

2006

# Rivers West Apparel and/or Workers Compensation Fund v. Utah Labor Commission; and/or Darla Basso : Brief of Appellee

Utah Court of Appeals

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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to § 78-2a-3(2)(a) and § 34A-2-801(8), Utah Code Annotated

### ISSUES AND STANDARDS OF REVIEW

**1. Did the Utah Labor Commission have jurisdiction to enter its Order of April 7, 2005, directing Rivers West to pay temporary disability compensation to Ms. Basso?**

Preservation of issue for review: Rivers West raised this issue in proceedings before the Commission, thereby preserving the issue for appellate review. (Record at volume 1, pages 49-66; also 162-171.)

Standard of review: The extent of the Commission's jurisdiction and authority is a question of law. As such it is subject to appellate review for correctness. Utah Code Ann. § 63-46b-16(4)(b); *Stokes v. Flanders*, 970 P.2d 1260, 1262 (Utah 1998).

**2. Did Ms. Basso's claim satisfy the 180-day notice requirement of § 34A-3-108 of the Utah Occupational Disease Act?**

Preservation of issue for review: Rivers West raised this issue in proceedings before the Commission, thereby preserving the issue for appellate review. (R. vol. 1, pages 49-66; also 162-171.)

Standard of review: On this point, Rivers West challenges the Commission's application of the facts surrounding Ms. Basso's claim to the "notice of claim" requirement found in § 34A-3-108 of the Utah Occupational Disease Act. Section 34A-1-103 of the Utah Labor Commission Act grants the Commission ". . . the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this or any other title or chapter it administers . . . ." This Court has previously held that § 34A-1-103 is an explicit grant of

discretion to the Commission:

(T)he Industrial Commission (predecessor to the Labor Commission) has been granted broad discretion to determine the facts and apply the law. (Citing §35-1-16(1), now codified as 34A-1-103) . . . . When the Commission “applies the law,” we review its determination for reasonableness.

*Caporoz v. Industrial Commission*, 945 P.2d 141, 143 (Utah App. 1997); see also *Osman Home Improvement v. Industrial Commission*, 948 P.2d 240, 242 (Utah App. 1998). Consequently, in reviewing the Commission’s determination that the facts of Ms. Basso’s claim satisfy § 108(2)’s notice requirements, this Court will uphold the Commission’s decision unless it “exceed(s) the bounds of reasonableness and rationality” so as to constitute an abuse of discretion under §63-46b-16(h)(i) of the Utah Administrative Procedures Act. *Osman*, at 243.

**3. Does the evidence support the Commission’s finding that Ms. Basso’s work at Rivers West aggravated her preexisting medical problems, so as to support the Commission’s award of temporary disability compensation to Ms. Basso?**

Preservation of issue for review: Rivers West raised this issue in proceedings before the Commission, thereby preserving the issue for appellate review. (R. vol. 1, pages 49-66; also 162-171.)

Standard of review: Rivers West argues the Commission erred in awarding disability compensation to Ms. Basso because the evidence does not establish a medical causal connection between her work at Rivers West and her physical problems. “Medical causation is an issue of fact and we review the determination of the [Labor] Commission under the substantial evidence standard.” *Zupon v. Industrial Commission, et al.*, 860 P.2d 960, 963 (Utah App. 1993).

## **DETERMINATIVE STATUTES**

The following statutes are determinative in the proceeding:

### **Section 34A-2-420 of the Utah Workers' Compensation Act:**

1) (a) The powers and jurisdiction of the commission over each case shall be continuing.

(b) After notice and hearing, the Division of Adjudication, commissioner, or Appeals Board in accordance with Part 8, Adjudication, may from time to time modify or change a former finding or order of the commission.

### **Section 34A-3-108(1),(2) and (3) of the Utah Occupational Disease Act:**

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

(2) (a) Any employee who fails to notify the employee's employer or the division within 180 days after the cause of action arises is barred from any claim of benefits arising from the occupational disease.

(b) The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment.

(3) The following constitute notification of an occupational disease:

(a) an employer's or physician's injury report filed with the:

(i) division;

(ii) employer; or

(iii) insurance carrier; or

(b) the payment of any medical or disability benefits by the employer or the employer's insurance carrier.

## STATEMENT OF THE CASE

Nature of the Case: Rivers West seeks judicial review of the Utah Labor Commission's award of temporary total disability compensation to Darla Basso pursuant to the Utah Occupational Disease Act, Title 34A, Chapter 3, Utah Code Annotated.<sup>1</sup>

Course of Proceedings: Ms. Basso filed a series of applications with the Commission seeking workers' compensation benefits or, alternatively, occupational disease benefits for cervical and right arm problems allegedly caused by her work as a seamstress for Koret and, later, for Rivers West.<sup>2</sup> (R.vol. 1, pages 1, 63 and 74.)

Administrative Law Judge Hann held an evidentiary hearing (R. vol. 8), issued an interim decision (R. vol. 1, pages 105-110) and then appointed a medical panel to evaluate the medical aspects of Ms. Basso's claims. (R. vol. 1, pages 105-110 and 112-114.). On April 5, 2002, Judge Hann issued her order (the "first order"; attached as Appendix A) accepting the panel's conclusions and, on that basis, dismissing Ms. Basso's claim against Rivers West and ordering Koret to pay medical benefits and temporary total disability compensation. (R. vol. 1, pages 207-213.)

Koret and Ms. Basso each appealed Judge Hann's first order. In particular, Koret challenged the medical panel's attribution of Ms. Basso's cervical and right arm problems to "awkward neck positioning" required by her work. (R. vol. 2, pages 218-231.) Ms. Basso argued that Judge Hann should have awarded temporary disability compensation for a longer

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<sup>1</sup> The Utah Occupational Disease Act establishes the substantive standards for disease claims, but incorporates procedural provisions of the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated. See § 34A-3-102(2) of the Occupational Disease Act.

<sup>2</sup> Koret, Ms. Basso's first employer, was insured by Liberty Mutual. They are jointly referred to as "Koret" in this brief. Rivers West, Ms. Basso's second employer, was insured by the Workers Compensation Fund. They are jointly referred to as "Rivers West."

duration. (R. vol. 2, pages 236-242.)

The Commission granted Koret's motion for review and remanded Ms. Basso's claims to Judge Hann for further proceedings to clarify the "neck positioning" requirements of Ms. Basso's work and to consider Ms. Basso's arguments for additional disability compensation. (R. vol. 2, pages 293-294; attached as Appendix B.)

Judge Hann conducted additional evidentiary proceedings, obtained a supplemental report from the panel, and then issued her decision on April 7, 2005. (R. vol. 2, pages 372-375.) This decision (the "second order") required Rivers West to pay \$3,584.22 in temporary disability compensation to Ms. Basso. (R. vol. 2, pages 372-375; attached as Appendix C.)

Rivers West and Ms. Basso each appealed Judge Hann's second order. (R. vol. 2, pages 382-391 and 393-409.) On January 5, 2006, the Commission denied both motions for review and affirmed Judge Hann's second order. (R. vol. 2, pages 423-426; attached as Appendix D.) Rivers West then filed its petition for appellate judicial review.

Statement of Facts: Ms. Basso began work as a seamstress for Koret in 1990. She sewed pockets on 320 to 360 pairs of pants each day and worked 40 hours per week. (R. vol. 8, pages 24 and 26.) In 1996, she began to experience pain in her right elbow and shoulder. (R. vol. 8, page 30.) Then, on February 14, 1997, her right arm was "jerked" as she lifted a box of clothes off a moving conveyor belt. This caused a sudden flare-up of her pain. (R. vol. 8, page 31.)

On February 28, 1997, Ms. Basso began to receive medical care for her pain. She was diagnosed with lateral epicondylitis and/or muscle strain. Intermittently, she was taken off work, restricted to light duty work, or allowed full duty work. Her pain waxed and waned. (R. vol. 4, pages 5 and 32-45.)

Koret closed its factory in August 1998 and Ms. Basso became unemployed. (R. vol. 8, page 38.) In March 1999, she found work as a seamstress at Rivers West. (R. vol. 8, page 42.) Her pain continued. She took time off during August and September 1999, and January and February 2000, on doctor's orders. (R. vol. 8, pages 45-46; vol. 4, page 66A.) During mid-2000, Rivers West laid Ms. Basso off for three months due to lack of work. (R. vol. 8, page 64.) Ms. Basso was recalled to work but resigned during October 2000 due to pain and headaches. (R. vol. 8, page 47.)

On November 15, 2000, Dr. Mortensen filed a "Physicians' Initial Report of Work Injury" with the Commission's Industrial Accidents Division, stating that Ms. Basso had a cervical degenerative disk disease and cervical radiculopathy and that her condition was an overuse condition related to repetitive activities she does at work. He further stated that he could not "ascertain whether the condition [was] related to her original Workman's Comp injury. Clearly I feel that this is an overuse condition that is related to the repetitive activities she does at work." (R. vol. 4, pages 55 and 56; this report included in Appendix E—"Medical Reports".)

Since 1997, when Ms. Basso began to experience her cervical and right arm problems, she has seen several physicians. Dr. Mantas, Dr. Berry, Dr. Mortensen and Dr. Reichman each concluded that Ms. Basso's problems were related to either the event on February 14, 1997, when her right arm was "jerked" as she lifted the box off the conveyor belt, or to the repetitive stress of her work duties. (R. vol. 4, pages 20, 37, 40, 55, 57, 75.) On the other hand, Dr. Moress, Koret's medical consultant, concluded that Ms. Basso's work at Koret was not the medial cause of her on-going problems. (R. vol. 4, page 53.)

In light of this disagreement among the medical experts, Judge Hann appointed a medical panel, consisting of Dr. Holmes<sup>3</sup>, to conduct a neutral evaluation of the medical aspects of Ms. Basso's claims. (R. volume 1, p. 112-114.) After examining Ms. Basso and reviewing her medical history, Dr. Holmes concluded that she suffered from a preexisting cervical condition that had been aggravated by the "awkward neck positioning" required by her work at Koret. Dr. Holmes found no medical causal connection between Ms. Basso's medical problems and her work at Rivers West. (R. volume 1, p. 119-126; Appendix E.)

Koret filed an objection to Dr. Holmes' report, arguing that when Dr. Holmes had considered the nature of Ms. Basso's neck positioning as contributing to her cervical and right arm problems, he had gone beyond the medical issues that had been framed by the parties and Judge Hann. (R. volume 1, page 128-130.)

On February 12, 2003, Judge Hann issued her decision on the merits of Ms. Basso's claim. Judge Hann accepted Dr. Holmes' report over Koret's objections. Then, relying on that report, Judge Hann dismissed Ms. Basso's claim against Rivers West "with prejudice." As to Ms. Basso's claims against Koret, Judge Hann concluded that the work at Koret had aggravated Ms. Basso's preexisting medical conditions. Koret was ordered to pay medical benefits and temporary total disability compensation for the period of January 26 through February 21, 2000. (R. volume 1, p. 207-213.)

Both Ms. Basso and Koret filed timely motions for Commission review of Judge Hann's decision. (R. volume 2, p. 218-232; 236-242.) Koret argued that Dr. Holmes had exceeded his authority by addressing an issue not presented by the parties--Ms. Basso's awkward neck

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<sup>3</sup> Although the term "panel" suggests more than one physician will be involved, §601(1)(c) of the Workers' Compensation Act permits a single physician to serve as a medical panel.

positioning at work. Ms. Basso argued that she was entitled to additional disability compensation beyond what had been ordered by Judge Hann.

On September 30, 2003, the Commission ruled that Koret and Ms. Basso should have an opportunity to address Dr. Holmes' theory that Ms. Basso's awkward neck positioning had contributed to her cervical and right arm problems. The Commission remanded Ms. Basso's claims to Judge Hann for additional proceedings on this point. (R. volume 2, p. 293-294.)

After the Commission remanded Ms. Basso's claims to Judge Hann, Ms. Basso filed two new applications against Koret and Rivers West. These applications specifically alleged that Ms. Basso had suffered a neck injury as a result of her awkward neck positioning while working for Koret and Rivers West. (R. vol. 2, pages 302 and 304.) Rivers West then filed a motion to dismiss this new claim on the grounds it had already been adjudicated and denied in by Judge Hann's first order. (R. vol. 2, pages 340 through 342.)

Judge Hann did not grant Rivers West's motion to dismiss. Instead, on January 8, 2004, Judge Hann held another evidentiary hearing on the subject of Ms. Basso's neck positioning at work. Ms. Basso's video deposition was taken into evidence and her medical records were updated. (R. volumes 3 and 5.) Judge Hann then referred the entire record to the medical panel with instructions to "more fully address your opinion that awkward neck posturing was the cause of [Ms. Basso's] condition." (R. vol. 2, pages 357-358.)

The panel responded to Judge Hann's instructions by drafting a supplemental report. (R. vol. 2, page 363; Appendix E.) Although the panel prefaced its supplemental report with a statement that the new evidence did not "significantly" change the panel's "overall" opinion, the panel also made the following specific medical conclusions (emphasis added):

It is my opinion, based on reasonable medical probability that the neck postures and hand/arm repetitive movements she described are partially contributory to her neck and upper extremity complaints that occurred beginning in 1996 or 1997 **and which continued while working.**

On April 7, 2005, Judge Hann issued her second and final order in this matter. Judge Hann incorporated the findings from her first order, but made additional findings based on the evidence submitted at the second hearing and the medical panel's supplemental report. Among other things, Judge Hann determined that the awkward "neck posturing" required by Ms. Basso's work at Rivers West had temporarily aggravated her underlying cervical problems. Judge Hann therefore ordered Rivers West to pay temporary disability compensation for the duration of that aggravation. (R. vol. 2, pages 372-375.)

Rivers West and Ms. Basso each asked the Commission to review Judge Hann's second order. Rivers West renewed its argument that Judge Hann second order could not revisit Ms. Basso's claim against Rivers West because that claim had been dismissed in Judge Hann's first order. Alternatively, Rivers West argued Ms. Basso's claim was barred by the notice provisions of § 34A-3-108 of the Utah Occupational Disease Act. Finally, Rivers West argued that the evidence did not support an award of temporary disability compensation. (R. vol. 2, pages 382-391.) On January 5, 2006, the Commission denied Rivers West's arguments and affirmed Judge Hann's second order. (R. vol. 2, pages 423-426.)

#### **SUMMARY OF ARGUMENT**

Ms. Basso worked as a seamstress for many years, first at Koret and then at Rivers West. This repetitive work, and the awkward neck positioning that was required to perform it, aggravated Ms. Basso's preexisting medical conditions. As a result, she required medical attention and was temporarily unable to work. She sought medical benefits and disability

compensation under Utah's occupational disease and workers' compensation laws.

Initially, Judge Hann concluded that Ms. Basso's problems were the result of her work at Koret, but were not related to her work at Rivers West. However, this first decision by Judge Hann never became final. Instead, Koret and Ms. Basso each appealed the decision and the Commission remanded Ms. Basso's claims to Judge Hann for further proceedings. As a result of those additional proceedings, Judge Hann and the Commission concluded that Ms. Basso's problems were attributable to her work at both Koret and Rivers West. The Commission therefore ordered Rivers West to pay temporary disability compensation to Ms. Basso for approximately eleven weeks, in the total amount of \$3,584. Rivers West now seeks this Court's review of the Commission's award to Ms. Basso.

Rivers West argues that Judge Hann's first order, which excused Rivers West from any liability to Ms. Basso, barred the Commission from further consideration of that issue. This argument relies on a rigid approach that is contrary to both the workers' compensation statutes and the public policy behind those statutes. As this Court has observed: "Workers' compensation claims are best viewed as a **process**, rather than as a discrete event . . . ." *Color Country Management v. Labor Commission*, 38 P.3d 969, 974 (Utah App. 2002). And § 34A-2-802(1) of the Utah Workers' Compensation Act authorizes the Commission to ". . . make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter." The Commission's actions in this case are consistent with these principles.

Rivers West also argues that Ms. Basso's claim is barred because it fails to comply with the 180-day notice provisions of § 34A-3-108(2) of the Utah Occupational Disease Act. However, the record in this matter establishes that the foregoing notice requirement was

satisfied by a report filed by Ms. Basso's physician.

Finally, Rivers West argues that the evidence does not support the Commission's finding of a medical causal connection between Ms. Basso's medical problems and her work at Rivers West. Rivers West has failed to marshal the evidence to demonstrate such a factual error. And when the evidence is reviewed, substantial evidence supports the Commission's finding.

In summary, the workers' compensation statutes gave the Commission authority to examine Ms. Basso's claim against Rivers West. The Commission used that authority to protect the rights of the parties and "carry out justly the spirit" of the workers' compensation system. The Commission reasonably concluded that that Ms. Basso's claim satisfied the Occupational Disease Act's notice requirements, and substantial evidence supports the Commission's finding of a medical causal connection between Ms. Basso's medical problems and her work at Rivers West. For these reasons, the Commission's decision should be affirmed.

## **ARGUMENT**

### **POINT ONE: THE COMMISSION RETAINED JURISDICTION TO ORDER RIVERS WEST TO PAY TEMPORARY DISABILITY COMPENSATION.**

Rivers West argues that one portion of Judge Hann's first order—the part that dismissed Ms. Basso's claim against Rivers West—became final and conclusive in all subsequent proceedings. As Rivers West puts it, "once a case has been fully litigated by all of the parties, an order has been entered and such an order has become final, the injured worker cannot then return to the Labor Commission asking it to revisit its denial of benefits." (Rivers West's brief, page 18.) Rivers West's argument continued that, because this part of Judge Hann's first order was final, it was improper for the Commission to subsequently address Ms. Basso's claim

against Rivers West.

The Commission believes this argument is incorrect for two reasons. First, Judge Hann's first order never became final. Second, the Utah Legislature has granted the Commission "continuing jurisdiction" in such matters.

Judge Hann's first order never became final. Both the Utah Workers' Compensation Act and the Utah Labor Commission Act define the point at which an ALJ's decision becomes final.

- Section 34A-2-801(2) of the Workers' Compensation Act provides that "[u]nless a party in interest appeals the decision of an administrative law judge . . . the decision . . . is a final order of the commission . . . ." (Emphasis added.)
- Section 34A-1-303 of the Utah Labor Commission Act provides: "A decision entered by an administrative law judge under this title is the final order of the commission **unless** a further appeal is initiated." (Emphasis added.)

Thus, an ALJ's decision is a final order only if it is not appealed. And if an ALJ's decision is appealed, then § 34A-1-303(4)(a) of the Labor Commission Act authorizes the Commission to affirm, modify, or reverse the order, or "return the case to an administrative law judge for further action as directed."

In this case, Judge Hann's first order dismissed Ms. Basso's claim against Rivers West. (R. vol. 1, pages 207-213.) However, that first order was appealed to the Commission. The Commission considered those appeals and concluded that further evidentiary proceedings were warranted. The Commission therefore exercised its authority under § 34A-1-303(4)((a)(iii) to return the case to Judge Hann for such proceedings. Consequently, under the terms of § 34A-1-303(1) of the Utah Labor Commission Act and § 34A-2-801(3) of the Utah Workers'

Compensation Act, Judge Hann's first order did not become a "final" decision, and Basso's claim remained open for further consideration by the Commission.

Section 34A-2-420 grants the Commission "continuing jurisdiction" over Ms. Basso's claim. Even if it were conceded for purposes of discussion that Judge Hann's first order became final, the Commission would still have continuing jurisdiction over Ms. Basso's claim pursuant to § 34A-2-420(a) and (b) of the Utah Workers' Compensation Act. This statute provides that "[t]he powers and jurisdiction of the commission over each case shall be continuing. After notice and hearing, the . . . commissioner . . . may from time to time modify or change a former finding or order of the commission."

In *Spencer v. Industrial Commission*, 733 P.2d 158, 161 (Utah 1987), the Utah Supreme Court explained the nature of the Commission's continuing jurisdiction as follows:

The power of the Industrial Commission to modify awards when "in its opinion" modification is justified is not an arbitrary power, *Mechem v. Industrial Commission*, 692 P.2d 783 (Utah 1984); *Buxton v. Industrial Commission*, 587 P.2d 121 (Utah 1978), **but a power wedded to the duty to examine credible evidence.** Under well-established principles of stare decisis, the basis of modification is provided by evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy. *Buxton*, supra, at 123.

In Ms. Basso's case, the Commission directed Judge Hann acted to obtain additional evidence regarding the causes of Ms. Basso's medical problems. The supplemental report that was then submitted by the medical panel established that Ms. Basso's work at Rivers West had aggravated her preexisting problems. Because Ms. Basso had not been compensated for the wages she had lost as a result of this work-related medical condition, Judge Hann and the Commission awarded additional temporary disability compensation

The Commission acknowledges that its continuing jurisdiction is not without limits. But under the foregoing conditions, the Commission has a duty to exercise its continuing jurisdiction to insure that the objectives of the Workers' Compensation Act and Occupational Disease Act are met. *Buxton v. Industrial Commission*, 587 P.2d 121, 123 (Utah 1978).

In summary on this point, although Judge Hann initially ruled in Rivers West's favor, that initial order was appealed and never became final. Instead, the Commission exercised its statutory authority to reopen the evidentiary proceedings to obtain clarification of the nature of Basso's medical problems. The Commission's actions were within its authority under the Act. More importantly, the Commission's actions complied with the directive of § 34A-802(1) to "carry out justly the spirit of the chapter."

**POINT TWO: MS. BASSO SATISFIED THE NOTICE REQUIREMENTS OF THE UTAH OCCUPATIONAL DISEASE ACT.**

Section 34A-3-108 of the Utah Occupational Disease Act bars an employee from claiming occupational disease benefits unless the employee notifies his or her employer of the claim within 180 days after the claim arises. Rivers West argues that Ms. Basso's claim is barred because she did not comply with § 108's notice requirement.

While it is true that § 34A-3-108(2) requires notice of occupational diseases within 180 days, it is also true that § 108(3) established alternative means for providing this notice. In particular, § 108(3)(a)(i) provides that a physician's injury report filed with the Commission's Industrial Accidents Division "constitutes notification of an occupational disease." Rivers West does not challenge the Commission's finding that Ms. Basso's occupational disease claim arose on October 20, 2000. Consequently, Ms. Basso had 180 days from that date to provide notice of her occupational disease.

On November 15, 2000, only 25 days after Ms. Basso's claim arose, Dr. Mortensen completed his "Physician's Initial Report of Work Injury or Occupational Disease" and attached a more detailed narrative summary that had been completed on November 13, 2000. Dr. Mortensen's report was actually received by the Industrial Accidents Division on November 20, 2000. (R. vol. 4, pages 55 and 56.) The report lists Ms. Basso's employers as "Korets of California" and "~~Rivers~~"; it is unclear why the reference to Rivers West was struck through. In any event, the report describes the nature of Ms. Basso's medical problems and implicitly relates them to her work activities at both Koret and Rivers West. The Commission concluded that, pursuant to the statutory provision of § 108(3)(a)(i), Dr. Mortensen's report constituted notice of Ms. Basso's occupational disease, thereby satisfying the 180-day notice requirement found in § 108(2) of that same statute.

In challenging the Commission's conclusion, Rivers West concedes that a physician's report to the Industrial Accidents Division is sufficient to satisfy § 108(2)'s notice requirement. However, Rivers West argues that Dr. Mortensen's report lacks sufficient detail to relate Ms. Basso's occupational disease claim to her employment at Rivers West. However, Utah Administrative Code R612-12-3.B, which contains the Commission's requirements for such reports, requires only limited information:

This form is used by physicians and chiropractors to report their initial treatment of an injured employee. This form must be completed when a bill is generated for treatment administered by a licensed health care provider, as defined in 34A-2-11. This form is also to be completed by the health care provider if treatment, beyond first aid, is given at an employer sponsored free clinic. The form must be cosigned by the supervising physician, unless the form is completed by a nurse practitioner.

In summary, physicians are required to provide only minimal information in their reports of injury or disease to the Industrial Accidents Division. Dr. Mortenson's report of

November 15, 2000, satisfies such requirements. Rivers West therefore argues that this Court should impose additional reporting requirements not found in either statute or Commission rule.

This argument is contrary to the well-established principle that the Workers' Compensation Act and Occupational Disease Act must be liberally construed in favor of coverage and compensation. The Utah Supreme Court expressed this principle in *McPhie v. Industrial Commission*, 567 P.2d 153, 155 (Utah 1977):

A further equally recognized rule of construction resolves any doubt respecting the right of compensation in favor of the injured employ[ee] or his dependents, as the case may be, and the compensation statutes should be liberally construed in favor of recovery.

This principle of liberal construction has been reaffirmed by both this Court and the Utah Supreme Court in recent cases. See *Heaton v. Second Injury Fund*, 796 P.2d 676, 679 (Utah 1990); *Olsen v. Samuel McIntyre Inv. Co*, 956 P.2d at 260 (Utah 1998); and *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 588 (Utah App. 1998).

In conclusion, the Commission's determination that Dr. Mortensen's report satisfied the 180-day notice requirement of § 108(2) is reasonable and rational. Requiring Ms. Basso to do more than is required by the statute would violate the long-standing principle that workers' compensation and occupational diseases statutes must be liberally construed in favor of compensation.

**POINT THREE: SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING OF A MEDICAL CAUSAL CONNECTION BETWEEN MS. BASSO'S WORK AT RIVERS WEST AND HER CERVICAL AND RIGHT ARM PROBLEMS.**

As its final argument, Rivers West challenges the Commission's finding that Ms. Basso's work at Rivers West aggravated her preexisting cervical and right-arm problems. This Court should reject Rivers West's argument because Rivers West has failed to marshal the

evidence, and because substantial evidence supports the Commission's finding.

Rivers West's failure to marshal the evidence. Because Rivers West assails the Commission's factual finding that Ms. Basso's work at Rivers West aggravated her preexisting medical problems, Rivers West must show that this finding is not supported by substantial evidence when viewed in light of the whole record. To meet that burden, Rivers West must "marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Grace Drilling v. Board of Review*, 776 P. 2d 63, 67-68 (Utah App. 1989).

Rivers West has failed to discharge this burden of marshalling the evidence. Specifically, Rivers West has not cited or discussed Ms. Basso's testimony (R. vol. 8, pages 45-47) or the opinion of Dr. Mortensen (R. vol. 4, pages 55 and 57) which support the Commission's finding that Ms. Basso's work at Rivers West aggravated her cervical and right arm problems. Instead, Rivers West focuses entirely on the medical panel's report and argues that the Commission should have interpreted that report differently.

Because Rivers West has not confronted the evidence supporting the Commission's finding, this Court should "decline to disturb the findings made by the ALJ and ratified by the Commission." *Intermountain Health Care v. Industrial Commission*, 839 P. 2d 841, 844 (Utah App. 1992.)

Substantial evidence supports the Commission's finding. Even if Rivers West is excused from its burden of marshalling the evidence, a review of such evidence supports the Commission's finding.

In considering Ms. Basso's claim against Rivers West, the Commission was required to determine whether Ms. Basso's work at Rivers West aggravated her preexisting cervical and right arm problems. Ms. Basso's testimony established that these problems continued and became worse during the period of her employment at Rivers West. (R. vol. 8, page 47.) During November 2000, shortly after Ms. Basso stopped working for Rivers West, she was examined by Dr. Mortensen, who diagnosed her as suffering from "an overuse condition probably related to her working environment." (R. vol. 4, page 57.) Finally, the medical panel reviewed Ms. Basso's entire medical history and concluded:

It is medically reasonable to conclude that some neck/shoulder symptomatology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurring during the course of her work and a few months thereafter. (R. vol. 2, page 368.)

The Commission accepted the opinions of Dr. Mortensen and the medical panel that Ms. Basso's work as a seamstress, both at Koret and then at Rivers West, had medically caused an exacerbation of her preexisting cervical and right arm problems. (R. vol. 2, page 425 and 426.) In light of those medical opinions and Ms. Basso's own testimony, this Court should conclude that substantial evidence supports the Commission's finding.

### **CONCLUSION**

The Commission believes it had jurisdiction to consider and rule upon Ms. Basso's claim against Rivers West. The Commission's determination that Ms. Basso's claim satisfied the notice requirement of § 108(2) of the Occupational Disease Act is reasonable and rationale. The Commission's finding that the work at Rivers West exacerbated Ms. Basso's preexisting cervical and right arm problems is supported by substantial evidence. Under the applicable standards of judicial review, the Commission respectfully submits that its decision awarding

benefits to Ms. Basso should be affirmed.

Dated this 11<sup>th</sup> day of August, 2006.



Alan Hennebold  
General Counsel  
Utah Labor Commission

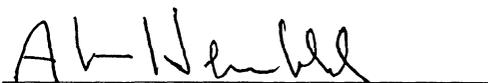
#### Certificate of Mailing

I hereby certify that on the 11<sup>th</sup> day of August, 2006, two true and correct copies of the foregoing Brief of Respondent, Utah Labor Commission, were mailed by U S Mail, postage prepaid to the following:

HANS M. SCHEFFLER  
WORKERS CORMPENSATION FUND  
392 EAST 6400 SOUTH  
SALT LAKE CITY UT 84107

DORI PETERSEN  
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DARLA BASSO  
550 SOUTH ROSE AVENUE  
PRICE UT 84501



## Appendix A

UTAH LABOR COMMISSION  
ADJUDICATION DIVISION  
P. O. Box 146615  
Salt Lake City, Utah 84114-6615  
Telephone: 801-530-6800

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DARLA BASSO,	*	FINDINGS OF FACT, CONCLUSIONS OF
Petitioner,	*	LAW & ORDER
	*	
vs.	*	CASE NO. 200117, 20011243, 2001952
	*	
KORET OF CALIFORNIA and/or LIBERTY	*	
MUTUAL INSURANCE; RIVERS WEST	*	Judge Debbie L. Hann
and/or WORKERS COMPENSATION FUND,	*	
Respondents.	*	
	*	
	*	

---

The above entitled matter came on for hearing before Debbie L. Hann, Administrative Law Judge, Utah Labor Commission, on December 13, 2001. Richard Burke, Attorney at Law, represented the petitioner. Dori K. Petersen, Attorney at Law, a represented the respondents Koret of California and Liberty Mutual Insurance. Hans Scheffler, Attorney at Law, represented the respondents, Rivers West and Workers Compensation Fund.

#### STATEMENT OF THE CASE

On January 8, 2001, the petitioner filed an Application for Hearing alleging a right shoulder, right elbow and neck injury as the result of a February 28, 1997 repetitive motion injury and claiming entitlement to medical expenses, temporary partial compensation, permanent partial compensation, travel expenses and interest. The respondents filed an answer admitting the petitioner suffered an industrial injury via repetitive motion on February 28, 1997 and that temporary total compensation was paid from March 1, 1997 through March 14, 1997 and again from April 16, 1997 through May 11, 1997. The respondents denied the petitioner's current symptoms were medically caused by the 1997 injury and denied that any neck injury was reported in 1997.

On August 9, 2001, the petitioner filed an "Amended Occupational Disease Claim" against Rivers West and Workers Compensation Fund alleging an occupational disease of the neck and upper extremity while employed at River's West from March 13, 1999 through February 26, 2000 and again May 1, 2000 through October 20, 2000. The respondents denied liability for the claim based on Utah Code § 34A-3-108 because the application for hearing was the first notice of the claim. The respondents also requested dismissal because the petitioner filed no supporting medical documentation.

On November 16, 2001, the petitioner filed an amended Application for Hearing alleging a February 14, 1997 injury to her right shoulder, right elbow and neck caused by pulling materials off the conveyor belt while employed by a Koret of California. The respondents again denied liability

because of a lack of medical causation between the injuries claimed and the petitioner's current condition.

Findings of Fact and Interim Order was issued on April 5, 2002 sending the medical aspects of this case to a medical panel. Dr. Edward B. Holmes, M.D., M.P.H. was appointed chairman of the medical panel. Dr. Holmes issued his report on July 5, 2002. The report was forwarded to the parties via certified mail on July 11, 2002. Both the petitioner and the respondent, Koret of California, filed objections to the panel report.

#### FINDINGS OF FACT

The petitioner worked as a seamstress for Koret of California sewing pockets on to pants using a single and double needle sewing machine. A conveyor belt went past the petitioner's right side with totes containing 20 to 24 pairs of pants and the pockets to be sewn on them. The tote was a plastic box with a handle that the petitioner reached over and took off the conveyor belt using her right arm. The totes came from behind her so as it came into her peripheral vision she would reach across and take it off the belt. The tote weighed 20-40 pounds depending on the size of the pants in the tote.

Sometimes the petitioner's right arm was jerked when taking the tote from the conveyor belt. The conveyor belt was operated by a person who watched the sewing machine operators work and sent the totes to them on the belt operated manually. The conveyor belt slowed so the workers could grab the tote from the line. If an operator missed the tote as it went by then they had to get up and go to the end of the conveyor belt to get it causing a slow down to the individual's work. Because the operators were paid by the piece, having to walk to the end of the belt cost the operator money in lost work. Sometimes, the belt operator would start the belt running again faster before an operator had the chance to get the tote fully off the belt causing the operator's right arm to be jerked hard while holding the tote. The petitioner used her right index and middle finger to grab the totes off of the conveyor although she sometimes used her whole right hand. On February 14, 1997, the petitioner's arm was jerked as she was getting a tote off the conveyor belt.

The petitioner used her right hand with her palm downward to hold a pocket onto the pant and rotated the pant with her right arm 180 degrees clockwise as she sewed the pocket. She then used her left hand in the same way to sew the left pocket. The petitioner worked 8 hours per day 5 days per week sewing 320 to 360 pairs of pants per day.

On February 28, 1997, the petitioner reported to Castlevue Hospital emergency room complaining of right elbow pain from continuous work and was diagnosed as having right lateral epicondylitis. Medical exhibit page 5. On March 1, 1997, the petitioner had a follow-up on her right elbow and shoulder pain and the medical history documents that petitioner has had pain off and on for the last year but now the pain radiates into the petitioner's shoulder at times. Medical exhibit 6-7. The petitioner's pain level was significantly increased over what it had been after February 14, 1997. The petitioner described the pain as more intense than it had been before.

On March 12, 1997, the petitioner followed up with Dr. Mantes and reported a one-year history of discomfort involved in her right elbow and shoulder. Dr. Mantes believed that the petitioner was suffering from muscle strain, not lateral epicondylitis. Medical exhibit 32. After physical therapy, the petitioner reported feeling remarkably better and was returned to full duty on April 9, 1997. Medical exhibit 36. By April 16, 1997, after returning to full duty, the petitioner reported an increase in pain. Dr. Mantes referred her to physical therapy took her off work for 4 weeks. Medical exhibit 37-38. On May 7, 1997, the petitioner returned to light duty work using only her left arm. Medical exhibit 39. On June 11, 1997, the petitioner was released to full duty for half-days for 2 weeks to increase to full duty if she had no problems. Medical exhibit 43.

On April 1, 1998, the petitioner returned to Dr. Mantes complaining of pain in her shoulder and elbow that Dr. Mantes found to be consistent with lateral epicondylitis. As he was giving her an injection, he found a mass in her shoulder muscle and referred her for an MRI. Medical exhibit 44.

In August 1998, the plant closed and petitioner stopped working for Kōret to California.

On February 4, 1999, the petitioner sought chiropractor treatment for pain and numbness in her left shoulder and hand. Medical exhibit 77-80. In March 1999, the plant reopened under new ownership, Rivers West. The petitioner's job duties were to use a single needle machine to sew labels into baby pajamas, zippers and cover stitch, using both hands to manipulate the materials as she sewed, using her right hand to pull the material and her left hand to guide. She also sewed some round patches in a movement similar to the movement used on the pants pockets she sewed at Koret. She also trained other employees.

The petitioner took off 1 week in August 1999 because of pain in her upper extremities but did not tell her employer why she took the time off.

In September 1999, the petitioner complained of pain in her left shoulder when she moved her right arm. The petitioner was given a couple of samples of Celebrex. Medical exhibit 62. The petitioner followed up in January 2000 for pain in her right shoulder and noted the Celebrex helped and requested a refill. Medical exhibit 66. The petitioner was also taken off work from January 26, 2000 through February 27, 2000 on unpaid leave. Medical exhibit 66A. The petitioner was also laid off for 2-3 months beginning in February 2000.

The petitioner stopped working at Rivers West on October 20, 2000 because she was in too much pain in her right shoulder and neck to continue working and she was also getting headaches. The petitioner sought authorization through Liberty Mutual, the insurer for the 1997 injury at Koret of California, for additional treatment and on October 26, 2000, the petitioner saw Dr. Mantes with complaints of achy regions in her body including shoulders, neck and elbow. Dr. Mantes noted the symptoms were to be more radicular in nature and he believed it was the same problem he previously treated. Medical exhibit 46. The petitioner sought a second opinion from Dr. Mortensen in November 2000 who believed the petitioner's problems of cervical degenerative disc disease and cervical radiculopathy were as a result of overuse activities and he was unsure whether not her

current symptoms related to the 1997 injury. On November 28, 2000, Dr. Mortensen concluded the petitioner's over-use symptoms related to her work environment. Medical exhibit 57.

The petitioner was evaluated by Dr. Barry on November 30, 2000 who diagnosed chronic cervical pain with significant radicular component and mild stenosis secondary to repetitive flexion of the neck and reach on the conveyer belt for the three years. Dr. Barry believed that the petitioner's current symptoms were related to the original 1997 event and recommended the petitioner have surgery. Medical exhibit 20.

Dr. Gerald Moress conducted an independent medical evaluation of the petitioner on May 23, 2001. Dr. Moress diagnosed the petitioner as having an ill defined pain complex involving the right shoulder, right extremity and neck, multilevel cervical spondylosis and degenerative disc disease with chronic depression and anger. Dr. Moress found no medical causal connection between the petitioner's current complaints and her work exposure at Koret of California. He also recommended against surgery. Medical exhibit 53-54.

On October 25, 2001 the petitioner sought treatment with Dr. Reichman whose impression was cervical stenosis and three level disc disease with radiculopathy and a mild myopathy cervical radiculopathy as a result of herniated cervical disks at C4-5, C5-6, and C6-7. Dr. Reichman recommended a C4-5, C5-6, C6-7 discectomy and fusion and believes the petitioner's condition is the result of "that incident of pulling material off of the belt." Medical exhibit 72-76.

Edward B. Holmes, M.D., MPH, submitted his report as medical panel chairman on July 5, 2002. Dr. Holmes found no medical evidence to supporting any medical causal connection between the claimant's condition and her work activities at Rivers West as her condition was present at the time she began work for Rivers West and the work, although similar in nature to that done for Koret, added nothing to the already existing pathology. Dr. Holmes found that the petitioner's work over the years at Koret, including the 2 accidents in February 1997, is the cause of her cervical condition. Dr. Holmes' opinion is that both the repetitive work over time at Koret and the two accidents in February 1997 are the cause of the petitioner's cervical condition, along with some degenerative changes. Dr. Holmes found the claimant to medically stable as of March 1, 1999.

In February 1997, the petitioner's average weekly wage was \$423.00 and she was not married and had no dependent children. The petitioner's compensation rate is \$282.00 per week.

#### PRINCIPLES OF LAW

Utah Code Ann. § 34A-2-401 requires compensation be paid only for those injuries arising out of and in the course of employment. Temporary total and partial disability are payable until the healing period has ended and the petitioner's condition has stabilized. "Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve. Once healing has ended, the permanent nature of the claimant's disability can be assessed and benefits awarded accordingly." Booms v. Rapp Construction Co., 720 P.2d 1363, 1366 (Utah 1986).

For an injury to be compensable under the Act, a petitioner must show by evidence, opinion or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability and in the event a petitioner cannot show a medical causal connection, compensation should be denied. *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986).

The Workers Compensation Act should be construed in favor of compensation when the statutory terms reasonably allow such compensation. Park Utah Consol. Mines v. Industrial Commission, 36 P.2d 979, 981 (Utah 1934); also Heaton v. Second Injury Fund, 796 P.2d, 676, 679 (Utah 1990).

### CONCLUSIONS OF LAW

The claimant suffered compensable industrial injuries on February 14, 1997 and February 28, 1997 while employed by the respondent, Koret of California.

The respondents, Koret of California and/or Liberty Mutual Insurance, are liable to the claimant for temporary total disability compensation for 3.86 weeks covering the period January 26 – February 21, 2000 in the amount of \$1,088.52.

The respondents, Koret of California and/or Liberty Mutual Insurance, are liable to the claimant for reasonable and necessary medical care related to the February 14, 1997 and February 28, 1997 industrial injuries.

### DISCUSSION AND ANALYSIS

There is not a preponderance of medical evidence to support a finding that a medical causal connection exists between the claimant's condition and her work activities at Rivers West. The evidence supporting this claim was thin at best when referred to the panel for evaluation. The occupational disease statute in effect at the time this claim arose required a referral to a medical panel and did not give discretion to the ALJ. Further, Dr. Moretenson's statements could have been read to support such a claim so it was under those circumstances that the ALJ requested the medical panel to evaluate this claim. The panel, and a preponderance of the medical evidence of record, did not support a finding that the claimant's activities at Rivers West had any contribution to the claimant's condition therefore that claim is dismissed.

The claimant's cervical condition was not initially diagnosed as such in 1997 when she began complaining of severe shoulder and arm pain. The physician at Castleview Hospital, where she initially went to the emergency room, diagnosed lateral epicondylitis, and Dr. Mantes, who she saw in followup, diagnosed muscular strain. Dr. Mantes noted improvement with light duty but whenever the claimant returned to her regular work activities, her condition deteriorated and she was again placed on light duty and then the plant closed so she was no longer engaged in activity that exacerbated her condition. At that time, treatment, which had been through the industrial carrier, ended and it was not until the plant reopened and the claimant began working again as a seamstress that her symptoms flared to the point where she again had to seek medical treatment.

The preponderance of medical evidence, including the panel's report, supports a finding that the claimant's work activities, including the February 1997 accidents, are the cause of the claimant's cervical condition. Although the medical panel discounts the 1997 accidents in the overall contribution to the claimant's condition and instead focuses more on repetitive trauma at Koret over a longer period, Dr. Holmes notes the February 1997 events are "...two more events in the cumulative trauma that occurred over the years prior to February 1997..." and that "...she developed this problem over a long period of time with cumulative trauma (including 2 events in February 1997)...". Although Dr. Holmes apportioned part of the claimant's condition to non-industrial factors, there is no provision for apportionment of accident claims. Dr. Reichman also believed the claimant's work activities at Koret and the February 1997 events are the cause of her cervical spine condition with the jerking incidents of February 1997 causing the onset of severe symptoms requiring medical intervention. Dr. Barry, in his evaluation following results of the cervical MRI, noted that "...it is clear in retrospect that this patient's symptoms that she has been complaining about for approximately three years are radicular in nature and stem from her original complaint in 1997." As such, the claimant has proven by a preponderance of medical evidence there exists a medical causal connection between the February 1997 accidents at Koret and her current cervical condition.

Both Dr. Reichman and Dr. Barry recommend surgery as reasonable and necessary to treat the claimant's cervical condition. Although Dr. Holmes expressed some reservation, noting the claimant is at risk for "less than an ideal result from any surgical procedure" he also notes that conservative treatment has not resolved her condition leaving the decision to the claimant as to whether to pursue surgery noting that it will likely not resolve her condition completely. Thus, Dr. Holmes did not find the recommended surgery to not be reasonable and necessary but only cautions that it may not resolve completely all the claimant's pain. Given that both Dr. Reichman, a neurologist, and Dr. Barry, an orthopedic surgeon, are of the opinion that is reasonable and necessary to treat the claimant's condition and that Dr. Holmes did not rule out surgery as a treatment option, the preponderance of evidence supports a finding that the proposed surgery is reasonable and necessary to treat the claimant's condition should she choose to undergo that procedure.

Drs. Reichman, Barry and Mortensen have given no opinions as to medical stability during the period from February 1997 through the present. Dr. Reichman only gives an opinion as to an estimate of time the claimant will be unable to work as the result of the proposed surgery. The claimant was paid temporary total disability benefits for the periods immediately after the 1997 accidents and was working light duty and eventually released to full duty in the summer of 1997. The claimant had returned to Dr. Mantes in April 1998 because of the increase in pain and was being evaluated when the plant closed in August 1998. Dr. Mantes had not released the claimant from work during this time. Dr. Holmes did not find there to be any period of medical instability related to the February 1997 accidents. Jeannee Olsen, P.A.-C. took the claimant off work for the period January 26, 2000 through February 21, 2000 stating as the reason "because she is ill" although from the notes made that day, it is clear the treatment was for the claimant's ongoing cervical condition that had not yet been correctly diagnosed. Thus, this is the only period of time the claimant was off work that is supported by the medical evidence after the initial period in 1997.

ORDER

IT IS HEREWITH ORDERED that the respondents, Koret of California and/or Liberty Mutual Insurance, pay the claimant \$1,088.22 for temporary total disability compensation covering the period January 26 – February 21, 2000. This amount is accrued and due and payable in a lump sum, plus interest pursuant to Rule R612-1-5.2 less attorneys fees of \$217.04 which respondents are ordered to deduct from the award and pay directly to Richard Burke, attorney for the petitioner, plus 20% of the interest payable on the award per Rule R602-2-4.

IT IS FURTHER ORDERED that the respondents, Koret of California and/or Liberty Mutual Insurance, pay the claimant's reasonable and necessary medical expenses resulting from the February 14, 1997 and February 28, 1997 accidents pursuant to Labor Commission medical and surgical fee schedule.

IT IS FURTHER ORDERED that occupational disease claim against Rivers West and/or Workers Compensation Fund, is dismissed with prejudice.

Dated this 12<sup>th</sup> day of February, 2003.

LABOR COMMISSION

  
Debbie L. Hann  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

MAILING of Findings, Conclusions of Law, and Order

I certify that I have mailed the attached document in the case of DARLA BASSO, Case No. 200117, to the following parties by first class prepaid postage on February 11, 2003.

DARLA BASSO  
505 SO ROSE AVE  
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KORET OF CALIFORNIA  
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RICHARD R BURKE, Atty,  
648 E 100 S #200  
SALT LAKE CITY UT 84102

DORI K PETERSEN, Atty,  
77 W 200 S #400  
SLC UT 84101



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Rosalee Oakeson

## Appendix B

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**UTAH LABOR COMMISSION**

**DARLA BASSO,**

**Applicant,**

**v.**

**KORET OF CALIFORNIA and  
LIBERTY MUTUAL INSURANCE;  
RIVERS WEST and WORKERS  
COMPENSATION FUND,**

**Defendants.**

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**ORDER GRANTING  
MOTION FOR REVIEW**

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**ORDER OF REMAND**

**Case Nos. 01-0017  
01-1243 & 01-0952**

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Koret of California and its workers compensation insurance carrier, Liberty Mutual (referred to jointly as “Koret”), and Darla Basso have each asked the Utah Labor Commission to review Administrative Law Judge Hann’s decision regarding Ms. Basso’s claim for benefits under the Utah Workers’ Compensation Act (Title 34A, Chapter 2, Utah Code Ann.) and the Utah Occupational Disease Act (Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over these motions for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

**BACKGROUND AND ISSUES PRESENTED**

Ms. Basso has filed a series of Applications For Hearing to compel her previous employers, Koret and Rivers West, to pay workers’ compensation or occupational disease benefits for Ms. Basso’s cervical and right arm problems. Ms. Basso’s claim is based on the alternative theories that her injuries are the result of accidents on February 14 and/or February 28, 1997, or long-term overuse of her right arm, or some combination of the foregoing factors.

After conducting an evidentiary hearing in this matter, Judge Hann appointed Dr. Holmes to serve as an impartial medical panel to consider the medical aspects of Ms. Basso’s claim. Consistent with Ms. Basso’s testimony and the other evidence of record, Judge Hann provided Dr. Holmes with a description of Ms. Basso’s work-related exertions, including the events of February, 1997.

Dr. Holmes ultimately concluded that Ms. Basso suffered from degenerative cervical disc disease and myofascial pain syndrome which had been aggravated by her work at Koret. Specifically, Dr. Holmes found that it was “several years of **awkward neck posturing** in her work” (emphasis added) that constituted the work-related component of her problems. Dr. Holmes’ report was the

**ORDER GRANTING MOTION FOR REVIEW/REMAND  
DARLA BASSO  
PAGE 2**

first time that this mechanism of injury had been suggested.

Koret objected to Dr. Holmes' report on the grounds its conclusions were based on a factual determination—Ms. Basso's awkward neck posturing—that had neither been identified by any of the parties nor included in the ALJ's charge to Dr. Holmes. Judge Hann rejected Koret's objection, adopted Dr. Holmes' report and awarded benefits accordingly.

Koret's motion for review now pending before the Commission restates Koret's objections to Dr. Holmes' report. Ms. Basso's motion for review to the Commission seeks additional temporary total disability compensation.

**DISCUSSION**

Koret contends that Dr. Holmes has inserted a new factual issue into this proceeding by attributing Ms. Basso's cervical problems, in part, to her previously undisclosed "awkward neck positioning." Koret argues it is entitled to investigate and, perhaps, rebut this new factual basis for Ms. Basso's claim.

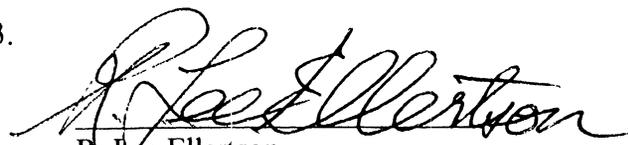
The Commission has carefully reviewed the record and concludes, on balance, that Koret has not had a sufficient opportunity to address whether Ms. Basso's alleged "awkward neck positioning" is, in fact, a contributing cause of her current problems. The Commission therefore remands this matter to Judge Hann to take such action as she considers reasonable and appropriate to allow Koret and Ms. Basso to respond to Dr. Holmes' opinion.

Because a final determination of Ms. Basso's right to benefits depends upon the additional proceedings to be conducted by Judge Hann, the Commission does not address Ms. Basso's argument that she is entitled to additional temporary total disability compensation. On remand, Judge Hann may consider and act upon that issue as she considers proper.

**ORDER**

The Commission grants Koret's motion for review and remands this matter to Judge Hann for further proceedings consistent with this decision. It is so ordered.

Dated this 30<sup>th</sup> day of September, 2003.



R. Lee Ellertson  
Utah Labor Commissioner

**ORDER GRANTING MOTION FOR REVIEW/REMAND  
DARLA BASSO  
PAGE 3**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Granting Motion For Review/Remand in the matter of Darla Basso, Case Nos. 01-0017, 01-1243 & 01-0952, was mailed first class postage prepaid this 30<sup>th</sup> day of September, 2003, to the following:

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LIBERTY MUTUAL INSURANCE COMPANY  
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WEST SACRAMENTO CA 95798-9000

RIVERS WEST  
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DORI K PETERSEN, ATTORNEY  
BLACKBURN & STOLL  
77 WEST 200 SOUTH #400  
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Sara Danielson  
Support Specialist

## Appendix C

UTAH LABOR COMMISSION  
ADJUDICATION DIVISION  
P. O. Box 146615  
Salt Lake City, Utah 84114-6615  
Telephone: 801-530-6800

DARLA BASSO,	*	FINDINGS OF FACT, CONCLUSIONS OF
Petitioner,	*	LAW & ORDER ON REMAND
	*	
vs.	*	CASE NO. 200117, 20011243, 2001952
	*	
KORET OF CALIFORNIA and/or LIBERTY	*	
MUTUAL INSURANCE; RIVERS WEST	*	Judge Debbie L. Hann
and/or WORKERS COMPENSATION FUND,	*	
Respondents.	*	
	*	
	*	

STATEMENT OF THE CASE

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On August 9, 2001, the petitioner filed an "Amended Occupational Disease Claim" against Rivers West and Workers Compensation Fund alleging an occupational disease of the neck and upper extremity while employed at River's West from March 13, 1999 through February 26, 2000 and again May 1, 2000 through October 20, 2000. The respondents denied liability for the claim based on Utah Code § 34A-3-108 because the application for hearing was the first notice of the claim. The respondents also requested dismissal because the petitioner filed no supporting medical documentation.

On November 16, 2001, the petitioner filed an amended Application for Hearing alleging a February 14, 1997 injury to her right shoulder, right elbow and neck caused by pulling materials off the conveyor belt while employed by a Koret of California. The respondents again denied liability because of a lack of medical causation between the injuries claimed and the petitioner's current condition.

The case was heard on December 13, 2001. Richard Burke, Attorney at Law, represented the petitioner. Dori K. Petersen, Attorney at Law, a represented the respondents Koret of California and Liberty Mutual Insurance. Hans Scheffler, Attorney at Law, represented the respondents, Rivers

West and Workers Compensation Fund. Findings of Fact and Interim Order was issued on April 5, 2002 sending the medical aspects of this case to a medical panel. Dr. Edward B. Holmes, M.D., M.P.H. was appointed chairman of the medical panel. Dr. Holmes issued his report on July 5, 2002. The report was forwarded to the parties via certified mail on July 11, 2002. Both the petitioner and the respondent, Koret of California, filed objections to the panel report. Findings of Fact, Conclusions of Law & Order was issued on February 12, 2003. Both the petitioner and the respondents, Koret and Liberty Mutual Insurance filed motions for review with the Commission. On September 30, 2003, the Commission issued an Order Granting Motion for Review and Order of Remand, remanding the case for further proceedings to address the issue of "awkward neck posturing" found by Dr. Holmes as part of his medical panel evaluation.

On October 2, 2003, Notice of Hearing was sent to the parties scheduling the matter for hearing on remand for January 8, 2004. The petitioner appeared and parties were represented by the same counsel as had appeared at the prior hearing. At the hearing, the parties submitted the petitioner's video deposition and an updated medical records exhibit. Dr. Clyde's opinion, offered by the respondents Koret and Liberty Mutual was excluded as untimely. The matter was then referred back to Dr. Holmes, chairman of the medical panel in this case. Dr. Holmes issued his report on September 17, 2004 and it was forwarded to the parties via certified mail. No objections to the report's entry into the evidentiary record were filed therefore it is admitted pursuant to Utah Code § 34A-2-601.

#### FINDINGS OF FACT

The findings of fact contained in the February 12, 2003 Findings of Fact, Conclusions of Law & Order are hereby incorporated by reference.

The petitioner's deposition was taken on videotape on December 18, 2003 to address in more detail the petitioner's neck position and work station set up. The parties stipulated to the facts contained in the petitioner's December 18, 2003 video deposition. The parties also stipulated that while the petitioner was sewing at both Koret and Rivers West she was not holding her head completely still and had to move it somewhat to see the sewing needle. They also stipulated that the thread the petitioner used was often the same color as the material it was sewed upon.

On December 26, 2003, Dr. Moress performed a supplementary record review on the petitioner and reviewed the medical panel report and the video deposition. Dr. Moress' opinion is that awkward neck position did not contribute to the degeneration of the petitioner's cervical spine. Medical exhibit 112.

Pages 85 and 100-101 were removed from the supplemental medical records exhibit as they are not medical records. Page 85 is an employer's first report of injury, not a physician's first report as noted on the exhibit. The Labor Commission records at pages 100-101 are not medical records. The pages are re-marked as respondent's exhibits 2 & 3.

Dr. Holmes reviewed the video taped deposition and the updated medical records. Although Dr. Holmes states that the evidence does not change his overall opinion, he provided significant

clarification of his prior opinion and reviewed the medical literature and National Institute for Occupational Safety and Health studies related to "...the development of neck/shoulder symptoms and repetitive hand arm movements..." to further clarify his analysis of causation in this case. Dr. Holmes clarifies that in his opinion and based upon the medical literature, the petitioner did not develop degenerative disc disease or degenerative joint disease as a result of her work activities at Koret. Dr. Holmes is of the opinion the petitioner's pain symptoms (described as neck/shoulder symptomology) were caused by her work activities and that this was an exacerbation of underlying degenerative conditions. The exacerbation as the result of her work activities occurred during the course of her work and "...a few months thereafter."

The preponderance of evidence is that the petitioner's repetitive trauma in and around 1997 at Koret contributed to her pain and symptomology in her neck and upper extremity however the evidence that her condition, specifically degenerative disc disease, was medically caused by her repetitive work activities is less clear. A close review of the medical evidence does not support by a preponderance, that the petitioner's repetitive trauma in and around 1997 at Koret or her work activities at Rivers West are the medical cause of her degenerative disc disease. Dr. Mortensen's opinion, given on November 28, 2000, is that the petitioner's "overuse symptoms" are related to her work environment. Dr. Reichman states that, "I would think that it is probably related to that incident of pulling the material off the belt." Dr. Barry does state unequivocally that in his opinion the degenerative disc disease was caused by her work activities. However, Dr. Holmes, in his clarifying opinion, outlines medical studies that show degenerative disc disease is multifactorial in origin and it is incorrect to assume that a temporal connection to work activities and evidence of degenerative changes on an MRI are related. Dr. Holmes also notes that just because degenerative disc disease is present, it cannot be assumed to be the source of pain, noting that the petitioner has alternatively been diagnosed with myofascial pain and muscle tension pain syndrome. Dr. Moress also makes note that the petitioner's pain symptoms do not correlate with cervical radicular pain. Dr. Holmes notes there is "little good research for or against such postures causing DDD of the cervical spine." Thus, while the petitioner has proven that her repetitive work activities at Koret caused her pain and discomfort in her neck and shoulder, the preponderance of evidence does not support the finding that such activities are the medical cause of her degenerative disc disease for which she currently seeks treatment.

The petitioner has been paid compensation for the periods of time her condition was exacerbated by repetitive activities at Koret thus no further compensation is due from Koret. However, because there is a preponderance of evidence that the petitioner's neck posturing caused her underlying condition to be aggravated and painful, the respondent, Rivers West is liable for a temporary aggravation of her underlying degenerative disc condition for the period January 26, 2000 through February 27, 2000 and for the period October 20, 2000 through December 20, 2000, when her temporary aggravation would have resolved per Dr. Holmes' opinion.

#### PRINCIPLES OF LAW

A compensable occupational disease is "... any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." Utah Code Ann. § 34A-3-103.

#### CONCLUSIONS OF LAW

The petitioner suffered a compensable occupational disease while employed by Rivers West in the form of an aggravation of her underlying degenerative disc disease.

The respondents, Rivers West and Workers Compensation Fund, are liable to the petitioner for temporary total compensation for the period January 26, 2000 through February 27, 2000 and October 20, 2000 through December 20, 2000 at the rate pf \$282.00 per week. (3.86 + 8.85 weeks x \$282.00).

#### ORDER

IT IS HEREWITH ORDERED THAT the respondents, Rivers West and Workers Compensation Fund are liable to the petitioner for temporary total compensation in the amount of \$3,584.22. This amount is accrued and due and payable plus interest at the rate of 8% per annum less attorneys fees payable directly to Richard Burke, Attorney at Law, in the amount of \$716.84 plus 20% of the interest payable.

Dated this 7<sup>th</sup> day of April, 2005.

LABOR COMMISSION



Debbie L. Hann  
Administrative Law Judge

#### NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER ON REMAND, was mailed by prepaid U.S. postage on April 7, 2005, to the persons/parties at the following addresses:

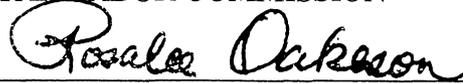
Darla Basso  
505 S Rose Ave  
Price UT 84501

Rivers West Apparel  
1130 S Carbon Ave  
Price UT 84501

Richard Burke Esq  
648 E 100 S Ste 200  
Salt Lake City UT 84102

Hans Scheffler Esq  
P O Box 57929  
Salt Lake City UT 84107

UTAH LABOR COMMISSION



Clerk  
Adjudication Division

*faxed 5-4-05 to Dori Petersen*

## Appendix D

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**UTAH LABOR COMMISSION**

**DARLA BASSO,**

**Petitioner,**

**vs.**

**KORET OF CALIFORNIA; LIBERTY  
MUTUAL INSURANCE; RIVERS WEST;  
and WORKERS COMPENSATION FUND,**

**Respondents.**

**ORDER DENYING  
MOTIONS FOR REVIEW**

**Case Nos. 01-0017, 01-0952  
and 01-1243**

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Darla Basso, the petitioner, and Rivers West, one of the respondents<sup>1</sup>, have each asked the Utah Labor Commission to review Administrative Law Judge Hann's decision regarding Ms. Basso's claims for benefits under the Utah Occupational Disease Act (Title 34A, Chapter 3, Utah Code Annotated) and the Utah Workers' Compensation Act (Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over these motions for review pursuant to Utah Code Ann. §63-46b-12, Utah Code 34A-3-107 and Utah Code Ann. §34A-2-801(3).

**BACKGROUND AND ISSUES PRESENTED**

During 2001, Ms. Basso filed a series of applications to compel her previous employers, Koret and Rivers West, to pay workers' compensation or occupational disease benefits for Ms. Basso's cervical and right arm problems. In her applications, Ms. Basso alleged her medical problems were caused by: 1) accidents on February 14 and February 28, 1997, while employed by Koret; and 2) overuse of her right arm while employed first by Koret and later by Rivers West.

Judge Hann held an evidentiary hearing on December 13, 2001, and then issued her first order on April 5, 2002. Among other things, Judge Hann's first order rejected Rivers West's argument that Ms. Basso's occupational disease claim should be dismissed because she had failed to provide timely notice. The first order also concluded that Ms. Basso's claim should be referred to a medical panel for review.

Judge Hann subsequently appointed Dr. Holmes to serve as the medical panel. After examining Ms. Basso and reviewing her medical history, Dr. Holmes submitted a report to Judge Hann that diagnosed Ms. Basso with degenerative cervical disc disease, myofascial pain syndrome, and depression. The report found no medical causal connection between Ms. Basso's work at Rivers

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<sup>1</sup> There are two respondents in the matter: 1) Koret of California and its insurance carrier, Liberty Mutual Insurance (jointly referred to as "Koret"); and 2) Rivers West and its insurance carrier, Workers Compensation Fund (jointly referred to as "Rivers West").

## **ORDER DENYING MOTION FOR REVIEW**

**Darla Basso**

**PAGE 2**

West and her medical problems. However, Dr. Holmes found that Ms. Basso had been subject to “awkward neck posturing” for many years while working at Koret. In Dr. Holmes’ view, this awkward neck posture at Koret constituted one-half the medical cause of her degenerative cervical disc disease and myofascial pain syndrome.

After receiving Dr. Holmes’ report, Judge Hann issued her second order on February 12, 2003. In this second order, Judge Hann adopted Dr. Holmes’ medical opinions and dismissed Ms. Basso’s claim against Rivers West with prejudice. Judge Hann also ordered Koret to pay Ms. Basso’s work-related medical expenses and temporary total disability compensation.

Koret then filed a motion for Commission review of Judge Hann’s second decision. Specifically, Koret challenged Dr. Holmes’ determination that Ms. Basso’s work at Koret had required awkward neck posture. Ms. Basso likewise submitted her own motion for review in which she argued she was entitled to temporary disability compensation for a longer period of time than had been awarded by Judge Hann.

The Commission granted Koret’s motion for review and remanded this matter to Judge Hann to determine whether Ms. Basso’s work at Koret had, in fact, required awkward neck posture. The Commission also instructed Judge Hann to reconsider Ms. Basso’s right to temporary total disability compensation in light of the additional information that might be adduced on remand.

Judge Hann conducted additional evidentiary proceedings and obtained detailed evidence about the conditions of Ms. Basso’s work for Koret. Judge Hann provided this additional information to Dr. Holmes and asked him to review and update his previous report. Dr. Holmes responded with a substantial explanation of the basis for his medical opinions, but with no significant change to his original opinion.

Judge Hann issued her third decision on April 7, 2005. Judge Hann again relied on Dr. Holmes’ opinions, which she understood as establishing that Ms. Basso’s work at Koret and Rivers West did not cause her underlying medical problems, but did temporarily exacerbate those problems. On that basis, Judge Hann concluded that Koret and Rivers West were each liable to pay temporary disability compensation to Ms. Basso for the periods of time she was unable to work as a result of such exacerbation.

In seeking review of Judge Hann’s third decision, Ms. Basso argues that her work for Koret and Rivers West caused her cervical disc disease and myofascial pain, and that she should continue to receive temporary total disability compensation because she is not yet medically stable from those problems. Rivers West’s motion for review contends that 1) Judge Hann lacked jurisdiction to consider Ms. Basso’s claim against Rivers West, 2) Ms. Basso’s claim against Rivers West was barred by her failure to provide timely notice, and 3) the medical evidence does not support an award of temporary total disability compensation from Rivers West to Ms. Basso.

## ORDER DENYING MOTION FOR REVIEW

Darla Basso

PAGE 3

### DISCUSSION

The Commission affirms and adopts Judge Hann's findings of fact, as modified and extended in the discussion that follows. The Commission will first address Ms. Basso's motion for review, and will then consider the issues raised by Rivers West.

Although Ms. Basso contends that her work for Koret and Rivers West caused her ongoing cervical disc disease and myofascial pain, the preponderance of medical evidence does not support her position. To the contrary, while her work temporarily exacerbated those medical problems, any such work-related exacerbation had ended by March 1, 1999. Consequently, Ms. Basso is not entitled to temporary total disability compensation after that date.

Turning to Rivers West's motion for review, its first argument is that, because Judge Hann's second decision dismissed Ms. Basso's claims against Rivers West "with prejudice," and none of the parties appealed that dismissal, Judge Hann erred in revisiting such claims in her subsequent decision. The Commission disagrees with this argument. All of Ms. Basso's claims have been consolidated in this proceeding. These claims arise from complex and interrelated facts regarding Ms. Basso's medical condition, as well as the nature and duration of her work at Koret and Rivers West. Consequently, all of Ms. Basso's claims have remained open throughout these adjudicative proceedings.

Next, Rivers West argues that Ms. Basso's occupational disease claim is barred because Ms. Basso failed to provide timely notice of that claim as required by § 34A-3-108(2) of the Utah Occupational Disease Act. In summary, § 34A-3-108(2)(a) required Ms. Basso to notify either her employer or the Commission's Industrial Accidents Division of her occupational disease within 180 days from the date her "cause of action" arises. Section 34A-3-108(2)(b) provides that a cause of action arises on the date the employee 1) suffers disability from the occupational disease **and** 2) knows or should have known that the disease was caused by employment.

The Commission accepts, for purposes of discussion, Rivers West's contention that Ms. Basso's cause of action arose on October 20, 2000. Therefore, pursuant to § 34A-3-108(2), she had 180 days after that date to notify **either** Rivers West **or** the Industrial Accidents Division of her occupational disease. The record in this matter establishes that Ms. Basso took the second of these options and notified the Industrial Accidents Division of her occupational disease on November 15, 2000, well within the 180-day period allowed for such notice. For this reason, the Commission concurs with Judge Hann's determination that Ms. Basso's claim is not barred by § 34A-3-108(2)'s notice requirement.

Rivers West's last objection to Judge Hann's decision is that the medical evidence does not support an award of temporary total disability compensation from Rivers West to Ms. Basso. However, Dr. Holmes summed up his evaluation of Ms. Basso's situation as follows:

**ORDER DENYING MOTION FOR REVIEW**

**Darla Basso**

**PAGE 4**

. . . I conclude that in this unique and particular case, it is medically reasonable to conclude that some neck/shoulder symptomatology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurred during the course of her work and a few months thereafter.

In reaching this conclusion that Ms Basso's work activity temporarily aggravated her neck and shoulder problems, Dr. Holmes did not exempt Ms Basso's work activities at Rivers West. Likewise, Dr. Mortensen, Ms. Basso's treating physician at the time she quit work at Rivers West, expressed the opinion that "this is an overuse condition that is related to repetitive activities she does at work." The Commission accepts the views of these physicians and concludes that Ms. Basso's work at Rivers West temporarily exacerbated her underlying neck and shoulder conditions.

**ORDER**

In light of the foregoing, the Commission denies the parties' motions for review and affirms Judge Hann's decision of April 7, 2005. It is so ordered

Dated this 5<sup>th</sup> day of January, 2006.

  
R. Lee Ellertson  
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.

**ORDER DENYING MOTION FOR REVIEW**

**Darla Basso**

**PAGE 5**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Darla Basso, Case No. 2001952, was mailed first class postage prepaid this 5<sup>th</sup> day of January, 2006, to the following:

Darla Basso  
505 S Rose Ave  
Price UT 84501

Rivers West Apparel  
1130 S Carbon Ave  
Price UT 84501

Hans Scheffler Esq  
P O Box 57929  
Salt Lake City UT 84107



Sara Danielson  
Utah Labor Commission

## Appendix E

PHYSICIAN'S INITIAL REPORT OF WORK INJURY OR OCCUPATIONAL DISEASE

This report must be filed pursuant to rule R568-23(A) for your protection Utah law requires notification that any workers compensation fraudulent claim for disability compensation or medical benefits and may be subject to fines and confinement in the state prison

Industrial Commission - Industrial Accidents Division  
160 East 300 South 3rd Floor, P.O. Box 16610, Salt Lake City, Utah 84114-6610

PLEASE PRINT OR TYPE

Insurance Company Liberty Mutual

Do Not Use This Space  
CLAIM NO  
POLICY NO  
Class Code

Address P.O. Box 52037 Phoenix AZ 85072

PATIENT	1 Employee's First Name Darla	Middle Initial A	Last Name Basco	2 Social Security No 528-94-2094	3 DOB 6-28-58	4 Sex F
	5 Street Address 505 S. Rose Ave. Price			City Utah	State 84501	Zip
	6 Phone No 435-637-6940		7 Ht 5'	8 Wt 94	9 Name of Employer Korets of Rivers California's	
HISTORY	11 Phone No NONE		12 Date Injured 3-97		Hour AM <input type="checkbox"/> PM <input type="checkbox"/>	13 Last Date Worked 10-19-2000
	14a Has This Part Been Injured Before <input type="checkbox"/> yes <input type="checkbox"/> no					
	14b If "Yes" State When and Describe					
	15 Employee's Statement of Cause of Injury or Illness (In First Person) Repetitious work					
EXAMINATION	16 Describe Complaints (In First Person) Burning Elbow Burning Shoulder Headaches					
	17 Findings of Examination					
	18 X Rays? <input type="checkbox"/> Yes <input type="checkbox"/> No				19 ICD 9 Codes	
	20 Diagnosis (Written Description)					
TREATMENT	21 Is the Condition Requiring Treatment the Result of the Industrial Injury or Exposure Described? <input type="checkbox"/> yes <input type="checkbox"/> no <input type="checkbox"/> undetermined <i>attached</i> If "No" Explain					
	22 Date of First Treatment			23 Type of Treatment		
	24 If Hospitalized, What Hospital? <input type="checkbox"/> In Patient <input type="checkbox"/> Out Patient			25 If Case Referred to Another Physician Give Physician's Name and Address		
DISPOSITION	26 Is Condition Medically Stationary? <input type="checkbox"/> yes <input type="checkbox"/> no		27 Is Any Further Treatment Required? <input type="checkbox"/> yes <input type="checkbox"/> no If "Yes" Date of Next Visit and How Many Estimated?		28 Will Injury Cause Permanent Impairment? <input type="checkbox"/> yes <input type="checkbox"/> no	
	29 Does Injury Prevent Return to Regular Employment? <input type="checkbox"/> yes <input type="checkbox"/> no If "Yes" Estimate Time Loss		Modified Employment? <input type="checkbox"/> yes <input type="checkbox"/> no If "Yes" Explain Restrictions		30 Date Released for Work	
	31 Remarks or Outline of Proposed Treatment					
	32 Are There Any Conditions That Would Retard or Prevent Recovery? <input type="checkbox"/> yes <input type="checkbox"/> no					
33 Name of Physician and Degree WAYNE W. MORTENSEN, M.D.			34 Address PROVO, UT 1067 North 500 West Suite 1		35 Phone No 377-1012	
36 Federal Tax ID Number 87-0460984		37 Date 11-15-00		38 Signature (Physician's Own Signature Please) <i>Wayne W. Mortensen</i>		

White Industrial Commission

Yellow Employee

Insurance Carrier Goldenrod Physicians File

ORIGINAL FILED IN 11-15-00

11-13-00

DARLA BASSO



This 42-year-old female seamstress in 1997 had an industrial injury and noted the onset of shoulder and upper arm pain. She was seen by Dr. Mantas who thought she had an overuse strain of her elbow and shoulder. She has had intermittent symptoms, but in the spring of 2000 noted the return of pain, primarily in the right paracervical area, in her upper arm, and right parascapular area. She has had some mild pain in the posterior aspect of her elbow with some associated numbness in her index and long finger. She has had persistent symptoms despite taking work off for three months.

- E: C-spine: Shows painful limited ROM with a positive Spurling's. She has right trapezial tenderness. She has parascapular tenderness. The shoulder shows actually full ROM. No impingement. Negative palm-down abduction. Negative Hawkins. No ligament instability. Elbows: Show mild tenderness over the triceps tendon with full active ROM. Stable ligaments. Distal NV is intact, although some subjective numbness in the thumb and long finger.
- X: X-rays were reviewed and showed significant degenerative disk disease at C4-5, C5-6, and C6-7.
- I: Cervical degenerative disk disease and cervical radiculopathy. No evidence of significant shoulder pathology. Mild right posterior elbow strain.
- P: I cannot ascertain whether this is related to her original Workman's Comp injury. Clearly, I feel this is an overuse condition that is related to the repetitive activities she does at work. I do feel like most of her problems is coming from her cervical spine. I would recommend a cervical MRI.

Wayne W. Mortensen, M.D.

D:11-13-00 WWM:ms/mlm

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**Edward B. Holmes, M.D., MPH**

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

July 4, 2002

Judge Debbie L. Hann  
Labor Commission  
Division of Adjudication  
160 East 300 South, 3rd Floor  
PO Box 146615  
Salt Lake City, Utah 84114-6615

Re: Darla Basso, Case #200117, 2001952, 20011243

Dear Judge Hann,

The following represents the report of the medical panel evaluation of Darla Basso and the examination performed in my office on June 26, 2002.

*1. What is the petitioner's current medical diagnosis?*

- Degenerative disc and joint disease in the cervical spine
- Non specific myofacial pain syndrome
- Probable depressive disorder

*2. Is there a medically demonstrable causal connection between the petitioner's current medical diagnosis and her work at Rivers West from March 1999 through October 2000? If yes, please apportion the medical causal contribution, if any, from each employer and/or non-industrial source.*

- a. There is no medically demonstrable causal connection between the petitioner's current medical diagnosis and her work at Rivers West from March 1999 through October 2000.

*3. Is there a medically demonstrable causal connection between the petitioner's current medical diagnosis and her industrial accidents of either February 14, 1997 or February 28, 1997?*

- a. There is little demonstrable connection between the specific February 1997 incidents mentioned and her current condition. There is no medical record to substantiate any substantive injury on 2/14/97 that would be associated with her current

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condition. There is no medical record to substantiate more than a minor incident on February 28, 1997. However, the records, and her history reported at this examination, are more consistent with a chronic, cumulative trauma type problem occurring over at least one year leading up to the 2/28/97 treatment. In other words, it is the panel's observation that she had pain in the right upper extremity long before the pain led her to seek treatment on February 28, 1997 (at least one year prior). Although she reports suffering some soft tissue strain on the above February dates, it is not felt that this was a substantial contribution to her overall problem but just two more events in the cumulative trauma that occurred over the years prior to February 1997. The effect of cumulative trauma at work over the years ultimately contributed to her report of unbearable pain on February 28, 1997. In this sense, her work over the year prior to February 28, 1997 was a partial cause of her current medical condition. It is estimated that approximately 50% of her current condition is related to her work through February 28, 1997.

4. *When, if at all, did the petitioner's condition stabilize as the result of the industrial exposure at Rivers West?*
  - a. It is not felt that the industrial exposure at Rivers West significantly contributed to her medical condition. She had virtually all symptoms, including the left upper extremity symptoms prior to her employment with Rivers West.
5. *When, if at all, did the petitioner's condition stabilize as the result of the February 14, 1997 injury?*
  - a. There is no documentation of any substantial injury on February 14, 1997 that would have had any lasting effect and therefore stabilization would have occurred immediately. Also see #6 below.
6. *When, if at all, did the petitioner's condition stabilize as the result of the February 28, 1997 injury?*
  - a. See answer to #5 above. She apparently had problems of muscle discomfort long before February 1997, which led to the ultimate reporting of the growing pain by the end of February

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1997. Since no specific medical condition developed on February 28, 1997, stabilization would need to consider the overall condition caused by repetitive trauma. She appears to have stabilized somewhere around March 1, 1999 from the cumulative trauma to the neck and upper extremities that occurred prior to that date (including the February 28, 1997 incident).

7. *Has the medical care that the petitioner received since October 2000 been necessitated by the petitioner's February 14, 1997 injury, her February 28, 1997 injury and/or her industrial exposure at Rivers West?*
  - a. The medical care since October 2000 has been reasonable in attempting to diagnose her degenerative neck condition. This evaluation and treatment was necessitated by the culmination of her cumulative trauma to the neck up to 1997 and the continued aggravation thereafter until she stabilized in about March 1999. Therefore, treatment after October 2000 would have been 50% due to her cumulative trauma through and including the February 1997 events and 50% due to non-industrial factors.
8. *What future medical treatment, if any, including surgery, will be reasonably required to treat the petitioner's February 14, 1997 and/or February 28, 1997 industrial injury?*
  - a. See question #3 above. Treatment for her degenerative spine condition will require continued home exercises, anti-inflammatory medication, occasional physician visits, occasional physical therapy visits, and possibly cervical spine decompression and fusion. The treatment would be necessitated by the combination of industrial and non-industrial factors previously apportioned in #7 above. Please see the discussion below for cautions regarding surgery in this case.
9. *What future medical treatment, if any, including surgery, will be reasonably required to treat the petitioner's industrial exposure at Rivers West?*
  - a. It is not felt that any substantial injury or aggravation has occurred from the work at Rivers West. Clearly, most of the degeneration and virtually all of the symptoms had been

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reported by 3/1/99. Although it is possible some minimal amount of aggravation could have continued to occur after 3/1/99, overall, the damage was already done by the time she started working for Rivers West.

### **Chief Complaint**

"Pain like a knife stuck in back of my throat". She has neck pain, headache, ear pain, and left shoulder pain when she moves the right arm. Episodic finger tingling in various fingers bilaterally and pain in the head when she moves the index and middle fingers.

### **History of Present Illness**

She reports that on or about 2/14/97 she pulled on a tote at work to remove it from the conveyor, like she always did, and felt pain and soreness in the muscles of her right shoulder blade region (this was not unusual for her). This soreness was similar to the pain she had almost every day after work. She continued her regular work activity and began to have more and more severe pain in the right shoulder blade and right elbow "like the muscle was ripped off the bone". On 2/28/97 she finally couldn't stand it anymore and went to the ER. X-rays were reportedly performed and were normal. She was seen by an MD and had PT and medication as well as modified duty, and improved. As soon as she went back to work after the improvement she felt an increase in her pain. This pain continued for about a year and never completely went away. In August of 1998 she was doing pocket work when the company was shut down. Later that summer she noted the left upper extremity began to hurt. During the year after 2/97 her piecework went from \$10/hr to \$6/hr due to her pain. At one point she went to school but couldn't do the chronic sitting due to neck pain and therefore she quit. In March of 1999 a new plant opened in the same place so she went back to work. She says she never went to a doctor while the first plant was shut down because she didn't know they would pay for it. The pain continued but she needed to work so she took a week off in August of 1999 without telling her employer it was due to pain. The pain improved while off work. In February of 2000 she was laid off and didn't return to work until May 2000. She went back to easier work and had less pain. Finally, she couldn't take the pain any longer and quit her work in October of 2000. She has not worked since that time. She eventually went back to Dr. Mantas who told her she had fibromyalgia syndrome. She demanded a second opinion and was sent to Dr. Mortensen. Dr. Mortensen felt she had a neck problem. MRI was ordered and she was sent to Dr. Barry. Dr. Barry told her that the neck was the problem from the very beginning (1997). Surgery was recommended on the neck about February 2001. She reports that Workers compensation denied the surgery since it was for the neck and they

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**Edward B. Holmes, M.D., MPH**

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were responsible for her shoulder and elbow. In June 2001 she saw Dr. Reichman who agreed she needed surgery. Surgery was scheduled for 12/01 but cancelled due to insurance reasons.

### **Past Medical History**

She denies any prior neck injuries, trauma, motor vehicle accidents or head injuries. She had female related surgeries only.

### **Social History**

She drinks 6-7 drinks per month. She smokes ½ pack per day and has done so for 20 years. She is divorced and has one child.

### **Family History**

Non-contributory

### **Occupational History**

1985-1990 Carbon county school district

1990 to 8/31/98 Korets of California/ seamstress

3/13/99 to 2/00 and 5/2000 to 10/2000 Rivers West/ seamstress

### **Examination**

Height 4'11", Weight 102#, BP 112/64, HR 56, Temp 99.5, RR 12

General: No acute distress, pleasant and cooperative with occasional bursts of obvious anger and frustration.

HEENT: WNL

Cervical Spine: No focal area of tenderness. No muscle spasm or nodularity is noted. She has FF to 45 deg, Ext 30 deg with neck pain. LF, Rotation are WNL bilat. During rotation she stated that she hears popping in her head and neck but the examiner did not hear this.

Right supraspinatus region is tender with a 2cm diameter, mildly tender muscle knot noted. Shoulder, elbow, wrist and hand range of motion is normal throughout. There is no atrophy, fasciculation or weakness. There is no focal elbow or lateral epicondyle tenderness. Both hands have a normal grip and no muscle wasting. She has a normal sensory and motor examination throughout. Gait is normal.

Reflexes are normal and symmetric throughout the upper and lower extremities. Cervical movement did not cause any specific radiation of pain to the upper extremities.

### **Medical Record Review**

The entire record was reviewed with the following important notations:

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2/28/97 Visit for right elbow pain that had been present for 1 year. Diagnosis was lateral epicondylitis.

3/1/97 off work 2 wks for right lateral epicondylitis of one year duration.

3/10/97 lat epicondylitis improved.

3/12/97 Dr. Mantas notes a 1 year history of right shoulder and elbow discomfort-not lateral epicondylitis. Pain is more in the trapezius and tricep regions. Diagnosis was muscle strain. PT and LD prescribed.

4/9/97 Feeling 100% better. RTW.

4/16/97 Much worse in right trapezius region since returning to work.

5/14/97 Some elbow and shoulder discomfort-strain

6/11/97 Much better, slowly increase work activity.

4/1/98 Pain started again. Lateral epicondylitis diagnosed and elbow injected. Mass the size of a pea in right trapezius noted so MRI ordered.

4/6/98 troubles at home, depressed, has lost 12# is down to 83#.

4/9/98 Elbow resolved, MRI normal and mass no longer palpable.

4/28/98 86#, positive changes in home life, on St. Johns wart.

2/4/99 Chiropractic for the neck and shoulders.

3/1/99 Chiropractic for pain in left shoulder and numbness in left hand.

9/3/99 Pain in left shoulder when moves right arm. This was described as an old problem.

1/26/00 Pain in the right shoulder. Celebrex had helped.

1/27/00 MRI cspine shows advanced multilevel DDD and degenerative uncovertebral joint disease with bilateral foraminal stenosis and moderate canal stenosis. Bilateral foraminal stenosis at C 5-6 and C 6-7. Left foraminal stenosis at C 4-5.

2/21/00 released to full duty.

10/26/00 Not seen for 2 years. Has aches in neck, shoulders, elbow and symptoms suggestive of radicular pain. Neck had decreased ROM and left rotation reproduced her pain. C-spine x-ray was described as normal in the disc spaces and foramina.

11/13/00 Dr. Mortensen described index and long finger numbness on the right. X-rays showed DDD C4-7 and a diagnosis of cervical radiculopathy was diagnosed.

11/28/00 Cervical DDD and radiculopathy diagnosed with no intrinsic upper extremity problem.

11/30/00 Dr. Berry: Onset of pain started in 3/97 from lifting, twisting and pulling. Pain is noted in the occiput, right posterior cervical, right trapezius, right heel, right posterior elbow and right hand. Diagnosis was radicular pain with mild stenosis. Discectomy C4-7 recommended. He relates this problem to her original complaints of 1997.

3/20/01 EMG and NCV totally normal. No evidence of nerve root compromise.

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3/24/01 Neck and right arm pain. Weak right wrist flexion and extension and decreased ROM of wrist in all directions. No atrophy noted.

5/23/01 Dr. Moress IME: 1990 to 1997 worked for Koret as a seamstress.

Developed right shoulder and elbow pain. He did not feel this was radicular in nature, felt it was vague and non-specific and felt surgery was not indicated. He did not find the current diffuse pain complaints related to her remote exposure at Koret in 1997.

### **Assessment**

1. Degenerative disc and joint disease in the cervical spine, work aggravated.
2. Non-specific myofascial pain syndrome, work aggravated.
3. Probable depressive disorder, non-industrial.

### **Discussion**

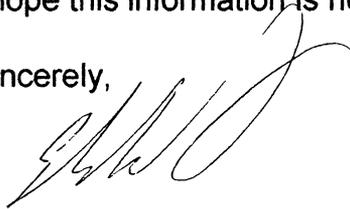
This unfortunate woman has suffered many years from myofascial pain as she worked as a seamstress. The pain was associated with work activity. She has also developed significant degenerative disc and joint disease in her neck. She did report chronic pain and several years of awkward neck posturing in her work from 1990 to 1997. She chronically had pain after her work shift for many years but it became much more noticeable in 1997. She had used sports creams at night and had relief while off shift. She describes a more slowly progressive problem that seemed to culminate in severe symptoms on February 28, 1997. The condition from which she suffers in the cervical spine is one also associated with the natural process of aging. Some individuals who have never worked develop degenerative disc and joint disease as she has. Repetitive and cumulative activity such as repeated neck bending (as in sewing) can theoretically accelerate or aggravate this condition. In her case, it is medically probable that approximately 50% of her cervical degenerative disc and joint condition is relatable to cumulative trauma at work through February 1997. The remaining 50% is relatable to natural degenerative processes due to aging. Interestingly, most of her symptoms have been on the right side but the foraminal stenosis is bilateral on the MRI and in fact in some respects worse on the left. Left sided symptoms weren't reported until 3/1/99 at the chiropractors office after having chiropractic treatment for her neck. Although there is no evidence of such in this case, chiropractic manipulation of the neck has been associated with worsening disc disease in some individuals. No electrodiagnostic evidence of radiculopathy has ever been found in her. Her complaints are atypical pain complaints and she has some non-physiologic radiation of pain. For example, moving her fingers causes pain in her head and moving her right arm causes left shoulder pain, etc. These findings lead to the conclusion that this condition is a complex pain syndrome in this patient. She has degenerative spine disease but

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there is a strong myofacial component with non-physiologic complaints. Future treatment will need to consider her risk for less than an ideal result from any surgical procedure based upon these complicating factors. Conservative treatment has not been successful in relieving all of her complaints. It is likely that surgical treatment will also not resolve all of her complaints. Given the lack of strong evidence for a true nerve irritation or lesion, successful surgical treatment is somewhat less likely. On the other hand, she has not found relief so far and will need to weigh the risks and benefits before deciding to proceed with surgery. Since she developed this problem over a long period of time with cumulative trauma (including 2 events in February 1997) it is very difficult to accurately establish an onset date and appropriate apportionment. It is medically probable that 50% of her current problems (the degenerative spine disease and the myofacial pain disorder) are due to the type of work she did over the years and the remaining 50% is due to natural degenerative processes. The bulk of all of her symptoms had occurred by 3/1/99 and it is felt that there is little evidence to support substantial worsening since that date. She clearly had significantly advanced degenerative disease on MRI by 1/2000 and this obviously had been present for many months before the MRI scan was performed.

I hope this information is helpful in adjudicating this claim.

Sincerely,



Edward B. Holmes, MD, MPH  
Medical Panel Chairman  
Occupational Medicine

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Date: September 16, 2004

Judge Debbie L. Hann  
Labor Commission  
Division of Adjudication  
160 East 300 South, 3rd Floor  
PO Box 146615  
Salt Lake City, Utah 84114-6615

Re: Supplemental Panel Review on Darla Basso

Dear Judge Hann,

The following represents the report of the supplemental medical panel evaluation on the above named patient. I have reviewed the video taped deposition of 12/18/03 as well as the updated medical records from Dr. Reichman and Dr. Moress. I was asked to address whether this new evidence changed my prior opinion from my medical panel report of July 5, 2002. The following represents my additional report and clarification.

1. *Address if this changes your opinion in any way and if so, how.*
  - a. This evidence does not significantly change my overall opinion however please see the discussion section below for comments and clarification on the specific percentage apportioned to work vs. non industrial factors in my original report.
2. *If it does not change your opinion, please clarify how her neck posture as set forth in the evidence submitted contributed to the petitioner's condition.*
  - a. It is my opinion, based upon reasonable medical probability that the neck postures and hand/arm repetitive movements she described are partially contributory to her neck and upper extremity complaints that occurred beginning in 1996 or 1997 and which continued while working.
  - b. Please see the detailed discussion below for further clarification.
3. *Please also address more fully the contribution of awkward neck posture versus the February 24, 1997 injury and the February 28, 1997 repetitive motion injury*
  - a. Other than temporary symptom exacerbations, I don't believe either the February 24, 1997 or February 28, 1997 incidents caused any significant portion of her ongoing/current problems.
  - b. Please see the detailed discussion below for further clarification.

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### **Record Review Highlights**

3/20/01 EMG report Dr. Duerhsen: No evidence of right cervical motor radiculopathy or brachiplexopathy. No TOS. No entrapment of ulnar nerve. No right pronator syndrome. No right carpal tunnel syndrome. No generalized axonal or demyelinating neuropathy right upper limb. Normal.

3/11/03 Dr. Reichman: Decreased range of motion of the cervical spine. Very impaired. 4/5 weakness in the deltoids, biceps, wrist extensors. Recommends C4-5, C5-6, C6-7 fusion and discectomy. Repeat MRI ordered.

12/4/03 Dr. Reichman: Neck pain, trapezius pain down into arms to her elbow. Numbness in 1<sup>st</sup> and 2<sup>nd</sup> digits. Cervical stenosis C4-7 with increased radiculopathy.

12/18/03 Video taped deposition: Reviewed in its entirety. Matter of record.

12/26/03 Dr. Moress file review: Does not feel her work postures were awkward as evidenced in the video. Does not feel work postures contributed to her DDD. He comments that the work postures may have contributed to tension myalgia early on but not to ongoing symptoms at this late date.

12/30/03 Dr. Reichman: No change in the MRI currently compared to the 11/01 MRI. Progressive symptoms necessitate surgery before further atrophy and nerve damage.

12/30/03 MRI cervical spine: C4-5 disc herniation into left foramina likely C5 root encroachment. Degenerative spondylotic disease bilateral C5-6 foraminal stenosis with likely C6 root impingement. Degenerative spondylotic disease C6-7 bilaterally with likely C7 root impingement bilaterally.

### **Discussion**

To clarify my thinking on this case I offer the following explanation. She has had Degenerative Disc Disease (DDD) as well as ongoing myofascial pain in the neck. Even though I estimated a percentage contribution from work and other factors in the original report, based upon reasonable medical probability, there is no way to exactly determine the causal contribution of any particular minor injury event or factor based upon currently available evidence and research. However, using sound scientific principles and reasoning I can explain my prior conclusions as follows.

This case involves a woman who worked as a sewer, frequently and on a sustained basis, bending her neck forward at work as well as repetitively moving her arms and shoulders. Concurrent with this type of work activity she developed neck, shoulder and upper extremity pain symptoms that appear to have been due to a combination of factors including muscle tension syndrome/myofascial pain syndrome, degenerative joint disease in the cervical spine, degenerative disc

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disease and possibly upper extremity tendonitis (epicondylitis). In addition she has many non physiologic complaints and some psychosocial issues that are likely contributory to her ongoing report of symptoms.

Early on she exhibited symptoms suggestive of epicondylitis and tendonitis however the symptoms of epicondylitis later resolved leaving only the neck, shoulder and arm discomfort. As was stated in my previous report of 7/5/02, it was and still is my opinion that essentially all of this pathology and essentially all of these symptoms had developed prior to her work at Rivers West.

On the other hand, her symptoms all became evident and magnified concurrent with her work activity at Koret of California. The history and details of the onset are well documented in the record and in my 7/5/02 report. There is no other history presented of any other confounding neck trauma at home or in other activities outside of work in the record. The concurrent development of symptoms while working at a particular job, in and of itself, does not establish causation. In fact, a temporal association between a potential cause and the development of disease is only one of many factors utilized in determining causation.

There are some small studies that suggest an association between neck and back posture and neck and upper extremity symptoms in school children and dentists among others. I am not aware of any really large, well designed studies to clearly establish a causal association between neck postures and the development of cervical DDD. However, just because this hasn't been well studied doesn't mean it cannot occur. In fact, there is not a lot of really good research evidence either way on this issue to date, although some is in progress at the University of Utah, Rocky Mountain Center for Occupational and Environmental Health.

In addition, I have begun to compile data on Drywall workers who install drywall, mud, tape and do sanding on the ceiling requiring extensive neck bending. This data is nowhere near the stage of analysis yet, however, the purpose for compiling this data is a clinical observation based upon many years of experience with injured workers wherein I have noted a relatively high degree of cervical DDD and herniations in relatively strong, healthy and young drywall workers. Only time and further scientific study will tell if there truly is a causal association between this type of frequent and sustained neck bending and DDD or neck pain. Although Drywall work is clearly of a different character than sewing, based upon reasonable medical probability, I believe there may be a propensity for development of DDD and/or neck pain with such extreme posturing and lessons can be learned from this mechanism. As further evidence

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of my conclusion, the national institute for occupational safety and health (NIOSH) has concluded:

*“There is **strong evidence** that working groups with high levels of static contraction, prolonged static loads, or extreme working postures involving the neck/shoulder muscles are at increased risk for neck/shoulder MSDs. Consistently high ORs were found (twelve statistically significant studies with ORs over 3.0) providing evidence linking tension-neck syndrome with static postures or static loads.”*

NIOSH further reported that in their conclusions on posture and neck symptoms,

*“Twenty-seven studies that considered extreme or static posture found a statistically significant positive association between posture and neck or neck/shoulder MSDs; three had non-significant findings (Table 2-1. Overall, in terms of magnitude of the association, looking at both significant and non-significant findings, 13 studies had estimations of risk (ORs or PRRs) greater than 3.0, 9 had risk estimates between 1 and 3, and none had an estimate less than 1.0. Eleven studies did not report their results in terms of ORs or PRRs; of these, all but one found a significant relationship.”*

Although not clearly stated in my original report, there is also significant scientific evidence regarding the development of neck/shoulder symptoms and repetitive hand arm movements like those performed by the petitioner as a sewer. NIOSH concluded:

*“There is **evidence** for a causal relationship between highly repetitive work and neck and neck/shoulder MSDs. Most of the epidemiologic studies reviewed defined “repetitive work” for the neck as work activities which involve continuous arm or hand movements which affect the neck/shoulder musculature and generate loads on the neck/shoulder area; fewer studies examined relationships based on actual repetitive neck movements. The two studies which measured repetitive neck movements by measuring head position (using frequency and duration of movements) fulfilled the most stringent epidemiologic criteria, showing strong associations with neck/shoulder MSDs. In those studies defining repetitive work involving continuous arm or hand movements affecting the neck/shoulder, nine studies were statistically significant and had odds ratios (ORs) greater than 3.0.; eight studies fulfilled all the epidemiologic criteria except the exposure criteria, and measured repetition for the hand/wrist and not for the neck. Of these, three were statistically*

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*significant and had ORs greater than 3, five had nonsignificant ORs, all under 2.0."*

The above studies cited by NIOSH are not all individually referenced here but can be obtained by reviewing the NIOSH publication. These studies vary in quality and character. Many do not deal with specific diagnoses but rather deal with associations found between neck/shoulder postures, hand/arm repetition and "pain" or other symptoms. This symptom association may be significantly different than a factor that may cause DDD in the cervical spine. Based upon the above, I think it is medically reasonable to conclude that sustained neck postures in flexion along with repetitive hand/arm movements as described by the petitioner could be a risk factor for neck/shoulder symptoms in some individuals. ✕

The development of DDD is a process that is clearly multifactorial and NOT solely due to trauma, cumulative trauma, or work activity. In fact, absent substantial trauma, the majority of factors leading to development of DDD and disc herniations in the spine may in fact be non work related. For example, natural aging, biochemical and physiologic factors, smoking, hobbies, sports, and work stressors have all been implicated. DDD is noted, even with herniations, in asymptomatic individuals that have been studied by MRI. As a result, one cannot assume that just because DDD is present or a herniated disc is present on an MRI that this is evidence of work trauma or indeed is even the cause of alleged symptoms. Symptoms may be due to some other factor (muscle tension syndrome) and just happen to be in the same body part (neck) as the DDD which was found on MRI. Furthermore, Degenerative Joint Disease (DJD) in the spine joints can cause arthritic pain that may only become evident when the joints are stressed (posture, use, cold, trauma, etc) or inflamed.

With regard to myofascial pain or muscle tension syndrome, this is a very difficult but common problem. Most people by age 40 at some time or another have experienced varying degrees of myofascial pain from "sleeping wrong" or getting a "kink" in the neck. Such pain can be quite severe and even relatively long lasting. Continued aggravation or exacerbation by work or hobby activities may prolong symptomatology. In addition, depression and psychosocial factors are strongly associated with prolonged symptomatology.

It is not just medically conceivable but medically reasonable to conclude, in this particular case, that the DDD (regardless of the underlying cause) was partially symptomatically aggravated by the sustained work postures she described and this contributed to her onset of symptomatic DDD and along with the myofascial pain. These types of aggravations and symptom exacerbations are usually of a temporary nature as evidenced by her history of having severe symptoms, then

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relief when off work, then worsening symptoms when back at work, etc. Therefore, I find it difficult to conclude that all of her current symptoms are attributable to work activity at Koret or Rivers West, since so much time has passed since leaving those exacerbating activities. In fact, it is more likely that her current ongoing symptoms are attributable to her underlying severe DDD and DJD in combination with psychosocial factors leading to prolonged non physiologic and atypical myofascial pain symptoms. Even though she has some documented structural abnormalities on her cervical spine MRI, with the other psychosocial factors and myofascial pain problems, surgical intervention may not be the best treatment choice and she may not have a fully favorable outcome, although it is possible.

NIOSH criteria for causation": Approach to Decision-Making

*Evidence of Disease*

1. She has had chronic symptomatology suggestive of myofascial pain or muscle tension syndrome diffusely in her neck and shoulders. Since there is no objective criteria for this, this is subjective evidence but nevertheless consistent across many examiners who have evaluated this patient.
2. MRI evidence showing: C4-5 disc herniation into left foramina likely C5 root encroachment. Degenerative spondylosis bilateral C5-6 foraminal stenosis with likely C6 root impingement. Degenerative spondylosis C6-7 bilaterally with likely C7 root impingement bilaterally. All of the above could be associated with neck pain and even radiation to the upper extremity.
3. Temporally, her symptoms developed and progressed with particular neck/shoulder posturing/activity at work.

*Epidemiology*

1. There is fairly good epidemiologic evidence of neck/shoulder discomfort in people with extreme, awkward or sustained neck postures as well as in those with repetitive hand/arm movements, as noted above in the NIOSH document.
2. There is little good research for or against such postures causing DDD of the cervical spine.

*Evidence of Exposure*

1. The description of her sewing activity is such that her spinal flexion (lumbar, thoracic and cervical) are all sustained in a non neutral position at work. Although not an "extreme" posture, NIOSH has noted

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that some studies of similar postures have been associated with neck/shoulder pain.

2. The work described involved repetitive hand/arm movement.
3. She performed this work for several years at Koret, and similar work later at Rivers West.

*Aggravation of Preexisting Conditions/other relevant factors*

1. She does have DDD and DJD in her cervical spine. These types of conditions only enhance the probability of her having worsening neck and upper extremity symptoms with exacerbating postures or activities, whether at work or at home.

*Conclusions*

In summary, she has vague, diffuse and sometimes non-physiologic neck/shoulder symptomatology suggestive of myofascial pain or muscle tension syndrome. She has some findings suggestive of symptom magnification. She may also have axial spine pain from DDD and DJD as well as a slight possibility of a radiculopathy (although not clearly evident on electrodiagnostics or exam). Utilizing NIOSH causation criteria, I conclude that in this unique and particular case, it is medically reasonable to conclude that some neck/shoulder symptomatology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurred during the course of her work and a few months thereafter.

Sincerely,



Edward B. Holmes, MD, MPH  
Medical Panel Chairman

References:

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<sup>1</sup>Musculoskeletal Disorders (MSDs) and Workplace Factors A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back, NIOSH, 1997, Chapter 2

<sup>11</sup> A GUIDE TO THE WORK-RELATEDNESS OF DISEASE, NIOSH, January, 1979, DHHS (NIOSH) Publication No 79-116