IN THE UTAH COURT OF APPEALS

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Lori Jill Leavitt, Petitioner, v. Labor Commission, Sinclair Oil Corp., Ace American Insurance Co., and Petroleum Wholesale and American Home Insurance, Respondents.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070646-CA F I L E D (October 2, 2008) 2008 UT App 349

Original Proceeding in this Court

Attorneys: Jay L. Kessler, Magna, for Petitioner
David H. Tolk, Michael K. Woolley, Mark D. Dean, Kristy L. Bertelsen, and Alan L. Hennebold, Salt Lake City, for Respondents

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Before Judges Thorne, Bench, and McHugh.

BENCH, Judge:

Petitioner Lori Jill Leavitt seeks review of the Utah Labor Commission's (the Commission) decision denying her claim for benefits under the Utah Workers' Compensation Act. Petitioner argues that the Commission erred in ruling that she failed to properly report her October 2004 injury within the statutory period. Also, Petitioner claims that the Commission improperly applied the tests outlined in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), in ruling that the December 2005 incident did not cause her injury.

Petitioner challenges the Commission's ruling that she failed to report the October 2004 injury to her employer in a timely manner. Pursuant to the Utah Code, "[a]n employee is barred for any claim of [workers' compensation] benefits arising from an injury if the employee fails to notify [the employer] within . . . 180 days of the day on which the injury occurs." Utah Code Ann. § 34A-2-407(3)(a)-(b)(i) (Supp. 2008).

Here, the record supports the Commission's factual determination that Petitioner did not notify her employer of the October 2004 injury until she filed for a hearing with the Commission in June 2006, well after the expiration of the 180 days. Although Petitioner argues that the marshaled evidence is insufficient to support the Commission's decision, her argument consists of merely pointing to conflicting evidence in the record and claiming that the fact-finder should have relied more heavily on the evidence favoring her position. Petitioner fails to "ferret out a fatal flaw in the evidence" on which the Administrative Law Judge and the Commission relied. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). Without demonstrating such a flaw or gap in the evidence, Petitioner's argument against the Commission's factual findings fails, and we therefore affirm the Commission's determination that Petitioner failed to properly report the October 2004 injury to her employer within 180 days of the incident.

Petitioner also claims that the Commission improperly applied the Allen test in making the determination that her impairment was not legally caused by the December 2005 incident.[1] "[W]here the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion [at work] is required to prove legal causation." Allen, 729 P.2d at 26. "Thus, the precipitating exertion [at work] must be compared with the usual wear and tear exertions of nonemployment life . . . ." Id. An exertion upon which a claim for workers' compensation benefits is based must be "greater than that undertaken in normal, everyday life." Id. at 25.

Petitioner concedes that she had a preexisting low back condition resulting from an automobile accident in 1991. Therefore, under Allen, she must demonstrate that the workplace exertion that precipitated her claim for benefits was unusual or extraordinary when compared to everyday nonemployment life. According to the record and the Commission's ruling, Petitioner's exertion at work consisted of lifting "no more than 39 pounds," with the Commission noting that the testimony varied regarding the weight of the items Petitioner lifted. Some testimony was offered that the items weighed as little as twenty-one pounds. The Commission reasonably determined that lifting between twenty-one and thirty-nine pounds was not an unusual or extraordinary

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[1]We need not discuss Petitioner's argument against the Commission's use of the medical causation test because our conclusion that she has failed to meet the legal causation test is dispositive.

exertion because people, in their nonemployment life, routinely lift items of similar weight.

We therefore affirm the Commission's order.

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Russell W. Bench, Judge

WE CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

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Carolyn B. McHugh, Judge