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IN THE UTAH COURT OF APPEALS

HILTON HOTEL and PACIFIC RELIANCE INSURANCE,

Petitioners/Appellants

vs.

JESSICA D. JACOBSEN,

Applicant/Respondent

and

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondent.

Case No. 940594-CA
Priority 7
Case No. Below: 92-817

UTAH COURT OF APPEALS
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DOCKET NO. 940594

REPLY BRIEF OF PETITIONERS/APPELLANTS

APPEAL FROM FINAL ORDER OF THE INDUSTRIAL COMMISSION

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COURT OF APPEALS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

THE BOARD HAD NO BASIS TO CREATE THE NOTION OF CUMULATIVE TRAUMA 1

A. There Is No Evidence In The Record That Jacobsen's Repetitive Lifting Of Trays Caused Her Permanent Impairment 1

B. The Board Had No Legal Authority To Define Jacobsen's Work Activity Sua Sponte 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Allen v. Industrial Com'n. of Utah,
729 P.2d 15 (Utah 1986) 1

Sisco Hilte v. Industrial Comm'n,
766 P.2d 1089 (Utah App. 1988) 3, 4

Virgin v. Bd. of Review of Indus. Com'n.,
803 P.2d 1284 (Utah App. 1990) 2

STATUTES

Utah Code Ann. § 35-1-97 2

INTRODUCTION

Hilton limits this reply brief to only those issues addressed in Jacobsen's principal brief.[1]

ARGUMENT

THE BOARD HAD NO BASIS TO CREATE THE NOTION OF CUMULATIVE TRAUMA.

A. There Is No Evidence In The Record That Jacobsen's Repetitive Lifting Of Trays Caused Her Permanent Impairment.

In responding to Hilton's argument that the Board created the notion of "cumulative trauma" sua sponte, Jacobsen musters three fragments from the record that she claims constitute a sufficient evidentiary foundation for the Board to have fashioned this notion. As an initial matter, there is no indication that the Board actually relied on any of these in concocting its idea of cumulative trauma, since the Board never explained where it came up with the idea. Furthermore, none of these fragments lends support to the notion that repetitive lifting of trays caused Jacobsen's permanent neck impairment.

First, Jacobsen contends that the cumulative trauma concept is plausible because she claims to have originally experienced work-related back pain on April 19, 1992. (Brief of Applicant, p. 2). Jacobsen never reported this alleged incident to her

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[1]For example, Jacobsen does not dispute the second point of Hilton's principal brief, that the single event of lifting the tray on May 6 would not constitute unusual and extraordinary activity under Allen v. Industrial Com'n. of Utah, 729 P.2d 15 (Utah 1986). She also does not directly challenge Hilton's main argument, that the Industrial Commission cannot define her work activity sua sponte.

employer; Utah Code Ann. § 35-1-97 emphasizes that an employee cannot rely upon an unreported "injury" in her application for benefits. This statute precluded the Board from considering the alleged April incident as a contributing factor to "cumulative trauma."

Second, Jacobsen asserts that one of her examining physicians, Dr. Schricker, found that her injury was caused by lifting of trays in May 1992. (Brief of Applicant, p. 3). Actually, Dr. Schricker noted only that her work activity merely aggravated pre-existing conditions. (R. 217). He never characterized her work-related injury as ongoing or cumulative. Instead, he stressed that her pre-existing conditions comprised the major factor in producing her **temporary** incapacity. Regardless of what unstated inferences the Board might have drawn from Dr. Schricker's report regarding the parameters of her work activity, Dr. Schricker viewed Jacobsen's incapacity as temporary. When work-related activity results in temporary, not permanent, aggravation of pre-existing conditions, the Industrial Commission cannot properly award workmens' compensation benefits. Virgin v. Bd. of Review of Indus. Com'n., 803 P.2d 1284, 1288-9 (Utah App. 1990).

The last bit of the record Jacobsen cites in her search for "evidence" upon which the Board might have relied in concocting its cumulative trauma idea is the medical panel's recitation that her problems began in April and continued through to the May 6

lifting incident. (Brief of Applicant, p. 2). By this recitation, the medical panel does not opine what in its view constituted Jacobsen's work activity; it merely summarizes Jacobsen's subjective story to the panel of how she incurred injury. (R. 49). When the medical panel later assesses Jacobsen's impairment due to her employment, it never mentions the possibility of cumulative trauma. Rather, it apportions the percentage of whole person impairment attributable to pre-existing conditions and attributable to "the industrial accident of 6 May 1992." (R. 52-3).

Despite Jacobsen's effort to scrounge up evidence in the record that might support the Board's unprecedented idea of "cumulative trauma," it remains that the Board lacked substantial evidence in defining her work activity sua sponte. Jacobsen could not find a sufficient evidentiary basis for "cumulative trauma" because there is none.

B. <u>The Board Had No Legal Authority To Define Jacobsen's Work Activity Sua Sponte.</u>

Jacobsen cites <u>Sisco Hilte v. Industrial Comm'n</u>, 766 P.2d 1089 (Utah App. 1988), as an instance where an employee's "work activity" for purposes of legal causation consisted of many exertions. Jacobsen concludes that the Board's creation of "cumulative trauma" in this case was therefore permissible.

In <u>Sisco Hilte</u>, an employee suffered a back injury after a day of lifting several large steel plates. The employer

attempted to describe the work activity as "lift[ing] a steel plate from knee level to his waist and set[ting] it back down." Id. at 1091. This Court rejected the employer's version of events, noting that

> [t]he Commission adopted specific, detailed findings of fact regarding the particular circumstances of Smith's moving and lifting the steel plates. The steel plates were eight to twelve feet in length, fourteen inches wide, and only one-quarter to three-eighths of an inch thick, which made them awkward to lift and move. Smith, working alone, had lifted and moved several of the plates, each weighing fifty to eighty pounds, immediately prior to his injury.
>
> Id. at 1091-2.

Conversely, the Board in this case did not enter detailed factual findings, much less any factual findings, supporting its idea that repetitive lifting over time legally caused Jacobsen's injury. It did not make findings regarding how many times she lifted her trays during her employment at Hilton, how much each tray weighed, how many trays she lifted each night, or whether co-employees helped her carry trays to tables. Moreover, the employee in Sisco Hilte apparently took the position that his cumulative work activities during the day in question caused his injury. Jacobsen, on other hand, has consistently limited her "accident" to the May 6 lifting incident. The Board came up with the notion of cumulative trauma on its own.

Hilton does not dispute that the Industrial Commission may in certain instances consider an employee's work activity as the accumulation of many exertions over time. However, the

Commission cannot raise this notion sua sponte, without supporting evidence and factual findings. The Board in this case had no legal authority to draw its unexplained cumulative trauma theory out of the air.

CONCLUSION

Jacobsen has not offered any compelling reason why this Court should sustain the Board's attempt to manufacture a favorable theory of legal causation for her. Hilton respectfully requests that this Court reverse the Board's award of benefits to Jacobsen.

DATED this 14th day of March, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By [signature]
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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing by first class mail, postage prepaid, this 14th day of March, 1995, to:

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