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Mary M. Stroud v. Industrial Commission of Utah et al : Brief of Respondent Salt Lake City Corporation

Utah Supreme Court

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E. R. Christenseon; Homer Holmgren; A. Pratt Kesler; Attorneys for Respondent;

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Case No. 7687

IN THE SUPREME COURT
of the
STATE OF UTAH

MARY M. STROUD,

Appellant,

— vs. —

INDUSTRIAL COMMISSION OF
THE STATE OF UTAH, and
SALT LAKE CITY CORPORA-
TION, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT SALT LAKE CITY
CORPORATION

FILED

JUL 18 1951

E. R. CHRISTENSEN,
City Attorney

HOMER HOLMGREN,
A. PRATT KESLER,

Clerk, Supreme Court, Utah

*Assistant City Attorneys,
Attorneys for Respondent.*

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BRIEF OF RESPONDENT SALT LAKE CITY
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STATEMENT OF FACTS

In addition to the facts as set forth in the brief of Appellant, I feel that it will be beneficial to the review of this matter to set forth in addition thereto the following facts which I feel are important to Respondent's position:

There is no dispute that THOMAS WILLIAM STROUD was in the employ of SALT LAKE CITY CORPORATION as a police officer up to and prior to January 5, 1951 (R. 6). Officer JAMES C. McGARRY had eight (8) cases of soda water in his car, and he and STROUD were transferring them from the McGARRY car to the STROUD car. That McGARRY did not see the gun discharge or know how it happened—(R. 11), nor did McGARRY or anyone else hear or see the gun fall, if in fact it did fall (R. 11), nor did McGARRY or anyone else see the gun or any gun on the person of STROUD before he heard a shot (R. 11).

The gun McGARRY saw on the sidewalk was not issued by the SALT LAKE CITY Police Department (R. 12-27). The car STROUD was using was his own personal car (R. 12), and the soda water was to be taken to a Ward House to be used at a square dance the night of January 5, 1951, which dance was purely a social function to be attended by police officers and their wives (R. 12) and had nothing to do with the Police Department as such, and was not a required function (R. 13). At the time of the shot, STROUD was dressed in civilian clothes (R. 13) and it was his day off (R. 13, 14, 19, 32, 33). The car to be checked out by STROUD was checked out by Acting Sergeant BRINTON (R. 19, 36). Police officers, while off duty, are not required to carry guns, either by order of the Chief or by the Rules and Regulations of the Police Department or the Rules and Regulations of the Civil Service Commission (R. 21, 24, 26),

and an officer would not be reprimanded if he did not carry a gun while off duty (R. 26). ELMER E. BRINTON was Acting Sergeant of the shift on January 5, 1951 (R. 32). Only the Acting Sergeant's orders would be carried out (R. 36).

It was agreed by counsel for Appellant, SALT LAKE CITY CORPORATION, and the INDUSTRIAL COMMISSION (R. 6) that the only issue involved in this matter is whether the accident which caused the death of THOMAS WILLIAM STROUD arose out of or in the course of his employment while employed by SALT LAKE CITY CORPORATION as is provided by Section 42-1-43, U.C.A., 1943.

STATEMENT OF POINTS

I.

COURT'S POWER IS LIMITED IN REVIEWING DECISIONS OF INDUSTRIAL COMMISSION UNDER THE WORKMEN'S COMPENSATION ACT.

II.

THE DEATH OF STROUD DID NOT ARISE OUT OF HIS EMPLOYMENT WITH SALT LAKE CITY CORPORATION.

III.

ACCIDENTS THAT DO NOT ARISE OUT OF OR DURING THE COURSE OF EMPLOYMENT ARE NOT COMPENSABLE EVEN THOUGH EMPLOYEE IS SUBJECT TO CALL 24 HOURS A DAY.

IV.

NECESSARY TO BE COMPLYING WITH AN ORDER
OR RULE OF EMPLOYER.

V.

STROUD WAS NOT IN THE COURSE OF HIS EMPLOY-
MENT.

ARGUMENT

POINT I.

COURT'S POWER IS LIMITED IN REVIEWING DE-
CISIONS OF INDUSTRIAL COMMISSION UNDER THE
WORKMEN'S COMPENSATION ACT.

The Utah Supreme Court has, on occasions too numerous to mention, held that in a proceeding to review a decision of the Industrial Commission under the Workmen's Compensation Act, the Court will examine into the evidence only to determine whether there is any substantial competent evidence to support the finding of the Commission, and, if there is in fact such evidence, the findings will be sustained even though the Commission could have found either way on the issue.

We shall cite a few of the authorities to illustrate the proposition stated under Point I.

*Globe Grain & Milling Co. v. Industrial Com-
mission of Utah*, 193 P. 642;

*Twin Peaks Canning Company v. Industrial
Commission of Utah*, 196 P. 854;

Rukawina v. Industrial Commission of Utah,
248 P. 1103;

Banks v. Industrial Commission of Utah, 278
P. 58.

POINT II.

THE DEATH OF STROUD DID NOT ARISE OUT OF HIS EMPLOYMENT WITH SALT LAKE CITY CORPORATION.

The findings of the Industrial Commission in this decision are all sustained by competent substantial evidence given at the time of the hearing and which, for the purpose of this particular argument, are as follows:

That McGARRY and STROUD had accepted the responsibility of furnishing refreshments for a square dance to be attended by police officers and their wives, which was a purely social function and had nothing to do with the Police Department, nor was it a required police activity. STROUD was using his personal car to transport the soda water to the Ward House where such dance was to be held. McGARRY did not, at any time, see the gun involved on STROUD'S person on January 5, 1951. He heard a shot and turned to see a gun on the pavement. No-one saw the shot fired and there is no testimony that a bullet from this gun caused the death of STROUD. January 5, 1951, was STROUD'S day off. He came to the station to meet McGARRY and transfer soda water to his car. Other persons could check out cars, and in this case Acting Sergeant BRINTON did

check out the car referred to. All officers do not carry guns on days off, and no Rule or Regulation of the Police Department or Civil Service Commission or order of the Department required the carrying of a gun on one's day off or while not on duty as a police officer.

Appellant cites many cases, a number of which are not in point here or which are distinguishable, particularly those cases which involved an accident resulting in injuries to an employee while going to or from work. Utah follows the majority rule that where an employee is injured going to and from work at the special direction or request of the employer, he is entitled to compensation. In this case STROUD was not going to or from work at the request of the Police Department, nor was he engaged in any endeavor which promoted the interest of his employer. To the contrary, he was off duty and on a mission of his own.

The case closest in point cited by Appellant is the case of *Beaver City v. Industrial Commission of Utah*, 67 Utah 8, 245 P. 378. The facts of this case are entirely different and distinguishable from this case. In the *Beaver City* case, *supra*, the Court found:

“The accident occurred between the regular hours of the marshal * * *” — p. 379.

and he had gone home to clean his gun as he had no office or other convenient place to clean the gun, and the Court stated:

“Had the marshal undertaken to clean the gun at the ditch and at the time it dropped out of his pocket, and in doing so then was injured by an accidental discharge of the gun, we think it could not successfully be contended that the injury did not arise out of or in the course of his employment. And we think it would have made no difference had he gone to the city hall (if Beaver City had a hall) or to some other convenient place, and had there attempted to clean the gun. Having no material with him with which to clean the gun, and there being no convenient place to clean it, he went to his house. He still was on duty and within the corporate limits over which his duties extended, and, though in his own house, yet in a sense on the premises of his employer, and, so far as made to appear, there exposed to no more danger in cleaning the gun than had he undertaken to clean it at the ditch or at some other place. We thus do not see wherein, in cleaning the gun at his house, the officer was any less in the course of his employment than if he had undertaken to clean it at some other place. It further is made to appear that cleaning the gun at his house was not a place chosen or selected by him as a mere personal convenience or accommodation, but rather one of necessity; there being no other place where he conveniently could have cleaned it. Thus, under the circumstances, we think the award was proper.”

In the case of *Mayor v. Ward*, 114 S.W. 2d, 804, cited by Appellant, the Court found that the injured policeman was, at the time of the accident, still under all of the obligations of his employment, in his uniform,

and carrying his badge and weapons of office. He also followed up, further, and arrested the drunk driver that hit him on the same night it happened.

All of the other cases cited by Appellant are third party cases or cases in which the injured were actually in the course of their employment while on duty when the injury occurred and are certainly not in point here.

Could it be argued that a policeman would be entitled to compensation from an injury received from a gun accident while he was employed as a special officer by a department store on his day off, or during non-working hours; or, during a hike in the mountains with his friends or family on his day off or during non-working hours; or, if he was injured by his gun falling from his dresser to the floor while he was either dressing or un-dressing while at home on his day off or during non-working hours? I do not believe that counsel for Appellant would argue that Appellant would be entitled to any relief under the above mentioned instances.

It must be remembered that STROUD was not called back to work. He was on a mission of his own, which in no way would benefit his employer. He was under no order, Rule or Regulation to carry a gun on off-duty hours. There is absolutely no evidence to show any causal connection between the injury and his employment or that the same arose out of his employment. The gun was not seen on his person prior to the shooting, and

no-one saw the shot fired, and there is no testimony to show that a bullet from the gun found on the pavement on the sidewalk caused the injury.

Many persons carry firearms, and the carrying of firearms has never been considered inherently dangerous. Accidents from firearms result in most every case from the carelessness on the part of the handler. In the case of *Roberts v. City of Colfax*, 260 N.W. 57, the Night Marshal of the City, while engaged in cleaning up the floor of the city jail, was injured when a revolver which he was carrying fell from his pocket and was discharged, and the Court held:

“that the loss of eye caused by discharge of night marshal’s revolver which fell from his pocket while marshal was cleaning floor of jail was not compensable as the carrying of firearms by peace officers was not a peril or hazard peculiar to the work of their office.”

In the case of *Kresl v. Village of Dodge*, 238 N.W. 752, the wife of the village marshal heard a shot from the bedroom where her husband was changing clothes prior to going on duty as the village marshal at about 6:00 o’clock in the evening. On going to the room, she found her husband dead and his revolver lying on the floor. The revolver had a bad history, it having gone off accidentally on prior occasions. The Court held that this was not an accident arising out of employment and denied compensation.

In the case of *Albers v. Kipp*, 263 N.W. 593, the Court held that an injury to an employee does not "arise out of the employment" within Workmen's Compensation Law where, without employer's knowledge or direction, employee is voluntarily performing work not contemplated by employment contract, in a place where his duties do not require his presence, and with appliance not furnished by employer and used without employer's knowledge or consent, notwithstanding work may have been beneficial to employer.

In the case of *Harvey v. Caddo DeSoto Cotton Oil Company*, 6 So. 2d 747, the rule is established for the common accident test as to whether an accident arose out of the employment, the Court stating:

"That it is only necessary to consider two points: (1) Was the employee then engaged about his employer's business and not merely pursuing his own business or pleasure, and (2) Did the necessities of the employer's business reasonably require that the employee be at the place of the accident at the time the accident occurred."

In the case of *Goodyear Aircraft Corp. v. Industrial Commission*, 158 P. 2d 511, the Court, in deciding the question of whether the accident arose out of employment, laid down the rule that an employer is not an insurer and that if the accident occurs while the employee is engaged in some act having no relation to his duties for his own comfort or otherwise, or has abandoned his occupation even temporarily, then injury does not arise out of employment.

In the case of *Roberts and Oake v. Industrial Commission, et al*, 39 N.E. 2d 315, the Court held:

“That in order for a risk to be incidental to the employment within Compensation Act it must have a relation to the work performed by the employee in fulfilling his contract of service, and that where an employee assumes to undertake a dangerous act which is altogether outside of his scope of employment, the risk taken is not incidental to the employment.”

POINT III.

ACCIDENTS THAT DO NOT ARISE OUT OF OR DURING THE COURSE OF EMPLOYMENT ARE NOT COMPENSABLE EVEN THOUGH EMPLOYEE IS SUBJECT TO CALL 24 HOURS A DAY.

Appellant contends most strongly that because STROUD was subject to call 24 hours a day, he was entitled to compensation for his injury. Many cases have been decided on this point, all of which hold that unless the employee was actually in the course of his employment or that the accident arose out of his employment, the same is not compensable. In the case of *Sullivan v. Industrial Commission*, 10 P. 2d 924, a Utah case where Mr. Sullivan was subject to call 24 hours a day, stopped over enroute to New York to visit his daughter at Vassar College, and while there with his daughter, was injured, the Court held:

“Though an employee is by the terms of his employment required to be ready to perform his duties for the employer at any hour of the day

or night, it does not follow that every accident or injury that he may receive during the course of the 24 hours arises out of his employment. To be compensable, it must appear that at the time of the injury he was discharging some of the duties he is employed to perform or that what he is doing is in some way connected with or incidental to the duty owing to the master."

In the case of *Mitchell v. Ball Bros. Co.*, 186 N.E. 900, the Court held that the death of an employee struck by an automobile while on way to employer's premises from lunch without any special call, did not arise out of and in the course of employment, although employee was subject to call at any time during the day.

Also, see *State Young Men's Christian Association v. Industrial Commission*, 292 N.W. 324.

POINT IV.

NECESSARY TO BE COMPLYING WITH AN ORDER OR RULE OF EMPLOYER.

In reply to the cases cited by Appellant to sustain his contention that it is immaterial that employer did not order STROUD to carry a gun, I call the Court's attention to the fact that in every case so cited and that in all the cases I was able to find where compensation was allowed, the injury resulted during the working hours of the injured employee's employment and further resulted in the actual course of employment.

POINT V.

STROUD WAS NOT IN THE COURSE OF HIS EMPLOYMENT.

Stroud was off duty, and was transferring cases of soda water from one car to his car when injured. In the case of *Vitagraph, Inc., v. Industrial Commission of Utah*, 85 P. 2d 601, the question arose as to whether the accident arose out of or in the course of employment, and the Court therein established the rule that for an injury to be compensable, the workman must at the time of the injury have been engaged in doing some work for the employer or under the direction and control of the employer, or at the point of danger pursuant to or in carrying out the order or direction of the employer, or in doing some act necessary to be done for the employment or incidental thereto and not detachable therefrom.

In the case of *State Young Men's Christian Association v. Industrial Commission*, *supra*, 292 N.W. 324, the evidence showed that the injured employee was employed to render medical service with the understanding that he would live on the premises and respond to all emergency calls. That while playing tennis on the employer's premises he received an eye injury, and the Court held:

“That the exercise of his privilege to join in a game of tennis with other employees who were also indulging in the pleasure, did not result in service to the employer. He and his companions were free to use their time to suit themselves. It was while playing in this manner that the injured was struck in the eye with a tennis ball. At the time he was exercising a personal privilege apart from any interest of the employer, the nature of which cannot be considered as being for the benefit of the employer or for the mutual benefit of both. His play was without direction or compulsion of any kind which required him to take part, and no duty was imposed on him nor would he be discharged for failure to participate.”

In the case of *Tabor v. Midland Flour Milling Co.*, 168 S.W. 2d, 458, the Court sets down the commonly accepted rule of “in course of employment” wherein the Court held:

“An injury to an employee arises in course of employment when it occurs within the period of his employment at a place where he might reasonably be and while he is reasonably fulfilling the duties of his employment or engaged in the performance of some task incidental thereto. But where, at the time of his injury, the employee is engaged in a voluntary act not known to or accepted by his employer and outside the duties for which he is employed, the injury is not received in the course of employment.”

CONCLUSION

That the Industrial Commision did not err in concluding that the accident which caused the death of THOMAS WILLIAM STROUD did not arise out of or in the course of his employment by Defendant SALT LAKE CITY CORPORATION and in denying the claim of MARY M. STROUD for compensation.

Respectfully submitted,

E. R. CHRISTENSEN,
City Attorney

HOMER HOLMGREN,
A. PRATT KESLER,
Assistant City Attorneys,

Attorneys for Respondent.

SALT LAKE CITY CORPORATION

.....copies of the foregoing brief received this
.....day of July, 1951.

Attorney for Appellant