report was filled out by the applicant.

On May 7, 1992, the applicant was sent to WorkCare by her employer, and, at that facility, it was recommended that she have 6 - 8 weeks of physical therapy. The applicant wanted a second opinion, so she contacted her employer and informed them that she would be seeking additional medical opinion. The applicant having previously been treated by Dr. Craig McQueen, reported to Dr. McQueen on May 12, 1992. Dr. McQueen had previously performed knee surgery on the applicant, and after examining the applicant, Dr. McQueen concurred with the recommendation of physical therapy.

The applicant received physical therapy, and was eventually released from that care. The applicant returned to work on or about July 15, 1992, and testified that she was fine at first. However, by mid-August, her symptoms had returned, especially following the lifting that was required by her job. The applicant was unable to function at full capacity. On or about August 20, 1992, she and her immediate supervisor discussed the problems the applicant was having doing her job, and, at that time, it was requested that the applicant resign, since she was unable to perform her duties due to the physical problems it was causing her. The applicant requested some additional time, so that she could get

JESSICA JACOBSEN
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her personal affairs organized. The applicant also testified that no light duty was offered to her and also that there is no light duty work that can be performed by a waitress. The applicant last worked on August 29, 1992.

On September 25, 1992, Dr. McQueen gave the applicant a 5% permanent partial impairment as the result of her industrial injury. In October of 1989, the applicant was seen by Dr. Gant for a psychological evaluation at the request of the Division of Rehabilitation Services.

The applicant received chiropractic treatment from Dr. Van Slooten following her injury of May 6, 1992, but those treatments were discontinued after the physical therapist that the applicant was receiving treatment from advised her that she should discontinue forceful chiropractic manipulations. The physical therapist advised the applicant that she needed nonforceful treatment. The applicant changed her chiropractic care to Dr. Troy Giles, and he treated her with spinal touch trigger point therapy, and other treatment modalities of a nonforceful nature.

Dr. Giles then referred the applicant on to Dr. Reichert for neurological care, after the applicant was complaining of tingling in her upper extremities following her chiropractic adjustments. Dr. Reichert had the applicant receive an MRI and a CT scan, and gave the applicant a 20% whole person rating.

In January of 1993, the applicant started massage therapy school, but later had to discontinue that program when she was informed that she had a carcinoma of her cervix and uterus. The applicant resumed that school program the first part of July of 1993.

The applicant's present complaints are that she has numbness in her hands and problems with her grip, which is exacerbated when she gardens, sews, or does any lifting. She also complains of decreased range of motion in her neck and neck pain.

In 1982, the applicant was involved in a car accident in Pennsylvania. A month or so afterwards, the applicant experienced the inability to move her neck, and so she reported to Dr. Soderberg, who informed her that it was not uncommon for a whiplash injury to become symptomatic a month later. Dr. Soderberg treated her conservatively, and the applicant testified that she had no further problems with her neck until January 1992. At that time, the applicant testified that she fell while skiing, and had

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tingling in her hands for one or two days, and then had problems with the paraspinous muscles of her mid and low back. She testified that that she treated with Dr. Van Slooten one or two times weekly as part of a maintenance program.

On cross-examination, the applicant testified that in January of 1993, she had the first of four surgical procedures on her carcinoma. The applicant testified further regarding the events of May 6, 1992. She testified that she had to lift the tray approximately 1-1½ feet off the service station onto her left shoulder. She stated that as she did so, she felt a pain in her neck and a clawing in her left hand, which caused her to drop the tray onto the station. The applicant also stated that she was leaning over as she lifted the tray. She stated that she had no had no prior problems similar to this in her neck.

At age fourteen, the applicant sustained a head injury while engaged in gymnastics. The applicant was attempting a triple flip off the parallel bars, when she missed, and as a result fractured both of her arms and had a concussion. The applicant reiterated that following the ski accident in January of 1992, she had tingling of her fingers for a couple of days. She also testified that she saw Dr. Van Slooten on May 5, 1992, for an adjustment of her back.

The Human Resource Director of the Hilton Hotel was called and testified that the applicant did not report any industrial injury to her on April 9, or April 19, or August 20, 1992. She testified that the applicant informed her that she was terminating her employment because she was unable to perform her work.

The applicant's immediate supervisor was called and testified that she witnessed the applicant's injury, and that the applicant lifted correctly and routinely. She also testified that the applicant was having problems and treatment for her back, starting with the first day she started at the Hilton Hotel. She also testified that the applicant reported no injuries to her on April 9, or April 19, 1992. She also testified that there was no accident on August 20, 1992, but rather, that she and the applicant sat and talked about the fact that lifting the trays was detrimental to the applicant and that it was hurting her physically.

The applicant's immediate supervisor also testified credibly that the applicant did not miss any work before May 6, 1992, due to her back. She also testified forthrightly that she observed no limitations on the part of the applicant as far as doing her job before May 6, 1992.

Based on the foregoing, I find that the applicant was not suffering from pre-existing problems with her neck or clawing of her left hand prior to May 6, 1992. However, the evidence does support a finding that she was having difficulties with her low back. The Nyrehn case requires that: "An employer must prove medically that the claimant 'suffers from a preexisting condition which contributes to the injury.' (Note omitted) In this case I have been directed to no evidence, by the defendants, upon which "the critical factual finding that [Jacobsen's] preexisting condition contributed to her injury." Accordingly, with respect to the neck injury of May 6, 1992 the higher legal causation standard of Allen does not apply. Therefore, the applicant is entitled to a finding that she sustained a compensable industrial accident on May 6, 1992.

The defendants referred the applicant to Dr. Schricker, for an independent medical examination. Dr. Schricker found that the applicant's work activities of May 1992, resulted "In an aggravation of her well documented pre-existing condition of osteoarthritis." Dr. Schricker went on to find that the applicant was temporarily disabled as the result of those activities for approximately ten weeks or until July 16, 1992. Dr. Schricker gave the applicant a 5% permanent partial impairment rating due to the osteoarthritis, and it would appear that the doctor also found that 1% of that 5% impairment would be due to the industrial events, although the report is not clear.

Because of the disputed medical issues, the case was referred to the Medical Panel for its evaluation. The Medical Panel found that the applicant was temporarily totally disabled from the industrial accident of May 6, 1992 until July 15, 1992. The Panel also concluded that the applicant has a 2% permanent impairment due to the accident of May 6, 1992, and that the accident did not result in any aggravation of the applicant's pre-existing psychiatric condition. Having reviewed all of the evidence on the file, I find that the Panel's findings are well supported by the evidence, and I adopt the Panel's findings as my own.

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On May 6, 1992 the applicant was single and was earning \$2.13 per hour plus tips. The payroll records indicate that the applicant was paid wages based on hours worked and tips earned. Usually, Section 75 of the Act requires that the average weekly wage be based on the number of hours worked by an employee per week. However, in this case because of the payment of tip income, it seems more appropriate to utilize the following provision:

35-1-75. Average weekly wage - Basis of computation.

* * *

(g) (i) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury.

Applying the foregoing statute to the facts of this case, I find that the applicant did not quite work the full 13 weeks of the first quarter of 1992. Rather, she worked 10 weeks in that quarter beginning with the payroll period ending January 26, 1992 and ending halfway through the payroll period ending April 5, 1992. Adding the gross wages received by the applicant beginning with the \$113.43 payment for the period ending 1/26/92 and ending with one-half (1/2) of the \$208.67 payment (i.e. \$104.34) for the period ending 4/5/92, results in total wages to the applicant of \$1,618.55. Dividing the total wages by 10 weeks results in an average weekly wage of \$161.85 per week, which entitles the applicant to compensation benefits of \$108 per week, when rounded to the nearest whole dollar.

Based on the findings of the Panel the applicant is entitled to temporary total compensation for the period May 7, 1992 through July 15, 1992, or a total of 10 weeks at the rate of \$108 per week for a total of \$1,080. The applicant is also entitled to 6.24 weeks of permanent impairment benefits at the rate of \$108 per week for a total of \$673.92 for her 2% impairment due to the industrial accident.

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ORDER
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CONCLUSION OF LAW:

Jessica Jacobsen sustained a compensable industrial accident on May 6, 1992 while employed by Hilton Hotel, and is entitled to benefits therefor.

ORDER:

IT IS THEREFORE ORDERED that Hilton Hotel and/or United Pacific Reliance pay Jessica Jacobsen compensation at the rate of \$108 per week for 10 weeks for a total of \$1,080, for temporary total disability resulting from the industrial accident of May 6, 1992. These benefits shall be paid in a lump sum with 8% interest from July 16, 1992.

IT IS FURTHER ORDERED that Hilton Hotel and/or United Pacific Reliance pay Jessica Jacobsen compensation at the rate of \$108 per week for 6.24 weeks for a total of \$673.92, for the 2% permanent impairment resulting from the industrial accident of May 6, 1992. These benefits shall be paid in a lump sum with 8% interest from July 16, 1992.

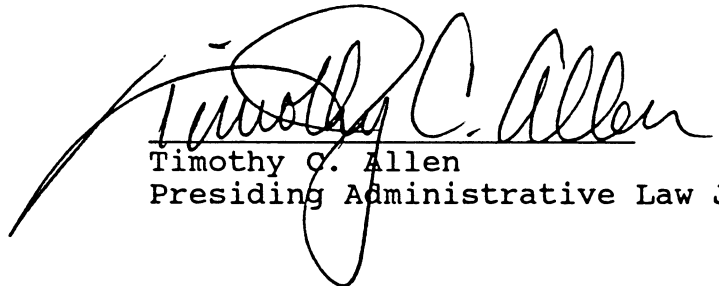
IT IS FURTHER ORDERED that that Hilton Hotel and/or United Pacific Reliance pay M. David Eckersley, attorney for applicant, the sum of \$351 plus 20% of the interest awarded to the applicant, for services rendered in this matter. Said fee to be deducted from the award herein and remitted directly to counsel's office.

IT IS FURTHER ORDERED that Hilton Hotel and/or United Pacific Reliance pay all medical expenses incurred as the result of the industrial accident of May 6, 1992.

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IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. In the event a Motion for Review is timely filed, the parties shall have fifteen (15) days from the date of filing with the Commission, in which to file a written response with the Commission in accordance with Section 63-46b-12(2), Utah Code Annotated.

DATED this 4th day of February, 1994.



Timothy C. Allen
Presiding Administrative Law Judge

MAILING CERTIFICATE

I hereby certify that on February 4, 1994, a copy of the attached Order in the case of Jessica Jacobsen was mailed to the following persons at the following addresses, postage prepaid:

M. David Eckersley, Atty., 175 E. 400 S., #900, SLC, UT 84111
Stuart Poelman, Atty., P O Box 45000, SLC, UT 84145-5000
Jessica Jacobsen, 2144 S. Highland Dr., #150-154, SLC, UT 84106
United Pacific Reliance Insurance, Vickie Holland,
P O Box 526198, SLC, UT 84152-6198

BY DIRECTION:

INDUSTRIAL COMMISSION OF UTAH

By Tim Allen
Tim Allen

ADDENDUM B:

ORDER ON MOTION FOR REVIEW

THE INDUSTRIAL COMMISSION OF UTAH

JESSICA D. JACOBSEN,	*	
	*	
Applicant,	*	
	*	ORDER ON MOTION
vs.	*	FOR REVIEW
	*	
HILTON HOTEL and	*	Case No. 92-0817
PACIFIC RELIANCE INSURANCE,	*	
	*	
Defendants.	*	
	*	

Hilton Hotel and its insurance carrier, Pacific Reliance (referred to jointly as "Hilton" hereafter) asks The Industrial Commission of Utah to review the Administrative Law Judge's decision awarding workers' compensation benefits to Jessica D. Jacobsen.

The Industrial Commission of Utah exercises jurisdiction over these Motions For Review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53 and Utah Admin. Code R568-1-4.M.

FINDINGS OF FACT

The Commission generally adopts the findings of fact set forth in the ALJ's decision, except to the extent such findings are amplified or corrected below.

Ms. Jacobsen began working as a waitress for Hilton during January 1992. During the course of each shift, she was frequently required to lift trays filled with dishes and meals. On April 19, 1992, as she was lifting a heavy tub of dishes, she experienced pain in her back. She continued to work. On May 6, 1992, as she was lifting a tray with meals to her shoulder, she experienced pain in her back, neck and left hand.

Ms. Jacobsen was examined by a physician who referred her to physical therapy. She returned to work in mid-July, 1992. After one month, she again began to experience neck pain in connection with lifting. During late August 1992, she resigned because she could not perform her work duties.

Ms. Jacobsen has been examined by a medical panel appointed by the ALJ. The panel concluded that she suffered a 6% whole person impairment due to problems associated with her cervical spine. Two thirds of that impairment preexisted her work at Hilton and one third resulted from her work at Hilton.

ORDER ON MOTION FOR REVIEW
JESSICA D. JACOBSEN
PAGE TWO

Ms. Jacobsen was also examined by Dr. Schricker on behalf of Hilton. Dr. Schricker concluded: "There is no question that her work activities or (sic) early May 1992 resulted in an aggravation of her well-documented pre-existing condition of osteoarthritis."

DISCUSSION AND CONCLUSIONS OF LAW

The ALJ concluded that Ms. Jacobsen did not suffer from preexisting neck problems prior to May 6, 1992. In its Motion For Review, Hilton disputes the ALJ's conclusion and argues that Ms. Jacobsen suffered from a preexisting neck condition that contributed to the problems she experienced while working at Hilton. According to Hilton's argument, since Ms. Jacobsen had a preexisting injury, she must meet the "legal causation" test of Allen v. Industrial Commission, 770 P.2d 912 (Utah 1988).

Based upon the reports of the medical panel and Dr. Schricker, it appears that Hilton is correct in its argument that Ms. Jacobsen suffered from a preexisting osteoarthritis condition in her neck. Therefore, under Allen, *ibid.*, she must demonstrate that her "cumulative work-related exertion exceeds the normal level of exertion in nonemployment life." Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah 1990).

After considering the demands of Ms. Jacobsen's employment, the Commission concludes that the requirements of her work, and in particular the repetitious lifting of loaded serving trays, exceeds the normal level of exertion customarily experienced in nonemployment life. Consequently, even though Ms. Jacobsen suffered from a preexisting condition, she has satisfied the Allen requirement of legal causation and is entitled to the workers' compensation benefits awarded by the ALJ.


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PAGE TWO

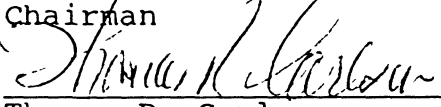
ORDER


Based on the foregoing, the Commission denies the Hilton Hotel's Motion for Review. The Commission affirms the award of benefits as set forth in the ALJ's decision. It is so ordered.

Dated this 12th day of September, 1994.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTIFICATION OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a request for reconsideration with the Commission within 20 days of the date of this Order. Alternatively, any party may appeal this Order by filing a Petition For Review with the Court of Appeals within 30 days of the date of this Order.

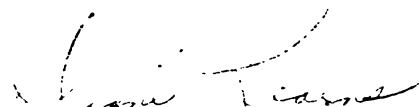
CERTIFICATE OF MAILING

I certify that a correct copy of the foregoing ORDER ON MOTIONS FOR REVIEW in the case of Jessica D. Jacobsen v. Hilton Hotel and Pacific Reliance Insurance, Case No. 92-0817, was mailed, first class postage prepaid, this 31 day of September, 1994 to the following:

M. DAVID ECKERSLEY
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VICKIE HOLLAND
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Diane Kearns
Secretary to General Counsel
Industrial Commission of Utah