IN THE UTAH COURT OF APPEALS

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Michael Verburg, Petitioner, v. Labor Commission and Ogden City Police Department, Respondents.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080139-CA F I L E D (October 30, 2008) 2008 UT App 390

Original Proceeding in this Court

Attorneys: Gary E. Atkin and K. Dawn Atkin, Salt Lake City, for Petitioner
Sharon J. Eblen and Alan L. Hennebold, Salt Lake City, for Respondents

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Before Judges Greenwood, Thorne, and Bench.

GREENWOOD, Presiding Judge:

Michael Verburg appeals from the Utah Labor Commission Appeals Board's (the Commission) decision denying his claim for workers' compensation benefits. Verburg argues that the Commission's decision was not reasonable and rational and that it was not supported by the evidence. We affirm on the basis that Verburg failed to establish legal causation.

Verburg argues that the Commission erred in concluding that he failed to meet his burden under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), which requires him to establish that his injury resulted from an unusual or extraordinary exertion. See id. at 25. Under Utah law, "[a]n employee . . . who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid [benefits]." Utah Code Ann. § 34A-2-401(1) (2005). If, however, the employer establishes that a preexisting condition contributed to the injury, the employee must further demonstrate that he or she was undertaking some kind of unusual or extraordinary exertion when the injury occurred. See Allen, 729 P.2d at 25.

> This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work.

Id.

In this case, the facts surrounding the accident in question are undisputed: Verburg hit his head while entering his patrol car; his vision went "dark" for a short time; the pain from the accident increased over the next few weeks; and the current injury and prolonged associated pain are connected to Verburg's preexisting cervical injury. Based on these undisputed facts, the administrative law judge (ALJ) determined that Verburg was entitled to workers' compensation benefits. The Commission, however, reversed, concluding that evidence that Verburg's vision went dark, without more, did not meet the Allen test's requirements. In other words, the Commission concluded that Verburg failed to establish legal causation. Because the facts in this case are undisputed, we are left to consider only whether the Commission's decision was reasonable and rational. See Nyrehn v. Industrial Comm'n, 800 P.2d 330, 333 (Utah Ct. App. 1990).

In arguing that the Commission's decision is not reasonable or rational, Verburg asserts that the Commission (1) incorrectly concluded that he hit his head during a "relatively routine event" and (2) made assumptions and based its conclusion on facts not in evidence. In support of his argument, Verburg likens his case to that of the employee in American Roofing Co. v. Industrial Commission, 752 P.2d 912 (Utah Ct. App. 1988). There, this court affirmed the Commission's decision granting benefits to George Green on the basis that Green's injury was the result of an unusual or extraordinary exertion. See id. at 915. Like Verburg, Green had a preexisting injury that he reinjured while at work. See id. at 913. Green reinjured his back when he lifted a thirty pound bucket of debris and the bucket "snagged on something." Id. At that point, "Green suffered a . . . severe 'lightning bolt' of pain in his back and legs." Id. The Commission concluded, and this court affirmed, that while "weight alone did not make Green's exertion unusual or extraordinary . . . . evidence of the weight, together with the manner in which Green lifted the bucket and the fact that the bucket snagged, combined to characterize Green's actions as unusual or extraordinary under the Allen definition." Id. at 915.

Analogizing his case to Green's, Verburg argues that the ALJ was correct when it concluded that even though getting into a car is an everyday occurrence, "the continuous movement of [Verburg's] body and weight added more force to the impact of [Verburg's] head and neck on the door jam [sic] which was unusual or extraordinary and satisfies the requirement of legal causation."

Ogden City (the City) responds that this court should affirm the Commission's conclusion because Verburg has the burden to establish the nature of his injury by a preponderance of the evidence and he failed to meet that burden. The City argues that because Verburg failed to present any evidence "to support a finding that the impact in this matter was in any way greater than a typical, everyday bump on the head, the commission's decision is supported by the evidence in the record and should not be disturbed." We agree with the City. Without evidence indicating that Verburg's activity was unusual or extraordinary, the Commission's conclusion that Verburg was not entitled to benefits is reasonable and rational. See id. at 914.

Verburg also argues that in disagreeing with the ALJ, the Commission made assumptions and based its conclusion on facts not in evidence. Verburg specifically takes issue with two of the Commission's remarks: (1) that it was "unconvinced" that vision going dark "is a measure of the force of impact" and (2) that there was no evidence submitted on any "bruising or other marks," which could have indicated a more serious collision between Verburg and the car door. Verburg argues that in making these statements the Commission violated Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah Ct. App. 1990), where we explained that the Commission's conclusions must be based on facts in evidence. See id. at 335.

We believe that Verburg's reliance on Nyrehn is unavailing. In Nyrehn, this court reversed the commission reasoning that the commission's conclusion was not based on the evidence because it concluded, as a matter of law without any supporting findings of fact, that the claimant suffered from a preexisting condition. See id. at 334-35. Whether Verburg has a preexisting condition is not at issue here. Moreover, under the legal causation section of Nyrehn--addressing whether there was an unusual or extraordinary exertion--this court first compared Nyrehn's accident to several examples of everyday experiences the supreme court listed in Allen. See id. at 336. The Nyrehn court concluded the following: "[I]t is unquestionable that two and a half months of lifting tubs of merchandise 30 to 36 times a day would cause unusual and extraordinary wear and tear on a body." Id. In the same practical manner, the Commission in this case compared Verburg's incident to the examples listed in Allen, and concluded that without more evidence, it could not say that

bumping one's head while entering a car constitutes an unusual or extraordinary exertion. More precisely, the Commission explained that "Verburg's exertion is more difficult to characterize because there is no way to determine the force with which he hit his head on his car door." Absent any evidence to indicate that the Commission's decision was in error or contrary to the evidence, we conclude that its decision is reasonable and rational. We therefore affirm.

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Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

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Russell W. Bench, Judge