

1986

Kelly Arlin Black v. McDonald's of Layton and or State Insurance Fund : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Black v. McDonald's of Layton*, No. 860296.00 (Utah Supreme Court, 1986).
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DOCKET NO. 860296

IN THE SUPREME COURT OF THE STATE OF UTAH

KELLY ARLIN BLACK, :
Appellant/Plaintiff, : (Argument Priority No. 6)
vs. : Indust. Comm. #85000922
MCDONALD'S OF LAYTON, and/or :
STATE INSURANCE FUND, : Case No. 860296
Respondents/Defendants. :

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NOV 14 1986

Court, Utah

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Respondents/Defendants. :

BRIEF OF RESPONDENTS

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the plaintiff, Kelly Arlin Black acting in the course and scope of his employment with McDonald's of Layton when he was driving to a softball game against McDonald's of North Ogden and struck and injured by another vehicle while traveling to that game?

2. Was the Industrial Commission's decision which denied Workmen's Compensation benefits to Kelly Arlin Black, arbitrary and capricious or wholly without cause?

STATEMENT OF FACTS

1. On June 13, 1985, Kelly Arlin Black was injured in an automobile accident when the car he was driving was hit by a truck. (R 43, 44) On the day in question, Mr. Black was employed by McDonald's of Layton as a crew trainer. (R 19)

2. Immediately before the accident, Mr. Black and four other McDonalds of Layton employees were on their way to a

softball game against the employees from the North Ogden McDonalds. (R 44)

3. The softball games in question were organized by employees of the various participating McDonalds Restaurants, who established divisions within the league and the rules and regulations. (R 250, 258)

4. The softball league was composed of McDonalds stores ranging in an area from Salt Lake to Tooele to Ogden. The stores themselves participated on a voluntary basis. (R 311, 312, 117)

5. At the beginning of the season each participating store contributed approximately \$25.00 or \$35.00 to the league for the purchase of scorebooks, softballs and trophies. This fee was paid by the Layton McDonalds on behalf of its employees. (R 294, 297, 313)

6. Trophies were offered to the winning teams of each division, the play-off runner up and the play-off champion. The money remaining after the purchase of scorebooks, softballs and trophies would be divided 75% to the championship team and 25% to the runner-up team, which money would go to the store itself and not the individual players. (R 33, 291, 292, 263, 64) At the end of the 1985 season the championship team received \$90.00 and the runner-up team received \$30.00. (R 264)

7. The McDonalds of Layton employees were informed of these softball games through a sign-up sheet on the employee bulletin board and were also told about the games by their fellow employees. (R 25, 31, 83, 116, 306, 353, 355)

7. The fact that a prospective employee may or may not play softball has never been a condition of employment and has no bearing on whether or not a person is hired at McDonalds of Layton. (R 76, 106, 107, 195)

8. Employee participation in these softball games was completely voluntary and no one was required to play. (R25, 111, 198, 257, 307)

9. Any employee who wished to participate in the games had to find a work replacement or request time off in advance if he or she was scheduled to work during a game. The players received no priority treatment regarding scheduling. (R 30, 84, 112, 163, 166, 197)

10. The employees were not paid for the time they spent participating in the games. (R 26, 84, 197, 289, 307) They did not receive, neither were they offered any free food, drink or special privileges or benefits in connection with participation in these softball games. (R 72, 121, 200, 307)

11. The employees found their own transportation to the games, volunteering the use of their vehicles, and paying their own transportation and gas expenses. (R 30, 31, 112, 113, 198, 309)

12. Each home team was responsible for reserving a ball park. The Layton McDonald's home games were played at Fisher Park in Clearfield. There was no cost for the use of the softball diamond. (R 24, 25, 72, 113, 303, 304)

13. The McDonalds of Layton provided the scorebook and the softballs at the home games. The employees furnished their own mitts, bats and any other equipment at all games. (R 31, 114, 199)

14. During the 1985 season some of the Layton players were given Tee-shirts that were purchased by the Layton McDonalds in 1984. They were simple, numbered baseball shirts and had no McDonalds logo or symbol whatsoever and were not designed to in any way advertise McDonalds. The shirts were to be returned to the store by the players at the end of the season. (R 32, 33, 114, 115, 200)

15. These games were not advertised by McDonalds of Layton, and the softball league was not designed to advertise McDonalds in any way. (R 115, 244) There was no financial benefit to McDonalds of Layton for participating in these games, and the only benefit to the store was perhaps an improvement in employee morale. (R 107, 119, 291)

SUMMARY OF ARGUMENT

Kelly Arlin Black alleges that he sustained injuries arising out of or during the course of employment with McDonalds of Layton, and therefore he is entitled to Workmen's Compensation benefits. It is respondents contention that when this injury was sustained, Mr. Black was not acting within the course or scope of his employment, nor for a purpose which would benefit his employer. Rather, he was engaged in an activity that had as its

main purpose to serve the social aspect, or other personal diversion of the employee.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION'S DECISION DENYING BENEFITS TO KELLY ARLIN BLACK SHOULD BE AFFIRMED BECAUSE THE INJURY SUSTAINED BY MR. BLACK CLEARLY DID NOT ARISE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

The Workers' Compensation Act of Utah provides for compensation to be paid only to an employee who is injured "by accident arising out of or in the course of his employment." Utah Code Ann. Section 35-1-45 (1953, as amended.) According to Utah Case law and other authorities in the area of Worker's Compensation law, there are a number of elements that must be considered when an employee is injured in connection with playing on a company team.

The Utah case of Auerbach Co. v. Industrial Commission, 113 Utah 347, 195 P.2d 245 (1948) is strikingly similar to the present case. An employee of Auerbach Company was injured in an automobile accident while enroute to play basketball on a team sponsored by the company. This team was part of the company's public relations and advertising campaign. The injured employee, Miss Wardle was not hired as a basketball player and she was paid only for her work as a cashier. However, her expenses were paid by her employer when she travelled with the team. Her playing basketball was not a condition of employment when she was hired, and her involvement with the team was completely voluntary. The

team was known as the "Auerbachs Shamrocks", and they wore uniforms with the word "Shamrocks" printed thereon. Not all of the players on the team were employees of Auerbachs, and any income from the games went to the company. The accident took place at night, after her duties at Auerbach's had ended. 195 P.2d at 245.

The Industrial Commission found that Miss Wardle was injured in the course of her employment. On appeal, the Supreme Court disagreed and set aside the award. The Supreme Court considered the following facts to be important:

- (a) the Company did not employ Miss Wardle as a basketball player;
- (b) she was not required to participate in the games; and
- (c) she was not paid as a cashier on a basis that included the playing of basketball as an element of qualification.

The court stated, "The issue is limited to a question of whether or not as part of her employment as cashier she was under the duty of playing basketball. We think not." Id. at 246.

The court further stated:

In this case, one of the most important elements of the master-servant relationship is missing--that of the right to control the employment. Right to control in this case does not mean merely coaching control, the purpose of which is to produce teamwork when the alleged employee plays; but means the right to require performance of a duty to play, if such a duty exists. * * *

Participants in a contest are subject to control for the purposes of safety; teamwork

on a basketball team is subject to control for purposes of efficiency in playing. Neither however, is the control contemplated by the Workmen's Compensation Act.

Id. at 246.

According to the elements outlined by the court in the Auerbach decision, Kelly Black and the others in his car cannot be said to have been injured during the course and scope of their employment. In the present case, as in Auerbach, the employees were not employed as softball players, they were not required to participate in the games, and they were not paid by McDonalds on a basis that included playing softball as a qualification. As part of their employment for McDonalds, the occupants of Kelly Black's car were under no duty to play softball. Furthermore, the element of the employer's right to control is missing in the present case, just as it was in Auerbach.

The present facts amount to an even stronger case for finding no course of employment than the facts in the Auerbach decision. In this case, McDonalds gained no advertising benefits as did Auerbachs; the employees here did not receive transportation expenses as did the Auerbachs employees; and McDonalds received no financial benefit from these games whatsoever, whereas Auerbachs received income from the games, although an amount that hardly kept up with team expenses. Accordingly, Mr. Black should be denied worker's compensation benefits.

On page six of petitioners appellate brief, he attacks the Auerbach decision because that case was decided in 1948 and "the concept of the Workman's Compensation Law has substantially

changed, and other Utah cases have seemed to retreat from some of the rationale of that decision." (Petitioners Brief page 6.)

However, the Auerbach decision has never been reversed, overruled, or even questioned by any subsequent Supreme Court decision. In fact, it was cited as authoritative as recently as 1980 in the Kinne v. Industrial Commission, 609 P.2d 926, at 928.

(Utah 1980) decision. It is therefore still a valid and binding precedent for the present case.

The applicant also cites the case of Stroud v. Industrial Commission, 2 Utah 2d 270, 272 P.2d 187 (1954) in support of his position. Aside from the fact that the Stroud case is nearly as old as the Auerbach decision, the facts in that case can be distinguished entirely from the present facts. In Stroud, the injured police officer was at the police station on his day off in order to check out a police car to two other officers. The men he was to meet were delayed, and Mr. Stroud began transferring beverages to his automobile while waiting for their arrival. He was killed while thus engaged, when his gun fell and discharged, the bullet entering Stroud's heart. 272 P.2d at 188. The Supreme Court held that Stroud was killed during the course of his employment, for reasons that are not present in the instant case:

"Stroud was authorized and required to carry his gun during his working hours; he carried it for the benefit of his employer and the employer thus was on notice that an accident of this type is an ordinary risk of a police officer. He had not abandoned his occupation and was performing the duty of waiting for the other officers."

272 P.2d at 190. Stroud is therefore not persuasive here.

Applicant next relies on the case of Martinson v. W-M Insurance Agency, Inc., 606 P.2d 256 (1980) to support his claim. However, even according to the standards announced in Martinson, Mr. Black and the other car occupants were outside the course of their employment at the time of the accident. The first test stated in Martinson is "whether such a trip is one which someone else would have had to make for the employer at some time if the claimant had not." 606 P.2d at 258. Had Mr. Black not made the trip to the game, the employer would not have sent another employee in his place, because softball game participation was purely voluntary, and McDonalds of Layton gained no direct benefit from the games and had no interest in directing any of its employees to attend.

The second and perhaps more relevant test of Martinson is "whether the paramount or predominant motivation and purpose of the trip or other activity is to serve the employer's interest, and the social aspects, or other diversion for one's own interest, is merely adjunctive thereto." Id. Although McDonalds of Layton may have benefitted indirectly from the softball games through improved employee morale, it cannot be said that the predominant purpose of the games was to serve the employer's interest. In fact, the opposite is true. The predominant motivation and purpose of the activity was in serving the social aspect, or other personal diversion of the employees. (R 291, 107, 263) This again points to the conclusion that there was no injury in the course of employment.

Petitioners reliance on 82 Am. Jur. 2d as supporting his claim is also misplaced. As stated in the sections quoted by petitioner, the so called "trend" throughout the country of finding persons engaged in company sponsored recreational activity to be within the scope of their employment when injured is based upon a number of elements that simply were not present in this case. The citation mentions the importance of such factors as whether the injury occurred on or off employer premises, during working hours, whether the employer required participation in the event, whether the employer derived some benefit from the activity, and the extent of employer control or participation in the event. All of these elements are discussed in Larson, Workmen's Compensation Law, Vol 1A.

By examining the Larson treatise, and applying its basic tenets to the facts and testimony of the case at bar, it is clear that Mr. Kelly Black was not acting within the scope of his employment at the time he incurred injuries.

Professor Larson, in his treatise on Workmen's Compensation Law, discusses the problem of employees who are injured as a result of their participation in company teams. The four categories of tests that have evolved from various jurisdictions include:

- (a) whether the games take place on or off the premises and in or out of working hours;
- (b) employer initiative;
- (c) employer contribution of money or equipment; and

(d) quantities and types of employer benefit.

Larson, Workmen's Compensation Law, Vol. 1A Section 22.24 (a) p. 5-139.

1. Time and Place

The first element discussed by Larson is the time and place of the activity in question. He states that if a game is played on the employer's premises during working hours "compensability has been seen to be clear." Larson, *supra*, Section 22.24(b). Likewise, the opposite is also true:

"[I]f the games are played both off the premises and after hours, the burden of proving work-connection falls heavily on the factors of employer initiative, financing, and benefit, and a showing on these points which might have sufficed in a case with some time or place work-connection may well prove to be inadequate. *Id.*

In the present case, the softball games in question were all played off of the employer's premises and during non-working hours. Applicant has therefore failed to meet the time and place test as outlined.

2. Degree of Employer Initiative

Professor Larson, in speaking of employer initiative, states: "If the employees have organized a softball league entirely on their own initiative, with no suggestion from the employer . . . the activity begins on an entirely different footing from, for example, [a] recreational program . . . which was actively promoted by the employer, even to the extent of having a paid supervisor." Larson, *supra*, Section 22.24 (c).

In the present case, the softball league was started when a number of McDonalds employees expressed an interest in forming a league. They originally coordinated their efforts through Mr. John Parisi, an operations consultant for the McDonalds Salt Lake Office. (R 226) Mr. Parisi volunteered his time and efforts in helping with the league because he had been involved in similar leagues while working for McDonalds in Los Angeles. (R 232) The Utah games began in 1983, when some McDonalds employees approached Mr. Parisi and desired to play softball. (R 232-233). Mr. Parisi received no encouragement in 1983 from the company to set up the program. (R 235)

In 1984 and 1985 also, employees expressed a desire to play softball to Mr. Parisi, so he helped them get organized. (R 241, 249, 250)

A meeting was held in May of 1985 with the employees, mostly crew people as opposed to management personnel, who were interested in playing. (R 250) Commissioners, treasurers and team captains were elected among those present, who set up the playing divisions, established the rules and handled the money. They handled the entire program. (R 250) Any problems that arose during the playing season were handled by the Commissioners. (R 252) The teams also furnished their own umpires from among the players. (R 16, 202, 310) Release forms were also drafted up for employees to sign so that it would be understood that the softball games were not sanctioned functions of McDonalds. (R 257) Mr.

Parisi was of the opinion that the corporation of McDonalds was not involved with the games. (R 258)

These facts all indicate that there was little if any employer initiative in that the games were organized, policed and conducted by the employees themselves.

3. Financial Support and Equipment Furnished

This third test of work-connection concerns "the furnishing of financial support, athletic equipment, prizes and the like by the employer." Larson, supra, Section 22,24(d). In speaking on this element, professor Larson states:

Although facts of this kind are helpful in building a cumulative case of employer involvement, standing alone they are ordinarily not enough to meet the burden of proof. Among the tangible employer contributions that have failed to produce compensability are these: \$1000 for equipment, which was dispensed through regular company forms and was stored on company premises; a \$500 subsidy; equipment and a \$50 entrance fee; uniforms and the Industrial League fee; uniforms, equipment, and fees; an allowance of \$225; a grant of \$150 over a two-year period.

Larson, supra, Section 22.24(d).

There is conflicting evidence as to the amount of money McDonalds of Layton contributed to the softball team. The testimony at the depositions estimated \$25.00 to \$35.00. (R 119, 254, 294) In any event, compared to the amounts that were cited by Larson which failed to produce compensability, a \$35.00 registration fee to cover the cost of trophies, scorebooks, softballs and a small cash prize hardly amounts to the necessary

financial support needed to establish activity within the course of employment.

4. Employer Benefit

McDonalds of Layton received neither financial benefit nor advertising benefit as a result of the games in question. The only benefit the employer received was perhaps improved morale of its employees who participated in the softball league. (R 107)

Touching this area, Professor Larson writes:

Controversy is encountered also when the benefit asserted is the intangible value of increased worker efficiency and morale. Basically, the trouble with this argument is not that such benefits do not result, but that they result from every game the employee plays whether connected with his work or not.

In this respect, the argument is reminiscent of the same view sometimes heard in connection with the personal comfort cases; eating, resting, and the like do indeed improve the efficiency of the employee, but this is equally true (and even more true) of the sleeping and eating which he does at home. And so, just as in the sleeping and eating cases some arbitrary time and space limitations must circumscribe the area within which the "benefit" establishes work-connection, the recreation cases must submit to some similar limitation, since otherwise there is no stopping point which can be defined short of complete coverage of all the employee's refreshing social and recreational activities.

It can be taken as the majority view that these morale and efficiency benefits are not alone enough to bring recreation within the course of employment. (Emphasis added; footnotes dropped.)

Larson, supra, Section 22.33.

Again, the applicant fails this final test for the reasons stated.

A recent case from another jurisdiction which refutes petitioner's claim that the "trend" throughout the country is in favor with allowing compensation in a case such as the one at bar is Rose v. Argonaut Insurance Companies, 77 Or. App. 167, 711 P.2d 218 (1985). In Rose, an employee suffered injury in a softball game played by a company team after work. The court held that the employee's injury during the softball game was not work related where the game occurred after work hours and off premises, employer did not organize, manage, or control the team, employees were not required to play, employer's only contribution was \$100, and employer's only benefit was indirect advertising received through jerseys. The court so held even though the employer encouraged employees to sell cars (engage in business) at games, and even though employer encouraged players to play on the team.

Thus, it is readily apparent that when the factors which Larson speaks of in his treatise are in accord with the facts in Rose, as well as in the case at bar, it is incumbent upon a court to find that the injury sustained was not incurred during the course of employment.

On page 9 of the Petitioner's brief he states that the employer made "strong overtures that participation in the softball program would be looked upon favorably", thus amounting to "indirect and compelling pressure" to attend the games. However, the testimony in the depositions consistently established that softball playing was never a condition of employment and that participation was strictly voluntary. Kelly Black himself

testified that the person who interviewed him for his job never indicated that playing softball was a pre-requisite for employment, (R 76) and that participation was voluntary. (R 25) Furthermore, the gentleman who interviewed Mr. Black testified as follows:

Q. . . . When you interview people for employment, do you ever make it a rule to discuss the softball games with them?

A. No.

Q. Does the fact that whether or not a prospective employee plays softball make any difference in your decision whether or not to hire them?

A. Absolutely not.

Q. So if you do discuss the subject of softball, what's the purpose of it?

A. It's never discussed during the interview.

(R 106, 107) There is conflicting evidence as to whether or not softball was discussed at Mr. Black's pre-employment interview. However, there is no doubt that playing softball was never a condition of employment at McDonalds of Layton. (R 195)

The case relied upon by the applicant on this point, Lawrence v. Industrial Commission of Arizona, 78 Ariz. 401, 281 P.2d 113 (1955) is inapplicable. The language cited from the Lawrence decision by the applicant is merely dictum, because the court stated, "the case at bar presents no occasion to hold that the 'encouragement' petitioner received constituted direction. On the facts established by the Commission the luncheon was an integral part of the employer's business plan." 281 P.2d at 115.

Because the employer's business was advanced at the meeting attended by the employee prior to his injury, he was awarded benefits. There are no similar facts in the present case.

The cases listed in the string cite on page 8 supporting the Applicant's argument that a suggestion or encouragement by an employer is tantamount to an express order are also distinguishable from the case at hand. For instance, in Stakonis v. United Advertising Company, 110 Conn. 384, 148 A. 334 (1930), the claimant had received a direct order from his foreman to attend the company picnic. The employees who attended were paid and those who did not attend were not paid, and the employer provided transportation to the event. The facts are clearly not comparable. In Lybrand, Ross Brothers & Montgomery v. Industrial Commission, 36 Ill. 2d 410, 223 N.E.2d 150 (1967), the golf outing held in connection with the claimant's injury was held on a regular working day. The court found substantial employer compulsion to attend because the employees were paid whether they attended the outing or not, and those who did not attend were required to work their regular duties. The employer also supplied food, drinks and prizes.

In the case Dependents of Staten v. Ewing Gas Company, 243 So.2d 561 (Miss. 1971), the employee died on an employer sponsored fishing trip and worker's compensation benefits were denied the dependents because there was no employer compulsion to attend and there was no showing of substantial benefit to the employer, even though one of the purposes of the event was to improve employer-

employee relationships. If anything, this case supports the position of defendants. Kelly v. Hackensack Water Company, 10 NJ Super. 528, 77 A.2d 467 (1950) is also distinguishable. The employee was injured at an outing where the employer paid the costs of the outing along with the wages of employees attending. The outing was also a benefit bargained for in the wage agreement with the employer, and it provided the employer an opportunity to make speeches and present awards to employees. Finally, in Clevenger v. Liberty Mutual Insurance Co., 396 S.W.2d 174 (Tex. Civ. App. 1965), the court relied on Professor Larson's treatise as outlined in defendant's original Memorandum, and cited the rule that an employer must derive a substantial benefit from the activity in question beyond the intangible value of improved employee health and morale before he will be found within the course of employment.

Although there may be a few cases which allow recovery on the sole basis that the event in question provides improved employee relations and builds morale, these are a minority and should be disregarded. As stated previously, according to Professor Larson, a noted authority in the area of Worker's Compensation law, the majority view is that "morale and efficiency benefits are not alone enough to bring recreation within the course of employment." Larson, Workmen's Compensation Law, Vol. 1A Section 22.33. It is interesting to note that the petitioner's brief fails to cite Larson altogether.

POINT II

THE INDUSTRIAL COMMISSION'S DECISION WHICH DENIED WORKMEN'S COMPENSATION BENEFITS TO KELLY ARLIN BLACK WAS NOT ARBITRARY OR CAPRICIOUS, WHOLLY WITHOUT CAUSE, OR WITHOUT ANY SUBSTANTIAL EVIDENCE TO SUPPORT IT; AND THEREFORE THE ORDER OF THE INDUSTRIAL COMMISSION MAY NOT BE OVERTURNED.

The standard of review which has been utilized by this Court in Industrial Commission cases is stringent and there are numerous cases which have articulated the power or scope of review which the Utah Supreme Court possesses with regard to decisions handed down by the Industrial Commission. One such case which clearly sets forth the proper standard is Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981). In Kaiser, the Court stated:

Under any of these standards . . . it is apparent that this Courts' function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the Court agrees with the Commission's findings or whether they are supported by the preponderance of evidence. Instead, the reviewing court's inquiry is whether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commissions findings be displaced.

631 P.2d at 890.

Accordingly, applying the above cited authority to the case at bar, the Supreme Court is powerless to overturn the Industrial Commission's order unless it can be said that the Commission clearly acted arbitrarily and capriciously in denying Mr. Black

Workmen's Compensation benefits. Such is not the case and the decision is not subject to the Supreme Court's scope of review.

The pertinent facts of this case are uncontradicted. Mr. Black was injured while enroute to a softball game. The game was to take place off of his employers premises and after Mr. Black's work hours. The employer did not organize, arrange, or control the team, and Mr. Black was not required to participate. The employers contribution to such activity was very minimal, and there was no direct benefit accruing to the employer from such activity.

In determining that Mr. Black's injury did not occur within the scope or course of his employment, the Industrial Commission considered the facts of this case, and applied the appropriate Utah case law which is consistent with the overwhelming majority of case law in this country.

Thus, it cannot be said the Industrial Commission's decision was arbitrary or capricious, wholly without cause, or contrary to one inevitable conclusion. Accordingly, the decision of the Commission is not subject to reversal.

CONCLUSION

Petitioner has failed to cite any persuasive authority to support his claim of being injured within the course and scope of his employment. According to the majority view, as stated in Utah case law and other decisions throughout the nation, the facts in this case indicate that Mr. Black and the other occupants of his car were not injured during the course and scope of their employ-

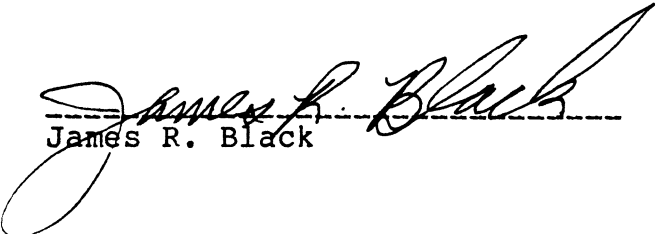
ment. They were enroute to an activity that had as its main purpose to serve the social aspect, or other personal diversion of the employees.

Further, because the Industrial Commission's decision denying benefits to Mr. Black was not arbitrary or capricious, or wholly without cause, the decision of the Commission is not subject to reversal.

Therefore, respondents herein respectfully request that the Utah Supreme Court affirm the order of the Industrial Commission which denied benefits to Kelly Arlin Black.

DATED this 14 day of November, 1986.

BLACK & MOORE


James R. Black

CERTIFICATE OF MAILING

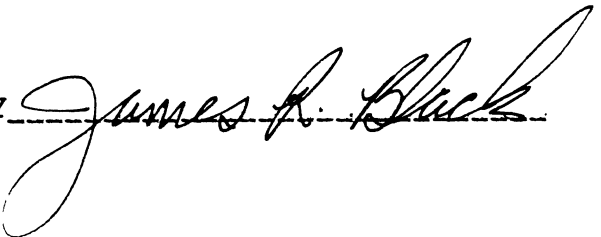
I hereby certify that four true and correct copies of the above and foregoing Brief of Respondent, was mailed, postage paid, on the 14 day of November, 1986, to the following:

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BY

A handwritten signature in cursive script, appearing to read "James R. Black", written over a horizontal dashed line.