

2010

# Layne Jex v. Precision Excavating and/or Owners Insurance Co. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LAYNE JEX,

Appellant/Petitioner,

v.

PRECISION EXCAVATING and/or  
OWNERS INSURANCE CO.,

Appellee/Respondents

Case No. 20100674

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REPLY BRIEF

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**ARGUMENT**

**JEX CONCEDES THE ISSUE AS ARGUED BY PRECISION.**

Precision argues in its Brief that the appropriate issue to be resolved on this appeal is whether “Mr. Jex’s motor vehicle accident ‘arose out of and in the course of his employment’ under section 34A-2-401, Utah Code, entitling him to receive worker’s compensation benefits”. *Precision brief at 1.* Jex concedes this is the appropriate issue on this appeal.

**THE APPROPRIATE STANDARD OF REVIEW IS CORRECTION OF ERROR  
OR “CONDITIONALLY DEFERENTIAL.”**

Precision admits that the appropriate standard of review of Commissioner Hayashi’s legal determination as to whether Jex was injured by accident arising out of his work is correction-of-error. *Precision Brief at 1*. However, Precision also claims the determination of the Commissioner is a “mixed question of law and fact” apparently claiming the application of a deferential standard. *Precision brief at 1-2*.

Jex submits that the correct standard of review is correction-of-error. Specifically, the Commissioner in concluding that the going and coming rule applies to bar Jex’s claim, erroneously interprets the law in two separate instances.

First, she interprets *VanLeeuwen v. Industrial Comm’n*, 901 P.2d 281 (Utah App. 1995) as requiring that “in order to be exempt from the going and coming rule, Mr. Jex must show that his truck served as an instrumentality to benefit Precision Excavating’s business **at the time of the accident.**” (R. at 71) (*emphasis added*). *VanLeeuwen* contains no such requirement. As set forth below, Jex does not need to prove his truck was an instrumentality of the business “at the time of the accident.”

Second the Commissioner interprets *Cross v. Bd of Review of Industrial Comm’n*, 824 P.2d 1202 (Utah 1992), as requiring Jex to demonstrate he conferred a “**significant benefit** to an employer such that the going and coming rule does not apply. (R. at 71.) (*emphasis added*). *Cross* contains no such requirement. As set forth below, Jex need not demonstrate the benefit to the employer be “significant.” As such the determination of the

Commissioner should be reviewed for correction-of-error.

Utah courts have consistently held that a determination as to whether an accident arises out of and in the course of employment is to be reviewed for correctness. As set forth above, both parties concede that the issue to be addressed here is whether the Commissioner correctly interpreted section 34A-2-401. In *Cross*, this court held that the Act does not expressly or impliedly grant discretion to the Commission to interpret the specific statutory language of Utah Code Ann. § 35-1-45 (1994). *Id* at 1204. (Now codified at 34A-3-401). As such, the determination of the Commissioner must be reviewed for correctness.

In the event this Court determines Commissioner Hayashi properly construed *VanLeeuwen* and *Cross*, Jex would concede that a deferential standard would apply as to whether the Commissioner applied the law to the facts correctly. However, the standard is a “conditionally deferential standard,” granting some deference to the Commissioner but requiring an “employee-friendly” analysis.

In *Salt Lake City Corp v. Labor Comm’n*, 2007 UT 4, Para 13; 153 P.3d 179, 180 (2007) the Supreme Court set forth the “conditional deferential” standard in the “multifarious array of factual settings presented by scope-of-employment cases”.

The issue before us is a mixed question of law and fact, one that calls upon us to review the application of law to fact. The facts relating to the accident and the take-a-car-home program are undisputed. We concern ourselves with the interplay between these facts and the eligibility requirements for workers' compensation benefits found in Utah's Workers' Compensation Act, Utah Code sections 34A-2-101 to -803.



In *Drake*, we explored in considerable detail the standard of review that we should assign to appeals from Industrial Commission rulings based on mixed questions of law and fact. We undertook this exploration in a context very similar to the one here. The facts were undisputed, and the legal principle the Commission applied to the facts was the "special errand" doctrine, a cousin of the going and coming rule that we examine today.

We settled upon a conditionally deferential standard of review grounded in two considerations. First, practical difficulties attend any attempt to craft coherent and evolving legal rules from the multifarious array of factual settings presented by scope-of-employment cases. In this environment, our preeminent role, as an appellate court charged with interpreting the law, would shrink away if we became a forum to merely reassess the facts. See *Drake*, 939 P.2d at 181 (citing *Pena*, 869 P.2d at 936).

Furthermore, our statutory obligation to give effect to the Act's purpose to "alleviat[e] hardship upon workers and their families" heightens the degree of oversight of Commission rulings, particularly those that result in a denial of benefits. *Id.* at 182 (quoting *Baker v. Indus. Comm'n*, 17 Utah 2d 141, 405 P.2d 613, 614 (Utah 1965)). We will therefore look closely to assure ourselves that the Commission has liberally construed and applied the Act to provide coverage and has resolved any doubt respecting the right to compensation in favor of an injured employee. *Id.* at 182 (citing *State Tax Comm'n v. Indus. Comm'n*, 685 P.2d 1051, 1053 (Utah 1984)).

Our obligation to adopt an employee-friendly perspective on scope-of-employment cases from the Commission highlights the material difference between this case and the earlier case involving this accident, *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, 73 P.3d 315. Unlike Ms. Ross's quest for benefits, the Ahlstrom plaintiffs were not entitled to a sympathetic application of the going and coming rule in aid of their effort to make Salt Lake City vicariously liable for Ms. Ross's negligence. Thus, elements of the take-a-car-home program that were insufficient to render Ms. Ross an employee for the purpose of Salt Lake City's vicarious liability were nevertheless adequate to make Ms. Ross eligible to receive workers' compensation benefits.

We break no new ground by applying different standards of review to scope-of-employment cases derived from vicarious liability and workers' compensation cases. In *Ahlstrom*, we anticipated the arrival of this appeal when we stated that

[w]ith very different presumptions governing worker's compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other because the legal effect of identical facts may be different in a negligence case than in a worker's compensation case.

*Ahlstrom*, 2003 UT 4, P 7, 73 P.3d 315.  
*Salt Lake City Corp.*, Para. 13-18.

#### **PRECISION'S ANALYSIS OF THE ALJ'S CONCLUSION IS NOT RELEVANT.**

The parties concede the sole issue to be addressed in this case is whether Jex's motor vehicle accident arose out of and in the course of employment. This ultimate conclusion rests on whether the Labor Commission properly applied the law to the facts. However, in its brief, Precision relies on the analysis of the ALJ, not that of the Labor Commissioner. In fact, in its brief, Precision sets forth two and one-half single spaced pages of the ALJ's analysis and then proceeds to present argument as to how the analysis of the ALJ is appropriate. (*Precision Brief at 17-19.*)

However, the Labor Commissioner did not adopt the legal analysis of the ALJ<sup>1</sup>. Instead, the Commissioner adopted the findings of the ALJ and supplanted the discussion

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<sup>1</sup> As such, Jex will not address the fallacies of the analysis used by the ALJ.

and Conclusions of Law of the ALJ with her own discussion and Conclusion of Law. (R. at 70-71.) Utah law is clear that an appeal from the Labor Commission is from the Labor Commissioner's ultimate conclusion, not that of the ALJ. In relevant part Utah Code Ann. § 34A-1-303(6) provides:

If an order is appealed to the court of appeals after the party appealing the order has exhausted all administrative appeals, the court of appeals has jurisdiction to:

- (a) review, reverse, remand, or annul **any order of the commissioner or Appeals Board**; or
- (b) suspend or delay the operation or execution of **the order of the commissioner or Appeals Board** being appealed

*(emphasis added.)*

As such, it is appropriate to review only those conclusions of law reached by Commissioner Hayashi, not those of the ALJ.

**VANLEEUWEN DOES NOT REQUIRE AN INJURED WORKER  
DEMONSTRATE HIS VEHICLE WAS AN INSTRUMENT OF THE BUSINESS  
“AT THE TIME OF THE ACCIDENT.”**

In determining that the going and coming rule applies as a bar to compensation, the Commissioner relies upon *VanLeeuwen v. Industrial Comm'n*, 901 P.2d 281 (Utah App. 1995). The Commissioner specifically concluded that “in order to be exempt from the going and coming rule, Mr. Jex must show that his truck served as an instrumentality to benefit Precision Excavating’s business **at the time of the accident.**” (R. at 71.)

*(emphasis added.)* The law places no such burden on the injured worker. The

appropriate test in determining whether an employee's vehicle is an instrumentality of the employer has nothing to do with whether the vehicle is benefitting the employer "at the time of the accident." Rather, the focus is whether the employer requires the employee to use the vehicle as an instrumentality of the business. *See Bailey v. Industrial Comm'n*, 398 P.2d 545 (Utah 1965); *State v. Industrial Comm'n*, 685 P.2d 1051, 1053 (Utah 1984).

In Jex's case, the Commissioner's analysis as to whether Jex's vehicle was an instrumentality of the business ended as she simplistically indicated that it was not an instrumentality that was benefitting Precision at the time of the accident. As the Commissioner has set forth a legal standard which is not recognized by Utah law, her ultimate conclusions are not correct, and Jex submits her decision must be reversed as a matter of law.

**CROSS DOES NOT REQUIRE AN INJURED WORKER DEMONSTRATE THE  
USE OF HIS VEHICLE CONFER A "SIGNIFICANT BENEFIT" UPON THE  
EMPLOYER.**

The Commissioner's conclusion that *Cross v. Bd. of Review of Industrial Comm'n*, 824 P.2d 1202 (Utah 1992), requires Jex to demonstrate he conferred a "significant benefit" on Precision erroneously states Utah law. When the Utah Supreme Court addressed this exact issue, it stated that a determination of scope-of-employment in "going and coming" cases comes down to "one unit of measure - - benefit." *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, Para. 20. To be precise, the inquiry should be focused on

whether the employer derived a benefit from the employee's actions. Indeed, the court stated that whatever benefits an employee derives from those same actions are "largely irrelevant" and "cannot be used to offset or diminish the significance of the benefits derived by the [employer] in making this calculation." *Id.* at Para. 25.

If the employee is "engaged in an activity that is **at least incidental** to employment," then that employee is acting within the scope of employment under Utah's workers' compensation laws. *Salt Lake City Corp. v. Labor Comm'n.* at Para. 23. (*emphasis added.*) "We have long indicated that the benefit to an employer **need not be predominant** over those of an employee before the employee becomes eligible for workers' compensation benefits." *Id.* at Para. 23. (*emphasis added.*)

While employer control has been applied as a factor in addressing scope-of-employment issues, it is more "usefully thought of as a gauge by which to measure the allocation of benefits." *Id.* at fn. 2 (citing *VanLeeuwen v. Indus. Comm'n.*, 901 P.2d 281 (Utah Ct. App. 1995)). Indeed, the Utah courts have recognized that even an employee's unilateral actions could properly fall within the scope of employment when they were "motivated in-part by a purpose to benefit employment." *Ae Clevite v. Labor Comm'n.*, 2000 UT App. 35, Para. 10, 996 P.2d 1072 (cited with approval in *Salt Lake City Corp. v. Labor Comm'n.* at fn. 2).

Contrary to the conclusion of the Commissioner, Utah law does not require Jex demonstrate that he is conferring a “significant benefit” on Precision to avoid being barred by the “going and coming rule.” Indeed, if he has demonstrated that he has conferred a benefit “that is at least incidental” on Precision while going or coming to the work place, he has established his burden and is entitled to benefits. The Labor Commissioner’s determination that he must confer a “significant benefit” is erroneous and contrary to Utah law. As such, the Commissioner’s ultimate conclusions are not correct and Jex submits her decision must be reversed as a matter of law.

### **THE LABOR COMMISSIONER MISAPPLIED THE LAW**

In the event this Court concludes the Commissioner interpreted *Cross* and *VanLeeuwen* correctly, Jex submits that she misapplied the law to the facts of this case. In concluding that Jex’s claim was barred by the going and coming rule, the Commissioner made four ultimate conclusions which are misapplied. She concluded:

1. Jex did not show his truck served as an instrumentality to benefit Precision Excavating’s business at the time of the accident. (R. at 71.)
2. Mr. Jex has not shown that his truck was being used to benefit Precision Excavation when the accident occurred. (R. at 71.)
3. Mr. Jex’s accident occurred during a “ride sharing arrangement. . . out of convenience” to Jex. (R. at 71.)
4. Jex was “not under Precision Excavating’s control” at the time of the accident. (R. at 71.)

The facts upon which the Commissioner reached her ultimate conclusions are largely undisputed<sup>2</sup>.

1. “Mr. Jex and Trent Holden, Mr. Jex’s supervisor on the date of the accident, offered sworn testimony. Mr. Jex testified that he was hired by Precision Excavation in St. George, Utah and worked on jobs in that area.” (R. at 32.)
2. “Mr. Holden testified there was a downturn in work available in the St. George area and the company was going to lay off employees.” (R. at 32.)
3. “The company was able to find a construction project in Cedar City and offered the choice to existing employees to work on the Cedar City project in lieu of lay-off.” (R. at 32.)
4. “Cedar City is approximately a 50 to 60 minute drive from St. George.” (R. at 32.)
5. “Mr. Holden indicated that he had told employees that there would be one shuttle available using the one truck assigned to Mr. Holden and that the seats were on first come basis.” (R. at 32.)
6. Jex testified “that when he drove his own truck he waited at a designated meeting site where Trent would pick up employees choosing to ride in the company truck.” (R. at 33.)
7. “Trent had asked the Petitioner to wait a bit longer for a chronically late employee named, Nick.” (R. at 33.)
8. “Trent asked the Petitioner to wait an additional ten minutes to see if Nick arrived and then Nick would ride to the job with Petitioner.” (R. at 33.)
9. “Nick was often tardy and this became a pattern.” (R. at 33.)

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<sup>2</sup> In his Brief, Jex takes issue with hearsay statements made to Holden from Irvin, which facts were used by the ALJ and adopted by the Commissioner. However, the hearsay statements of Irvin are largely irrelevant to the Commissioner’s analysis, and for the purposes of this analysis Jex assumes the ALJ correctly relied on Irvin’s out of Court Statements.

10. "Petitioner did not know Nick except through work." (R. at 33.)
11. "Nick did not share gas expenses with Petitioner." (R. at 33.)
12. "The company never reimbursed the Petitioner for his time or travel." (R. at 33.)
13. While Jex was waiting for Nick, "Trent would leave with the employees that were ready on time." (R. at 33.)
14. Jex testified that there was no "ride share agreement" with Nick. (R. 74 at 25.)
15. Jex testified that the only reason he picked up Nick is because that is something his supervisor, Trent Holden, had asked him to do in order to relieve room inside the single cab truck that Holden was driving and because Holden did not want to have to wait for Nick to arrive delaying Holden's arrival at the Cedar City jobsite. (R. 74 at 25.)
16. Jex testified that if he did not take Nick to the jobsite as requested by Holden that he would be replaced for "undermining their intelligence." (R. 74 at 53.)
17. Holden testified that it was beneficial for Precision to have Nick taken to the jobsite from St. George. (R. 74 at 133-134.)
18. "The Petitioner brought an exhibit of tools that he carried in his truck to and from the jobsite." (R. at 33.)
19. "There was a tape measure that he indicated he used 'pretty much every day.'" (R. at 33.)
20. "There was a large pipe and crescent wrench which he used to work on some of the equipment at the jobsite." (R. at 33.)



21. "There was a sledgehammer." (R. at 33.)
22. There was a "homemade level device that he had modified for use on the Cedar City job." (R. at 33.)
23. "Mr. Jex also testified at one time his truck was used to move a company compressor from one area to another at the job site (his truck had a hitch on it)." (R. at 34.)
24. "He also had some machinery fluids that belonged to his employer and were used in some of the equipment that he used at the jobsite." (R. at 33.)
25. "Petitioner said that the level had been made at the request of his supervisor, Trent Holden." (R. at 33.)
26. "The tools were taken to and from the jobsite in the Petitioner's truck and were in the truck on the date of the accident." (R. at 33.)
27. Holden testified that Jex would have preferred using Jex's own tools on the jobsite, because Holden's pickup truck was "at the higher jobsite and the company vehicle would be at the lower jobsite, so it would have been easier for him to use them." (R. 74 at 101.)
28. While initially testifying that the distance between the upper and the lower jobsite was about 3,000 yards, Holden later testified that it would be approximately 400 yards for Jex to walk to get tools, so whenever he needed a tool he would be required to walk 800 yards round trip. (R. 74 at 125-127.)
29. Jex testified that he used his own tools at the jobsite because Mr. Holden's truck was "rarely in [his] area for [him] to use" and that it was "almost a quarter mile to where his truck was sometimes." (R. 74 at 73-74.)
30. "Mr. Jex gave detailed testimony about two errands he had run for Precision Excavation while on the Cedar City job." (R. at 34.)

31. "He had gone to a NAPA auto parts store and also to Wheeler Machinery to get needed parts for the job equipment." (R. at 34.)
32. "He had used his own truck to run those errands." (R. at 34.)
33. On the July 22, 2008, date of the accident, "at the end of the workday Trent Holden was giving Petitioner instructions for the following day and told him he could go ahead and leave." (R. at 33.)
34. "Trent Holden indicated that he would be working overtime." (R. at 33.)
35. "Petitioner drove down a hill away from the immediate work area and noticed that a Mustang vehicle belonged to a co-worker was not on site." (R. at 33.)
36. "The Petitioner assumed that Mr. Irvin rode in the company truck. The Petitioner assumed that the co-work, James Irvin, might need a ride home since Trent was working late." (R. at 33.)
37. "Petitioner went back to his supervisor, Trent, and asked if he needed to give James a ride home." (R. at 33.)
38. "Trent said, 'Yea go ask James if he wants to go now, and give him a ride.'" (R. at 33.)
39. Jex gave Irvin a ride and testified that he was not headed straight home at the time of the accident, but was rather taking Irvin to where his vehicle was at and after dropping off Irvin he would head home. (R. 74 at 60.)

The Commissioner did not apply the law in an "employee-friendly" manner to the "multifarious array of facts" presented by this scope-of-employment case. Her failure to

apply the law in such a manner to the complex fact pattern was inappropriate and her decision is therefore flawed.

**THE COMMISSIONER MISAPPLIED THE LAW TO THE FACTS IN  
CONCLUDING JEX'S TRUCK WAS NOT AN INSTRUMENTALITY  
OF PRECISION'S BUSINESS.**

The Labor Commissioner concludes that Jex failed to show that his truck served as an instrumentality benefitting Precision Excavation at the time of the accident. As set forth above, Jex does not believe the law requires a showing that his truck was benefitting Precision "at the time of the accident". However, conceding the point, the facts clearly demonstrate Jex was using his truck as an instrumentality of the business, which benefitted Precision at the time of the accident.

Jex was told by his supervisor, Holden, where to meet every morning before heading to Cedar in his truck. He was told to wait for Nick for 10 minutes at which point Holden would leave for the jobsite with other employees. If Nick didn't show up, Jex was then free to go ahead and drive up to the jobsite. Jex didn't know Nick, did not share gas expenses with Nick and testified that there was no "ride share agreement" with Nick. Jex testified the only reason he picked up Nick was because that is something Holden asked him to do in order to relieve room inside Holden's single cab truck and so Holden wouldn't be delayed from going to the Cedar City jobsite. Additionally, Jex testified that he believed he would be replaced for undermining the intelligence of his employer if he didn't transport Nick to the jobsite.

Jex also took his own tools to the jobsite everyday to use at the Cedar City jobsite. He took a level, tape measure, crescent wrenches, pipe wrenches, sledgehammer, and also carried on his truck fluids that he would use on the jobsite. He used his truck to run errands on two separate occasions during the three to four week period he was going to the Cedar City jobsite. He used his truck to allow his Precision to move a compressor from one area of the jobsite to another. Then, on the date of the accident, as he was preparing to leave the Cedar City jobsite, Jex asked his supervisor, Holden, if he should take Irvin home with him. Trent said, "Yeah go ask James if he wants to go now, and give him a ride."<sup>3</sup>

While Holden testified that Jex really didn't need to use his tools on the jobsite, it is evident that failure to do so would have made Jex very inefficient. Jex testified that he would have to get tools at a distance of about one-quarter of a mile from the company truck. This is confirmed by Holden who indicates Jex would have to walk about 400 yards or 800 yards, round trip. Based on the testimony of Jex and Holden, Jex would have to walk about ½ mile to get fluid or grease for his track hoe or equipment to change hammers and buckets on the track hoe. These activities certainly benefitted Precision.

The evidence is unrefuted that Jex was ferrying employees back and forth to the Cedar jobsite at his employer's request and that he was using his tools and truck to benefit Precision. At the time of the accident, Jex's tools and a co-employee were in his vehicle.

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3 The ALJ made additional factual determinations as to what Irvin allegedly said to Holden after the accident. Those findings are irrelevant as the ALJ found and the Commissioner adopted the finding that Trent told Jex to "go ask James if he wants to go and give him a ride."

Applying the law to these facts, Jex's truck was an instrumentality of Precision's business as he was benefiting Precision at the time of the accident.

**THE COMMISSIONER MISAPPLIED THE LAW TO THE FACTS WHEN SHE CONCLUDED JEX HAS NOT SHOW THAT HIS TRUCK WAS BEING USED TO BENEFIT PRECISION EXCAVATION WHEN THE ACCIDENT OCCURRED.**

At the time of the accident, Jex was transporting a co-employee by the name of James to the designated drop off and pick up area. He was specifically told to do so by his supervisor, as Holden told Jex to "give him a ride." Holden testified that transporting employees was a benefit to Precision. Jex testified that it was beneficial to Precision, because Holden did not have room in his truck to carry the other employees.

Additionally, as set forth above, at the time of the accident Jex's truck was loaded with tools that were used at the jobsite every day. The use of these tools and bringing them to the jobsite each and every day certainly benefitted Precision in that Jex was much more productive in using his own tools to repair the track hoe and change track hoe hammers instead of trekking one-half mile every time he needed something out of the company truck. Applying the law to these facts, Jex ferrying of employees to and from the jobsite and use of his truck for errands and tools benefitted Precision at the time of the accident.

**THE COMMISSIONER MISAPPLIED THE LAW TO THE FACTS IN CONCLUDING THERE WAS A RIDE SHARING AGREEMENT THAT WAS OUT OF CONVENIENCE TO JEX.**

The Commissioner specifically adopted the findings of the ALJ. Those findings

demonstrate that Jex did not know who Nick was, did not like Nick, was not paid any gas money by Nick and only took Nick to Cedar City because his supervisor asked him to do so. Jex testified there was no “ride sharing” agreement. Certainly, it was not convenient to Jex to take Nick to the jobsite, as he would have to go to the pre-designated meeting spot and wait for ten minutes before he was permitted to go onto the Cedar City jobsite. Those facts do not establish a “ride sharing agreement” that was convenient for Jex.

Additionally, there was no “ride sharing” agreement between Jex and Irvin. He simply asked his employer if he should take Irvin home and was told to “give him a ride”. The Commissioner’s conclusion that this was a “ride sharing” arrangement out of convenience misapplies the law to the facts.

**THE COMMISSIONER MISAPPLIED THE LAW TO THE FACTS IN  
CONCLUDING JEX WAS NOT UNDER PRECISION EXCAVATION’S  
CONTROL.**

The Commissioner concluded that Jex was not under the control of Precision as part of her analysis in denying Jex benefits. However, this conclusion fails to recognize the realities of the situation. Every day Jex went to the predetermined Precision Excavation pick up point to wait for Nick. Then, on the date of the accident, he was taking James back to the predetermined pick up point as instructed to do by his supervisor, Holden. Certainly, the requirement that he go to the pick up spot and take a person to the jobsite and to take a person back to the pick up spot evidences control on the part of Precision Excavation. The Commissioner’s determination to the contrary simply misapplies the law to the facts.

**THE COMMISSIONER DID NOT APPLY THE FACTS TO THE LAW  
IN AN “EMPLOYEE-FRIENDLY” ANALYSIS.**

The Utah Courts have consistently required the courts to have a sympathetic application of the going and coming rule to alleviate hardship upon injured workers and their families. See *Baker v. Industrial Comm’n*, 405 P.2d 613, 614 (Utah 1965); *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4. In this situation, the Commissioner has not applied this rule of law to these facts. Jex submits that an “employee-friendly” application of the going and coming rule would support the conclusion that Jex would be exempt from such a harsh determination under the traveling employee doctrine, as he was simply going from the employer mandated pick up and drop off spot at the time of the accident. Further, an “employee-friendly” analysis would require exemption from the going and coming rule, as Jex was on a “special errand” taking a co-employee back to the designated drop off and pick up spot at the instruction of Holden. Finally, an “employee-friendly” analysis would lead to a determination that Jex was using his vehicle as an instrumentality of Precision to benefit Precision.

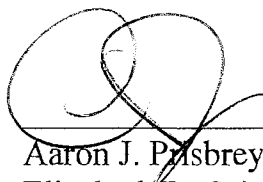
Indeed, Jex is an employee that every employer should like to have. He ferried employees to the jobsite for whom he had no personal relationship without compensation, because he was asked to do so. He waited for a habitually late employee when asked so his supervisor could get to the jobsite early in a less crowded truck. He used his truck on the jobsite to move equipment. When he was asked to go on errands, he took his truck without being paid for fuel and without complaint. He used his tools every day on the

jobsite to avoid having to walk one-half mile round trip in order to get the job done. Then, on the date of the accident, he asked his employer if he should take Irvin home and was doing just that when the accident occurred. An "employee-friendly" analysis suggests that based on these facts, the application of the going and coming rule to bar Jex's claims would be anything but employee-friendly.

### CONCLUSION

For the reasons set forth above, Jex respectfully requests that the determination of the Labor Commissioner that Jex was not injured by accident arising out of and in the course of his employment be reversed and that benefits be awarded consistent with Utah law.

DATED this 22 day of April, 2011.

A handwritten signature in black ink, appearing to read "Aaron J. Prsbrey", is written over a horizontal line.

Aaron J. Prsbrey  
Elizabeth B. Grimshaw  
Attorneys for Plaintiff and Appellant



**CERTIFICATE OF SERVICE**

I hereby certify that on the 22 day of April, 2011, a copy of the foregoing

REPLY BRIEF was mailed, postage prepaid, as follows:

Utah Court of Appeals	(1 original)
450 South State Street	(7 copies)
P.O. Box 140230	
Salt Lake City, Utah 84111-0230	

Labor Commission of Utah	(2 copies)
160 East 300 South, 3rd floor	
P.O. Box 146615	
Salt Lake City, UT 84114-6615	

Bret Gardner	(2 copies)
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257 East 200 South, Suite 800	
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