1995

Reva Brunson v. Industrial Commission of Utah, Stouffer Foods Corp. and/or Travelers Insurance : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

REVA BRUNSON, Petitioner, vs. INDUSTRIAL COMMISSION OF UTAH, STOUFFER FOODS CORP. and/or TRAVELERS INSURANCE, Respondent.	*	Appeal No. 950198-CA Priority No. 7

BRIEF OF PETITIONER/APPELLANT REVA BRUNSON FOR PETITON FOR REVIEW

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JURISDICTION

The Court of Appeals has jurisdiction to review an order of the Utah Industrial Commission pursuant to §35-1-86 Utah Code Ann.

NATURE OF PROCEEDINGS AND OF AGENCY

This is a Petition For Review of an Order of the Utah Industrial Commission.

STATEMENT OF ISSUES

The issues presented for review on appeal are as follows:

1. **Whether or not the Industrial Commission erred by ignoring competent, reliable and credible evidence of the industrial cause of Applicant's accident and by finding no industrial accident occurred.**

The standard of review is the "substantial evidence" standard. (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993); King vs. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993)).

DETERMINATIVE PROVISIONS

Utah Code Ann. §35-1-86 states as follows:

> "The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order."

STATEMENT OF CASE

On February 3, 1994, Petitioner filed an Industrial Disease and Accident Claim with the Industrial Commission. The Petitioner was claiming that her on-the-job activities, which included

standing to watch a moving conveyor belt for approximately 11 hours caused her to faint and sustain a concussion and head injury.

Defendants claim that Petitioner's recent bout with bronchitis and inner ear infection caused her to faint and hit her head on the floor and thus, denied her claim.

The medical records indicate that Petitioner had been awake for approximately 20 hours at the time of the industrial accident. The Petitioner's treating physician, Dr. Colver reported that the Petitioner's fainting was probably due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis. Dr. Colver goes on to indicate that the Petitioner's fainting may also have had some labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyor belt.

On or about October 12, 1994, the Administrative Law Judge found that Petitioner's industrial accident was not a result of her work activities. However, in so doing, he ignored competent, credible evidence that Petitioner's work activities and conditions aggravated her internal infirmities, causing an accident. On or about February 17, 1995, the Industrial Commission affirmed the Administrative Law Judge's decision, failing to give adequate weight to a clarifying letter from Dr. Colver dated March 21, 1994, wherein, he stated that Petitioner's physical condition was

aggravated by working too hard and being on her feet which could have been exacerbated by the motion of the conveyor belt. However, the Industrial Commission referred to his opinion as "conjecture".

The Industrial Commission also failed to give adequate consideration to the Petitioner's emergency room physician, Dr. Egbert, who's report indicates that considering the nature of the Petitioner's work he believed that the most likely the cause of her passing out was motion sickness due to the watching of the conveyor belt going past her. However, the Industrial Commission referred to his opinion as "conjecture".

The Industrial Commission also failed to give adequate consideration to the Summary of Medical Records submitted by Dr. Clark. Dr. Clark specifically states that there is a medically demonstrative causal relationship between the industrial accident and the problems for which Petitioner was treated.

STATEMENT OF RELEVANT FACTS

At the time of the accident, the Applicant was 75 years old and had been working for Stouffer Foods for only 3 days. The shift that she had been working, and was working at the time of the accident, began at 3:00 p.m. and was to end at 11:00 p.m. At the time of Applicant's injury she had been getting less sleep than normal because her sleep pattern had been disturbed by the new job. She had recently suffered a cough without fever, chills, sweats and

a sore throat, from which she was recovering. At the time of the accident, Applicant had completed her shift and was working overtime.

The Applicant's duties consisted of standing next to a conveyor belt which transported frozen food and watching the boxes as they came down the conveyor belt. If any of the boxes needed to be readjusted, Applicant would do so. On the night of the industrial accident, Applicant had a meal break from 7:30 p.m. to 8:30 p.m. in the cafeteria. Through-out her 8 hour shift and the overtime, the Applicant had been standing. Sometime shortly after 12:13 a.m., during the overtime shift, the Applicant looked up at the ceiling lights and then at the boxes as they moved along the conveyor belt and began to feel light headed. Applicant testified that she did not feel ill or faint. From that point on, the Applicant had no recollection of what happened. Sometime soon thereafter, Applicant fell backwards hitting her head on the tile floor. The Applicant was placed in a stretcher and transported to Mountain View Hospital in Payson, Utah, where she was hospitalized for 3 days. Prior to working at Stouffer Foods, the Applicant had been out of the work force for a considerable period of time. On the day of the accident, the Applicant had been up since 6:00 a.m. that morning. The doctor's notes indicated that the Applicant had been awake for 20 hours at the time of the industrial accident.

In the hearing, Victoria Nelson, a Registered Nurse, employed by Stouffer Foods for 7 years, testified that she knew of other employees on another conveyor line who had become nauseous or light headed. Ms. Nelson testified that on the other conveyor line the movement of the belt would make people light headed. She stated that many of the people who became light headed had been pregnant. Ms. Nelson also testified that to her knowledge, no one had fainted or had light headiness problems on the conveyor line in which the Applicant had been working.

Subsequent to the fall, Dr. David T. Roberts found the Applicant had an abnormal EEG. However, it is not clear from the medical records whether the abnormal EEG occurred as a result of the fall or was present prior to the fall.

The Administrative Law Judge states that, "On December 7, 1993, Dr. Colver reported that he suspected that the fall was due to a syncope based upon a generalized weakness due to resolving bronchitis and possibly due to mild labyrinthitis exacerbated by working on her feet at a moving conveyor belt all day." (See Page 3 of Order) The Industrial Commission also stated that Dr. Colver's opinion of the cause of the fall was conjecture (See Addendum E page 3). However, what Dr. Colver stated was:

> Syncope. This is probably due to a generalized weakness and **working too hard on her feet** after getting over a bout of bronchitis. She may have also had some

> labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyor belt. (Emphasis added) (See Addendum A).

The Administrative Law Judge also failed to mention, and the Industrial Commission ignored a letter from Dr. Colver, dated March 21, 1994, which was submitted by the Applicant. Said letter stated:

> In response to your questions in the letter dated March 12, 1994, you asked if my report states that you had a inflammation of the inner ear prior to the accident. The letter from Mr. Keith F. Walquist, dated March 8, 1994, states: "also he reported that you had a inflammation of the inner ear which could cause vertigo".
>
> Mr. Walquist is misquoting me. My note dated 7-7-93, says that she may have also had some labyrinthitis with some vertigo. Thus, I did not say that you had an inflammation of the inner ear, I merely hypothesized that it was possible.
>
> There is no way of knowing from my reports or examination if you had a inflammation of the inner ear prior to the accident.
>
> I did feel the most likely cause of your fainting was, "due to a generalized weakness and working too hard on your feet after getting over a bout of bronchitis". My records indicate that you had a cough from which you were recovering when you went back to work and had the accident...(Emphasis added).
> (See Addendum B)

The Administrative Law Judge and the Industrial Commission also failed to give adequate consideration to a letter of December

14, 1993, from the Applicant's emergency room physician, Dr. L. Dean Egbert. Dr. Egbert states the following:

> Mrs. Brunson is a 74 year old women that I saw in the emergency department on 12-7-93, after falling while working at a conveyor belt while working at Stouffers. She had been working there for only 2 days, she did not feel any spinning sensation, simply became light headed, passed out, hit her head on the floor sustaining a contusion of her brain. She was admitted to the hospital. As far as I know, no other specific cause of the blacking-out episode was found. **Considering the nature of this work I think that the most likely cause of her passing out was motion sickness due to watching the conveyor belt go passed (sic) her.** (Emphasis added)
> (See Addendum C)

The Administrative Law Judge and the Industrial Commission also failed to give proper weight to the Summary of Medical Record which was signed by Dr. John R. Clark, the Applicant's neurosurgeon. In said Summary of Medical Records, it is specifically stated that there is a medically demonstrative causal relationship between the industrial accident and the problems for which she was treated. (See Addendum D)

SUMMARY OF ARGUMENT

The Commission ignored and disregarded competent, reliable and credible evidence from the petitioner's treating physicians when it found that the petitioner's industrial injury was caused by a pre-existing condition rather than as a result of her fainting while watching the conveyor belt.

DETAIL OF ARGUMENT

I

THE INDUSTRIAL COMMISSION IGNORED COMPETENT, RELIABLE AND CREDIBLE EVIDENCE WHEN IT FOUND THAT THERE WAS NO EVIDENCE WHICH MEETS THE STANDARD OF REASONABLE MEDICAL PROBABILITY AS TO AN INDUSTRIAL CAUSE OF THE APPLICANT'S ACCIDENT.

The Court of Appeals has authority to reverse the Industrial Commission's Order. (See U.C.A. §35-1-86). The standard applied by the Court of Appeals in reviewing the Industrial Commission's Order is "substantial evidence". (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993); King vs. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993)). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993).

The Industrial Commission adopted the Administrative Law Judge's Findings of Fact (See Addendum F page 1). Thus, this appeal includes issues covered in the Administrative Law Judge's Findings of Fact and Conclusions of Law and Order.

The Industrial Commission arbitrarily disregarded competent evidence when it affirmed the Administrative Law Judge and found that the applicant had failed to establish medical causation. In Nicholson vs. Industrial Commission of Utah, 389 P.2d 730 (Utah 1964), the Supreme Court recognized the fact that it would not

disturb the findings or the order of the Commission if they were supported by "substantial evidence". However, at the same time they recognized that the Supreme Court has a duty, particularly with reference to the denial of compensation, to determine whether the Commission has arbitrarily disregarded competent evidence in making its decision.

In the Administrative Law Judge's Findings, the last paragraph on page three, it states:

> A preponderance of evidence shows that Mrs. Brunson's injury coincidentally occurred at work because of her idiopathic condition without any enhancement from the work place. Although, there has been speculation about why she had the fainting episode there is no evidence which can be set-forth which meets the standard of a reasonable medical probability. (See Addendum E)

"Medical causation demands that petitioner 'prove (his) disability is medically the result of a exertion or injury that occurred during a work-related activity.'" Allen vs. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). "'The key question in determining causation is whether given this body and this exertion, the exertion in fact contributed to the injury.'" Stouffer Foods Corp. vs. Industrial Comm'n, 801 P.2d 179, 182 (Utah App. 1990) (quoting Allen, 729 P.2d at 24). In order to answer this question, we must focus on what exertions by Petitioner are involved. See id.; Nyrehn vs. Industrial Comm'n, 800 P.2d 330, 334 (Utah App.

1990), cert. denied, 815 P.2d 241 (Utah 1991).

As mentioned in the Statement of Facts, Dr. Colver stated on two occasions, that although, petitioner's physical condition was weaker than usual, it was aggravated by, "...working too hard on her feet..." and "...could have been exacerbated by the motion of the conveyor belt". In his clarifying letter of March 21, 1994, Dr. Colver goes on to state in more definitive terms, "I do feel the **most likely cause** of your fainting was, 'due to a generalized weakness and working too hard on your feet after getting over a bout a bronchitis'". (emphasis added).

As also pointed out in the Statement of Facts herein, the December 14, 1993, letter of L. Dean Egbert, M.D., the emergency room physician, stated, also in definitive terms, his opinion of the cause of the Applicant's injury. He stated:

> Considering the nature of this work, I think the **mostly likely cause** of her passing out was motion sickness due to watching the conveyor belt go passed her. (emphasis added).

The Administrative Law Judge states in his Findings that there was no evidence that had been set-forth which meets the standard of a reasonable medical probability. The definition of medical probability, according to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, page 318, is as follows:

> ***Possibility, Probability***: These are terms that refer to the likelihood or chance that an injury or illness was caused or aggravated by

> a particular factor. "Possibility" sometimes is used to imply a likelihood of less than 50%; "probability" sometimes is used to imply likelihood of greater than 50%. (See Addendum G).

The opinions of Dr. Colver and Dr. Egbert both state, "the most likely cause" of the Applicant's injury was due to working too hard, being on her feet for extended period of time, and motion sickness from watching the conveyor belt. The words, "most likely cause" certainly indicate that, in their medical opinion, there is more than a 50% likelihood that the of the cause of the accident was the Applicant being on her feet for an extended period of time, working too hard, and motion sickness from watching the conveyor belt. Thus, both treating physicians opined that it was medically probable that the cause of the accident was industrially related. Consequently, the Administrative Law Judge ignored opinions of reasonable medical probability from the two treating physicians that the injury was in fact caused by conditions of the Applicant's employment. Dr. Clark's opinion that petitioner's injury was directly related to an industrial accident compounds further the evidence in favor of petitioner.

It is well established that if a pre-existing condition is aggravated by working conditions, resulting in an injury, as long as the activity which caused the injury was extraordinary in nature, causation is established and workers compensation benefits

should be ordered. (See Allen vs. Industrial Commission, 729 P.2d 15 (Utah 1986)). Certainly, standing on one's feet for nine or more hours watching a conveyor belt would be considered an extraordinary activity. An ordinary 20th century person would not usually engage in a similar exertion in everyday, nonindustrial life. (See Allen vs. Industrial Commission, 729 P.2d 15 (Utah 1986)). As is set-forth herein, the Applicant did not suffer from an idiopathic fall. The Applicant was recovering from some pre-existing conditions, and consequently, may have been in a weakened state. However, as stated by the opinions of Dr. Colver and Dr. Egbert, **it is more than likely** that the cause of the accident was the aggravation of those pre-existing conditions by the long hours the Applicant was working, standing on her feet the entire time and the motion sickness that she incurred by watching the conveyor belt. This is also supported by the testimony of Victoria Nelson, the Registered Nurse employed by Stouffer Foods, who testified that other employees at Stouffer Foods had become nauseous and light headed by watching the conveyor belt.

CONCLUSION

Petitioner requests that this Court find that the Commission, in denying petitioner's application for benefits, arbitrarily disregarded competent evidence in when it determined that the petitioner's job-related-activities did not cause the industrial

accident. There simply is no evidence to indicate otherwise. Thus, Petitioner respectfully requests that this Court enter an Order reversing the Industrial Commission's Order in this matter.

DATED this 19 day of July, 1995.

WAYNE A. FREESTONE
Attorney for Applicant

ADDENDUM

ADDENDUM A

MOUNTAIN VIEW HOSPITAL
1000 East, U.S. Highway 6
Payson, Utah 84651

INTERNAL MEDICINE CONSULTATION REPORT

Name: Brunson, Reba
Hosp. #: 01 36 75
Date: 12-7-93

Consulting Physician: Kevin J. Colver, M.D.
Referring Physician: John R. Clark, M.D.

CHIEF COMPLAINT:

This is a 75-year-old white female patient admitted by Dr. Clark because of syncope and cerebral contusion.

HISTORY OF PRESENT ILLNESS:

The patient recently had a cough without fevers, chills, sweats, or sore throat from which she was recovering. She returned to her new job working at a conveyer belt at Stouffer's yesterday evening and after standing for almost her complete 8 hour shift she felt dizzy and then fell backwards with apparent loss of consciousness and struck the back of her head. She sustained a laceration and a cerebral contusion. Apparently she had no chest pain, palpitations, or shortness of breath. It is unclear whether her dizziness was vertigo or light headedness.

PAST MEDICAL HISTORY:

1. Partial thyroidectomy in 1973, now on chronic Synthroid therapy.

2. Appendectomy in 1967.

3. Spinal meningitis without sequelae in 1958.

4. Brief syncopal episode many years ago while in a shower after getting over a cold.

MEDICATIONS: Synthroid, one pink pill per day.

ALLERGIES: None known.

HABITS: None.

SOCIAL HISTORY:

The patient is married and has a new job at Stouffer's.

EXHIBIT "A"

REVIEW OF SYSTEMS:

Otherwise negative except for significant hearing loss.

PHYSICAL EXAMINATION:

General: This is a sleepy white female with a left hearing aid.

HEENT:
- Head: She has a laceration on the back of her head.
- Eyes: The pupils are equal and round and respond to light.
- Ears: The tympanic membranes were difficult to visualize due to narrow canals.
- Throat: Clear.

Lungs: Clear.

Cardiac: Normal S1 and S2, 2/6 systolic murmur at the upper left sternal border.

Abdomen: Bowel sounds present. The abdomen is soft and non-tender.

Extremities: Without cyanosis, clubbing or edema.

Neural: Mental status is alert and oriented. Cranial nerves II through XII show decreased hearing, otherwise intact. Motor strength is 4 to 5/5 in all extremities. Sensory: She has light touch sensation in all extremities. Deep tendon reflexes: There is a +2 left prepatellar and a trace right prepatellar reflex. Babinski's are absent.

Laboratory: EKG shows possible left anterior fascicular block, otherwise normal. Chemistries include a glucose of 137, LDH 200. CBC: WBC 6.2, hematocrit 39.4. CBC unremarkable.

IMPRESSION AND PLAN:

1. Syncope. This is probably due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis. She may have also had some labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyer belt. There has been no arrhythmias and no indication of other cause of syncope. The preliminary report on the carotid ultrasound shows very trace left plaque and none on the right. I would like to check some cardiac enzymes and also check the urinalysis. If these are negative, I do

not feel strongly that any further for the workup for the cause of syncope is indicated. I do agree with the EEG as already ordered by Dr. Clark.

2. History of thyroidectomy. Will resume her Synthroid 0.2 mg QD.

KEVIN J. COLVER, M.D.
Verified By Electronic Signature

KJC/cm
D/ 12-7-93 13:41
T/ 12-7-93 15:36

ADDENDUM B

Kevin J. Colver, M.D.
1120 East Highway 6, Suite 1
Payson, Utah 84651

March 21, 1994

Reva Brunson
91 South 200 East #4
Provo, Utah 84606

Dear Mrs. Brunson:

In response to your questions in the letter dated 12 March 1994, you asked if my report states that you had inflammation of the inner ear prior to the accident. The letter from Mr. Keith F. Wahlquist dated 8 March 1994 states, "also he reported that you had an inflammation of the inner ear which could cause vertigo."

Mr. Wahlquist is misquoting me. My note dated 7-7-93 says that, "she may have also have some labyrinthitis with some vertigo." Thus I did not say that you had an inflammation of the inner ear, I merely hypothesized that this was possible.

There is no way of knowing from my reports or examination if you did have inflammation of the inner ear prior to the accident.

I did feel the most likely cause of your fainting was, "due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis." My records indicate that you had a cough from which you were recovering when you went back to work and had the accident. The sentence in Mr. Wahlquists letter which states, "Dr. Kevin Colver reported that your fainting was probably due to your getting over a bout with bronchitis" is accurate.

Sincerely,

K. Colver MD

Kevin J. Colver, M.D.

KJC/pj

EXHIBIT "B"

ADDENDUM C

MOUNTAIN VIEW HOSPITAL
1000 East, U.S. Highway 6
Payson, Utah 84651

December 14, 1993

To Whom It May Concern:

Re: Reva Brunson

Attending Physicians: John R. Clark, M.D.
Kevin J. Colver, M.D.

Mrs. Brunson is a 74-year-old woman that I saw in the Emergency Department on 12-7-93 after falling while working at a conveyer belt at Stouffer's. She had been working there for only two days. She did not feel any spinning sensation, simply became light headed, passed out, hit her head on the floor sustaining a contusion to her brain. She was admitted to the hospital. As far as I know, no other specific cause of the blacking out episode was found. Considering the nature of this work, I think that the most likely cause of her passing out was motion sickness due to watching the conveyer belt go past her.

Sincerely,

L. Dean Egbert, M.D.
Emergency Room Physician
Mountain View Hospital

LDE/cm
D/ 12-14-93 9:37
T/ 12-14-93 10:45

EXHIBIT "C"

ADDENDUM D

... Revised 7/93

Exhibit "L"

Industrial Commission of Utah-Adjudication Division
160 East 300 South, 3rd Floor, P.O. Box 146615
Salt Lake City, Utah 84114-6615
(801)530-6800

SUMMARY OF MEDICAL RECORD
(to be completed by treating physician)

EVALUATION FOR: Reva Brunson

DATE OF INJURY: 7 Dec 1993 EMPLOYER

1. Has applicant been released for usual work? NO What date?
2. Has applicant been released for light duty? NO What date?
3. Applicant was required to be off work from 7 Dec 93 to Present
4. Has applicant a permanent injury? No
5. In case of permanent injury, on what date did or will the applicant reach a final state of recovery?
6. If there is a permanaent injury, give your estimate of impairment in terms of percentage of loss of function:
7. Is there a medicallly demonstrative casual relationship between the industrial accident and the problems you have been treating? Yes Please explain as necessary: Post-concussion aftermath
8. What future medical treatment will be required as a result of the industrial accident? Observation only
9. What is the percentage of permanent physical impairment attributable to previously existing conditions, whether due to accidental injury, disease of congenital causes? None
10. What is the applicant's total physical impairment, if any, resulting from all causes and conditions, including industrial injury? Temporarily Totally Disabled
11. Did the industrial injury aggravate the applicant's pre-existsing condition? Please explain as necessary: N/A

Dated this 4th day of April 1994

John R. Clark MD — Physician's Name (please print)
Neurosurgery — Physician's Specialty
John R Clark — Physician's Signature
1172 Highway 6 #12 — Street Address
Payson UT 84651 — City/State/Zip
801/465-4866 — Physician's Telephone Number

Shall RTW @ no restrictions as of 2 May 1994

ADDENDUM E

INDUSTRIAL COMMISSION OF UTAH

Case No. 94-180

REVA BRUNSON,	*	
	*	
Applicant,	*	**FINDINGS OF FACT,**
	*	
vs.	*	**CONCLUSIONS OF LAW,**
	*	
STOUFFER FOODS CORP. and/or **TRAVELERS INSURANCE,**	*	**AND ORDER**
	*	
	*	
Defendants.	*	
	*	
* * * * * * * * * * * * * * * * * *		

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah on August 31, 1994 at 10:00 o'clock a.m. The hearing was pursuant to Order and Notice of the Commission.

BEFORE: Benjamin A. Sims, Administrative Law Judge.

APPEARANCES: The applicant, Reva Brunson, was present and represented herself pro se.

The defendant employer, Stouffer Foods, and its insurer, Travelers Insurance, were represented by Steven Aeschbacher, Attorney at Law.

The applicant, Reva Brunson, claims medical expenses and temporary total disability. The applicant was initially scheduled for a hearing on July 15, 1994. She has a profound hearing loss and wears hearing aids. Because her hearing aids were in for repair, she was unable to hear the proceedings, and elected, after considerable discussion, to delay the hearing until August 31, 1994.

On August 31, 1994, arrangements were made by Travelers Insurance to have a stenographic reporter present who provided a lap top computer by which the applicant could see on a computer screen all of the discussion that transpired in the hearing room. In addition, as back-up, the Industrial Commission provided a 20 inch computer screen by which typed questions could be shown to the applicant. The 20 inch screen was not necessary since the applicant could adequately read on the lap top computer screen what was transpiring during the session.

The defendants submitted an additional document on September 27, 1994, and the applicant submitted her response to it on September 30, 1994. The case was considered ready for an Order on October 3, 1994.

This case involves a fall at work. The 75 year old applicant, who looks younger than her age, had been working for Stouffer Foods (Stouffer) for only three days at the time of her injury. During her work for Stouffer, her shift was from 3:00 o'clock p.m. to 11:00 p.m. She was getting less sleep than she normally got, and although she had rested prior to going to work, her sleep pattern had been disturbed. MR at 16. At the time of her injury, she recently had a cough without fevers, chills, sweats, or sore throat from which she was recovering. She was working overtime. Her job was to stand next to a conveyer which transported frozen food and to readjust boxes as they came down the conveyer belt. On the night of the industrial incident, she had a meal break from 7:30 to 8:00 p.m. in the cafeteria.

At about 12:13 a.m., the applicant recited that she felt fine. She had been standing during her shift, and during her overtime. She looked up at the ceiling lights, and then at the boxes as they moved along the conveyor belt. Sometime thereafter she stated that she began to feel "light headed". She did not feel ill, nor did she feel faint. She has no recollection of what happened, but she fell backwards, hitting her head on the tile floor. She was placed on a stretcher and transported to the Payson Hospital where she was hospitalized for three days.

The applicant had previously worked as a supervising seamstress. She had also worked for Carlisle Foods. After a long period being out of the work force, she went to work for Stouffer. Stouffer instructed all of its employees, including the applicant, that if they were injured they were to go to see a company nurse, and if they were feeling ill they were to tell a supervisor or trainer.

On the day of this incident, the applicant had been up since 6:00 a.m. that morning. The doctor's notes indicate that the applicant had been awake for 20 hours at the time of the industrial incident. Although the applicant denied that she had been up for 20 hours, from 6 a.m. to 12 midnight is 20 hours. The applicant recited that she rested before she went to work. She claims that her problem stemmed from a lack of carbohydrates and attributes her fainting to lack of foods high in carbohydrates in Stouffer's cafeteria, and the movement of the conveyor on which she adjusted the food boxes.

The defendant employer provides free food to its employees, but does not tell them what to eat. The employees may choose such food items as they desire. Offered are entree items, salads, cereals, snacks, breads, peanut butter, and normal food items carried by cafeterias including numerous other carbohydrates. The employer is not responsible for providing its employees food.

The applicant was adamant at the hearing in expressing her physical endurance and ability to work for extended periods of time. In fact, subsequent to her injury, the applicant recited that she had worked from 7 a.m. to 5 p.m. in May 1994 for several days moving heavy boxes from a storage area.

The applicant also asserted that her problem with fainting and falling while at work at Stouffer was due to the fact that she had an extra undershirt on, and that the additional clothing caused her to get too warm.

Victoria Nelson, a registered nurse employed by Stouffer Foods for seven years, testified that she has had other people on another conveyor line who have become nauseous or light headed. On the other conveyor line, the movement of the belt will make people light headed. Many of the people who become light headed have been pregnant. No one has had fainting or light headedness problems on the conveyor line on which the applicant was working to the knowledge of Ms. Nelson. The applicant's conveyor line was designed differently.

The applicant suffers from previously existing long standing Hypacusis, and Hypothyroidism which is under control by replacement medication. Subsequent to the fall, Dr. David T. Roberts found an abnormal EEG. He reported that some of the forms appear "suspiciously epileptiform in character." MR at 49 & 8. It is not clear from the medical records whether this abnormal EEG occurred as a result of the fall, or was present prior to the fall.

On December 7, 1993, Dr. Colver reported that he suspected that the fall was due to a syncope based upon a generalized weakness due to resolving "bronchitis and possibly due to mild labyrinthitis exacerbated by working on her feet at a moving conveyor belt all day." MR at 53.

Dr. Clark gave her work releases through March 17, 1994. At the time he released her to return to work on March 17, 1994, he indicated that she had a post-concussion syndrome which was subsiding, as well a slight left ulnar neuropathy. She told Dr. Clark that she was afraid to return to work because she works swing shift, and at this time of the evening she is most tired and does not feel well. She claimed that if she could return to work during the day shift that she could handle it because during the day she is able to lift items and do her house work. MR at 19.

The preponderance of the evidence shows that Mrs. Brunson's injury coincidentally occurred at work because of her idiopathic condition without any enhancement from the workplace. Although there has been speculation about why she had the fainting episode, there is no evidence which has been set forth which meets the

standard of a reasonable medical probability.

Prior to and at the time of her syncopal episode and fall, Mrs. Brunson was not engaged in any activity which created any strain, exertion, or stress greater than that of her normal nonemployment life or the normal nonemployment life of any other person. Her syncopal episode and injury did not result from any strain, exertion, or stress related to her employment.

CONCLUSIONS OF LAW:

1. Mrs. Brunson was not injured by accident arising out of and in the course of her employment with her employer.

2. Neither Mrs. Brunson's employment nor any activities related thereto were the legal cause or medical cause of her injury.

3. The fall was related to a syncopal episode.

4. Mrs. Brunson is not entitled to workers' compensation benefits as set forth in U.C.A. Sect. 35-1-1 et seq.

DISCUSSION:

The general rule concerning causation is that an employee cannot recover for a physiological malfunction which is not job-induced and which could have happened as easily away from work as at work. Thus, in Sabo's Electronic Service v. Sabo, 642 P.2d 722, 723-24 (Utah 1982), the Utah Supreme Court denied recovery for a herniated disc caused by preexisting back problems from another job, and which manifested itself when the employee engaged in lifting activities which were not strenuous and could have happened anywhere. Accord Billings Computer Corp. v. Tarango, 674 P.2d 104 (Utah 1983); Farmers Grain Co-op. v. Mason, 606 P.2d 237 (Utah 1980); Church of Jesus Christ of Latter-day Saints v. Ind. Comm'n and Thurman, 590 P.2d 328 (Utah 1979); see also Nuzum v. Roosendahl Construction and Mining Corp., 565 P.2d 1144 (Utah 1977); Redman Warehousing Corp. v. Ind. Comm'n, 22 Utah 2d 398, 454 P.2d 283 (Utah 1969).

The Utah Supreme Court has held that a different rule applies, however, where because of some non-occupational internal weakness (such as a fainting spell), an employee falls and sustains an injury from the fall. Kennecott v. Ind. Comm'n and Georgas, 675 P.2d 1187 (Utah 1983). The Court stated, however, that the Georgas case did not present the question, and for that reason the Court did not decide whether an idiopathic fall to level ground and resulting injuries were compensable. Id. at FN 4. Compare, e.g., Williams v. Ind. Comm'n, 38 Ill.2d 593, 232 N.E.2d 744 (1967)

(recovery for fall to level floor denied), with Lovett v. Gore Newspapers Co., Fla., 419 So.2d 306 (1982) (recovery allowed). The instant case presents the instance of a fall to a level tile floor.

It will be helpful to first review the statute germane to this case. The Utah statute in effect at the time of the injury states in pertinent part:

> Each employee ... who is injured ... by accident arising out of and in the course of his employment, wherever such injury occurred,... shall be paid compensation ....

U.C.A. Sect. 35-1-45 (1988).

The statute requires an accident "arising out of and in the course of" employment. Id. (emphasis added). It is not sufficient to have an injury which occurred in the course of employment, but which did not arise out of the employment. There is no question, but that the head injury occurred in the course of her employment. However, the question based upon the facts of this case, is whether the arising out of prong has been met. The arising out of requirement might be met out of the hardness of the tile floor as an added employment hazard. A. Larson, Law of Workmen's Compensation, Sect. 12.14(e)(1994). As Professor Larson discusses, a china dish might survive if dropped on the kitchen linoleum, but would not have a chance on the ceramic tile floor of a factory.

Of the five cases allowing a level-floor award, one involved a tile floor (General Ins. Corp. V. Wichersham, 235 S.W.2d 215 (Tex. Civ. App. 1951), three involved a concrete floor (Smith v. Container Gen. Corp., 559 So.2d 1019 (Miss. 1990); Employers Mut. Liab. Ins. Co. v. Ind. Acc. Comm'n, 41 Cal.2d 676, 263 P.2d 4 (1953); George v. Great Eastern Food Prod., 44 N.J. 44, 207 A.2d 161 (1965), and one involved a "hard wood" floor (Pollock v. Studebaker Corp., 97 N.E.2d 631 (Ind. App. 1951). These cases indicate that the arising out of prong is satisfied by a physical impact with a floor which was the immediate cause of the injury.

However, the great majority of cases deny recovery where the injury occurred upon a tile or concrete floor because these types of floors are common outside the work environment, and these types of floors present risks which are not unique to work. See e.g., Oldham v. Ind. Comm'n, 139 Ill. App. 3d 594, 93 Ill. Dec. 868, 487 N.E. 693 (1985)(the diagnosis was a transient loss of consciousness of unknown etiology, and the necessity of standing and the presence of a clay tile floor were not risks greater than those outside of the employment).

In the instant case, there is insufficient evidence to show

that the injury arose out of the employment. There was no showing that the applicant's employment posed a risk to her that was greater than that to which she would be exposed as a member of the general public. There are many homes and businesses which have concrete and ceramic tile floors, and had she fainted in any of them, her injury would have been as severe. Under the circumstances, as much as I would like to give her an award, there is unfortunately no legal basis for recovery since the medical evidence does not show by a preponderance that her fainting was caused by her employment.

ORDER:

IT IS HEREBY ORDERED that the claim filed by Reva Brunson for injuries filed as a result of a fall on December 7, 1993 while working on the premises of Stouffer Foods Corporation must be dismissed with prejudice since it did not arise out of her employment for Stouffer Foods Corporation.

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

DATED THIS 12 day of October 1994.

INDUSTRIAL COMMISSION OF UTAH

Benjamin A. Sims
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of October, 1994, the attached ORDER in the case of Reva Brunson was mailed, postage prepaid to the following persons at the following addresses:

Reva Brunson
91 S 200 E #4
Provo UT 84606

Steven Aeschbacher, Atty
PO Box 45385
SLC UT 84145-0385

INDUSTRIAL COMMISSION OF UTAH

June S. Harrison, Paralegal
Adjudication Division

/jsh

ORD\BRUNSON

ADDENDUM F

THE INDUSTRIAL COMMISSION OF UTAH

REVA BRUNSON, Applicant, vs. STOUFFER FOODS CORPORATION and TRAVELERS INSURANCE COMPANY, Defendants.	*	ORDER DENYING MOTION FOR REVIEW Case No. 94-0180

Reva Brunson asks The Industrial Commission of Utah to review the Administrative Law Judge's decision denying her claim for benefits under the Utah Workers' Compensation Act.

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

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in the decision of the ALJ, summarized below.

Ms. Brunson had worked at Stouffer Foods for only three days prior to the accident in question. The accident occurred on December 7, 1993 while she was assigned to adjust packages of frozen food that passed by on a conveyor belt. Without warning, she fainted and struck her head on a tile floor. As a result of the fall, Ms. Brunson suffered a concussion and required overnight hospitalization.

Ms. Brunson can only speculate as to the cause of her fainting spell. She has submitted a written statement from Dr. Colver that "the most likely" cause of the incident was "a generalized weakness and working too hard on your feet after getting over a bout of bronchitis." She has also submitted a written statement of Dr. Egbert that "the most likely" cause of her accident was "motion sickness due to watching the conveyor belt go passed (sic) her." Finally, Dr. Clark states "there is a medically demonstrative causal relationship between the industrial accident and the problems for which (Ms. Brunson) was treated." However, Dr. Clark provides no explanation of his conclusion.

Based on the foregoing evidence, the ALJ concluded that Ms. Brunson had failed to establish that her fainting and resulting injury "arose out of and in the course of" her employment at Stouffer Foods. The ALJ therefore held that her injury was not compensable under the Utah Workers' Compensation Act.

DISCUSSION AND CONCLUSIONS OF LAW

The Utah Workers' Compensation Act provides compensation to workers who are injured by accident "arising out of and in the course of" their employment. (Utah Code Ann. §35-1-45.) It is the worker's burden to prove that his or her employment is both the medical and the legal cause of injury. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The focus of this case is on the requirement of medical causation, which requires Ms. Brunson to prove that her work at Stouffer Foods was the medical cause of her injury.

Ms. Brunson herself cannot explain why she fainted at work. Likewise, her physicians' statements do not reveal any reasonable medical certainty regarding the cause of her fainting. In fact, Dr. Colver and Dr. Egbert arrive at two different conjectures to explain the incident. Under these circumstances, the Commission agrees with the ALJ's conclusion that Ms. Brunson has failed to establish medical causation.

As noted above, it is Ms. Brunson's burden to prove medical causation. Because she has not done so, the Commission must deny her claim for workers' compensation benefits.

ORDER

The Commission affirms the decision of the Administrative Law Judge and dismisses Ms. Brunson's Motion For Review. It is so ordered.

Dated this 17 day of February, 1995.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

NOTICE OF APPEAL RIGHTS

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

CERTIFICATION OF MAILING

I certify that a copy of the foregoing ORDER DENYING MOTION FOR REVIEW in the matter of Reva Brunson, Case No. 94-0180, was mailed, first class, postage prepaid this 17 day of February, 1995, to the following:

WAYNE A. FREESTONE
PARKER, FREESTONE, ANGERHOFER & HARDING, P.C.
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SALT LAKE CITY, UTAH 84101

STEVE J. AESCHBACHER
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70 SOUTH MAIN STREET
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REVA BRUNSON
91 SOUTH 200 EAST #4
PROVO, UTAH 84606

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

Orders\94-0180

CERTIFICATE OF MAILING

I hereby certify that on ___ day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Motion For Review to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

_____

CERTIFICATE OF MAILING

I hereby certify that on ___ day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Motion For Review to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

ADDENDUM G

5. Illness, Disease: An illness may be considered to be the summation of the physical, mental, and other kinds of factors that are involved in an individual's less than optimal health status. A disease may be considered to be the specific pathophysiologic processes involved, which give rise to the individual's signs and symptoms and their progression.[1]

6. Employability: This is the capacity of an individual to meet the demands of a job and the conditions of employment associated with that job as defined by an employer, with or without accommodation.

7. Employability Determination: This is an assessment by management of the individual's capacity, with or without accommodation, to meet the demands of a job and the conditions of employment. The management carries out an assessment of performance capability to estimate the likelihood of performance failure and the likelihood of incurring liability in case of human failure. If either likelihood is too great, then the employer may not consider the individual employable in the job.

8. Medical Determination Related to Employability: This is the process of evaluating the relationship of an individual's health to the demands of a specific job as described by the employer, such as demands for performance, reliability, integrity, endurance, or prolonged service. The physician must ensure that the medical evaluation is complete and detailed enough to draw valid conclusions with respect to the individual's capability of meeting the job's demands and carrying out essential job functions.

The physician's tasks are to (1) identify impairments that could affect performance and determine whether or not the impairments are permanent; and (2) identify impairments that could lead to sudden or gradual incapacitation, further impairment, injury, transmission of a communicable disease, or other adverse occurrence.

In estimating the risk factors, the physician should indicate whether or not the individual represents a greater risk to the employer than someone without the same medical condition and should indicate the limits of the physician's ability to predict the likelihood of an untoward occurrence.

9. Risk, Hazard: A *risk* represents the probability of an adverse event; a risk must be weighed together with the consequences of the adverse event. An individual's activities or characteristics, and biologic, physical, or chemical factors, may increase the risk of morbidity or mortality.

A *hazard* is a potential source of danger, to a woman contemplating crossing the Atlantic Ocean in a rowboat, the Atlantic presents a serious hazard. Excessive numbers of coliform bacteria or *Shigella dysenteriae* in the public water supply present a hazard to a city.

10. Possibility, Probability: These are terms that refer to the likelihood or chance that an injury or illness was caused or aggravated by a particular factor. "Possibility" sometimes is used to imply a likelihood of less than 50%; "probability" sometimes is used to imply a likelihood of greater than 50%.

Social Security Disability Determinations

Although the Social Security system predated the first *Guides* edition and is not based on the *Guides*, a description of the system is included here to compare and contrast the ways in which medical information is used under each approach. The Social Security Administration (SSA) has national responsibility under Public Law 74-271 for the administration of both the Social Security disability insurance program (title II) and the supplemental security income (SSI) program (title XVI). Every person who pays into Social Security contributes to the Social Security Disability Trust Fund.

The title II program provides cash benefits to disabled workers and their dependents who have contributed to the trust fund through the FICA tax on their earnings. A person qualifies under the title II program because of financial need. The title XVI program provides for a minimum income for the needy, aged, blind, and disabled. Under that program, financial need is indicated by limitation of income and resources to a level that is equal to or less than an amount specified in the law.

Definitions and Terms

Under the title II and title XVI programs, the definitions of disability are essentially the same. The law defines disability as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months (Section 223 [d] [1] [A]). The law may apply to infants and children as well as adults. In terms of the law, a person is either disabled or not disabled.

To meet the definition of disability, an individual's impairment or combination of impairments must be of such severity that he or she not only is unable to do the work previously done, but also cannot perform any other kind of substantial gainful work considering the individual's age, education, and work experience (Section 223 [d] [2] [A]). Substantial gainful work means any work that involves significant and productive physical or mental activities and is

CERTIFICATE OF MAILING

I hereby certify that on 19 day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Brief of Petitioner/Appellant Reva Brunson to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

Industrial Commission of Utah
Adjudication Division
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P.O. Box 146615
Salt Lake City, Utah 84114-6615