

1940

Goodyear Tire and Rubber Company, and Hartford Accident and Indemnity Company v. The Industrial Commission of the State of Utah and Lee James Harris : Brief of Plaintiffs

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinne

Recommended Citation

Brief of Appellant, *Goodyear Tire et al v. Industrial Commission of Utah*, No. 6250 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/682

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

GOODYEAR TIRE AND RUBBER COM-
PANY, a corporation, and HART-
FORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF
THE STATE OF UTAH and LEE
JAMES HARRIS,

Defendants.

Case No. 6250

PLAINTIFFS' BRIEF

STATEMENT OF THE CASE.

Two questions are herewith presented for review. First, was the applicant, Lee James Harris, injured by an accident which arose out of or in the course of his employment? Second, may the Commission award compensation covering permanent loss of bodily function without evidence of permanent injury? The first question more narrowly stated is simply this: Is an employee entitled to the benefits of the Workmen's Compensation

Act under the following circumstances, to-wit: when he leaves the premises of his employer, goes to his home for his dinner, and, incidentally, to give his sister a ride on a motorcycle, and is injured on the public highway while returning to his employer's place of business?

In considering the following statement of facts, upon which there is no dispute, two questions must be kept in mind. First, at the time of the accident, what duty was Harris performing that benefited or furthered the interests of his employers? Second, at the time of the accident, who had control of his activities?

It is earnestly believed that this Court will not sustain this decision of the Industrial Commission, which has departed from a fundamental and well-settled rule of law which, simply stated, is this: That when an employee goes on a personal errand of his own, to-wit: to get a meal at his home, he departs from his employment and is not covered.

The material facts which are undisputed are briefly these: Harris was a part-time employee, having been employed only five days. On the day in question, May 8, 1939, near the close of the day's work, a rush job had come in and he was instructed to remove the wheels from this truck while his foreman, Ed Schneider, and another employee went after the new wheels. After the foreman had left, Harris helped himself to a motorcycle belonging to plaintiff, Goodyear Tire & Rubber Company, and left the premises, as he says, to get his supper, but as was also proven, to give his sister a ride. A few minutes

later, while returning to work, he lost control of the same and he crashed into a house, injuring himself.

The theory of workmen's compensation is itself a departure from the common law rule, which did not require one to pay for another's injury unless caused by fault. The cases limit this payment of compensation without fault to accidents which arise out of or happen in the course of the employment. Manifestly, the decision of the Industrial Commission requiring the employer to compensate the employee for an accident which happened away from the employer's premises, wholly disconnected from his business and at a time when the employer had no control and direction over the employee, is contrary to law. The decision of the Commission herein is directly opposed to a well-settled rule of law of this state.

THE FACTS IN THE CASE.

As applied to the first question, it conclusively appears that Ed Schneider was the foreman in charge of the station of the Goodyear Tire & Rubber Company, and that the applicant understood such was the case is apparent from his testimony in the transcript page 11. Again at transcript page 7 appears the following testimony of the applicant: "Ed Schneider was in charge of the service department where I was working," and "he had never given me any instructions about using the motorcycle at any time."

Ed Schneider testified that he was the assistant service manager and that Harris was working under his

direction. (Tr. 14) He further testified, "My instructions were, when I left to get the wheels, that Mr. Sims and Mr. Erickson were to get lunch and while I was gone, he (Harris) was to take the wheels off the truck and after I got back and the other boys got back, we would let him (Harris) go. I told him when I got back and the other boys got back, he and I would go." (Tr. 35) I told him to stay there until I got back (Tr. 36) "and against instructions, he left the premises." (Tr. 39) He had been directed to take off the inside nuts, but "he left before that was finished." (Tr. 40)

At page 15 of the transcript appears the following testimony by the applicant:

Q. Mr. Schneider was the one who employed you?

A. Yes.

Q. He didn't say you could take the motorcycle to go home or go to supper?

A. No, he didn't.

There is nothing in the record that even intimates that the employer sent Harris home for his supper. On the contrary, the evidence shows that he violated the instructions given to him by assistant manager Schneider, who was in charge of the work, to remain at work taking off the wheels, until he could return with new ones, and then both of them would go to supper. It was a rush job and Harris was so informed by Mr. Schneider, and yet he left without completing the work laid out for him and which he was directed to do prior to Mr. Schneider's return.

There is not a particle of evidence in the record that the employer or anyone in authority in its behalf gave the applicant permission to take the motorcycle home with him, (immaterial as it is to the issues in this case) or that the applicant, while away from the premises getting his supper, was doing anything whatsoever in the course of his employment or of use or benefit to his employer's business.

Such being the evidence, what basis, then, is there for a finding by the Commission that the applicant, at the time of the accident, was within the scope of his employment? Certainly there is no competent or substantial evidence in the record to support any such finding.

As to the second question, raised herein, to-wit: "May the Commission award compensation covering permanent loss of bodily function without evidence of permanent injury?" it should suffice to say at this point in the brief, under a discussion of the facts, that there is not a scintilla of evidence in the record on this point. The law applicable to the same will be discussed later on in the brief under subdivision II.

THE DECISION OF THE COMMISSION IS CONTRARY TO LAW.

I. The evidence here shows without contradiction that the injury did not arise out of or in the course of applicant's employment, and there is no evidence to support any such finding that it did. It is a fundamental

and well-recognized rule of law in this jurisdiction as well as elsewhere that an employee injured on the way to and from meals is not entitled to compensation, for he is serving primarily a purpose of his own.

II. There is no competent or substantial evidence in the record, and, in fact, no evidence, to support the finding of the Commission that the applicant "while in the course of his duties as helper, sustained accidental injury," and that he now suffers some permanent partial loss of the use of his left leg below the knee as a result of such injury; but, on the contrary, such findings are predicated solely upon surmise, speculation, and conjecture.

Therefore it is apparent that the Commission's conclusions of law herein are contrary to law, and are unsupported by any finding of fact based upon competent or substantial evidence, and therefore the decision is contrary to law in its entirety.

I.

THE INJURY DID NOT ARISE OUT OF OR IN COURSE OF EMPLOYMENT.

The decision of the Commission herein is contrary to the rule laid down by this court in the case of *Fidelity and Casualty Company v. Commission*, 79 Utah 189, 8 P. (2d) 617, wherein this question was presented to it and the award therein made by the Industrial Commission was annulled and set aside. The rule announced

by this court in that case is in full accord with the established authorities elsewhere. Undoubtedly the error made herein is accounted for because of the pressure of work upon the Commission, and had reference been made to the decisions of this Court, and if all the members of the Commission had had an opportunity to pass on same, the result arrived at would have been exactly opposite.

The facts in this case, as hereinbefore pointed out, demonstrate that the employee was not acting in the course of his employment when injured, so that the decision of the Commission, if sustained, would have the effect of extending the liability of employers not only in compensation, but also in personal injury cases involving third parties, to situations where the employee was not acting in the course of his employment.

It is evident that a decision that an employee is entitled to Workmen's Compensation Insurance when injured at a time when he is not under the control or right of control of his employer, nor in any way limited in his activities by reason of his employment, in fact, holds that it is not necessary that the employee shall have been acting in the course of his employment, to be entitled to Workmen's Compensation for injury.

The decision of the Industrial Commission in this case fails to recognize that an employee is not acting in the course of his employment when he is going to his place of employment or coming back therefrom. The "going and coming" rule is well established, not only in this state, but elsewhere, and the evidence in this case

demonstrates that the rule is fully applicable to the case at bar. To reverse such a well-established rule would be to unsettle the law and add serious burdens to industry not contemplated by the Legislature and unwarranted in justice and principle.

While in the case of *Ocean Accident and Guaranty Company v. Industrial Accident Commission*, 173 Cal. 313, it is recognized that it is a necessary part of his employment that the employee shall go to and return from his place of labor, the Court said:

“Therefore, an employee going to and from his place of employment is not rendering any service and begins to render such service only when, as has been said, arriving at the place of his employment he proceeds to use some instrumentality provided, by means of which he equally places himself in a position to perform his tasks.”

This rule was later affirmed by Chief Justice Waste in the later case of *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 190 Cal. 433.

This court in the case of *North Point Consol. Irr. Co. v. Industrial Commission of Utah, et al.*, 61 Utah 421, 214 P. 22, held that an employee was not protected while on his way to work even though he had been disappointed in receiving transportation promised by his foreman without authority. The following is taken from the syllabus in that case.

“Injuries to an employee struck by an automobile while riding his bicycle on a street of his

own selection on his way to work, after his foreman failed to get an automobile to carry him, as he had stated he might do, did not arise in the course or out of the employment within the Workmen's Compensation Act, the foreman having undertaken to provide transportation as a mere accommodation without authority from the employer, who was not obligated to do so.

“Where at the time of the injury the employee is engaged in a voluntary act not accepted by, or known to, his employer and outside of the duties for which he is employed, the injury cannot be said to be in the course of the employment.”

71 C. J. 663.

This fundamental principle is sustained by authorities in practically every state in the United States, including the recent Utah case of *Rich v. Industrial Commission*, 80 Utah 511, 15 P. (2d) 641.

The following principle, well sustained by authority, is found in 71 C. J., page 638:

“Nevertheless a definition widely adopted is that an injury to an employee arises in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental to it.”

An attempted extension of the doctrine to protect an employee while on his way to or from work was very vigorously made in the leading case of *Postal Telegraph & Cable Co. v. Industrial Accident Commission*, 37 P.

(2d) Page 442. This court will recognize the importance of that case, and very seldom indeed are so many eminent counsel called into a legal controversy as there were in that case. The reason therefore is because of the seriousness of the question and the attempt to bring under the coverage of the Workmen's Compensation Act, accidents not arising in the course of the employment. The facts in that case also involved a motorcycle operated by an employee. The injured man was on no special errand for the employer and had not yet reached his place of employment where his duties began. The facts are identical in that regard with the case under consideration. Said the Court:

“When an employee is off duty, the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work.”

The Court further said:

“He could not only deviate for the convenience of his friend, but could also perform any task for himself or for another at any time before reaching the place where his duties were to begin. This holding is in accord with the overwhelming weight of authority where the principle involved is identical with that found in the instant case.”

The award was annulled.

In the case of *Covey-Ballard Motor Co., et al., v. Industrial Commission, et al.*, 64 Utah 1, 227 Pac. 1028, involving a salesman while riding home in his own auto-

mobile after attending a meeting at the office of the employer, it was held that injury was not compensable as arising in the course of the employment.

In the case of *Denver & Rio Grande R. R. Co. v. Industrial Commission, et al.*, 72 Utah 199, 269 Pac. 513, the company furnished transportation *from* the section house, but the accident happened *before* the employee got to the section house and in the same vehicle driven by the same employee that was later to take him from the section house to the place of work. The court, after reviewing the authorities, held that the risk of going to the section house was the employee's and, therefore, the award of the Utah Industrial Commission was annulled. Announcing the principle, this court said:

“Before arrival at the section house in the morning neither (employee nor truck driver) were under the control or direction of the employer.”

In the case of *Greer v. Industrial Commission, et al.*, 74 Utah 379, 279 Pac. 900, an employee carrying a saw which he had sharpened at home was injured, but the court held that he was not protected while on his way to work merely because he was carrying a saw belonging to the company and which it was his duty to keep sharp, as this was only incidental and the employee did not come within any of the exceptions to the general rule. This Court said:

“In this case the deceased was not injured while sharpening the saw at his home. The accident did not occur while he was actually engaged

in the performance of a duty for the employer. The dangers of the street between his home and the stockyards were not incidental to his employment, but were dangers common to all."

Surely by this test the applicant's case herein falls, because he was not performing any duty for his employer. It thus appears that the decided Utah cases are in full agreement with the general rule and are decisive of the issue here in favor of plaintiffs and against the decision and award of the Commission.

The facts in the case of *Fidelity and Casualty Company v. Industrial Commission* (supra), in which this Court reversed an award of compensation made by the Industrial Commission made out a much stronger claim for compensation than do the facts herein. There the employee was required to have and use a bicycle and was required to take a bicycle home after working hours because his first duty in the morning was to go directly from home to the Semloh Hotel where he picked up films for development and which he was required to take to his place of employment. This hotel was on his direct route to his place of employment. While riding his bicycle from home to the hotel, and before reaching the hotel, he was injured. This Court held that his course of employment did not commence until he arrived at his place of employment, and that not having reached the Semloh Hotel, where his duties first began, he had not yet entered upon his duties for his employer and was not, therefore, acting in the course of his employment. This

Court pointed out in that case, that at the time the employee was injured he was in no sense under the control of his employer, indicating that in order for the relationship of an employer and employee to exist there must be control or the right of control, and that without this there is no employment and necessarily no course of employment.

The Court said:

“It is a general rule of law that an injury sustained by an employee while going to or returning from his place of work upon his own initiative in a conveyance of his own choosing and on his own time is not an injury arising out of or in the course of his employment and hence an injury thus sustained is not compensable under Workmen’s Compensation Acts. *This court is committed to such doctrine.*” (Italics ours.)

“*North Point Consol. Irr. Co. v. Industrial Commission*, 61 Utah 421, 214 P. 22;

Greer v. Industrial Commission,
74 Utah 379, 279 P. 900;

Denver & Rio Grande W. R. Co. v. Industrial Comm., 72 Utah 199, 269 P. 512,
62 A. L. R. 1436;

Covey-Ballard Motor Co. v. Industrial Commission, 64 Utah 1, 227 P. 1028.”

In this case, just as in the case above referred to, the employee was at perfect liberty to take whatever course he desired to reach his place of employment and as the Court said, “the time when he was to enter upon

his employment had not yet arrived.' In that case, just as in this case, the employee was not under the protection of the act when he was several miles away from his place of employment and on his way to work. There is no reason whatever for applying a different rule in the instant case than in the case above referred to.

In the instant case it was wholly immaterial to the employer where the employee should have his meals and what means of conveyance, if any, he should use in going to such place. Certainly it was not responsible for his use of the motorcycle nor the manner in which he operated it. Where the employee went to obtain food was no concern of his employer and the manner in which he chose to go there was entirely his own selection and not that of his employer.

During the time that the employee was absent in going to his home his employment was suspended and during such time no act of his can be considered as occurring in the course of his employment, either for the purpose of establishing a right to compensation or to justify an action by a third party against the employer for the acts of the employee. In driving the motorcycle home he acted as a free agent and his method and course of travel were in no way controlled by his employer. When injured, he was on no errand for his employer and was neither bound to render it further service nor was he subject to its further directions until he returned to the premises for work. As said before, the relation of the employer and employee was suspended. There was

at the time of the accident, no employment, as the term is used in the statute.

It is uniformly held that to entitle an employee to compensation for an injury he must prove that he was performing a service for his *employer*. In going to and from his home the employee in this case was performing a service *for himself*. There is, therefore, no basis for taking this case out of the "going and coming" rule.

It is apparent from the testimony that the employee in this case took the motorcycle without the permission of his employer, so that he might have a means of transportation to his own home to obtain something to eat and to give his sister a ride. That was his own personal business. If he had been injured while walking to or from his employer's premises, it is certain that he would not then have been in the course of his employment. Does the fact that he took his employer's motorcycle, without permission, change the situation in any way? He was not insured generally against accident while working for his employer. At home or on the street he may meet with an accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, eats, that he may be able to work, and goes to work because of his employment; yet, if he meets with an accident before arriving at the employer's premises, that is not a risk of his occupation, but of life generally. He was not injured while on duty nor in his working hours nor

on his way to or from his duty within the premises of the employer.

It is manifest from the evidence that the employee took the motorcycle as a matter of convenience to himself and for his own pleasure, and this too, without the consent of his employer. He was neither required nor directed to go home for his supper, nor to use the employer's motorcycle for that purpose. On the contrary, he violated the instructions given him to continue with his work in removing the wheels from the truck and to remain on the premises of his employer until such time as his boss could return with new wheels, at which time he had been told he might then go to supper.

As was said in the case of *Johnson v. State Highway Commission*, 134 Atl. 564:

“The petitioner's accident did not arise in the course of or out of his employment any more than did an accidental injury received after he returned from his day's work, and while he was removing his working clothes in his own home, preparing himself for his evening meal and night's rest.”

A proper application of the above established principle must necessarily lead to the conclusion that the injury in the case at bar did not occur in the course of employment.

There are numerous other authorities from many jurisdictions, but enough has been cited from our own Court to clearly define the principle upon which the

decision here should be based. It is simply this, as set out in the case of *Ocean Accident & Guaranty Co. v. Industrial Accident Commission*, (supra):

“But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore, the employee going to and from his place of employment is not rendering any service and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks. Such beyond question is the reasoning of the cases and the meaning of their adjudication * * *.”

In the case of *Hartford Accident & Indemnity Company, et al., v. Lodes*, (Okla.) 1933, 22 P. (2d) 361, it was held that an employee engaged to haul water for his employer's gin and who was injured when the team ran away while he was returning to the gin after having gone home for dinner was not entitled to compensation because the injury “did not arise out of or in the course of his employment.” The court said at page 363:

“To constitute an injury arising out of and in the course of employment there must be existing at the time of the injury the relationship of master and servant between employer and employee and such employee cannot bring himself within the provisions of the Workmen's Compensation Law for an accidental personal injury

sustained by him unless at the time of the injury he is on some substantial mission for his employer growing out of or incidentally or specifically connected with such employment. He must be rendering some service to his master at the time of the injury and he thereby places himself in a position whereby he assumes his task under the relationship of master and servant. See *Oldham v. Southwestern Surety Ins. Co.*, 1 Calif. Industrial Accident Commission Decisions (No. 171914) 7; *Ocean Accident & G. Co. v. Industrial Accident Commission*, 173 Cal. 313, 159 P. 1041, L. R. A. 1917 B, 336.

In the light of the foregoing we conclude that respondent at the time of the injury was not rendering any service to his master and did not sustain an injury arising out of and in the course of his employment."

Under analogous circumstances the same result was reached by the Supreme Court of Vermont in *Kneeland v. Barker* (Vt.), 135 Atl. 8.

The same conclusion was reached by the Court of Appeals of Kentucky in the case of *Inland Gas Corporation v. Fraser*, 55 S. W. (2d) 26. In that case the court discussed first the general "going and coming" rule and held that because at the time of the accident the employee was driving his automobile for his own purpose, to-wit, to transport himself from his home to the place where his employment would begin, and that the mere fact that he required his automobile in his duties or that he had in his automobile the equipment of the company, which he needed to perform his services, was wholly immaterial in determining whether he was then in the

course of his employment. In that case it clearly appeared, as it does in this case, that the employee was using his own means of conveyance as a convenience in transporting himself from his home to his work and suffered an injury while he was so engaged. In the case last referred to, there was more reason than in the case at bar for holding that the employee was at the time in the course of his employment, because the employee in that case was required to use his own automobile in which he transported equipment belonging to the company needed in his work. Such was also the situation in *Chernick's case*, 189 Northeastern 800 (Mass. 1934), wherein the Court said at page 801:

“It is now elementary that the Compensation Act (G. L. (Ter. Ed.) c. 152) does not extend to cover employees going to and coming from their work, or when, as here, they do not have work assigned to be performed elsewhere until instructed at the office. *McNicol's Case*, 215 Mass. 497, 498, 102 N. E. 697, L. R. A. 1916A 306; *Rourke's Case*, 237 Mass. 360, 129 N. E. 603, 13 A. L. R. 546.”

As we have heretofore said, the employee in the case at bar, at the time of the accident, was not engaged in or about the furtherance of the business or affairs of his employer nor was he under the control of the employer. The employer had not assumed any obligation for the transportation of its employees. It had no concern whatever in the transportation or the means of transportation of employees to and from their place of work. *The accident to the applicant did not result*

from a risk or hazard, which was necessarily or ordinarily or reasonably inherent or incident to his work. All the authorities have repeatedly held that a distinct pre-requisite to the right of compensation is that the employee must have been performing a service to his employer at the time of the injury, and that the employer had the right to control and direct him.

In this case, it is obvious that the injury to the applicant, Harris, did not take place in the course of his employment; nor was he at the time of the accident performing any service incidental to or growing out of his employment; nor was he acting in the course thereof.

The applicant chose his own means of conveyance for the purpose of going to obtain his supper. There was no agreement on the part of the employer to transport any employee to or from work. At the time of the accident he was performing no duty incidental to his employment. The matter of where he should eat his lunch was his own individual affair. He chose to eat it at his home and selected his own means of transportation. The applicant incurred a danger of his own choosing and one altogether outside of his employment. The act of the applicant in going to his own home and choosing his own means of conveyance was entirely personal. He selected his own time and place to eat and during the time that he selected, his employer asserted no authority over him and derived no benefits from his acts.

Conclusively sustaining plaintiff's Point One, that an employee injured on the way to and from meals is not entitled to compensation, because he is serving primarily a purpose of his own, are the following cases, the facts in which coincide with those in the case under review.

Honnold on Workman's Compensation Acts, Sec. 107 page 358 to 361;

Boyd's Workman's Compensation Acts, Sec. 481, page 1061;

Hills v. Blair,
182 Michigan 20, 148 N. W. 243;

Haggard's Case,
234 Mass. 330, 125 N. E. 561;

London Guarantee and Accident Co. v. Ind. Acc. Com., 190 Cal. 587, 213 Pac. 977;

Pearce v. Ind. Acc. Comm.,
299 Ill. 161, 132 N. E. 440;

Clark v. Voorhees,
231 N. Y. 14, 131 N. E. 553;

Johnson v. Smith,
263 N. Y. 10, 188 N. E. 140;

Clapp's Parking Station v. Ind. Accident Com., 51 Cal. App. 624; 197 P. 369.

Scott Tobacco v. Cooper,
258 Ky. 795, 81 S. W. (2d) 588;

Jack v. Morrow Mfg. Co.,
185 N. Y. Supp. 588;

Southern Surety Co. v. Galloway,
89 Okla. 45, 213 P. 850;

Taylor v. Binswanger and Co.,
130 Va. 545, 107 S. E. 649;

Ohrmund v. Ind. Com.,
211 Wis. 153, 246 N. W. 589;

Rush Const. Co. v. Woodward,
14 P. (2d) 409.

In *Haggard's Case*, *supra*, a teamster, who, with his team, was hired by a city to do general hauling, was injured while eating his lunch. On the day in question he was hauling coal from a pile near a railroad. It did not appear that he received any orders from his employer except as to places of delivery or receipt of loads. As his team was being fed near the coal pile he sat down on a railroad track to eat his own lunch, leaning against a railroad car. While he was sitting there, the car against which he was leaning was moved unexpectedly when bumped by another car, and claimant was injured when he rolled under the car. In holding that the accident did not arise out of claimant's employment, the court said that he

“chose ‘to go to a dangerous place where he had no business to go, incurring a danger of his own choosing and one altogether outside any reasonable exercise of his employment, and the act in which he was engaged had no relation to his employment.’ ”

The claim was dismissed.

In *Clark v. Voorhees*, *supra*, claimant sought compensation for the death of a salesman employed by a wholesale fruit and vegetable merchant. It appeared that he was killed by a motor truck while crossing the

street from his employer's place of business to a restaurant for the purpose of having his lunch. In reversing an award of compensation, the court held that the accident neither arose out of nor in the course of decedent's employment.

The Court said:

“When the decedent left the employer's place of business for the purpose stated, and while walking in the street he was not doing anything which he was employed to do; nor was it anything incident to or connected with the employment. It was no more a part of his employment than it would have been had he started for his own home for the purpose of getting his breakfast. The business of the employer ended when he got into the street. (*Armstrong, Whilworth & Co. v. Redford*, 1920 App. Cas. 737; *Davidson v. M. Robb*, 1918 App. Cas. 304). While on the way to the restaurant he was engaged in his own personal affairs.

“This court has recently held that when an employee was injured while on his way to the place where he was to render service such injuries did not arise out of the employment and were not connected therewith. (*Matter of Kowalek v. N. Y. Consolidated R. R. Co.*, 229 N. Y. 489; *Pierson v. Interborough Rapid Transit Co.*, 184 App. Div. 678; *affd.*, 227 N. Y. 666; *Matter of Schultz v. Champion Welding & Mfg. Co.*, *supra*). Also, where a workman left the employer's premises to go to his home for dinner. (*Matter of McInerney v. Buffalo & S. R. R. Corporation*, 225 N. Y. 130).”

The case of *Ohrmund v. Ind. Comm.*, *supra*, involved a claim for injuries sustained by an automobile mechanic

in an accident while returning from lunch at his home to work overtime on Saturday afternoon. He was given permission to use his employer's car to go to lunch, and was told to hurry back. In reversing judgment which affirmed an award of compensation, the court held that claimant's injuries were not compensable, since at the time of the accident he was not performing services growing out of and incidental to his employment within the meaning of the statute.

The court said:

"It is difficult to imagine what services the employee rendered to his employer in going home for this meal. During that period he was on his own time, he was subject to no control while away, he performed no act which in the slightest degree advanced his employer's interests. In hurrying back he was not rendering a service, he was returning to a place where he was required to present himself for the purpose of future service. It was a part of his duty as an employee to present himself at the place where the service was to be rendered. The master had not agreed to transport him and did not transport him. Therefore the relation of employee and employer did not exist, until he returned to the place where, by the term of employment, he was required to perform service. *Geldnick v. Burg*, 202 Wis. 209, 231 N. W. 624. This case is ruled clearly by *Bloom v. Krueger*, 182 Wis. 29, 195 N. W. 851. Speaking for the court in that case, Doerfler J. said, 'The controlling fact in the case, which stands out foremost above all others consists of the employee's use of the truck solely for the purpose of enabling him to obtain his noonday meal. Assuming that the employer either ex-

pressly or impliedly consented to the use of his truck for this purpose, such use was and must be deemed to have been solely for the employee's benefit during a period of time while the relationship of master and servant was suspended."

The foregoing authorities demonstrate the fallacy of confusing an act done by an employee for his own benefit and preparatory to his work with an act done in the course of his employment.

II.

NO EVIDENCE OF PERMANENT INJURY.

As hereinbefore stated, there is absolutely no evidence whatsoever in the record by a physician or anyone else to the effect that the injury to the applicant's leg is permanent. Nevertheless, the Commission, in the absence of any such evidence, in its finding No. II found as a fact that the applicant "now suffers some permanent partial loss of the use of his left leg below the knee as a result of the injury of May 8, 1939," and in its conclusions of law concluded that the plaintiffs herein should pay "compensation covering permanent loss of bodily function, if any, resulting from the said injury, the degree of which is to be determined at the proper time."

"A failure to sustain a burden of proof cannot be remedied by a finding based upon guess, conjecture, or surmise." Glass on Workman's Compensation Law, pp. 39-40.

“The burden rests upon the employee to prove the facts as to the character and extent of the injury justifying, under the terms of the statute, an award in the amount that he seeks, whether it be for a total disability, permanent or temporary, or for a permanent or temporary partial disability.” 71 C. J. 1070.

In view of the fact, as stated, that there is no evidence whatsoever in the record with reference to permanent injury, such finding and conclusion of law with reference to the same are without any basis or foundation whatsoever and the result of mere surmise, speculation, and conjecture, and on this ground alone, the decision of the Industrial Commission herein should be annulled and set aside.

THE DECISION HEREIN WOULD RENDER THE
EMPLOYER LIABLE TO THIRD PERSONS FOR
ANY INJURIES RECEIVED THROUGH THE
NEGLIGENCE OF THE EMPLOYEE.

Discussion of the above point, while not strictly pertinent to the case at bar, is vital, because an incorrect decision of the instant case would have as one of its far-reaching evil consequences the upsetting of a well-settled branch of law.

If logically carried out, it would follow necessarily that if the applicant, Harris, was in the course of his employment, when he was returning to work on the motorcycle, and he had negligently injured a third person, instead of himself, that such third person would be entitled to recover damages from the employer.

The absurd results that would follow a decision that an employee is acting in the course of his employment while transporting himself to work, whether it be in his own conveyance or his employer's conveyance, and even though it was necessary that he use such conveyance in performing his duties is illustrated in the case of *Carroll v. Western Union Telegraph Company*, 17 P. (2d) 49. In that case O'Brien was employed by the telegraph company as a motorcycle messenger, whose duty it was to deliver messages and packages as directed. On the day in question he obtained permission from his employer to get some horn brackets for the purpose of attaching to his motorcycle, and on his return from so doing injured the plaintiff, who sought to hold the defendant telegraph company responsible.

This was a case where a third party sought to hold the employer liable in damages. The facts are similar to the case at bar. The court said at page 50:

“But it is argued that the boy in order to hold his position and perform his duties, was required to have a motorcycle in proper repair and the master was concerned in seeing to it that the employee was so equipped. Likewise to hold his position the boy would require food, clothing, proper shelter and perhaps medical care, and other things too numerous to mention. Could it be reasonably argued that, if, after a hard day's work the boy was on his way home to obtain food, rest and care necessary to fit him for the next day's work, he would therefore then be about the master's business and in the course of his employment? We see no difference in principle between the two situations.”

To the same effect is the case of *Nussbaum v. Traung Label and Lithograph Company*, 46 Cal. App. 561, in which the court said at page 571:

“If the rule be extended to hold the master liable for the negligent acts of a servant while on his way to report for duty in the morning, the master would also be liable for the negligent acts of the servant while preparing his dinner-pail before leaving his home, because he is then preparing, or, in a sense, on his way to report for duty; and, also the master under such a rule, would be liable for the negligent act of a servant from the time he arose from his bed in the morning in preparation to report for his day’s duties. The statement of such a rule reduces it to an absurdity.”

It has thus been the settled law of this state for many years that in an action against an employer for injuries negligently caused by his employee when he is traveling from his home to his place of employment in the vehicle which he must use in performing his duties of employment the employer is not liable, because the employee is not acting in the course of his employment. That view is not peculiar to this state, as appears from the result recently reached by the Washington court in the Carroll case, and in the many other cases herein cited.

Inasmuch as in the two cases last referred to, the employee was required to operate a vehicle, there was a stronger combination of facts in favor of the employee than in the case at bar, but yet the court, in each of these

cases, held that the employee was not within the scope of his employment during his absence from his duties.

The last expression of this court upon the subject of liability of the employer to third parties is to be found in the case of *Saltas v. Affleck*, 102 P. (2d) 493, wherein this court held that the employee, at the time of the injury to a third person, was acting outside of the scope of his employment and, hence, the doctrine of respondeat superior was not applicable. The evidence in that case was clear as it is in this case that the employee had departed from the scope of his employment. In that case, just as in this case, the vehicle operated by the employee was owned by the employer. However, in that case it was the regular duty of the employee to operate the deliver truck which, of course, is not the situation in this case. On the contrary, it appears that in this case the employee, Harris, took the motorcycle without permission. In the case referred to, this court said that the presumption of the agency of the driver arising from proof of ownership by the employer was overcome by clear, convincing and conclusive evidence that the truck was not at the time of the accident being operated on the employer's business, but was being driven by the employee on an errand of his own, and, hence, as a matter of law, the employer was not liable. Such is the situation in this case and this court, *as a matter of law*, should decide in accordance with the uncontradicted evidence that at the time of the accident the defendant was not within the scope of his

employment and that, therefore, the decision of the Industrial Commission herein should be annulled.

CONCLUSION.

While additional cases might be cited from Utah and other jurisdictions, further citation of authorities would seem unnecessary. There is no case, which we have been able to discover, which questions the authority of the above cases, or which departs from the principles established by those cases.

As hereinbefore pointed out, the decision in this case that the employee was in the course of his employment at the time he was injured is particularly vital because it involves not only the liability of an employer for Workmen's Compensation for injuries not heretofore considered or established as compensable, but also for liability to third persons who have been negligently injured by his employee under similar circumstances. It has heretofore been assumed by all concerned that the decisions in this state have determined that the established law in this state is that there is no liability of the employer to third persons or to the employee himself where the injury occurs before the employee has reached his place of employment when at the time he is on an errand of his own and not under the control or direction of the employer. Such decisions are in accord with those of the courts of last resort of every state where the problem has arisen. As hereinbefore pointed out, the decision is directly opposite and contrary to the rule

established by this court in the case of *Fidelity and Casualty Company v. Commission*, 79 Utah 189, 8 P. (2d) 617. To justify the decision of the Commission in this case, it would follow that the law established in that case must be overruled and that this court must depart from similar decisions of the courts of last resort of every other state.

For the foregoing reasons, we respectfully urge that the award of the Industrial Commission herein be annulled and set aside.

Respectfully submitted,

ELIAS L. DAY,

CHARLES WELCH, JR.,

ARTHUR E. MORETON,

Attorneys for Plaintiffs.