

2010

Layne Jex v. Precision Excavating and/or Owners Insurance Co. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bret A. Gardner; Balckburn and Stoll; Attorney for Appellee.

Alan L. Hennebold; Deputy Commissioner; Aaron Prisbrey; Attorney for Petitioner/Appellant.

Recommended Citation

Brief of Appellant, *Layne Jex v. Precision Excavating and/or Owners Insurance Co.*, No. 20100674 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2474

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 Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LAYNE JEX,

Appellant/Petitioner,

v.

PRECISION EXCAVATING and/or
OWNERS INSURANCE CO.,

Appellee/Respondents

Case No. 20100674

AMENDED BRIEF OF APPELLANT
(AMENDED HEARING TRANSCRIPT CITATIONS)

Bret Gardner
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Precision Excavating and/or Owners Insurance Company

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, UT 84114
Attorney for Labor Commission of Utah

Aaron J. Prisbrey
Aaron J. Prisbrey P.C.
1090 East Tabernacle
St. George, UT 84770
Attorney for Petitioner/Appellant

FILED
UTAH APPELLATE COURTS
APR 29 2011

IN THE UTAH COURT OF APPEALS

LAYNE JEX,

Appellant/Petitioner,

v.

PRECISION EXCAVATING and/or
OWNERS INSURANCE CO.,

Appellee/Respondents

Case No. 20100674

AMENDED BRIEF OF APPELLANT
(AMENDED HEARING TRANSCRIPT CITATIONS)

Bret Gardner
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111
Attorney for Appellee/Respondent
Precision Excavating and/or Owners Insurance Company

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, UT 84114
Attorney for Labor Commission of Utah

Aaron J. Prisbrey
Aaron J. Prisbrey P.C.
1090 East Tabernacle
St. George, UT 84770
Attorney for Petitioner/Appellant

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION.....	1
ISSUE PRESENTED AND STANDARD OF REVIEW.....	2
DETERMINATIVE LAWS.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	6
SUMMARY OF ARGUMENTS.....	12
ARGUMENT.....	16
CONCLUSION.....	30
ADDENDUM.....	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Asplundh Tree Expert Co. v. Pac. Emplrs. Ins. Co.</i> , 2005 Va. LEXIS 41, P. 19 – 20, 611 S.E. 2d 531, 537 (Va. 2005).....	26
<i>Bailey v. Utah State Indus. Comm’n</i> , 398 P.2d 545 (Utah 1965)	15, 17, 19, 28
<i>Cross v. Board of Review of Indus. Comm’n</i> , 824 P.2d 1202, 1204 (Ut. App. 1992)...	16, 19
<i>Cross v. Indus. Comm’n</i> 824 P.2d 1202 (Ut. Ct. App. 1992)	2, 17, 26, 28
<i>Drake v. Indus. Comm’n</i> , 939 P.2d 177, 182 (Utah 1997).....	18
<i>J.D. Dutton, Inc. v. Industrial Comm’n</i> , 584 P.2d 1190, 1192 (Ariz. App. 1978).....	26
<i>Moser v. Industrial Comm’n</i> , 440 P.2d 23 (Utah 1968)	6, 13, 16, 17, 18, 19, 20, 21, 22
<i>Nucor Corp. v. State Tax Comm’n</i> 832 P.2d 1294, 1296 (Utah 1992)	2
<i>Ronald Gibson v. J.E. Larsen Construction/Workers Compensation Fund</i> , Labor Commission Case Nos. 01-167 & 03-123.	28
<i>State v. Indus. Comm’n</i> , 685 P.2d 1051 (Utah 1984)	14, 25
<i>VanLeeuwen v. Industrial Comm’n</i> , 901 P.2d 281, 284 (Utah App. 1995)	17, 20
<u>Constitution, Statutes and Rules</u>	
UTAH CONSTITUTION, Article 1, Section 7.....	2, 24
UTAH CONSTITUTION, Article 2, Section 11.....	3, 24
UTAH CODE ANN. § 34A-2-401.....	3, 16
UTAH CODE ANN. § 63G-4-403(1)	1
Larson’s Workers’ Compensation Law, §14.02 (2010).....	14, 26

AARON J. PRISBREY (USB No. 6968)
Attorney for Petitioner and Appellant
1090 East Tabernacle
St. George, Utah 84770
Telephone 435/673-1661

IN THE COURT OF APPEALS
STATE OF UTAH

LAYNE JEX,

Appellant/Petitioner,

v.

PRECISION EXCAVATING
and/or OWNERS INSURANCE
CO.,

Appellee/Respondents

AMENDED BRIEF OF APPELLANT
(AMENDED HEARING
TRANSCRIPT CITATIONS)

Case No. 20100674

JURISDICTION

This appellate review proceeding arises from the Utah Labor Commission's denial of workers' compensation benefits in Layne Jex's case. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Ann. § 63G-4-403(1).

ISSUE PRESENTED AND STANDARD OF REVIEW

Issue No. 1: Whether the Labor Commissioner erred in determining Jex's vehicle was not an "instrumentality-of-the-business" where Jex shuttled employees to and from a remote worksite under directions of Precision Excavation; regularly transported tools in his truck to the worksite; used them at the worksite; and was required to use his truck to run errands for Precision.

Standard of Review: Questions as to whether the Labor Commissioner properly applied the facts under the "instrumentality-of-the-business" doctrine in determining whether an employee was injured in the "course and scope of employment" are subject to a correction of error standard. *Nucor Corp. v. State Tax Comm'n* 832 P.2d 1294, 1296 (Utah 1992); *Cross v. Indus. Comm'n* 824 P.2d 1202 (Ut. Ct. App. 1992).

Preservation of the Issue at the Administrative Agency Proceeding: This issue was preserved in Petitioner's Motion for Review. (R. at 39 – 50.)

DETERMINATIVE LAWS

UTAH CONST. Art. I, §7

"No person shall be deprived of life, liberty or property, without due process of law."

UTAH CONST. Art. II, §11

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”

UTAH CODE ANN. § 34A-2-401:

“Compensation for industrial accidents to be paid.

(1) an employee described in Section 34A-2-104 who is injured. . . by accident arising out of and in the course of the employee’s employment, wherever such injury occurred, . . . shall be paid:

- (a) compensation for loss sustained on account of the injury or death;
- (b) the amount provided in this chapter for [medical expenses].”

STATEMENT OF THE CASE

Layne Jex was hired by Precision Excavation in St. George as a heavy equipment operator to work in the St. George area, specifically operating a track hoe. Sometime after employment began with Precision, Precision took a job some 60 minutes away on the East side of Cedar City up Cedar Canyon. Precision provided transportation for some of their employees, but as they did not have enough vehicles, some of the employees were required to provide their own transportation to the Cedar Canyon job site. Jex, on occasion, was shuttled by Precision. If there was not enough room in the Precision vehicle he would take his own truck.

Precision directed Jex to take one employee to the job site on a routine basis, a fellow by the name of Nick. Jex did not like Nick personally, had no car-pooling arrangement with Nick, received no funds from Nick or his employer for transporting Nick, but solely transported Nick at the direction of his employer. Specifically, Jex was instructed to pick up Nick at a designated pick up spot in St. George. If Nick did not show up within 10 minutes of the designated time, Jex was told he was then free to proceed to Cedar for the morning's work.

In addition to using his truck to transport employees to and from the Cedar Canyon job site, Jex's truck was used to run errands to and from the job site. Furthermore, Jex used his own tools from his truck on a regular basis. He had an excavation level he would use almost daily, hammers, pipe wrenches, crescent wrenches, shovels, chains, a hitch, tape measure and other hand tools which were used on the job site. He also kept hydraulic fluid and grease in his vehicle for routine maintenance for the heavy equipment. Precision's only witness, Trent Holden, Jex's supervisor, testified that Jex would be required to walk a distance somewhere between 400 and 3,000 yards one way if he wanted to use Precision's tools or oils rather than his own. This is the manner in which Precision customarily required the use of Jex's truck.

On the night of the accident, Jex was preparing to leave the Cedar City worksite when he noticed that another employee did not have his car on the worksite. Jex asked Holden if he should drive James Irvin back to St. George. Holden told Jex to ask Irvin if he needed a ride. Thereafter, Jex was transporting Irvin to drop him off at the meeting

spot designated by Precision Excavating. Before they arrived at that meeting point, Jex suffered injuries in a one car rollover.

Because the workers' compensation carrier (hereinafter, "Precision") denied compensability for the accident based on the "going and coming" rule, Jex filed an Application for Hearing on August 19, 2008. An evidentiary hearing was held before Administrative Law Judge Cheryl Luke (the "ALJ") on February 26, 2009 in Parowan, Utah. (R. at 31.) The parties put on evidence, consisting of the Medical Records Exhibit and the testimony of Layne Jex and Trent Holden, who testified on behalf of Precision. (R. at 31 – 32.) On May 28, 2009, the ALJ issued "Findings of Fact, Conclusions of Law and Order" where she concluded that Jex was not in the course and scope of his employment at the time of the accident based on the "going and coming" rule since Jex was "not on the clock" when the accident happened and denied Jex's application for benefits.

Jex timely filed a Motion for Review challenging the ALJ's findings of fact to the extent they relied on hearsay in violation of the residuum rule. Jex further challenged the ALJ's conclusions as she failed to consider the nature of Precision's use of Jex's truck as an instrumentality of the business. On or about July 29, 2010, the Labor Commissioner filed her "Order Affirming ALJ's Decision" where she adopted the findings of the ALJ and denied benefits based on the "going and coming" rule without any analysis whatsoever as to whether Jex's truck was and instrumentality of the business at the time of the accident.

Jex timely filed a Notice of Appeal of the Commissioner's decision and this appeal follows. For the reasons set forth below, Jex submits that the Commissioner's decision is

inadequate as a matter of law where she failed to consider the actual relationship between Precision and Jex and Precision's use of Jex's truck in violation of the required analysis set forth in *Moser v. Industrial Commission*, 440 P.2d 23 (Utah 1968). As such, Jex respectfully requests that the Labor Commissioner's decision be reversed and remanded for consideration of the applicable facts and a reasoned decision as required by Utah law.

STATEMENT OF FACTS

1. Layne William Jex (hereinafter "Jex") worked as a heavy equipment operator and laborer for Respondent Precision Excavation on the date of the industrial accident. Jex earned \$880.00 per week and worked 50 hours per week. (R. at 32.)¹

2. Jex was hired by Precision Excavation in St. George, Utah and worked on jobs in that area. During July, 2008, Precision Excavation had a construction project in Cedar City, Utah. (R. at 32.)

3. During Jex's employment with Precision Excavating, he carried tools in his truck to and from job sites which he used to carry out his employment duties. Jex had a tape measure, a large pipe and crescent wrench that he used to work on some of the equipment at the job site, a sledge hammer, a homemade "level" device which he had specifically modified for use on the Cedar City job at his supervisor Trent Holden's

¹ In this case, the Labor Commissioner adopted the ALJ's Findings of Fact. As such, the citations in the Statement of Fact are to the ALJ's Findings of Fact.

request, and some machinery fluids that belonged to his employer and were used in some of the equipment that he used at the job site. Jex carried these tools to and from the job site in Cedar City and had them in his truck on the date of the accident. (R. at 33.)

4. Trent Holden, Jex's supervisor, was the only witness who testified on behalf of Respondents, was paid \$250.00 for his in Court appearance². (R. at 32, R. 74 at 108.)

5. Holden testified that Jex "could have" used tools off the company truck in order to perform his job. (R. at 34.)

6. Although the ALJ neglected to mention this, Holden initially testified that in order for Jex to use the tools off the company truck, Jex would have to walk approximately 3,000 yards. Holden later testified that this distance would be approximately 400 yards. In other words, Jex would have to walk somewhere between one-quarter and two miles each way every time he needed to get a tool off the company truck from where he was working. (R. 74 at 94, 125.)

7. Jex also had some machinery fluids, such as grease and hydraulic fluid, that belonged to Precision for his use in maintaining some of Precision's equipment where Jex was working at the Cedar City worksite. (R. at 33.)

² The Labor Commissioner fails to make note of this fact. At the time of the hearing the ALJ indicated that she viewed that as simply a per diem and it was of no import to her. However, the fact that a lay witness was being compensated to appear in court above the statutorily mandated witness fees raises serious questions about the reliability of Holden's testimony and Jex respectfully submits that it was incumbent on the Labor Commissioner to take that into account in considering the testimony.

8. While working on the Cedar Canyon job, Precision Excavating relied on the use of Jex's truck to run errands, such as going to NAPA Auto Parts store and Wheeler machinery in Hurricane to get needed parts for Precision Excavating equipment. Holden testified that he simply did not discuss whether Jex should use the company truck or his own for those errands. Holden further testified that he was aware the Jex was taking his own truck to run these errands. (R. at 34, R. 74 at 104 - 105.)

9. The Cedar City worksite had two Precision trucks, one was a fuel truck which remained on site and the other was the company truck which Holden drove back and forth between St. George and Cedar City. (R. 74 at 60 - 61.)

10. Precision Excavating further relied on the use of Jex's truck when it was used to move a company compressor from one area to another at the job site because Jex's truck had a hitch on it. (R. at 34.)

11. Trent Holden undertook the responsibility of providing transportation for Precision Excavating employees to the Cedar City jobsite. Holden picked employees up at a designated meeting site and offered transportation on a first-come-first-served basis, but did not pay them for their travel time to and from the job site. (R. at 32-33.)

12. Jex met at the designated meeting place for travel to the Cedar City job and sometimes rode up with Holden in the company truck but drove his own truck the majority of the time. (R. at 32.)

13. The ALJ's Findings of Fact state, "On occasion, Trent asked the petitioner to wait a bit longer for a chronically late employee named, Nick. 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.)

14. However, the record provides additional information:

- a. Holden testified that he told Jex to wait for Nick at Precision’s designated meeting spot until five minutes after six before he could go ahead and leave for the Cedar City worksite. (R. 74 at 124.)
- b. Jex was transporting Nick from the meeting point to the Cedar City worksite approximately three times per week. (R. 74 at 23 - 24.)

15. Jex did not know Nick except through work and Nick did not share gas expenses. (R. at 33.)

16. In fact, Jex did not like Nick. He transported him because Holden had told him to. (R. 74 at 24 - 25.)

17. Although Holden testified that he indicated that “the employees could try and coordinate with each other to get to the job site,” he undertook to arrange transportation for his employees by furnishing the company truck as a shuttle and arranging for Jex to transport additional Precision Excavation employees. (R. at 32-33.)

18. Jex testified that he thought it was a job requirement for him to help with transporting employees between the meeting spot and the Cedar City worksite, because Holden told him to transport Nick on a regular, on-going basis and he was required to wait for at least ten minutes before he could leave Nick, if Nick did not show up. (R. 74 at 52.)

19. At the end of the workday on July 22, 2008, Jex was preparing to drive back to St. George from the Cedar City job. He noticed that another Precision Excavation employee, James Irvin, was still on the worksite. (R. at 33.)

20. Jex did not know Irvin and had never transported him between St. George and Cedar City before. (R. 74 at 28 - 29.)

21. Jex asked Holden whether he should drive Irvin back to St. George. Holden instructed Jex to see if Irvin needed a ride, which Jex did at which point Irvin rode back to St. George with Jex. (R. at 33.)

22. Holden testified that Jex could have opted not to drive Irvin back to St. George on the day of the accident and that Irvin did not know he had a choice to stay later at the Cedar City job or go back with Jex. However, Irvin was not present at the hearing and did not offer testimony concerning the circumstances under which he accepted a ride back to St. George with Jex. (R. at 33, 31.)³

23. In offering the hearsay statement of Irvin, Holden first testified that Irvin came up to Holden the day after the accident to complain about having not been able to stay on the worksite longer the night before. Although Jex and Irvin had been involved in a serious truck accident that put Jex in the hospital, Holden testified that Irvin's conversation the day following the accident was not about the accident, or to ask how Jex was doing, but

³ As discussed in Section B of the Argument, it was improper for the ALJ to rely on the hearsay statements that "Mr. Irvin did not know he had a choice to stay later." As that was not supported by a residuum of competent evidence.

only to complain about the circumstances of leaving the worksite with Jex. (R. 74 at 116 - 118.)

24. While Jex was returning to St. George on July 22, 2008, his truck rolled, causing injury to Jex, including fractures at two places in his spine. (R. at 33.)

25. At the time of the accident, Jex was en route to drop Irvin off at Irvin's vehicle. (R. 74 at 60.)

26. On or about May 28, 2009, the ALJ issued Findings of Fact, Conclusions of Law, and Order denying workers' compensation benefits to Jex based on the "going and coming" rule, concluding the use of Jex's truck and tools did not benefit Precision. (R. at 31-38.)

27. On or about June 26, 2009, Jex filed a Motion for Review where he challenged the ALJ's factual findings to the extent that she relied on hearsay statements of Irvin that were not supported by a residuum of competent evidence. Jex further challenged the ALJ's conclusion that he was not acting in the course and scope of his employment at the time of the accident where the ALJ failed to analyze the actual manner in which Precision used Jex's truck as opposed to Holden's after-the-fact testimony that Jex "could have" refused to use his truck for transporting employees or bringing his own tools. Jex argued that the appropriate legal standard required the ALJ to consider the actual state of the facts rather than speculate about what Jex's employment relationship "could have" been. Jex argued that based on the ALJ's factual findings, the actual

dealings between Precision and Jex established a customary reliance on Jex's truck. (R. at 39-50.)

28. On July 29, 2010, Utah Labor Commissioner Sherrie Hayashi issued an Order Affirming ALJ's Decision adopting the ALJ's Findings of Fact, including those which were solely based on hearsay, and denying workers' compensation benefits based solely on the fact that Jex was driving on his way home at the time of the accident and that he was not paid for that drive time. In so doing, the Labor Commissioner, like the ALJ, ignored the realities of the employment relationship between Jex and Precision Excavating based on the largely undisputed evidence presented at the hearing. (R. at 70 – 72.)

29. It is from the Labor Commissioner's Order Affirming ALJ's Decision to deny workers' compensation benefits, which Petitioner appeals.

SUMMARY OF ARGUMENTS

The ALJ's factual findings, which the Commissioner adopted, establish a course of dealing between Precision and Jex where Precision relied on Jex to use his truck to transport Precision employees between a designated meeting spot and the worksite, to use his own tools at the worksite, which he hauled back and forth from the worksite in his truck, to run errands on company time, and to store company materials for Jex's use on the worksite. Notwithstanding these findings, the Commissioner denied workers'

compensation benefits for Jex's accident based solely on the facts that Jex was driving on his way home from the work site and that he was not paid for that drive time.

Under *Moser v. Industrial Comm'n*, 440 P.2d 23 (Utah 1968), the Labor Commission is required to examine the actual dealings between the employer and employee concerning the use of an employee's vehicle in considering whether an accident happened within the course of employment. Indeed, the *Moser* court reversed a Labor Commission ruling that applied the "going and coming" rule to deny benefits without considering the manner in which the employer used Moser's truck. *Id.*

The fact of the matter is that Precision required the use of Jex's truck when it undertook to furnish transportation for its employees from a meeting point designated by Precision to the Cedar City worksite. Precision further required the use of Jex's truck for the purpose of running errands, having Jex bring his own personal tools to the worksite, and storing on Jex's truck company materials to maintain company equipment while Jex was on the job. Under the legal standard established by *Moser*, it was error for the Commissioner to reach a decision without engaging in this analysis.

In addition, the purely hearsay testimony which Precision attempted to introduce that James Irvin did not want to leave the worksite when Jex was leaving on the night of the accident was not proper for the Commission to consider under the residuum rule. The ALJ's reliance on this testimony was prejudicial to Jex and violates due process and open courts under the Utah Constitution. Similarly, it was error for the ALJ to consider as evidence Holden's testimony as to what Jex "could have" done to not allow Precision to

benefit from the use of Jex's truck. As a matter of fact, Holden's own testimony established that despite what the company "could have done," there was an implicit course of dealing between Precision and Jex that relied upon the use of Jex's truck.

Under Utah law, injuries that occur on the way to or coming home from work are compensable when the transportation is furnished by the employer for the employer's benefit. *State v. Indus. Comm'n*, 685 P.2d 1051 (Utah 1984). Moreover, as a general matter of law, the "going and coming" rule will apply between an employee's home and a "check-in" point established by an employer, but once travel commences after that meeting point. See, *Larson's Workers' Compensation Law Section 14.02*. In this case, Precision Excavating undertook to furnish the transportation of its employees from a designated meeting point to the Cedar City worksite. Precision even made accommodation for a chronically late employee by directing Jex to wait at that meeting spot for this employee and instructing Jex that he could leave after he had waited a certain amount of time.

Based on these facts, Precision was furnishing transportation to its worksite and was relying on the use of Jex's truck to do so. This reliance became customary as the undisputed evidence showed that Jex drove this late employee to the worksite approximately three times per week. Moreover, once on the worksite, Precision relied on Jex to bring his truck so that he could use his own tools closer to the worksite than the tools on the company truck, which were somewhere between one-quarter and two miles away from where Jex was working. Precision likewise had Jex run special errands on company time in Jex's own truck.

Under *Bailey v. Utah State Indus. Comm'n*, 398 P.2d 545 (Utah 1965), an employee's vehicle is an instrumentality of the business when that employee is required to bring his vehicle to work whether it be because his vehicle is transporting tools that the employee needs or for the use of the vehicle itself. Based on the law and the undisputed evidence established at the hearing, Jex's vehicle was an instrumentality of Precision's business both for transporting employees from a designated meeting point to the Cedar City worksite, but also for bringing tools and supplying company material to allow Jex to work more efficiently at his worksite rather than walk some distance back and forth to the company truck every time he needed a tool.

However, because the Commissioner declined to analyze the manner in which Precision relied on and benefited from the use of Jex's truck, its decision is inadequate as a matter of law. Moreover, the undisputed evidence based on the actions of the parties establishes that Jex's truck was indeed an instrumentality of Precision's business and the Commission should have found that Jex was injured in the course of his employment when he was transporting a co-employee from the worksite back to the designated meeting spot at the time of the accident.

ARGUMENT

THE COMMISSIONER'S CONCLUSION THAT JEX WAS "OFF THE CLOCK" WHEN THE ACCIDENT OCCURRED IS IRRELEVANT BECAUSE JEX'S TRUCK WAS AN "INSTRUMENTALITY" OF PRECISION'S BUSINESS.

The ALJ and the Commission found that Jex was injured in his own vehicle "off the clock" when he wrecked his truck. As such, benefits were denied. In reaching such a simplistic conclusion, the Commission ignored the facts and the law relative to whether Jex's truck was an instrumentality of Precision's business. The utter disregard of the relevant facts and law cannot stand.

This case deals with the Labor Commissioner's interpretation of what it means to be acting "within the course and scope of employment" under Utah's Workers Compensation Act. Utah Code Ann. § 34A-2-401. Because the Labor Commissioner has not been granted discretion to interpret this statutory provision, the Labor Commissioner's decision is reviewed for correction of error. *Cross v. Board of Review of Indus. Comm'n*, 824 P.2d 1202, 1204 (Ut. App. 1992). Moreover, "the workmen's compensation act should be liberally applied in favor of coverage of the employee in order to effectuate its purposes." *Moser v. Industrial Comm'n*, 440 P.2d 23, 25, fn. 7 (Utah 1968)(citations omitted.)

Jex was injured in an automobile accident while driving a co-worker back to a meeting spot designated by Precision at the direction of his supervisor. Precision also relied on Jex's truck to bring his own tools for use on the job and to keep company supplies

such as oil and hydraulic fluid at his disposal. The Labor Commission declined to analyze whether Jex's truck was an instrumentality of Precision's business and instead denied workers' compensation benefits based solely on the fact that Jex was driving home from work and that he was not "on the clock" for drive time when the accident happened. Jex respectfully submits that the Commissioner's analysis fails to properly interpret the law and apply the facts to the law in determining whether Jex was within the course of his employment.

A. The Contours of the "Going and Coming" Rule Require the Labor Commission to Examine Whether Jex's Truck was an Instrumentality of Precision's Business Based on Precision's Actual Conduct.

The "going and coming" rule stands for the general proposition that an employee's travel to and from work is not within the course and scope of employment. *VanLeeuwen v. Industrial Comm'n*, 901 P.2d 281, 284 (Utah App. 1995). The rationale behind the "going and coming" rule is that the employer does not derive a special benefit from an employee simply arriving to work and does not exercise control over how the employee gets to and from work. *Cross v. Industrial Comm'n*, 824 P.2d 1202, 1205 (Utah App. 1992). However, the "going and coming" rule may not be applied to shield an employer from liability when he uses an employee's car as an instrumentality of his business. *Moser v. Industrial Comm'n*, 440 P.2d 23 (Utah 1968); *Bailey v. Utah State Indus. Comm'n.*, 398 P.2d 545 (Utah 1965).

Scope-of-employment issues involve a fact-intensive inquiry⁴. *Drake v. Indus. Comm'n*, 939 P.2d 177, 182 (Utah 1997). The Utah Supreme Court held that the Commission commits reversible error when it relies on a mechanical application of the “going and coming” rule to deny benefits without determining what the nature of the employment was at the time of the accident. *Moser* at 24. In *Moser*, the Commission denied compensability for injuries Moser sustained when his truck caught fire while he was attempting to start it and drive to work. In that case, the Commission’s denial was based only on the facts that Moser had not begun driving to work and because Moser did not get paid until he reached his work. *Id.*

In reversing the Commissioner’s denial, the Supreme Court explained, “it is appropriate to focus attention upon the factual situation and plaintiff’s relationship thereto, **just as it existed at the time of his injury**,” rather than focus solely on whether the employee was on his way to work. *Id.* (emphasis added). The court noted that the employee owned the truck but leased it back to the employer, that he was “on call” to use the truck at his employer’s direction, that he followed the employer’s guidelines for maintenance, reported problems starting the car to his employer, and got injured while

⁴ For the sake of clarity, Jex is not challenging the weight or sufficiency of the evidence relied on by the Labor Commissioner as set forth in the ALJ’s Findings of Fact. The evidence established at trial is largely undisputed, other than the hearsay items discussed in section B below. The substance of this appeal is that the Labor Commissioner failed to engage in the legal analysis required under the applicable laws concerning instrumentalities of the business.

pouring gasoline into the carburetor according to his employer's instructions. *Moser* at 24-25.

The court undertook a specific factual analysis concerning *how* the employer used the employee's truck overall and did not simply deny benefits because the employee was on his way to work. This contemplates express agreements as well as those formed through customary use or course of dealing. The court reasoned, "where an employee is engaged in activities in carrying on the work of his employer, he is within the scope of his employment and the mere fact that he may also derive some benefit himself does not exclude him from coverage." *Id.* at 25.

Likewise the court in *Bailey v. Utah State Indus. Comm'n*, 398 P.2d 545 (Utah 1965), held that an employee/owner's car was an instrumentality of the business where he used it to make emergency calls at all hours, carried tools in it, permitted customers to use it while their cars were being serviced, and only used his car for work and listed it as a business asset. Consequently, the court determined that the use of his car benefitted the employer and that he was therefore acting in the course and scope of his employment when he died in a car accident while driving to work. *Id.*

On the other hand, the Utah Court of Appeals has held that a vehicle is not an instrumentality of the business when the employer takes no part in making travel arrangements for employees driving to a worksite and has no involvement in car-pool arrangements between co-workers. *Cross v. Bd. of Review of Indus. Comm'n*, 824 P.2d 1202 (Ut. Ct. App. 1992)(holding that ride-sharing arranged between co-workers for their

mutual convenience is not within the control of and does not benefit the employer beyond arrival at the worksite.). Neither is it sufficient for a vehicle to be merely carrying some tools used for work when they are not being used on the job. *Id.* at 1206 (stating that batteries in the employee's vehicle which were left over from a previous work assignment do not make the employee's vehicle an instrumentality of the business.) In addition, the act of simply driving a company car to work, without more, will not relieve an employee from the effects of the "going and coming" rule. *VanLeeuwen v. Indus. Comm'n*, 901 P.2d 281 (Ut. Ct. App. 1995).

The common thread in all of these cases is that where an employer involves himself in an employee's use of his vehicle, whether it be in undertaking the transportation arrangements for employees, running special errands, or relying on tools used on the job that are transported in an employee's vehicle, it benefits the employer making vehicle an instrumentality of the business. The controlling legal authority set forth in *Moser* requires the Commission to look at the actual relationship between employer and employee. The Supreme Court enunciated a legal principle to apply in enquiring into how an employer actually used an employee's vehicle in the employment. This principle contemplates the actual situation – whether an employer's use of an employee's vehicle is by express agreement or as a matter of customary usage. *Id.*

In this case, the Commissioner failed to analyze Jex's case in terms of how Precision Excavating relied on the use of Jex's truck. The only bases for denying compensability is that Jex was on his way home from work and that he was off the clock.

In so doing, the Labor Commissioner failed to consider the undisputed evidence that Precision instructed Jex to wait for a chronically late co-worker to transport him from a meeting point designated by Precision to the Cedar City worksite approximately three times per week.

The Commissioner also ignored the undisputed evidence that Jex transported and used his own tools on the worksite because the tools in the company truck were located somewhere between $\frac{1}{4}$ and 2 miles from where Jex was working. She ignored the undisputed evidence that Jex had grease and hydraulic fluid in his truck, provided by Precision, for him to use to maintain and repair equipment while he worked. She ignored the undisputed evidence that Precision knew Jex was using his own truck to run special errands during work hours and made no effort to require him to use the company trucks. Finally, the Commissioner ignored the evidence that Jex was transporting a coworker from the Cedar City worksite to his car at Precision's designated meeting spot at the time of the accident. In sum, the Commission ignored in its entirety the manner in which Precision relied on the use of Jex's truck during his employment. The truth of the matter is that Jex's truck had become an instrumentality of Precision's business at Precision's invitation and as a matter of custom. The Labor Commissioner's failure to consider this evidence makes its decision inadequate as a matter of law. *See Moser.*

Precision argues that Jex's truck was not an instrumentality of Precision's business because Jex "could have" refused to shuttle employees to the worksite and "could have" used Precision's truck to run special errands, and "could have" used the tools on

Precision's truck. The Labor Commissioner implicitly agreed with this approach when it adopted the ALJ's findings of fact, which rely on these arguments. However, this is not the legal standard. The law is quite clear that the Commissioner is required to "focus attention upon the factual situation and plaintiff's relationship thereto, **just as it existed at the time of his injury.**" *Moser* at 24. What "could have" been is not a factual situation. It is an aspirational one that has no basis in evidence.

The only testimony presented by Precision was from Trent Holden. Holden testified that he not only told Jex to transport Nick to the worksite on a regular basis, but that he knew that Jex was using his own tools from his truck and running special errands in his own truck. Precision tacitly extended the requirement of Jex's truck when it did nothing to dissuade him from understanding and acting otherwise. Indeed, the custom that Precision expected Jex to help transport co-workers between the worksite and Precision's designated meeting spot was so ingrained that neither Jex nor Holden thought it out of the ordinary when Jex asked if he needed to drive James Irvin back to St. George on the day of the accident. There is no competent evidence on the record to suggest otherwise. Precision's actions in establishing the customary use of Jex's truck to further its business purposes cannot be done away with by after-the-fact self serving testimony that the requirement of Jex's truck "could have" been something different than what it actually was.

If the analysis becomes one of what "could have happened" as opposed to what "did happen," the law would be eviscerated. Certainly, Jex "could have" called in sick the day

of the accident and avoided this horrific tragedy. However, he did not and the accident did happen. While Jex hypothetically could have refused to transport employees back and forth; could have refused to use his truck for Precision's errands; and could have refused to transport and use tools at the job site on a daily basis, the fact is he did not refuse to do those things. The Commissioner is required to apply the facts to the law, not "what ifs" to the law. That is rank speculation. The fact of the matter is Precision required Jex to use his truck for its purposes and benefitted therefrom.

B. The Commission's reliance on unsupported hearsay was error.

While hearsay may be considered in a workers' compensation proceeding, it must be supported by a residuum of competent evidence. *Hackford. V. Industrial Comm'n*, 358 P.2d 899 (Utah 1961). In this case, Precision attempted to introduce the hearsay statement of James Irvin that on the day of the accident, he did not want to leave the worksite with Jex, but had wanted to work longer. Precision did not call Irvin as a witness or otherwise present competent evidence to support that proposition. Instead, Precision called Trent Holden, who was compensated for his appearance in violation of Utah law, to offer up the hearsay statement purportedly uttered by Irvin.

The reliability problem with this kind of unsubstantiated hearsay is patent. In introducing this purported statement, Holden testified that Irvin approached Holden the

day after the accident not to talk about the accident or ask about Jex's condition, but only to complain that he hadn't wanted to leave work that early.

Notwithstanding the existence of the residuum rule and the obvious reliability problems with Holden's testimony about what Irvin purportedly said, the ALJ relied on this to find that Jex arranged his own carpool. There was no legitimate evidentiary basis for the ALJ to make such a conclusion. This is not a question of weighing of the evidence as there was no evidence properly before the ALJ to weigh in this respect. Indeed, the ALJ's reliance on this unsubstantiated hearsay testimony approaches a violation of Jex's rights under the due process and open courts provisions of the Utah Constitution to be able to question the witnesses against him. UTAH CONST., Art. I, §7; UTAH CONST., Art. II, §11. What is just as puzzling is the Commissioner's failure to address this at all on Jex's Motion for Review. Jex respectfully submits that it was improper for the Commission to condone the ALJ's reliance on unsupported hearsay.

Likewise, Holden's testimony that Jex "could have" refused to use his truck in the manner Holden had requested and come to expect does not pass evidentiary muster. To be clear, Precision Excavating did not offer evidence that it actually gave Jex a choice whether to use his truck to ferry co-employees to and from the Cedar City job, run special errands while on the clock, or use his truck to bring and use his own tools and store company supplies. Moreover, the ALJ specifically found that Holden had affirmatively instructed Jex to wait for and transport at least one Precision employee. Similarly, the ALJ's

Findings state that Holden never talked to Jex about using his own truck to run company errands.

Precision Excavating's argument, and the basis of the ALJ's reasoning, is nothing more than an after-the-fact alternate reality where Jex "could have" used company equipment and "could have" refused to transport employees. It is questionable whether this would have been true. Further, this is why customary usage and course of dealing can establish the parameters of a business relationship as opposed to stated parameters that are clearly not followed. However, the Labor Commission is not in the business of resolving cases based on speculation of what the business relationship "could have" been, but on what it actually was. And the ALJ made factual findings as to what the relationship actually was. The Labor Commission should have been bound by them rather than deny benefits on the strength of what the parties' relationship "could have" been.

C. Precision Undertook to Furnish Transportation to the Cedar City Worksite For Its Employees and Required the Use of Jex's Truck to Do So.

In *State v. Indus. Comm'n*, 685 P.2d 1051 (Utah 1984), the Utah Supreme Court noted that "injury has been held compensable where transportation was furnished by the employer to the benefit of the employer." *Id.* at 1053. Likewise, other jurisdictions have held that injuries that occur while going to or coming from work to be compensable when the employer furnishes the transportation, even when the transportation is furnished as a

matter of custom. See *Asplundh Tree Expert Co. v. Pac. Empls. Ins. Co.*, 2005 Va. LEXIS 41, P. 19 – 20, 611 S.E. 2d 531, 537 (Va. 2005)(holding injury compensable “where the transportation is furnished by custom to the extent that it is incidental to and part of the contract of employment; or when it is the result of a continued practice in the course of the employer’s business which is beneficial to both the employer and the employee.”); *J.D. Dutton, Inc. v. Industrial Comm’n*, 584 P.2d 1190, 1192 (Ariz. App. 1978)(holding that injury on the way home from work will be compensable even when “an implied or tacit agreement existed between the employer and employee by which the employer furnished transportation.”)

In addition, Larson’s Workers’ Compensation Law §14.02 notes that many jurisdictions recognize that injuries during travel to a worksite are compensable after the employee has left a “check-in” site designated by the employer. Such is the case here. With respect to the shuttle arrangements between St. George and Cedar City, the evidence shows that Precision undertook responsibility for transporting employees, including provision for the chronically late ones, to and from the job site. Unlike the facts in *Cross*, there was no instance of ride sharing that was arranged by Jex and co-employees for their “mutual convenience.” Instead, it was arranged by Precision for the benefit of Precision.

Rather than wait for Nick himself, Holden required Jex to ferry employees to the job site. He expected Jex to meet at the designated meeting spot and await his instruction rather than drive directly from his home to the Cedar City job. While Holden maintains that Jex “could have” opted not to transport co-employees, he testified that he instructed Jex to wait

for Nick and bring him up, but that he could leave if Nick didn't show up after a certain time. This is the nature of a job requirement. The Commissioner's characterization that Holden "suggested" Jex wait for Nick does not comport with the evidence. The expectation that Jex's truck was subject to Precision's use was so grounded in the assumptions of the parties that on the night of the accident, Jex asked Holden if he needed to transport a co-employee back to St. George to which Holden responded by telling Jex to see if the employee needed a ride. This was not "loose cooperation" of the employees to arrange their own transportation. It was direction of a supervisor.

Regardless of the circumstances surrounding Irvin's acceptance of a ride back to St. George, the clear facts are that Jex knew he was expected to transport employees as part of his job on an ongoing basis. Finally, Jex was not driving straight home, but was transporting a co-employee back to St. George to the meeting spot designated by Precision. Although Jex was leaving the Cedar City site, he was going to where Precision directed, carrying a co-employee with whom he had never car-pooled before at the direction of Precision. Based on these undisputed facts, it is evident that Precision routinely used Jex's truck as an instrumentality of its business in furnishing transportation of its employees. As such, Jex was in the course of his employment when his truck rolled while he was returning a co-employee to the designated meeting spot at the time of the accident.

D. Precision Excavating Routinely Relied On the Use of Jex's Truck for His Tools, To Run Errands, and To Carry Precision Excavating Materials to Maintain and Repair Machinery At the Worksite.

With respect to the tools Jex kept in his truck, Precision clearly relied on Jex to park his truck closer to his worksite for access to tools, not to mention company supplies, which he used to work on Precision machinery. “[W]hen an employee is required by his employer to bring his own vehicle to the place of business for use there, the employee is covered while going to and from work in the vehicle.” *Bailey v. Utah State. Indus. Comm’n*, 398 P.2d 545, 546 (Utah 1965). In a case similar to Jex’s case, the Utah Labor Commission relied on the *Bailey* holding to include vehicles that are used to transport tools which are required to be used in the employment. *Ronald Gibson v. J.E. Larsen Construction/Workers Compensation Fund*, Labor Commission Case Nos. 01-167 & 03-123, “Order Granting Motion For Review/Order of Remand.” There, the Labor Commissioner observed that when an employer requires an employee to bring his own tools and drive his own truck for the benefit of the employer, the truck becomes and instrumentality of the business. *Cross* stands for the same proposition where it distinguished that carrying tools in the vehicle had to be tools that were actually being used on the job at the time of the accident. *Cross* at 1206.

In contrast to the established legal framework, the ALJ made much of the fact that Jex “admitted” that using his own tools was a convenience so that he did not have to walk to the company truck. This is not the legal standard. Moreover, the Commissioner

ignored the critical undisputed fact that the company truck that contained the tools that Jex "could have" used was parked between $\frac{1}{4}$ and 2 miles away from Jex's work assignment. The undisputed testimony established that Jex used his own tools on a regular basis. It also established that Precision kept some of its own materials, such as grease and hydraulic fluid, in Jex's truck so that Jex could perform maintenance on the equipment at his worksite as necessary. The legal standard is not whether it was "convenient" for Jex to use his own tools, but whether the employer relied on and benefitted from Jex's use of his own tools. Jex respectfully submits that he was required to have his tools more accessible than 2 miles away and, by its actions, Precision was well aware of this, and obviously benefitted from it.

Jex was paid by the hour. In theory, he could have walked two miles to the company truck every time he needed a wrench, oil or equipment. His wage would stay the same and he would be paid for the hours on the job. However, no work would get done during these treks to the company truck to the detriment of Precision. The conclusion by the Commission that the use of Jex's truck and equipment by Jex was a "convenience" to him is ignorant of the facts. Precision received the benefit of Jex's tools and truck, and Jex's tools and vehicle were getting worn out to Jex's detriment.

With respect to the special errands Jex ran, Holden testified that he was aware that Jex was taking his own truck. Holden did not reprimand Jex for doing this. The fact that Holden simply didn't discuss which truck Jex "could have" taken to run errands and obtain parts for company equipment goes to Precision's expectation that Jex would use his truck

to run the errands. This makes sense where Holden testified that Holden's company issued truck had all of the company tools in it and the other company truck was needed on the worksite to provide fuel for the equipment. Holden's testimony shows that not only did Precision expect Jex to use his own truck, but that Precision was not in a position to send its trucks out on errands and expect employees to continue uninterrupted on the worksite.

Again, the Commissioner should have considered the actions of the parties in determining whether the use of Jex's tools and truck for running special errands made Jex's truck instrumentality of the business. She did not. These facts demonstrate that Precision routinely relied on the use of Jex's truck on the Cedar City job, derived a substantial benefit from the use thereof, and exercised control over the use of Jex's truck while on the job site and in ferrying employees to and from St. George. Indeed, Jex's truck was an instrumentality of Precision's business. As such, the Commissioner's Order Affirming the ALJ's Decision should be reversed.

CONCLUSION

For the foregoing reasons, Jex respectfully requests that the Order Affirming ALJ's Decision be reversed and benefits be awarded Jex consistent with the facts and law.

DATED this 20 day of April, 2011.



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

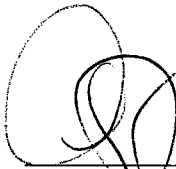
CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of April, 2011, a copy of the foregoing
APPELLANT'S 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)
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111

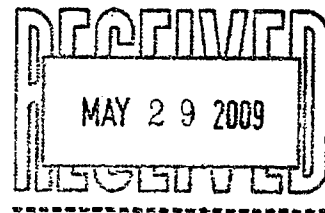


AARON J. PRISBREY
Elizabeth B. Grimshaw
Attorneys for Petitioner

ADDENDUM

- 1.....ALJ's Findings of Fact, Conclusions of Law and Order
- 2.....Order Affirming ALJ's Decision
- 3.....Larson's Workers' Compensation Law, §14.02 (2010)
- 4.....*Ronald Gibson v. J.E. Larsen Construction/Workers
Compensation Fund*, Labor Commission Case Nos. 01-167 & 03-123

Addendum 1



UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 1840
Parowan, Utah 84761
435-477-1056

LAYNE WILLIAM JEX,
Petitioner,

vs.

**PRECISION EXCAVATING and/or
OWNERS INSURANCE CO,**
Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 08-1030

Judge Cheryl D Luke

HEARING: 2nd Floor Courtroom, Labor Commission, 68 South 100 East, Parowan, Utah, on February 26, 2009. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Cheryl D Luke, Administrative Law Judge.

APPEARANCES: The petitioner, Layne William Jex, was present and represented by his attorney Aaron Prisbrey Esq.

The respondents Precision Excavating and Owners Insurance Co were represented by attorney Bret Gardner Esq.

STATEMENT OF THE CASE

The petitioner, Layne William Jex, filed an Application for Hearing with the Utah Labor Commission on August 20, 2008 and claimed entitlement to the following workers compensation benefits (1) medical expenses; (2) recommended medical care, and ; (3) temporary total disability compensation. Mr. Jex's claim for workers compensation benefits arose out of a motor vehicle accident on July 22, 2008. The respondents denied that Mr. Jex's motor vehicle accident on July 22, 2008 arose out of and in the course of his employment with Precision Excavating.

PROCEDURAL HISTORY

The parties were concerned that relevant medical records from Dixie Regional Medical Center had not been made part of the record. The Court agreed to keep the medical record exhibit open for thirty (30) days from the date of the hearing for submission of additional medical records. No additional records were submitted. A joint medical records exhibit was admitted into evidence pursuant to Utah Labor Commission Rule R602-2-1(h).

FINDINGS OF FACT

A. Employment,

At all times relevant to this claim Precision Excavating employed Mr. Jex as a heavy equipment operator and laborer.

B. Compensation Rate

At the time of the accident in issue, Mr. Jex was not married and had no dependent children. His wage was \$880.00 per week¹ and the compensation rate would be \$586.00 per week.

C. Temporary Total Disability

The petitioner's claim for temporary total disability benefits ("TTD") is claimed for the period of July 22, 2008 to October 15, 2008 based on the treating physician's opinion that October 15, 2008 would be a date of medical stabilization.

D. The July 22, 2008 Accident and Injuries

No dispute exists that on July 22, 2008 while driving home from a Cedar City, Utah work site to his home in St. George, Utah Mr. Jex had a tire failure while traveling on the I-15 freeway and had a one car rollover vehicle accident. The parties agreed that Mr. Jex injured his low back with fractures at the L1 and L2 level in the July 22, 2008 accident.

E. The July 22, 2008 Accident with Respect to Mr. Jex's Employment for Precision Excavation.

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. Mr. Holden testified that there was a down turn in work available in the St. George area and that the company was going to lay off employees. 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. Cedar City is approximately a 50 to 60 minute drive from St. George. Mr. Holden indicated that he told employees there would be one shuttle available using the one truck assigned to Mr. Holden and that the seats were on a first come basis. Mr. Holden indicated that there would be no compensation for travel time or gas to and from the job for those driving their own vehicles.

Mr. Jex testified that he drove his own truck on some days and that sometimes he gave rides to other employees. He also testified that on occasion he had ridden to the job site in the company truck ("shuttle"). Mr. Jex testified that he rode with Trent Holden about 4 times over a 3-4 week

¹ This is based on the week of the injury during which the petitioner was working ten hour days.

period. Mr. Jex also admitted that he chose to use his own vehicle because there were smokers in the company truck and he didn't want to be in it. He also 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. Trent would leave with the employees that were ready on time and on occasion, Trent had asked the petitioner to wait a bit longer for a chronically late employee named, Nick. 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. Nick was often tardy and this became a pattern. Petitioner did not know Nick except through work and Nick did not share gas expenses with petitioner. The company never reimbursed the petitioner for his time or travel.

On the day of the accident the petitioner was **leaving** the job site and on his way home when the accident occurred. At the end of the work day Trent Holden was giving petitioner instructions for the following day and told him he could go ahead and leave. Trent Holden indicated that he would be working overtime. Petitioner drove down a hill away from the immediate work area and noticed that a Mustang vehicle belonging to a co-worker was not on site. The petitioner assumed that Mr. Irvin rode in the company truck. The petitioner assumed that the co-worker, James Irvin, might need a ride home since Trent was working late. Petitioner went back to his supervisor, Trent, and asked if he needed to give James a ride home. Trent said, "Yeah go ask James, if he wants to go now, and give him a ride". Trent Holden testified that James could have remained on the job working overtime and ride home in the company truck. From the testimony it seemed clear that the message communicated to James did not include the option to stay on the job site and continue working. Mr. Holden testified that he had never required Mr. Jex to give a ride to a fellow employee. When there was no St. George work and the Cedar City job came up the company had indicated that employees could try and coordinate with each other to get to the job site but it was not a directive.

James left with the petitioner. That was the first time that petitioner had given a ride to James. They made no stops on the way home and about 40 minutes into the drive the tire came apart and the vehicle rolled.

The petitioner brought an exhibit of tools that he carried in his truck to and from the job site. There was a tape measure that he indicated he used "pretty much every day", there was a large pipe and crescent wrench that he used to work on some of the equipment at the job site, there was a sledge hammer and also a homemade "level" device that he had modified for use on the Cedar City job. He also had some machinery fluids that belonged to his employer and were used in some of the equipment that he used at the job site. Petitioner said that the level had been made at the request of his supervisor, Trent Holden. The tools were taken to and from the job site in the petitioner's truck and were in the truck on the date of the accident. The petitioner admitted on cross examination that it was a convenience to have the tools so that he did not have to walk back and forth to the company truck which could be parked away from his work assignment. He further admitted that on the days he rode with Trent he was able to do his job without the tools from his truck. He also admitted that the tools were also used personally by the petitioner for his own projects.

Mr. Holden testified that all the tools needed on the job were provided by the employer and Mr. Jex was not required to bring his own tools. Mr. Holden testified that he had never seen Mr. Jex's homemade level which was patterned after a level provided by a job site engineer which had at one time been repaired by Mr. Jex.

Mr. Jex gave detailed testimony about two errands he had run for Precision Excavating while on the Cedar City job. He had gone to a NAPA auto parts store and also to Wheeler machinery to get needed parts for job equipment. He had not been paid for gas and both errands occurred during company time so he was on the payroll clock. He had used his own truck to run those errands. Mr. Holden testified that Mr. Jex could have taken the company truck for those errands and it simply was not discussed at the time. Those errands did not occur on the date of the accident at issue in this case.

Mr. Jex also testified that 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).

On the date and time of the accident Mr. Jex had not been instructed by Mr. Holden regarding what route to take. Mr. Jex was on his way home for the evening having offered to give co-worker James Irvin a ride home.

It was not controverted that Mr. Jex was not paid for his time or gas in going to and from the work site in Cedar City, Utah.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-401 of the Utah Workers Compensation Act requires employers and their insurance carriers to pay medical and disability benefits to employees injured by accident "arising out of and in the course of employment, wherever such injury occurred...". Mr. Jex contends he is entitled to benefits because the injuries he suffered in the traffic accident on July 22, 2008, arose out of and in the course of his employment with Precision Excavating.

As a rule, accidents that occur while an employee is traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation system. VanLeeuwen v Industrial Commission, 901 P.2d 281, 284 (Utah App. 1995). But there are exceptions to this rule. Among the exceptions is the principle that when an employee is required to bring his or her vehicle to the worksite for the use and benefit of the employer the vehicle becomes an instrumentality of the employer's work. The employee is therefore protected by the workers' compensation system while driving the vehicle to and from work. Bailey v Utah State Industrial Commission, 398 P.2d 545, 547 (Utah 1965). Whether a vehicle is "an instrumentality of the employer's work" depends on the facts of the particular employment relationship.

In a more recent case the Utah Supreme Court commented that in workers compensation cases an analysis of the benefit of the employees activity to the employer be made noting that the

purpose of the workers compensation act to alleviate hardship upon workers and their families requires the application of the act to be liberally construed in favor of the injured worker (see generally SLC v Labor Commission and Michelle S. Ross, 2007 UT 4, January 12, 2007).

The Utah Supreme Court

further observed that "(s)cope -of- employment issues are in general highly fact-dependent. Indeed, our prior case law recognizes that 'whether or not the injury arises out of or within the scope of employment depends upon the particular facts of each case.'" (Citation omitted.) The inherent difficulty of scope-of employment cases is aggravated when employers and employees fail to define the terms of the employment relationship before an accident occurs. It is usually necessary to determine the scope of an employee's employment by reference to actual conduct and the realities of the work setting.

In this case the petitioner argues that the transportation of co-workers both to and from the job site, the carrying and use of personal tools at the job site and the two time use of his vehicle to run a company errand are sufficient to sustain a finding of compensability.

Careful analysis of the facts in this case even when liberally construed in favor of the petitioner demonstrates otherwise. It was clear when the job was offered that it was the employee's responsibility to get to and from work (the traditional going and coming). When there was not work in St. George the employees were given an option of working at the Cedar City job site. The company would offer to shuttle over workers in the one truck that was assigned to the job site supervisor. The shuttle was offered on a first come basis and employees were not going to be paid for travel time or expenses. In VanLeeuwen v Industrial Commission, 901 P.2d 281, 284 (Utah App. 1995) we find that the general rule of non-compensability has an exception in situations where the employer provides transportation primarily for the employer's own benefit and exercises control over the use of that transportation. Under Utah law the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct of the employee. In this case Mr. Jex made a choice to drive his own vehicle for his own reasons including not being around smokers. The employer did not exercise any control over what days Mr. Jex drove, what vehicle he used, what routes he took to and from work. The loose cooperation between Mr. Jex in offering rides to other co-workers was not mandated by the employer. On the date of the accident Mr. Jex **offered** the ride to his co-worker and his communication with Mr. Holden is best described as informational communication, not employer instructions. In some cases getting a crew or other workers to the job might be of benefit to the employer. The trip in question only benefited Mr. James and Mr. Jex who wanted to travel home from work like any other employee. There is no indication that had Mr. Jex not offered a ride to Mr. James that Mr. Holden and Precision Excavation's work would have been in anyway hindered as Mr. Holden was ready and able to give Mr. James a ride home. Indeed Mr. Holden testified that he told Mr. Jex to see if Mr. James wanted to leave or continue working. Mr. Jex botched the message and didn't communicate it in a way that gave Mr. James the option of working late which may have benefited the employer.

Can Mr. Jex make his car an instrumentality of employment unilaterally? Clearly Mr. Jex used some of his own tools at the job and carried them in his truck. The convincing evidence

is that this was not a job requirement, and was not necessary (he worked without problem on the days he rode with Mr. Holden and did not have access to the tools). The going and coming rule would be eviscerated if an employee could choose to bring something to work (a favorite pen for example) and unilaterally overcome the rule.

The third exception that is suggested by petitioner is that he was running a special errand for the company. They point to the trips to NAPA auto parts and Wheeler machinery and then try to argue that giving James a ride home is similar. The NAPA and Wheeler errands were on company time during the work day and certainly if this accident had occurred while coming and going to get parts on those errands we would not be debating compensability. The accident in fact occurred off the clock on the employee's way home. This is the traditional coming and going situation and compensability is not proven.

The major premise of the "going and coming" rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit Cross v Brd. Of Review Indus. Comm'n (Ut. Crt App) 824 P.2d 1202.

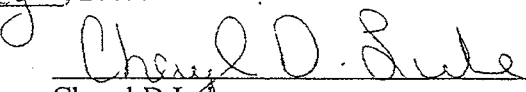
In this case the petitioner has not proven that he was any different then any other employee driving to and from a work place and ride-sharing with co-workers as a mutual convenience. Mr. Jex carried some personal tools that he could and did use at the job site but he was not required to do so and the company provided all necessary tools at the job site. Lastly Mr. Jex was on his way home and not under the control, direction or of benefit to his employer at the time of the accident. There has been no proof that supports a finding in the petitioner's favor under any exception to the going and coming rule.

I find that the petitioner has failed to meet his burden of proof that the accident and injuries suffered in the motor vehicle accident of July 22, 2008 arose out of and in the course of his employment.

ORDER

IT IS THEREFORE ORDERED that this case is dismissed with prejudice.

DATED this 28 day of May, 2009.


Cheryl D Luke
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for

review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

Layne William Jex vs. Precision Excavating and/or Owners Insurance Co Case No. 08-1030

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order was mailed by prepaid U.S. postage on May 28, 2009, to the persons/parties at the following addresses:

Layne William Jex
275 E Arrowweed Way
Washington UT 84780

Precision Excavating
P O Box 659
St George UT 84771

Owners Insurance Co
Bruce Lawhun Manager Designated Agent
Box 840
Riverton UT 84065

Aaron Prisbrey Esq
1090 E Tabernacle St
St George UT 84770

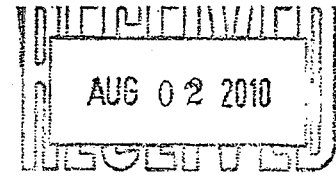
Bret Gardner Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk
Adjudication Division

Addendum 2



UTAH LABOR COMMISSION

LAYNE WILLIAM JEX,

Petitioner,

vs.

PRECISION EXCAVATING and
OWNERS INSURANCE CO.,

Respondents.

ORDER AFFIRMING
ALJ'S DECISION

Case No. 08-1030

Layne William Jex asks the Utah Labor Commission to review Administrative Law Judge Luke's denial of Mr. Jex's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Jex claims workers' compensation benefits for a low-back injury he sustained on July 22, 2008, when he was involved in a rollover accident while driving home from work in his truck. Judge Luke held an evidentiary hearing on the claim and determined that Mr. Jex's injury was not work-related because it did not occur in the course and scope of his employment. Mr. Jex challenges Judge Luke's decision by arguing that Mr. Jex's truck was an instrumentality that benefitted Precision Excavating's business and therefore driving home in his truck falls within the course and scope of Mr. Jex's employment.

FINDINGS OF FACT

The Commission adopts Judge Luke's findings of fact, which are summarized as follows. Mr. Jex worked for Precision Excavating as a heavy equipment operator near St. George, Utah. Precision Excavating was operating on a construction site east of Cedar City, Utah, approximately one hour away from St. George. Because of the distance to the construction site, Precision Excavating provided shuttle transportation to some of its employees from St. George to the site. Although Mr. Jex had taken advantage of the group transportation on occasion, he normally drove his own truck to and from the construction site. Mr. Jex also occasionally ran errands on Precision Excavating's behalf with his truck.

On July 22, 2008, Mr. Jex finished working and was preparing to go home for the night. Mr. Jex's supervisor was working late. As Mr. Jex was leaving the construction site, he noticed that a

ORDER AFFIRMING ALJ'S DECISION
LAYNE WILLIAM JEX
PAGE 2 OF 4

certain coworker did not drive to the site that day and might need a ride home because his supervisor was staying late. Mr. Jex then approached his supervisor to inquire if he should offer his coworker a ride home. Mr. Jex's supervisor suggested that Mr. Jex ask his coworker if he needed a ride. Mr. Jex offered his coworker a ride home and he accepted. Mr. Jex and his coworker were traveling home on I-15 when one of his truck tires came apart and caused the truck to roll over. Mr. Jex was treated for low-back injuries following the accident.

DISCUSSION AND CONCLUSION OF LAW

Mr. Jex sustained a low-back injury when he was involved in a rollover accident in his truck on his way home from work. As a general rule, injuries sustained while traveling to and from work are not covered by the workers' compensation system. See *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051 (Utah 1984). Mr. Jex argues that this rule, known as the 'going and coming' rule, does not apply to him because his truck was an instrumentality of the business that provided a benefit to Precision Excavating.

In *VanLeeuwen v. Industrial Comm'n*, the Utah Court of Appeals addressed the issue of a truck as a business instrumentality in connection with the going and coming rule. The court held that an employee who sustained injuries while driving to work in a company truck was not exempt from the going and coming rule because the employer did not require him to perform any job-related service or use the truck as an instrumentality to benefit the business at the time of the accident. 901 P.2d 281, 285 (Utah App. 1995). The evidence indicates that Mr. Jex's truck occasionally served to benefit Precision Excavating's business. However, 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.

Mr. Jex has not shown that his truck was being used to benefit Precision Excavation when the accident occurred. At the time of the accident, Mr. Jex was traveling home from the construction site with a coworker, but the evidence indicates that this ridesharing arrangement was out of convenience and not under Precision Excavating's control. Additionally, Precision Excavating did not pay Mr. Jex's transportation costs or undertake the responsibility of providing transportation for him when the accident occurred. The Utah Supreme Court has determined that transportation to and from a construction site under these conditions does not constitute a significant benefit to an employer such that the going and coming rule does not apply. *Cross v. Bd. of Review of Industrial Comm'n*, 824 P.2d 1202, 1205 (Utah 1992). As a result, the going and coming rule applies to the claim, and Mr. Jex is not entitled to workers' compensation benefits.

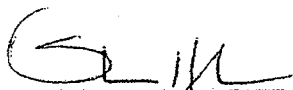
[Intentionally Left Blank]

ORDER AFFIRMING ALJ'S DECISION
LAYNE WILLIAM JEX
PAGE 3 OF 4

ORDER

The Commission affirms Judge Luke's decision of May 28, 2009, in this matter. It is so ordered.

Dated this 29th day of July, 2010.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER AFFIRMING ALJ'S DECISION
LAYNE WILLIAM JEX
PAGE 4 OF 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Layne William Jex, Case No. 08-1030, was mailed first class postage prepaid this 27th day of July, 2010, to the following:

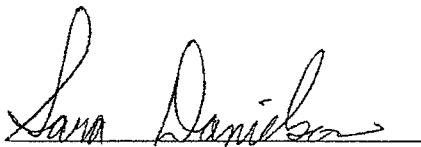
Layne William Jex
275 E Arrowweed Way
Washington UT 84780

Precision Excavating
P O Box 659
St George UT 84771

Owners Insurance Co
Bruce Lawhun Manager Designated Agent
Box 840
Riverton UT 84065

Aaron Prisbrey Esq
1090 E Tabernacle St
St George UT 84770

Bret Gardner Esq
257 E 200 S Ste 800
Salt Lake City UT 84111



Sara Danielson
Utah Labor Commission

Addendum 3

Larson's Workers' Compensation Law

Copyright 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

PART 3 COURSE OF EMPLOYMENT: TIME AND PLACE
CHAPTER 14 JOURNEY ITSELF PART OF SERVICE

1-14 Larson's Workers' Compensation Law § 14.02

§ 14.02 Distinguishing "Inside" and "Outside" Employees

Occasionally the line between employees having fixed employment time and premises and those not having them is itself a matter of controversy. ¹ Some outside and traveling workers have an identifiable point in time and space where their employment actually commences. If they are required to check in at a certain place in the morning, the journey to that place in the morning is not within the course of employment. ² Thus, a policeman who checked both in and out of a station house was not covered when he tripped on a curb on his way home after checking out at night. ³ Similarly, a county employee who regularly drove his car to a garage, where he picked up a county-owned car, which he was required to bring to the court house, was held to be outside the course of employment on the first leg of the journey. ⁴ On the other hand, a nurse who did not work at the employer's premises, but who traveled to various patient's homes, did not have a fixed place of work; her injuries sustained while driving to her first patient's home was compensable since the travel was an essential part of her work. ⁵

FOOTNOTES:

Footnote 1. For a list of citations by jurisdiction, see ^{14.02D.1} n. 1.

Footnote 2. For a list of citations by jurisdiction, see ^{14.02D.2} n. 2.

Footnote 3. *Blackley v. City of Niagara Falls*, 284 A.D. 51, 130 N.Y.S.2d 77 (1954) .

For cases holding police officers to be in the course of employment during the going and coming journey, *see* Ch. 13, § 13.04[5] n.73, *above*.

Footnote 4. *Makal v. Industrial Comm'n*, 262 Wis. 215, 54 N.W.2d 905 (1952) .

Footnote 5. *Jamison v. Workers' Comp. Appeal Bd.*, 955 A.2d 494 (Pa. Commw. Ct. 2008) . *See* Ch. 14, § 14.03 below.

Addendum 4

UTAH LABOR COMMISSION

RONALD GIBSON,

Applicant,

**J E LARSEN CONSTRUCTION and
WORKERS COMPENSATION FUND,**

Defendants.

*
*
*
*
*
*
*
*
*

**ORDER GRANTING
MOTION FOR REVIEW /
ORDER OF REMAND**

Case Nos. 01-0167 & 03-0123

Ronald Gibson asks the Utah Labor Commission to review Administrative Law Judge George's denial of Mr. Gibson's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

Mr. Gibson was injured in a traffic accident on July 27, 1999, as he drove his pickup truck to a Larsen Construction worksite. On February 12, 2001, Mr. Gibson filed an Application For Hearing with the Commission to compel Larsen Construction and its insurance carrier, the Workers Compensation Fund ("WCF"), to pay workers' compensation benefits for his injuries. Larsen and WCF denied liability on the grounds Mr. Gibson's accident and injuries were not work-related.

Judge George conducted an evidentiary hearing on Mr. Gibson's claim on September 18, 2001. On July 31, 2003, Judge George denied the claim, finding that Mr. Gibson's accident and resulting injuries were not work-related and, therefore, not compensable under Utah's workers' compensation system.

Mr. Gibson now requests Commission review of Judge George's decision. Specifically, Mr. Gibson argues that, because his pickup truck was an instrumentality of his work for Larsen, his accident in that truck was work-related.

FINDINGS OF FACT

The Commission has carefully examined the evidentiary record in this matter and enters the following findings of fact.

Mr. Gibson owned a concrete business that he operated out of his home west of Cedar City.

ORDER GRANTING MOTION FOR REVIEW/REMAND

RONALD L GIBSON

PAGE 2

Over the years, he has done concrete work as a subcontractor for Larsen Construction on several projects. In early 1999, Larsen Construction won a contract for part of the "Millcreek" project in St. George. Larsen Construction's share of the project included more than \$1,000,000 of concrete work. However, the Millcreek contract required Larsen Construction to perform the work through employees, rather than subcontractors. For that reason, Larsen Construction hired Mr. Gibson to supervise its concrete crew. Mr. Gibson had authority to hire and fire employees, establish work schedules and duties, and direct performance of those duties.

Because Mr. Gibson was already established in the concrete business, he owned tools and materials necessary for the concrete work at the Millcreek project. He used his own pickup truck to transport the tools and materials between his home and the construction site. He also used his truck to transport material purchased from local vendors to the Millcreek site. On some occasions, Larsen Construction's owner rode with Mr. Gibson to pick up materials. On other occasions, Larsen Construction employees used Mr. Gibson's truck to pick up materials.

Larsen Construction agreed to pay Mr. Gibson \$15 per hour, plus 50% of the company's profits on the Millcreek concrete work. Larsen Construction also paid Mr. Gibson \$100 for gasoline expense. This compensation package was negotiated between Larsen Construction and Mr. Gibson to take into account Mr. Gibson's use of his personal vehicle and tools on the Millcreek project.

In traveling between his home and the Millcreek site, Mr. Gibson could choose between two routes. One route headed west, then south, through Veyo and on to St. George. The other route headed east to Cedar City, then south to St. George. Travel time and distance were not substantially different between the two routes. Mr. Gibson preferred the Veyo route, but usually took the Cedar City route in order to meet with Larsen Construction staff in Cedar City or provide rides to Larsen Construction's concrete crew.

On July 27, 1999, Mr. Gibson was expecting delivery of cement to the Millcreek site. Additional forms had to be built before the concrete could be unloaded. Before dawn, Mr. Gibson loaded supplies into his truck and began driving to the Millcreek site by way of Cedar City. Mr. Gibson intended to pick up two or three crew members who lived in Cedar City and then pick up additional materials in St. George.

Three miles from his home, Mr. Gibson collided with an oncoming car. He suffered severe injuries that give rise to his current claim for benefits.

ORDER GRANTING MOTION FOR REVIEW/REMAND
RONALD L GIBSON
PAGE 3

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-401 of the Utah Workers Compensation Act requires employers and their insurance carriers to pay medical and disability benefits to employees injured by accident "arising out of and in the course of employment, wherever such injury occurred" Mr. Gibson contends he is entitled to benefits because the injuries he suffered in the traffic accident of July 27, 1999, arose out of and in the course of his employment by Larsen Construction.

As a rule, accidents that occur while an employee is traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation system. VanLeeuwen v. Industrial Commission, 901 P.2d 281, 284 (Utah App. 1995). But there are exceptions to this rule. Among the exceptions is the principle that when an employee is required to bring his or her vehicle to the worksite for the use and benefit of the employer the vehicle becomes an instrumentality of the employer's work. The employee is therefore protected by the workers' compensation system while driving the vehicle to and from work. Bailey v. Utah State Industrial Commission, 398 P.2d 545, 547 (Utah 1965). Whether a vehicle is "an instrumentality of the employer's work" depends on the facts of the particular employment relationship.

The Utah Supreme Court has observed that "(s)cope-of-employment issues are in general highly fact-dependent. Indeed, our prior case law recognizes that 'whether or not the injury arises out of or within the scope of employment depends upon the particular facts of each case.'" (Citation omitted.) Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). The inherent difficulty of scope-of-employment cases is aggravated when employers and employees fail to define the terms of the employment relationship before an accident occurs. It is usually necessary to determine the scope of an employee's employment by reference to actual conduct and the realities of the work setting.

In this case, Larsen Construction granted a large degree of authority to Mr. Gibson with respect to the concrete work at the Millcreek project. Larsen Construction knew of Mr. Gibson's expertise in such matters and trusted his judgment, not only with the technical requirements of concrete work, but also over the logistics of the project. It appears Larsen Construction expected Mr. Gibson to use his expertise and judgment to marshal the necessary personnel, tools and materials in order to accomplish Larsen Construction's objectives. It also appears that Larsen Construction expected Mr. Gibson to use his own tools and equipment, including his pickup truck, to accomplish the project.

Mr. Gibson's authority and responsibility over the Millcreek project is reflected by the fact that his compensation was not limited to an hourly wage, but included a right to share in any profits from the concrete portion of the project. Furthermore, Larsen Construction had actual knowledge of Mr. Gibson's use of his pickup truck to accomplish Larsen Construction's objectives. For example, the owner of Larsen Construction sometimes rode in the pickup with Mr. Gibson to obtain supplies for the Millcreek project. Larsen Construction also paid Mr. Gibson \$100 to defray his gasoline

ORDER GRANTING MOTION FOR REVIEW/REMAND

RONALD L GIBSON

PAGE 4

expense. The Commission takes these facts as establishing Larsen Construction's recognition and encouragement of Mr. Gibson's use of his truck as an instrument to accomplish Larsen Construction's work. Because the truck was an instrumentality of Mr. Gibson's work for Larsen Construction, he was within the course and scope of his employment as he drove the truck on the morning of July 27, 1999.

Larsen Construction suggests that, even if Mr. Gibson was covered by the Act as he drove to and from the worksite, he lost that coverage because at the time of his accident he intended to deviate from the work-related travel in order to pick up his crew members in Cedar City to give them a ride to the work site.

While the Commission accepts Larsen Construction's general premise that a personal deviation from work-related travel is not covered by the Act, the specific facts of this case do not support such a result. Although two routes were available for Mr. Gibson to travel between his home and the Millcreek site, the evidence does not establish any substantial difference between them in terms of distance or travel time. Larsen Construction did not require Mr. Gibson to travel over one or the other route. In fact, on occasion Larsen Construction required Mr. Gibson to use the Cedar City route, which is the route on which the accident occurred. Furthermore, at the time of the accident, Mr. Gibson had not deviated from his work-related travel. Finally, Mr. Gibson's intention of picking up crew members in Cedar City had the substantial work-related motive of insuring the concrete crew was at the work site to prepare for the upcoming concrete pour.

In summary, the Commission concludes that Mr. Gibson's pickup truck was an instrumentality of Larsen Construction's work. It was necessary for Mr. Gibson to drive the pickup truck to worksite each day. Mr. Gibson's motor vehicle accident on July 27, 1999, arose out of and in the course of that work-related travel. Consequently, Mr. Gibson is entitled to medical and disability benefits for his injuries as provided by the Act.

The Commission remands this matter to Judge George to determine the nature and amount of benefits Mr. Gibson is entitled to receive for his injuries. In light of the inordinate length of time Mr. Gibson has been waiting for resolution of this matter, Judge George is instructed to resolve the remaining issue with all possible speed.

ORDER GRANTING MOTION FOR REVIEW/REMAND
RONALD L GIBSON
PAGE 5

ORDER

The Commission grants Mr. Gibson's motion for review, sets aside Judge George's decision dated July 31, 2003, and substitutes this decision in its place. The Commission remands this matter to Judge George for further proceedings consistent with this decision. It is so ordered.

Dated this 31st day of March, 2004.

R. Lee Ellertson
Utah Labor Commissioner