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**UTAH LABOR COMMISSION**

**KENDRA HEMMERT,**

**Petitioner,**

vs.

**SLUSSER WHOLESALE and WORKERS  
COMPENSATION FUND,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 08-0728**

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Kendra Hemmert asks the Utah Labor Commission to review Administrative Law Judge Lima's denial of her claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

**BACKGROUND AND ISSUE PRESENTED**

Ms. Hemmert claims workers' compensation benefits for an injury to her low back while working for Slusser Wholesale ("Slusser"). Ms. Hemmert attributes her injury to an accident that occurred on May 24, 2004, when she picked up a 35 pound cooler. Judge Lima held an evidentiary hearing on the claim, and referred the medical aspects of the claim to an impartial medical panel. The panel concluded that Ms. Hemmert suffered from a preexisting condition that contributed to her injury.

Judge Lima adopted the panel's finding, and determined that the more stringent standard of legal causation applied as set by the Utah Supreme Court in *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986). Judge Lima concluded that Ms. Hemmert's actions did not satisfy the more stringent standard of legal causation because lifting a 35 pound cooler was not an unusual or extraordinary exertion. Judge Lima therefore denied benefits to Ms. Hemmert. Ms. Hemmert challenges the denial of benefits by arguing that lifting the cooler was an unusual exertion because she did not expect it to be so heavy.

**FINDINGS OF FACT**

On May 24, 2004, Ms. Hemmert was doing stocking and inventory work for Slusser when she lifted a soft-sided cooler that weighed 35 pounds from off the floor to her knees and twisted. After lifting the cooler to knee level and twisting, Ms. Hemmert felt a sensation in her low back and put the cooler back down. Ms. Hemmert picked up the cooler again, finished what she was doing

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and got into her car to go to the next location. Ms. Hemmert then experienced intense pain in her right leg. She sought medical treatment for the pain at an urgent care clinic, where she was diagnosed with sciatica.

On July 29, 2004, Dr. MacFarlane evaluated Ms. Hemmert and opined that her back pain may have been caused by offset spondylolisthesis as well as disc herniation. Ms. Hemmert underwent surgery to treat her back problems in October, 2004. On August 23, 2006, Ms. Hemmert was examined by Slusser's medical expert, Dr. Marble. Dr. Marble found that there was no medical connection between the accident and Ms. Hemmert's current low back problems. Dr. Marble also opined that Ms. Hemmert suffered from preexisting spondylolisthesis, and agreed with Dr. MacFarlane's assessment that it may have caused Ms. Hemmert's back pain and contributed to her disc herniation.

Judge Lima referred the medical aspects of Ms. Hemmert's claim to an impartial medical panel. The panel found that Ms. Hemmert suffered from a preexisting condition that contributed to her low back injury. The panel also opined that there was no medically demonstrable connection between the accident and Ms. Hemmert's current low back problems. Judge Lima adopted the panel's findings and determined that the more stringent standard for legal causation applied because of Ms. Hemmert's preexisting condition. Judge Lima chose not to address the issue of medical causation, but determined that Ms. Hemmert had not met the higher standard of legal causation because her actions in lifting a 35 pound cooler did not rise to the level of unusual or extraordinary exertion required by that standard.

**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" employment. Utah Code Ann. §34A-2-401. To qualify for benefits under the foregoing standard, an injured worker must establish that his or her work was both the legal cause and the medical cause of the injury in question. *Allen v. Industrial Commission*, 729 P.2d 15, 25 (Utah 1986). The issue before the Commission is whether Ms. Hemmert's work exertion on May 24, 2004, satisfies the requirement of legal causation.

In *Allen*, *ibid.*, the Utah Supreme Court discussed the context in which the requirement of legal causation is applied.

Whether an injury arose out of or in the course of employment is difficult to determine where the employee brings to the workplace a personal element of risk such as a preexisting condition. Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that "the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable . . . ." (Citation omitted.) To meet the legal causation requirement, a claimant with a preexisting condition must show that the

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employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life.

In its subsequent decision in *Price River Coal Co. v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

Under *Allen*, an usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, **if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life."** . . . . The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. (Citations omitted; emphasis added.)

Thus, because Ms. Hemmert suffered from a preexisting back condition that contributed to her current injury, she must satisfy the more stringent prong of the *Allen* test for legal causation by showing that her work at Slusser involved "some unusual or extraordinary exertion over and above the usual wear and tear and exertions of nonemployment life." To assess whether Ms. Hemmert's actions met the *Allen* test of an "unusual or extraordinary exertion," the Commission must compare her work activities to other typical activities and exertions experienced by men and women in modern nonemployment life. *See Allen* at 26. Some of the specific examples cited by the Supreme Court in *Allen* of typical nonemployment exertion are "taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings."

Ms. Hemmert contends that lifting a 35 pound cooler should be considered an unusual or extraordinary exertion because she did not expect the cooler to be so heavy, and the unexpected weight caused an unusual jolt and jerking motion to lift it. The *Allen* standard, however, requires a comparison to the typical exertions experienced by men and women in modern nonemployment life. While the unexpected weight of the cooler may have surprised Ms. Hemmert, it is not an unusual or extraordinary exertion compared to the typical exertions that are experienced by men and women in modern nonemployment life. The Commission therefore affirms Judge Lima's decision that Ms. Hemmert is not entitled to workers' compensation benefits.

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**ORDER**

The Commission affirms Judge Lima's decision of August 25, 2009, on this matter. It is so ordered.

Dated this 29<sup>th</sup> day of October, 2009.

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Sherrie Hayashi  
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.