
UTAH LABOR COMMISSION

GALEN S. BARTLING,

Petitioner,

vs.

**WALMART STORES, INC. and
AIG CASUALTY COMPANY fka
BIRMINGHAM FIRE INSURANCE,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 08-0927

Galen S. Bartling asks the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of benefits to Mr. Bartling 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

Mr. Bartling claims workers' compensation benefits from Walmart Stores, Inc. and its insurance company, AIG Casualty Company, (hereafter referred to jointly as "Walmart") for a work injury that occurred on May 1, 2006, when he fractured his right hand. After holding an evidentiary hearing, Judge Marlowe found Mr. Bartling had a preexisting condition that contributed to his injury and concluded that the work accident was not the legal cause of Mr. Bartling's injury. Judge Marlowe denied benefits.

In his motion for review, Mr. Bartling does not dispute Judge Marlowe's findings, but argues she erred in her conclusions of law and that his work injury is compensable. Specifically, Mr. Bartling argues his preexisting condition does not require application of the more stringent Allen test because his condition was asymptomatic, his preexisting condition did not contribute to the work "accident," and that the work accident was unusual or extraordinary, thus satisfying Allen.

FINDINGS OF FACT

The Commission adopts Judge Marlowe's findings of fact. The facts relevant to the issues raised in Mr. Bartling's motion for review can be summarized as follows:

Mr. Bartling was working as a cashier at Walmart on May 1, 2006. While passing a product over a scanner at the check-out counter, Mr. Bartling hit his right hand on the corner of the scanner.

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Mr. Bartling sought medical treatment later that month and an x-ray showed he fractured the navicular bone of his hand. Dr. Allred later operated on Mr. Bartling's hand and noted that two-thirds of Mr. Bartling's navicular bone had significant aseptic necrosis.

Walmart's medical consultant, Dr. Knorpp examined Mr. Bartling and indicated it was unlikely the fracture would have been caused by the work accident. He further found that Mr. Bartling's vascular necrosis was a preexisting condition that contributed to his injury. Dr. Allred reviewed Dr. Knorpp's opinion and agreed that the necrosis was preexisting, but noted that the necrosis had been asymptomatic.

DISCUSSION AND CONCLUSION OF LAW

The central issue before the Commission is whether Mr. Bartling has proven that his work accident was the legal cause of his injury. Section 34A-2-401 of the Utah Workers' Compensation Act provides benefits to workers injured by accident "arising out of and in the course of" employment. In Allen v. Industrial Commission, 729 P.2d 15, 26 (Utah 1986), the Utah Supreme Court held that an injury "arises out of" employment when the work-related event or exertion is both the "legal cause" and the "medical cause" of the injury.

The requirement of legal causation is further explained in Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986):

Under Allen, a 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."** (Emphasis added.)

Nevertheless, not every pre-existing condition will trigger application of the more stringent "unusual or extraordinary exertion" test for legal causation. As the Utah Court of Appeals stated in Nyrehn v. Industrial Commission, 800 P. 2d 300, 334 (Utah App. 1990) (emphasis added):

[The Commission] may not simply presume that the finding of a preexisting condition warrants application of the Allen test. **An employer must prove medically** that the claimant "suffers from a preexisting condition which **contributes** to the injury." (Citations omitted; emphasis added.)

Mr. Bartling first argues that Allen does not apply because his preexisting condition was asymptomatic prior to the work accident. However, this argument is unavailing. The Commission has previously found that Allen applies even if the preexisting condition was asymptomatic. This decision was affirmed by the Utah Court of Appeals in Acosta v. Labor Commission, 44 P.3d 819,

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827 (Utah App. 2002). In Acosta, the court held:

When analyzing whether an injury arose out of and in the course of employment, it matters not at all, from the standpoint of legal causation, whether the preexisting condition was symptomatic or asymptomatic. Once the employer/insurer has shown that there was a preexisting condition that contributed to the injury, that is, that the employee has brought some element of risk of injury to the job him or herself, the Allen test applies—whether anyone knew prior to the accident that the condition existed or not.

Thus, the question of whether a preexisting condition was asymptomatic prior to the work injury is irrelevant. Mr. Bartling next argues that even if he had a preexisting condition, the question should not be whether the preexisting condition contributed to his injury, but rather, whether the condition contributed to his *accident*. The Commission finds this argument also unavailing. In Nyrehn, the court specifically held that the question was whether the preexisting condition contributed to the *injury*. Mr. Bartling concedes in his motion for review, “It just happened that the resulting injury was worse than it might have been had it not been for the AVN [aseptic vascular necrosis] condition.” Thus, the undisputed evidence establishes that Mr. Bartling suffered from a preexisting condition that contributed to his injury, thereby requiring application of the more stringent “extraordinary or unusual test” from Allen.

Mr. Bartling also argues that the legal causation test set forth in Allen can be satisfied by a way other than the unusual or extraordinary exertion test, such as the unusual mechanism involved in the injury. However, it is firmly established in Utah case law that in order to establish legal causation, the employee must show that the exertion involved was unusual and extraordinary.

Finally, Mr. Bartling argues that the exertion involved when he hit his hand on the corner of the scanner was unusual or extraordinary, thus satisfying the test for legal causation. To assess whether Mr. Banks’ specific work activities meet the Allen test of an “unusual or extraordinary exertion,” the Commission must compare his work activities to other typical activities and exertions experienced by men and women in modern nonemployment life. Some of the specific examples cited by the Supreme Court in Allen as examples 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.” The exertion involved in Mr. Bartling’s injury was not unusual or extraordinary.

In summary, Mr. Bartling has not established that his work injury of May 1, 2006, was the legal cause of his right hand condition and his work injury is not compensable.

ORDER

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The Commission hereby affirms Judge Marlowe's decision. It is so ordered.

Dated this 30th day of July, 2009.

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.