

1955

Milan D. Smith v. The Industrial Commission of Utah et al : Defendant's Brief

Utah Supreme Court

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Case No. 8455

**IN THE SUPREME COURT
of the
STATE OF UTAH**

MILAN D. SMITH, for and on behalf
of KATHLEEN MAY SMITH and
MICHAEL JAY SMITH, minor chil-
dren of Roland B. Smith, Deceased,
Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION
OF UTAH, SMITH CANNING COM-
PANY, BOX ELDER PACKING
CORPORATION, SMITH FROZEN
FOODS, INC., and NATIONAL
SURETY COMPANY,

Defendants.

FILED
MAR 8 9 1956

Clerk, Supreme Court.

DEFENDANT'S BRIEF

**MORETON, CHRISTENSEN
& CHRISTENSEN
E. R. CALLISTER, Atty. Gen.
*Attorneys for Defendants***

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IN THE SUPREME COURT of the STATE OF UTAH

MILAN D. SMITH, for and on behalf
of KATHLEEN MAY SMITH and
MICHAEL JAY SMITH, minor chil-
dren of Roland B. Smith, Deceased,

Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION
OF UTAH, SMITH CANNING COM-
PANY, BOX ELDER PACKING
CORPORATION, SMITH FROZEN
FOODS, INC., and NATIONAL
SURETY COMPANY,

Defendants.

Case No. 8455

DEFENDANT'S BRIEF

THE FACTS

The purported statement of facts set forth in the plaintiff's brief, is neither complete nor accurate. Many of the asserted propositions of fact, find no support in the record. In other instances, strained inferences have been placed on the evidence in the record, to arrive at conclusions favorable to the plaintiff. Rather than point out in detail wherein we disagree with the plaintiff's statement of the facts, we are setting forth in full the facts as revealed by the record. It may be pertinent to observe

here, that the facts are substantially without dispute, and are established entirely by witnesses called by the plaintiff, and favorable to him. They are as follows:

The Smith family operates a far flung industrial empire in the canning and food processing industry extending over the states of Utah, Idaho and Oregon. The Smith interests in Utah consist of The Box Elder Packing Corporation, and Smith Frozen Foods, Inc., both of which are Utah Corporations, having their plants at Brigham City, Utah; the Smith Canning Company, a Utah corporation with offices and plant at Clearfield, Utah; the Smith Sales Company, a co-partnership, having its principal office at Clearfield, Utah, (and a branch office at Pendleton, Oregon); a warehouse at West Point, Utah; Intermountain Frozen Foods, Inc., located at 369 Z.C.M.I. Avenue; and National Brokerage Company, a co-partnership, with offices in Clearfield, Utah. (R. 36-40). All of these separate enterprises were originally named as parties defendant, along with National Surety Corporation, the compensation insurance carrier for all of them. (R. 21, 24). However, as the evidence developed, it readily became apparent that the Warehouse at West Point; Intermountain Frozen Foods, Inc., and National Brokerage Company, were improperly joined, and they were eliminated as parties defendant. (R. 36-38). At the conclusion of the original hearing, it was made to appear that Smith Sales Company had not complied with the provisions of Sec. 45-1-43, Subdivision (4) U.C.A. 1953, and therefore, there could be no right of compensation from that defendant. (R. 85). In addi-

tion to the Utah operations above set forth, there is an Idaho corporation, Inland Empire Foods Company, and two Oregon corporations, Smith Frozen Foods of Oregon, Inc., and Smith Canning Company of Oregon. (R. 7). In addition, as above noted, the Smith Sales Company maintained an office at Pendleton, Oregon.

Roland B. Smith, out of whose death the present claim arises, actively participated in all of these enterprises. He was president and general manager of both of the Brigham City corporations (R. 26, 27); he was vice president of Smith Canning Company (R. 29); and he was a general partner in the Smith Sales Company. (R. 29). In addition, he was an officer or director in the Idaho and Oregon corporations. (R. 55, 56).

All of the Smith corporate enterprises in Utah, as well as the corporate organizations in Idaho and Oregon, are engaged in the production of packaged foods for sale on the market. Box Elder Packing Corporation and Smith Canning Company are engaged in canning fruits and vegetables, and Smith Frozen Foods, Inc., is engaged in preparing frozen foods for the market. (R. 41-43).

The Smith Sales Company was a co-partnership, consisting of the deceased, and his two brothers and a sister. (R. 7-8, 66). At the inception of the partnership, the deceased owned an equal interest with his two brothers, each of them owning a 28% interest, and the sister owning a 16% interest. (R. 7-8). As appears from the Articles of Partnership, and the amendments thereto, the

proportionate interests of the partners changed from time to time, and at the time of his death, the deceased owned a 24% interest, and each of his brothers owned a 30% interest, the sister retaining her 16% interest. (R. 14).

As president and general manager of the two Brigham City corporations, the deceased had the overall supervision of their operations. This included the obtaining of contracts with fruit and vegetable producers, purchasing necessary materials and supplies, supervision of maintenance at the plants, supervision of personnel, and overall supervision of the operations of those corporations. (R. 27-29, 52-54, 75-76). As vice president of Smith Canning Company his duties were largely administrative and fiscal. (R. 29, 75-76). Although he was not a managing partner of the sales company, he was a general partner and he consulted with the other partners in decisions relating to policy. (R. 10, 29, 76). He also shared in the profits, proportionately to his capital investment. (R. 9, 55, 78).

Paragraph 9 of the partnership agreement provided that profits and losses would be pro-rated according to the capital interest of the partners. (R. 9). Paragraph 12, provided that each of the partners would "diligently employ himself or herself in the business of the said partnership." (R. 8). Paragraph 19, provided that all questions "as to the management of the business" should "be decided by a majority of said partners." (R. 10). The purpose of the partnership, as set forth in the articles,

was to act as “exclusive sales representative” of all of the Smith enterprises, either then existing or to be created in the future. Paragraph 2. (R. 7).

The Smith enterprises were all closely interrelated. (R. 40). All of the partners in the Smith Sales Company were principal stockholders and officers and directors in all of the corporate enterprises. The notable exception to this, was that Alfred T. Smith was not a member of the partnership, although he held a substantial interest in the corporations. (R. 40). The interests held by the various members of the Smith family varied somewhat in the different corporations. The interest of the decedent in the partnership, was at the time of his death 24%. (R. 14). He had an 11.17% interest in the Smith Canning Company; 34.20% interest in Box Elder Packing Corporation; 37% interest in Smith Frozen Foods, Inc., and a 20% interest in Smith Frozen Foods of Oregon. (R. 79-80).

In brief, the Smith organization consisted of several corporations, in three different states, actively engaged in canning and processing foods for market. The produce of these corporations was all sold through Smith Sales Company, a co-partnership, which was the “exclusive sales representative.” (R. 7). The corporations did not employ any salesman, nor did they have any sales organization. (R. 67) Smith Sales Company acted as brokerage agent in marketing their produce. In essence, the corporations were engaged in production; the partnership was engaged in sales. (R. 81-82).

On April 19, 1954, the deceased, in company with

William Robbins and their respective wives, left on an airplane trip to various cities in the middle west. The airplane was owned by the partnership, (R. 51), and the expenses of storage, operation and maintenance of it, were paid by the partnership. (R. 56). Mr. Robbins was the sales manager of Smith Sales Company, and was employed solely by that firm. (R. 30, 45). He was not a stockholder, officer, director or employee of any of the Smith corporations. His duties related almost exclusively to selling, although in connection with that, he had some responsibilities for the procuring of packages and containers necessary to put the produce in condition to be transported to the markets. (R. 45).

There is no question but what the principal purpose of this trip, if not the sole purpose, was to sell a tomato pack. (R. 33, 34, 47, 48, 73). As stated by the witness Victor R. Smith:

“* * * our *principal* object in requesting or suggesting that the trip be made, and I might say Bill’s [Robbins] present reason for insisting they go on the trip, was *to contact buyers* of tomato products in the east to sell surplus tomato products which we had on hand, and also *incidentally* to make some contacts one of which, I mean, was with the P.I.E. in Chicago incident to reviewing some freight rates. * * *” (R. 33). (Emphasis ours.)

To this end, calls were contemplated at Wichita and Hutchinson, Kansas; Kansas City; Chicago; Austin, Minnesota; and Des Moines, Iowa. (R. 48-50). All of these stops were scheduled for the purpose of making calls on

brokerage houses, wholesalers, chain store operators, or other potential customers. (R. 48-50). There is no *specific evidence in the record* that the trip was for any purpose other than sales. There is a suggestion that the parties contemplated stopping at St. Louis, if possible. (R. 50, 51). However, the record does not indicate who was to be contacted in St. Louis, or for what purpose, or even whether such call, if made, would be for business or pleasure. Mr. Victor Smith, the witness who testified as to the proposed call at St. Louis, admitted that he had no knowledge of what that business would be. (R. 50). There is also a statement in the record that at Chicago, in addition to contacting potential customers, that Smith and Robbins would call on P.I.E. to discuss freight rates. Counsel for the plaintiff apparently takes great comfort from this fact. However, a discussion of freight rates would appear to be a matter of great interest to the partnership, the marketing agent, and to relate much more to its business than to the business of the manufacturing corporations. There is nothing in the record to indicate that anything was to be done in furtherance of the purposes of any of the producing corporations. We again quote from the witness Smith:

“Q. So that except for the contact in Chicago with P.I.E. the entire purpose of the trip was sales, wasn't it?

A. Well, these particular companies, yes.

Q. Well, were there any other companies?

A. No, there was no, nothing definite that was discussed.” (R. 49-50).

There is an abundance of evidence that efforts would be made to sell the tomato pack, and other products on hand. It is clear beyond question that the prime and motivating purpose of the trip was in furtherance of the partnership business and not in furtherance of the business of any of the corporations of which the deceased was an officer.

At Denver, Colorado, the plane crashed, killing all of its occupants. (R. 16, 19, 26). The decedent Smith left two minor children, in whose behalf the present proceedings are brought. (R. 1). An application for death benefits was duly filed by their general guardian, (R. 4) upon which hearing was had, and at which the above evidence was developed.

At a subsequent hearing, counsel for the plaintiff was permitted to introduce certain documentary evidence, which he claimed showed that the expenses of Smith on the trip were being borne by the corporations of which he was president, rather than the partnership. This evidence is, to say the least, speculative. It consists of a photo-static copy of a check, dated April 18, 1954, payable to the Clearfield Pharmacy in the amount of \$200. (R. 102). A voucher attached to the check indicates that it was for travel expenses. However, it does not indicate any specific trip. For aught that the record shows, the check could even have been in reimbursement for travel expenses incurred by the defendant traveling between his home in Clearfield, and the corporations' places of business in Brigham City. There is also evidence that

the deceased carried with him two blank checks of Box Elder Packing Corporation, and one blank check of Smith Frozen Foods, Inc. (R. 103, 104). However, there is nothing whatsoever to indicate for what purposes these blank checks were to be used. For aught that the record shows, it may have been the habit or custom of the deceased to carry blank checks of the corporations for ready use where needed. Even Melvin J. Stephenson, the controller of Smith Sales Company (R. 69) would not deny that the decedent's expenses in connection with this trip were borne by Smith Sales Company. (R. 82).

Even if it should be assumed, that the expenses of the decedent were to be advanced in the first instance by the corporations for which he worked, such expenses might well have been reimbursed later by the partnership. The plaintiff's own exhibits show that there was a considerable amount of interchange of funds between the various Smith entities. Smith Frozen Foods, Inc.'s cash report, as of April 18, 1954, shows that during the preceding week withdrawals were made on behalf of Smith Canning Company, (in two instances), and also for Box Elder Packing Corporation. (R. 101). The cash report of the same corporation for the week following indicates two payments to Box Elder Packing Corporation. (R. 103).

The Industrial Commission held the matter under advisement for a period of approximately eight months. It may be fairly assumed that during this period of time the Commission carefully considered all of the evidence, from which it concluded that at the time of the fatal

accident, Roland B. Smith was engaged in the service of Smith Sales Company, the partnership, rather than in the service of any of the corporations of which he was an officer. The commission rightly concluded that there was no right of compensation as against the partnership, because the partnership had admittedly failed to comply with the provisions of Sec. 35-1-43(4) U.C.A. 1953, and there was no right of compensation against the corporations, because at the time of his death the decedent was not in the course of his employment by the corporations. (R. 16-17). A petition for rehearing was duly denied, (R. 105-112, 113), whereupon the plaintiff brought the instant proceedings in this court. (R. 116-118).

In summary, the evidence shows *without dispute* that Roland B. Smith was killed in an airplane accident on April 19, 1954; that at the time of the accident he was a general partner in Smith Sales Company; that Smith Sales Company was the exclusive sales agent for all of the Smith corporate enterprises; that the airplane in which the accident occurred was owned and maintained by Smith Sales Company; that deceased was accompanied by William Robbins, the sales manager of Smith Sales Company, who had no office, employment, connection or proprietary interest in any of the other Smith enterprises; that the prime and motivating purpose of the trip was to sell a tomato pack; that for this purpose calls or stops were planned at various cities throughout the mid-west; and there is no specific evidence that any business or purpose of any of the corporate enterprises was to be served. All of this quite conclusively establishes

that at the time of the accident the deceased was engaged in the service of Smith Sales Company, and abundantly and adequately supports the findings of the Commission to that effect.

THE ISSUES

As we see it, there are at most two issues for determination by this court:

1. Is there substantial evidence in the record to support the Commission's finding that the deceased was engaged in the business of the partnership at the time of his death? If the court holds that the Commission's finding is supported by the evidence, the Commission's conclusions and order follow as a matter of law, and that is determinative of the matter. If, however, this court finds that the Commission's findings are not supported by the evidence, there remains a second issue to be considered:

2. If the deceased was in the service of either or any of the corporations of which he was an officer at the time of his death, was he an "employee" within the meaning of the Utah Workmen's Compensation Act, and are his dependents entitled to recover death benefits?

POINT I.

THE FINDING OF THE INDUSTRIAL COMMISSION THAT THE DECEASED WAS ENGAGED IN THE BUSINESS OF THE PARTNERSHIP, AND NOT IN THE BUSINESS OF ANY OF THE CORPORATIONS OF WHICH HE WAS AN OFFICER, AT THE TIME OF HIS DEATH, IS SUPPORTED

BY SUBSTANTIAL EVIDENCE, AND THE FINDING OF THE COMMISSION IN THIS REGARD MAY NOT BE DISTURBED UPON REVIEW BY THE SUPREME COURT.

As we understand the position of the plaintiff in this case, he contends that there is no substantial evidence in the record to support the findings of the Commission; that the findings of the Commission are therefore arbitrary and capricious, and that the findings should be set aside and the order of the Commission reversed. In other words, plaintiff contends that the evidence compels a finding in his favor. We have, in our statement of facts, set forth evidence adduced at the hearing, which not only amply supports the findings of the Commission, but, in our opinion, compels the finding made by the Commission.

The scope of review of an industrial proceeding by the Supreme Court is set forth in Section 35-1-84, U.C.A. 1953, which in so far as material here, reads as follows:

“The review shall not be extended further than to determine:

(1) Whether or not the commission acted without or in excess of its powers.

(2) If findings of fact are made, whether or not such findings of fact support the award under review.”

This statute has continued virtually unchanged in the Workmen's Compensation Act since 1921. We also invite the court's attention to the provisions of Section 35-1-85, U.C.A., 1953, which reads as follows:

“After each formal hearing, it shall be the duty of the Commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the commission *on questions of fact shall be conclusive and final and shall not be subject to review*; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission.” (Italics ours.)

Although this statute has existed in its present form only since 1949, prior to that time, it contained essentially the same provisions, although the language was somewhat different.

These two statutes circumscribe the scope and extent of review by this court of industrial proceedings. Almost from the inception of the Compensation Act, they have been before this court for review in innumerable cases, and this court has unwaveringly followed both the letter and the spirit of the statutes. The rule of decision was well stated by this Court in the case of *Amalgamated Sugar Co. v. Ind. Comm.*, 56 Utah 80, 189 P. 69. It was there said:

“The only question raised and presented to this court for consideration is whether or not there is any substantial testimony in the record which tends to support the finding of the Commission that the death of the said Benson was occasioned by accidental causes arising out of and in the course of his employment with the Amalgamated Sugar Company. * * *

“* * * It would subserve no good purpose to review the testimony in detail which tends to sup-

port the conflicting theories of the respective parties. In this class of cases, under our statutes, this court is confined to a review of the testimony and findings of the Commission for the sole purpose of determining whether or not there is any substantial evidence in the record to support the award made by the Commission to the claimants. *If there is any substantial evidence in the record to support the findings of the Commission, and the ultimate facts found by the Commission support the award*, we, as a reviewing court, under our statutes, cannot do otherwise than enter judgment affirming the award made by the Commission.” (Italics ours.)

The above rule was restated in substance and effect in a long line of cases following that decision: *Geo. A. Lowe Co. v. Ind. Comm.*, 56 Utah 519, 190 P. 934; *McVicar v. Ind. Comm.*, 56 Utah 342, 191 P. 1089; *Globe Grain & Milling Co. v. Ind. Comm.*, 57 Utah 192, 193 P. 642; *Utah Fuel Co. v. Ind. Comm.*, 57 Utah 246, 194 P. 122; *Doscolos v. Ind. Comm.*, 57 Utah 486, 195 P. 638; *Twin Peak Canning Co. v. Ind. Comm.*, 57 Utah 589, 196 P. 853; *Moray v. Ind. Comm.*, 58 Utah 404, 199 P. 1023; *Pinyon Queen Mining Co. v. Ind. Comm.*, 59 Utah 402, 204 P. 323; *Denver & R. G. W. R. Co. v. Ind. Comm.*, 60 Utah 95, 206 P. 1103; *Fonnesbeck v. O.S.L. R. Co.*, (Ut.) 207 P. 1114; *Milford Copper Co. v. Ind. Comm.*, 61 Utah 37, 210 P. 993; *Alexander v. Ind. Comm.*, 61 Utah 430, 213 P. 1078; *McKellar v. Ind. Comm.*, 62 Utah 621, 221 P. 849; *Park City v. Ind. Comm.*, 63 Utah 205, 224 P. 655; *Hartford Acdt. & Indem. Co. v. Ind. Comm.*, 64 Utah 176, 228 P. 753; *Aetna Life Ins. Co. v. Ind. Comm.*, 64 Utah 415, 231

P. 442, and *Utah Consol. Min. Co. v. Ind. Comm.*, 66 Utah 173, 240 P. 440.

Notwithstanding the oft reiterated exposition of the rule, cases attacking the findings of the commission continued to come before the court, and in the case of *Adams v. Ind. Comm.*, 67 Utah 157, 246 P. 364, this court, apparently somewhat annoyed at the need for restating the rule so frequently, admonished the bar as follows:

“Counsel and litigants in these cases should understand once and for all that this court is powerless to review the evidence except for the purposes heretofore frequently declared by the court in a long series of well-considered cases.

* * *

“This court is now firmly committed to the doctrine that it will examine into the evidence only to ascertain whether there is any substantial evidence in support of the findings of the commission and whether it has either acted without or in excess of its jurisdiction. * * *”

There followed another long line of cases, reiterating the rule: *Standard Coal Co. v. Ind. Comm.*, 67 Utah 292, 247 P. 298; *Garff v. Ind. Comm.*, 67 Utah 345, 247 P. 495; *Rukavina v. Ind. Comm.*, 68 Utah 1, 248 P. 1103; *Chief Consol. Min. Co. v. Ind. Comm.*, 70 Utah 333, 260 P. 271; *Utah Idaho Sugar Co. v. Ind. Comm.*, 71 Utah 190, 263 P. 746; *Utah-Idaho Central R. Co. v. Ind. Comm.*, 71 Utah 490, 267 P. 785; *Fish Lake Resort Co. v. Ind. Comm.*, 73 Ut. 479; 275 P. 580; *Banks v. Ind. Comm.*, 74 Utah 166, 278 P. 58; *Combined Metals Reduction Co. v. Ind. Comm.*,

74 Utah 274, 278 P. 1019; *A. S. & R. Co. v. Ind. Comm.*, 76 Utah 503, 290 P. 770; *Hauser v. Ind. Comm.*, 77 Utah 419, 296 P. 780; *Kelly v. Ind. Comm.*, 80 Utah 73, 12 P. (2d) 1112; *Easthope v. Ind. Comm.*, 80 Utah 312, 15 P. (2d) 301; *Harness et al. v. Ind. Comm.*, 81 Utah 276, 17 P. (2d) 277; and *Ostler v. Ind. Comm.*, 84 Utah 428, 36 P. (2d) 95.

In the case of *Leventis v. Ind. Comm.*, 84 Utah 174, 35 P. (2d) 770, this court again addressed the bar on this principle (which had by this time become axiomatic), in the following terms:

“In view of the record and the findings of the commission, our course is an open highway, marked by an unbroken line of decisions which have the support of both natural justice and of common sense. The principles involved are so limpid and axiomatic that their recitation or a citation thereof would be an adscititious burden. Therefore, we move straight toward a conclusion. In all respects the findings are supported by substantial competent evidence, which this court can neither weigh nor review, as the commissioners are the sole judges of the credibility of the witnesses and of the weight of the evidence.”

The court used even stronger language in the case of *Park Utah Consol. Mines Co. v. Ind. Comm.*, 84 Utah 481, 36 P. (2d) 979. It was there said:

“It seems daft and unjust, certainly malapropos, that this court should be required to repeatedly expostulate with legists about principles so well established, and to so frequently reaffirm

that the findings and conclusions of the commission on questions of fact are conclusive, and final and are not subject to review, * * * and that they cannot be disturbed unless it appears as a matter of law that they are contrary to law and contrary to the evidence. We cannot weigh conflicting evidence, nor direct which of the two or more reasonable inferences ought to be drawn from evidence not in conflict. * * * In the determining of facts the conclusions of the commission are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence."

The court has continued to follow the same rule of decision down to the present time. See *Vecchio v. Ind. Comm.*, 84 Utah 528, 37 P. (2d) 542; *Ogden Union Ry. & Depot Co. v. Ind. Comm.*, 85 Utah 124, 38 P. (2d) 766; *Spencer v. Ind. Comm.*, 87 Utah 336, 40 P. (2d) 188; *Littleford v. Ind. Comm.*, 86 Utah 46, 40 P. (2d) 231; *Roberts v. Ind. Comm.*, 87 Utah 10, 47 P. (2d) 1052; *Ellis v. Ind. Comm.*, 91 Utah 432, 64 P. (2d) 363; *Gerber v. Ind. Comm.*, 91 Utah 479, 64 P. (2d) 1281; *Babick v. Ind. Comm.*, (Utah) 65 P. (2d) 1133; *Pecharich v. Ind. Comm.*, 99 Utah 412, 107 P. (2d) 167; *Wilson v. Ind. Comm.*, 99 Utah 524, 108 P. (2d) 519; *Silcox v. Ind. Comm.*, 101 Utah 438, 121 P. (2d) 901; affirmed on rehearing, 101 Ut. 443, 125 P. (2d) 428; *Bradshaw v. Ind. Comm.*, 103 Utah 405, 135 P. (2d) 530; *Woodburn v. Ind. Comm.*, 111 Utah 393, 181 P. (2d) 209; *Camacho v. Ind. Comm.*, (Ut.) 225 P. (2d) 728; *Comm. of Finance v. Ind. Comm.*, (Ut.) 239 P. (2d) 185; and *Edlund v. Ind. Comm.*, (Utah) 248 P. (2d) 365.

The problem presented to the court in this case can be well stated by quoting from the language of this court in the case of *Peterson v. Ind. Comm.*, 102 Utah 175, 129 P. (2d) 563, where it is said:

“In the instant case we are not asked to determine if there is any evidence to support the finding of the commission. We are asked to determine that the probative force of the evidence is such as compels a finding contrary to that made by the commission. The commission having denied an award, found no liability on the insurance carrier or employer, we are asked to declare that the evidence requires or compels a holding to the contrary; that the findings are so against the evidence as to find no support therein; that there is nothing in the evidence upon which a reasonable mind, a judicious mind could rest in arriving at a conclusion, and therefore the conclusion must have been arrived at arbitrarily or capriciously without regard to the evidence. * * *

“* * * To be a reasonable conclusion it must be one for which from the evidence one can give reasons which a judicious mind would deem worthy of consideration, upon which it would be content to rest a judgment. In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence, or unreasonably refused to believe such evidence.* * *

“* * * If there is substantial, competent evidence to sustain it, then it cannot be said to be arbitrary or capricious. * * *”

As shown by the authorities above set forth, this court has historically been reluctant to interfere with the holdings of the Commission, and has reversed its orders, or set aside its findings of fact, only in the clearest of cases. One of the leading cases dealing with the question of what is necessary to warrant a reversal of the commission on its findings of fact, was *Kavalinakis v. Ind. Comm.*, 67 Utah 174, 246 P. 698. The rule there laid down is as follows:

“By what has been said we do not wish to be understood as holding that there is no limit to the commission’s power or authority in disregarding or in refusing to give effect to uncontradicted evidence. The commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and to act upon credible evidence which is unquestioned and undisputed. What we hold is that in case the commission is charged with having arbitrarily and capriciously refused to consider credible evidence, and we are asked to overturn the findings and conclusions of the commission which appear to be in conflict with or contrary to the evidence, *it must be clearly made to appear to us that the commission acted arbitrarily or capriciously and wholly without cause* in rejecting or in refusing to give effect to the evidence. We cannot set aside a finding or conclusion of fact merely because we are of the opinion that upon the face of the record the commission refused to give effect to certain uncontradicted evidence. *Before we can set aside findings or conclusions of fact, the fact that the commission acted arbitrarily or capriciously must be so clear and convincing that but one conclusion is permissible*, and that we would be required to

issue a writ of mandate directing a specific finding of dependency, as we are empowered to do by subdivision (d) of section 3148, *supra*. Any other conclusion would make this court merely a reviewing court with power to weigh the probative effect of the evidence.” (*Italics ours.*)

In the case of *Norris v. Ind. Comm.*, 90 Utah. 256, 61 P. (2d) 413, this court further refined the principles of the Kavalinakis case, and set forth definite criteria by which to measure the sufficiency of the evidence to support the findings of the commission. The standards there laid down, were as follows:

“Where the matter presented on appeal is the question of whether the commission should have in law arrived at a conclusion of fact different from that at which it did arrive from the evidence, a question of law is presented only when it is claimed that the commission could only arrive at one conclusion from the evidence, and that it found contrary to that inevitable conclusion. But in order to reverse the commission in this regard it must appear at least that (a) the evidence is uncontradicted, and (b) there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony and (c) that the uncontradicted evidence is not wholly that of interested witnesses, or, if the uncontradicted evidence is wholly or partly from others than interested witnesses, that the record shows no bias or prejudice on the part of such other witnesses, and (d) the uncontradicted evidence is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof, and (e) precludes any other explanation or hypothesis as being more or equally as reasonable, and (f) there is

nothing in the record which would indicate that the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that reason not be disturbed."

The principles and statements of the Kavalinakis and Norris cases have been oft repeated and steadfastly followed, as illustrated by the following cases: *Kent v. Ind. Comm.*, 89 Utah 381, 57 P. (2d) 724; *O'Brien v. Ind. Comm.*, 90 Utah 266, 61 P. (2d) 418; *West v. Ind. Comm.*, 90 Utah 262, 61 P. (2d) 416; *Milkovich v. Ind. Comm.*, 91 Utah 498, 64 P. (2d) 1290; *Johnson v. Ind. Comm.*, 93 Utah 493, 73 P. (2d) 1308; *Stoddard v. Ind. Comm.*, 103 Utah 351, 135 P. (2d) 256; *Godfrey v. Ind. Comm.*, 105 Utah 324, 142 P. (2d) 174; *Lorange v. Ind. Comm.*, 107 Utah 261, 153 P. (2d) 272; *Bailey v. Ind. Comm.*, 110 Utah 395, 174 P. (2d) 429; and *Jones v. Calif. Packing Corp.*, (Utah), 244 P. (2d) 640.

Applying the standards of the Norris case to the record in the case at bar, we find that at least three of the criteria established in the Norris case as essential to warrant a reversal of an Industrial order, are absent in this case. The first requirement (a) mentioned in the Norris case is that the evidence must be uncontradicted. While in this case there is no dispute on the evidentiary facts, the inferences which may be drawn therefrom are at best conflicting, or if they are not conflicting, they compel the finding made by the commission. We have heretofore in our statement of facts set forth abundant evidence, upon which the findings of the commission

were based. It certainly cannot be said that there is a lack of evidence to support the findings of the commission, or that there is uncontradicted evidence which compels a finding to the contrary.

The third standard (c) laid down in the Norris case, is that the uncontradicted evidence should not be wholly that of interested witnesses, and that the record should show no bias or prejudice on the part of witnesses, other than interested witnesses. The only witnesses who testified in this case were Victor Smith, (brother of the decedent, and also a brother of the guardian and applicant, and an uncle of the minor children, for whose benefit the award is sought,) and Melvin Stephenson, an employee of the Smith enterprises. While several of the Smith businesses are named as parties defendant, they are defendants only in a nominal sense, since any award would be borne by the compensation insurance carrier. It is patent from an examination of the testimony of these witnesses, that it was their desire to present the evidence in the light most favorable to the applicant. They were called as witnesses for the applicant, and it was their apparent purpose to attempt to make a case of liability under the Industrial Act. It cannot be said that they were disinterested witnesses, or that their testimony was free of bias.

The fifth requirement (e) established by the Norris case is that, the evidence must preclude any other explanation or hypothesis as being more or equally reasonable. In other words, the evidence will permit of only

one reasonable conclusion. If the evidence in this case compels any conclusion, it compels a finding that decedent was in the service of the partnership at the time of his demise. If the evidence permits of more than one conclusion, the conclusion drawn by the Commission is certainly at least equally as reasonable as any other which may be drawn. Most certainly the evidence does not preclude the finding made by the Commission.

It is readily apparent that at least three of the six elements necessary to warrant a reversal of the Commission's findings are absent in this case.

We also remind the court that the burden in this case is upon the plaintiff to prove by a preponderance of the evidence, that the deceased was killed in the course of his employment as an employee of one of the corporations. The burden is not upon the defendants to show that he was not an employee, or not in the scope of his employment at the time of the fatal accident. The rule in this regard is well stated in the case of *Bingham Mines v. Allsop*, 59 Utah 306, 203 P. 644:

“It was incumbent upon the beneficiaries to prove that the death resulted from an accident arising out of and in the course of deceased's employment.”

The rule has oft-times been reiterated, as illustrated, by the following cases: *Higley v. Ind. Comm.*, 75 Utah 361, 285 P. 306; *D. H. Perry Estate v. Ind. Comm.*, 79 Utah 8, 7 P. (2d) 269; *Chase v. Ind. Comm.*, 81 Utah 141, 17 P. (2d) 205; *Thompson v. Ind. Comm.*, 82 Utah 247,

23 P. (2d) 930; *Wherritt v. Ind. Comm.*, 100 Utah 68, 110 P. (2d) 374; *General Mills, Inc. v. Ind. Comm.*, 101 Utah 214, 120 P. (2d) 279; and *Royal Canning Corp. v. Ind. Comm.*, 101 Utah 323, 121 P. (2d) 406.

We do not understand that the plaintiff takes issue with any of the foregoing principles. On the contrary, the plaintiff apparently specifically admits on page 19 of his brief, that the rules are well established and not now open to question. However, having stated and conceded the rule, plaintiff in effect nonetheless, seeks to overthrow it, or get around it, by a series of arguments which we now consider.

Under Point I, and to a lesser extent, under Point II of his brief, plaintiff takes certain of the facts established without dispute in the record, and from these argues for certain inferences which he contends naturally follow, and from which he seeks to derive the ultimate conclusion that decedent was engaged in the service of one or more of the corporations of which he was an officer, at the time of his death. Conceding for the purpose of this argument, but without otherwise admitting that the evidence would permit an inference that the decedent was so engaged, there are, nonetheless, strong inferences which point to the conclusion that he was engaged solely in the service of the partnership, at the time of the accident. Under our statement of facts we pointed out that decedent was a general partner, in the partnership; that as such, he shared pro-rata in the profits of the partnership; that by the terms of the articles of partnership,

he was bound to devote his best efforts to the business of the partnership; that the purpose of the trip was the sale of a tomato pack; that none of the corporations had any sales organization; that the partnership acted as exclusive sales agent for the produce of all of the corporations; that the trip was made in a plane solely owned and maintained by the partnership, and that Robbins, who accompanied the decedent, was employed exclusively by the partnership as sales manager. All of these things point unerringly to the conclusion reached by the Commission in this case.

Counsel for the plaintiff argues that because the trip was for the purpose of selling the products of a corporation of which decedent was president and general manager, and that the corporation had some interest in disposing of its product, that the trip was therefore for the benefit of, and in the service of, the corporations. He argues that if the trip had been for the purpose of selling the products of Smith Canning Co., Mr. Victor R. Smith would have gone on the trip instead of the decedent, and that if the trip had been for the purpose of selling products of the Idaho or Oregon corporations, Mr. Milan D. Smith would have made the trip. This is pure argument and conjecture, and is not based upon any evidence in the record. While this line of argument may point to a permissible inference, it certainly does not compel the inference which the plaintiff draws. Several other equally probable inferences may be drawn. It may be argued that the decedent made the trip because it was necessary that Victor R. Smith, the managing partner,

remain at the home office to manage the affairs of the partnership during the absence of the sales manager. It may also be argued or inferred that it would not be convenient for an officer of the Idaho and Oregon corporations to come to Salt Lake for the purpose of going on a sales trip when there was a Utah resident readily available for that purpose. It is also possible that the decedent desired to take the trip partially for pleasure purposes. In this connection, it is not without significance that both men were accompanied by their wives. For aught that the record reveals, decedent may have made the trip because he was the best or only qualified pilot available. There is no specific evidence in the record that any purpose or function of any of the corporations was to be served by this trip. Without dispute the trip was primarily for the purpose of selling a tomato pack, a function exclusively within the province of the partnership. All references to any other business to be conducted on the trip, are at best, vague and uncertain.

The rule heretofore stated, that findings of the commission upon conflicting evidence are final, applies with equal force where the evidence is uncontradicted, but conflicting inferences may be drawn therefrom.

The rule was thus stated in *Parker v. Ind. Comm.*, 78 Utah 509, 5 P. (2d) 573:

“This court is not authorized to weigh conflicting evidence, nor is it authorized to direct which one of two or more reasonable inferences must be drawn from evidence which is not in conflict. That is the peculiar province of the In-

dustrial Commission.”

To the same effect are *Pace v. Ind. Comm.*, 87 Utah 6, 47 P. (2d) 1050 and *Russell v. Ind. Comm.*, 86 Utah 306, 43 P. (2d) 1069.

The language of this court in the case of *Sugar v. Ind. Comm.*, 94 Utah 56, 75 P. (2d) 311, is also apropos:

“Granting that there is some evidence or inference favoring the applicant’s theory, yet the commission was not bound to adopt that theory. It was the commission’s duty to decide between the opposing theories and inferences.”

Other cases to the same effect are illustrated by the following: *Tintic Standard Min. Co. v. Ind. Comm.*, 100 Utah 96, 110 P. (2d) 367; *Salt Lake County v. Ind. Comm.*, 101 Utah 167, 120 P. (2d) 321; *Pac. States Cast Iron Pipe Co. v. Ind. Comm.*, 101 Utah 580, 126 P. (2d) 25, and *Utah Fuel Co. v. Ind. Comm.*, 102 Utah 26, 126 P. (2d) 1070.

Under Points II and III, of his brief, plaintiff attempts to bring this case within the rule of concurrent employment, citing and relying upon *Murray v. Wasatch Grading Co.*, 73 Utah 430, 274 P. 940. The facts of that case are quite different from those in the case at bar. That was not a true case of concurrent employment, but rather a case of a borrowed employee. The applicant in that case was originally employed by the railroad, but was assigned to duty with the defendant corporation. Although he received his wages directly from the railroad, the railroad was reimbursed by the defendant cor-

poration for such wages, and the employee worked under the direction and for the benefit of the defendant corporation. The court there held that he was an employee of the defendant corporation. We have no quarrel with that holding. We merely observe that the facts bear no similarity to the facts in the case at bar. Here, the decedent held simultaneously the position of corporate officer and director of several corporations, and the office of general partner in a partnership. He received salary from most, if not all of the corporations, and divided his time among the several corporations and the partnership. He also received profits from the partnership. The cases are in no wise analogous.

Counsel also cites and relies upon several cases from foreign jurisdictions. However, it is readily apparent that all of those cases involve situations where an employee was jointly employed by two or more employers for the common benefit of both, as for example, a salesman representing two different companies, or the case of a watchman jointly employed by two or more employers to care for their respective property. Such is not the situation here. The decedent was separately employed by each of the various corporations, and the partnership which he represented. The salary was based upon the services rendered to the particular employer, and bore no relationship to his compensation from any other employer.

A case more to the point than any of those cited by plaintiff is *Bamberger Electric R. Co. v. Ind. Comm.*,

59 Utah 257, 203 P. 345. In that case the decedent was employed both by a railroad company and a power company, and spent part of his time operating the railroad company's transformers on one side of a building, and the other part of his time attending to the power company's machinery on the other side of the same building. There was no joint contract between the two companies for the payment of decedent's wages. Either company could have discharged the deceased from its employ, but neither could have discharged the decedent from the employ of the other. Each employer paid the decedent according to the pay scale of its other employees similarly engaged. At the time of his death, the decedent was engaged in working solely on behalf of the power company. The Industrial Commission made an award jointly against both the railroad company and the power company. Upon review, the order was reversed as to the railroad company, and it was held that the power company was solely liable for the payment of the award because at the time of his death, the deceased was engaged solely and exclusively in the service of the power company, and not in the service of the railroad.

The reasoning of that case applies fully here. Either or any of the corporations could have terminated decedent's services at any time without in any wise affecting his services to any of the other corporations, or the partnership. At certain times, he was engaged in the service of one corporation and at other times, he was engaged in the service of another corporation. At the time of the accident he was, as found by the commission, engaged in the service of the partnership, and

not in the service of any of the corporations.

Under Point V of his brief, plaintiff seeks to avoid the rule prohibiting this court from weighing the evidence, or the inferences therefrom, under the well recognized exception that this court will review the jurisdictional facts and weigh them independently of the commission. This exception apparently had its origin in the early case of *Ind. Comm., vs. Evans*, 52 Utah 394, 174 P. 825. That case was decided under the law as it existed prior to the 1921 amendments to the Industrial Act. The court there concluded that where there was a conflict in the evidence, as to the facts necessary to give the Commission jurisdiction, that such facts could be reviewed by the Supreme Court, and that this court could, under those particular circumstances, make findings on conflicting evidence, contrary to those of the Commission. The reasoning of the court in the *Evans* case is somewhat nebulous. However, from that decision, the rule has been evolved as stated in the case of *Angel vs. Ind. Comm.*, 64 Utah 105, 228 P. 509:

“Whether or not Skoubye was an employe of Angel, within the meaning of the Industrial Act, is a jurisdictional question calling for a judicial determination. * * * It becomes our duty, therefore, to determine the facts from a preponderance of the evidence and apply thereto the law of the case.”

The rule has been consistently followed since that time, and we do not now question it. See *Luker Sand & Gravel Co. v. Ind. Comm.*, 82 Utah 188, 23 P. (2d) 225;

Weber County-Ogden City Relief Committee v. Ind. Comm., 93 Utah 85, 71 P. (2d) 177; *Holt v. Ind. Comm.*, 96 Utah 484, 87 P. (2d) 686; *Miller v. Ind. Comm.*, 97 Utah 226, 92 P. (2d) 342; *Stover Bedding Co. v. Ind. Comm.*, 99 Utah 423, 107 P. (2d) 1027; *Rosenbaum v. Ind. Comm.*, 112 Utah 109, 185 P. (2d) 511; *Christean v. Ind. Comm.*, 113 Utah 45, 196 P. (2d) 502; *Sommerville v. Ind. Comm.*, 113 Utah 504, 196 P. (2d) 718.

However, this is not a case involving a dispute as to the jurisdictional facts. The jurisdictional facts are the facts which must exist in order to give the Industrial Commission jurisdiction of the claim. They are such facts as whether the claimant was an employee or an independent contractor; or whether the employer at the time of the accident had three or more employees in his employ, so as to bring him within the ambit of the Act. Such is not the problem here. The decedent's official connection as a corporate officer of the various corporations, and as a general partner in the partnership, is established without dispute. The question here involved is not whether he was an employee, or independent contractor, but whether at the time of the accident he was engaged in the "course of his employment" of any of the corporations. This is not a jurisdictional fact, but a fact relating to the merits of the plaintiff's claim. It is a fact upon which the findings of the commission, if supported by substantial evidence, are final, and not subject to review by this court. See *Colonial Building & Loan Ass'n. et al v. Ind. Comm.*, 85 Utah 65, 38 P. (2d) 737. The rule

is well stated in *Batchelor v. Ind. Comm.*, 86 Utah 261, 42 P. (2d) 996, where it was said:

“The Commission having found as an ultimate fact that applicant did not suffer any injury by accident arising out of or in the course of her employment, and there being evidence in the record from which the Commission could have found either affirmatively or negatively upon the ultimate issue of fact, we may not disturb the finding of the Commission.”

We submit that the findings of the Industrial Commission are amply supported by substantial evidence; that conflicting inferences which may be drawn from the uncontradicted evidence are not reviewable by this court, and that the inferences drawn by the Industrial Commission from the uncontradicted evidence were reasonable and support the decision of the Commission; that this is not a case of concurrent employment; that decedent was not at the time of the accident in the service of any of the corporations of which he was an officer; that there were no jurisdictional questions of fact involved, and that under the statutes of this state, and the well established rules of this court, the findings of the Commission may not be disturbed, and the order of the Commission must be affirmed.

POINT II.

EVEN IF IT BE HELD THAT THE DECEDENT WAS AT THE TIME OF HIS DEATH ACTING IN BEHALF OF, OR IN THE SERVICE OF ANY OF THE CORPORATIONS OF WHICH HE WAS AN OFFICER, HE WAS NOT AN “EMPLOYEE” WITHIN THE MEANING OF THE WORK-

MEN'S COMPENSATION ACT, AND THEREFORE, HIS DEPENDENTS ARE NOT ENTITLED TO RECOVER DEATH BENEFITS.

Up to this point in our argument, we have attempted to establish that the Commission's finding that, at the time of his death the decedent was acting in the service of the partnership, and not in the service of any of the corporations, is supported by substantial evidence, and that such finding on the part of the Commission is final and conclusive, and not subject to review. In the event that the court is in agreement with that position, there will be no need for the court to consider our Point II. However, if the court rules adversely to the position taken by us under Point I, we respectfully submit that, even though decedent be considered to have been acting at least partially on behalf of one or more of the corporations of which he was an officer, he was nonetheless not an "employee" of any of those corporations within the meaning of the Compensation Act, but was acting in his capacity as an executive officer of such corporations, and that while acting in such capacity he did not come within the letter or the spirit of the Compensation Act, and therefore his dependents would not be entitled to an award of death benefits.

The question of whether a corporate officer, director or stockholder is an employee of the corporation which he represents, has been considered by the courts of last resort of many jurisdictions in this country. So far as our research has discovered, there have been no decisions from this court on the subject. The holdings of the courts

which have considered this question are at considerable variance, depending upon the particular facts of each case. However, it appears that the general rule to be derived from a consideration of these decisions is that an executive officer of a corporation, *as such*, is not an employee of the corporation within the meaning of the Compensation Act. However, one who is engaged to perform, and actually performs as a regular part of his duties, mechanical or manual tasks such as are ordinarily performed by employees (as distinguished from executives), will not be debarred from recovering compensation, merely because he is an officer or stockholder of the corporation for which he works. Common examples are as in the case of small corporations, such as small service stations, grocery stores, drug stores, etc., where the corporate officer works along-side the other employees, performing exactly the same type of work and assuming the same risks. However, where the corporate officer is charged principally with managerial functions, such as general supervision of operations, negotiation of contracts, hiring and discharging employees, and other similar matters, it is ordinarily held that he is not an employee within the contemplation of the act. The rule is well stated by Larson, *Workmen's Compensation Law*, Vol. 1, page 748, Sec. 54.00 where it is said:

"Corporate officers who perform only executive functions are deemed excluded from almost all acts. But a person who can establish independently, on the basis of nature of the work done, method of payment, and subservience to the control of an employer, that he meets the test of em-

ployment does not forfeit that status by occupying at the same time the status of corporate officer, director or stockholder.” (Italics ours.)

The same author says at page 786, Sec. 54.21:

“As long as an officer’s or director’s duties are confined to the executive functions associated with the office, such as policy-making, hiring and firing, negotiating of important contracts, and the like the Compensation Act does not apply.”

The rule is similarly stated in 58 Am. Jur. 678, Workmen’s Compensation, Sec. 150:

“While the managing or higher executive officers of corporations have been held in some instances not to fall within the category of ‘workmen’ or ‘employees’ within the meaning of those terms as used in compensation acts, the cases appear generally to hold, in the absence of any provision to the contrary, that the mere fact that one is a stockholder, officer, or director of a corporation does not necessarily preclude recovery for his injury or death, as an employee of the company, under Workmen’s compensation acts, but that he may be an employee of the company, depending upon such factors as the nature of the work for which he receives pay, the proportion of the stock which he owns, and whether, in case he performs the work of an ordinary employee, such work is not merely occasional or incidental, but is his regular work. But, as already indicated, an officer of a corporation is not brought within the operation of a compensation statute merely because he was engaged in the performance of the work of an ordinary employee at the time of receiving an injury, where the performance of such work by him is merely incidental or occasional, or where

there is an absence of the essential elements of the master and servant relationship. * * * The fact that a corporate officer received no compensation for the performance of the duties of an ordinary employee, in addition to his fixed salary as such officer, has been held to be determinative against his right to compensation as an employee for injuries sustained while so engaged."

The cases hereafter cited and discussed are illustrative of the rule.

In the case of *Bowne v. S. W. Bowne Co.*, 221 N.Y. 28, 116 N.E. 364, an award was made to a claimant who was the president and majority stockholder of a manufacturing corporation. He was its principal executive officer, receiving a salary of \$70 a week, and receiving annual dividends amounting to approximately \$30,000. He was injured while assisting other employees in the performance of manual labor. In reversing the award the Court of Appeals of New York said:

"Conceding that a corporation may employ its officers as workmen, to handle lumber, operate lathes, or set brakes, or to act as superintendents and foremen, it must also be conceded that *the higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word*, nor are they expected to perform manual labor. The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the Workmen's Compensation Law. * * * The statutory definition speaks of one 'in the service' of an employer. In a broad sense the officers of a corporation serve it, but in common speech

they are not referred to as its servants or employees. * * * The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. * * * The short title of the act, the limitation thereof to employers employing workmen, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed \$20 a week based on loss of earning power, — all point conclusively to a distinction between such an officer and other employees, which the court should not disregard. * * *” (*Italics ours.*)

To the same effect is the later case of *Kolpien v. O'Connell Lumber Co.*, 230 N.Y. 301, 130 N.E. 301.

In the case of *Leigh Attichison, Inc. v. Industrial Commission*, 188 Wis. 218, 205 N.W. 806, the Wisconsin Supreme Court said:

“It may be conceded that the mere fact that one is a stockholder, officer, or director of a corporation does not preclude his being at the same time an employee. No hard and fast rule can be laid down based upon the amount of stock which an individual may own or any other arbitrary standard. A study of the cases to which reference has been made sustains that. It is quite apparent that in this case none of the ordinary incidents of the relationship of employer and employee exist. 20 C.J. 1241, and cases cited. * * *

“We do not, in reaching this conclusion, ignore the fact that the corporation is a distinct entity;

nor do we reach this conclusion merely because she was the owner of a very large proportion of the stock issued, but because upon the undisputed facts she did not sustain the relation of employee to any one. While it is true she devoted practically all of her time to the carrying on of the business of the corporation in the doing of work which might be done by employees, that is not controlling. The relationship of a person to a corporation is not determined by the nature of the services performed, but by the incidents of the relationship as they actually exist.

“The Court of Appeals of the state of New York, in a very helpful and illuminating discussion of the matter, reached this conclusion: ‘The claimant in this case is willing, in order to collect a workman’s allowance for himself from the insurance carrier, to assume a status that he might be the first to disclaim for any other purpose. Theoretically he was subject to the orders of his corporation and was liable to be discharged for disobedience. Practically he was the corporation, and only by a legal fiction its servant in any sense.’ ”

In the case of *Higgins v. Bates Street Shirt Co.*, 129 Me. 6, 149 Atl. 147, it was held (under a statute similar to the Utah Act) that while the president of a corporation was not precluded from becoming an employee within the meaning of the Compensation Act he had the burden of proving that he was such an employee. Here the evidence showed that his duties were simply those pertaining to his office, and that he was performing such duties while injured. In denying an award the court said:

“When the president of a corporation acts

only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of the statutory definition."

In *Brown v. Conway Electric Light & P. Co.*, 82 N.H. 78, 129 Atl. 633, the court held that the treasurer and general manager of the defendant corporation, who also owned over one-third of the stock therein, was not a workman within the meaning of the Compensation Act. Said the Court:

"Officers and executive agents do not have the occasion for the benefit of the act which ordinary workmen have, and the legislation was not passed in their interest. Their need of such relief as the act gives is negligible compared with the need of ordinary workmen and the latters' dependents. The economic and industrial history on account of which such legislation has been promoted calls for no or but slight protection in favor of such service."

In *Hodges v. Home Mortgage Co.*, 201 N.C. 701, 161 SE 220, decedent was executive vice president and general manager of a corporation having no immediate superior and being responsible only to the board of directors. He was killed while on a trip for the purpose of producing mortgages for the corporation. The court held that he was not an employee within the purview of the Compensation Act. The court stated that executive officers of a corporation would not be denied compensation merely because they were executive officers, but stated that the question turned as to whether the nature and quality of the acts being performed were such as

would fall within the ordinary duties of workmen. Following this decision in the later case of *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E. (2d) 120, the same court said:

“The Workmen’s Compensation Act was designed and intended for the relief of injured workmen and employees earning a ‘weekly wage’ and not for salaried executives. The title and theory of the act impart the idea of compensation for workmen and their dependents. *Hodges v. Home Mortgage Co.*, 201 N.C. 701, 161 S.E. 220, 222; *Roberts v. City Ice & Coal Co.*, 210 N.C. 17, 185 S.E. 438. Executive officers of a corporation are not, as such, its employees in the ordinary sense of the word and as it is used in the act. . . .

“We adhere to the dual capacity doctrine under which executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. . . .

“To come within this doctrine it is not sufficient to show that an executive officer sustained injuries while performing manual or mechanical labor which was no part of his duties. . . . Nor are desultory, disconnected, infrequent acts of manual labor performed by an executive sufficient to classify him as a workman when so engaged. The test is, was he at the time of his injury as a part of his duties, engaged in performing ordinary, detail, mechanical or manual labor or other ordinary duties of a workman?

* * * *

“The automobile was furnished deceased as president of the corporation. The accident was during his working hours as an executive. No

inference that he was engaged as an employee rather than as an executive is permissible. As his work, as an employee, was only incidental to his employment as an executive the contrary inference is more logical.

* * *

It follows that claimants have failed to offer any competent evidence tending to show that the death of deceased arose out of and in the course of his work as an employee.

“Even if we concede, however, that such death occurred at a time when deceased was acting for the corporation, still the award cannot be sustained. The corporation was engaged in building and general construction work. The deceased was its president, its chief executive officer. The evidence gives rise to certain surmises. Treating these surmises as legitimate inferences, the president was on his way to High Point to negotiate a contract to give estimates of costs, to fix prices and to bind the company by contract. In so doing he was the alter ego, the voice and the brains of the corporation. Manifestly such business does not lie within the field of the duties of an ordinary employee or workman. They pertain exclusively to the functions of an executive.

“ . . . Here the deceased was the superior acting on his own initiative as the chief executive officer of the corporation.”

In *Carville v. A. F. Bornot & Co.*, 288 Pa. 104, 135 Atl. 652, the decedent was vice president of a corporation receiving a substantial salary as such. He was also a stockholder. In addition to performing his executive duties he made himself generally useful about the corporation's plant and took part in some manual work. His death re-

sulted from an explosion while telephoning from the plant where he had gone to investigate a naphtha leak. In holding that he was not an employee within the meaning of the compensation act, the court said:

“In the present case, it is only necessary to say that, under the statute now before us, the term ‘master’ was not intended to cover a corporation paying a substantial salary to an executive officer, or the terms ‘employee’ and ‘servant’ one occupying the position which Carville did in the organization of the defendant corporation. That is all it is necessary to decide, for this is not the case of an ordinary employee, on wages, being used pro forma as an executive officer of defendant company, nor is it the case of one with the title of an executive officer but really serving as an ordinary employee, and receiving a fixed and ascertainable compensation for his work as such.”

To the same effect is *Santi v. American Coal Exch.*, 91 Pa. Super. Ct. 271.

A long line of Minnesota cases starting with *Donaldson v. Wm. H. B. Donaldson Co.*, 176 Minn. 422, 223 N.W. 772 have also recognized and applied the rule.

In the case of *Benson v. Hygienic Artificial Ice Co.*, (Minn.) 269 N.W. 460, claimant was treasurer of defendant ice company, receiving a salary of \$75 per month. The defendant company was owned by two other companies in one of which the claimant owned 100 shares of stock and was a director. He was injured in an automobile accident while returning to work after having deposited money in the bank for the defendant company. The court held that he was an officer of the company

and not an employee and therefore not entitled to compensation.

In *Bendix v. Bendix Co.*, 217 Minn. 439, 14 N.W. 2d 465, decedent was president and principal stockholder of defendant corporation. He devoted the major portion of his time to sales and executive management, but assisted with installation and repairs when occasion required. The court said:

“The Workmen’s Compensation Act defines an employee as ‘Every person in service of another under any contract of hire, express or implied, oral or written.’ * * * But as we stated in *Donaldson v. Wm. H. B. Donaldson Co.*, 176 Minn. 422, 423, 223 N.W. 772, 773, ‘throughout the act the purpose to include only workers as distinguished from executive officers is apparent. The act has in view wages and services.’ The underlying reason for excluding executive officers is apparent. They do not come within the ordinary accepted meaning of the terms ‘workman’ and ‘employee’ for whose benefit the legislation was primarily enacted. They are not generally subject to hazards or risks, nor is their compensation ordinarily affected by temporary disability caused by injuries received while engaged in their employment.”

To the same effect is *Korovilas v. Bon Ton Renovating Co.*, 219 Minn. 294, 17 N.W. 2d 502.

In the case of *Macshir Co. v. McFarland*, 99 Ind. App. 196, 190 N.E. 69, the claimant was a director and secretary-treasurer of a small corporation. He owned 49% of its stock. He was employed by the corporation as a traveling salesman at a salary of \$50 per week. On the occa-

sion in question, he drove with the president of the corporation to another town for the double purpose of inspecting a line of merchandise which the company was contemplating adding to its line and of consulting with an attorney regarding a contract. Enroute home, the automobile was involved in a collision causing injuries to the claimant. An award of compensation by the Industrial Board was reversed, the court holding that at the time of the accident claimant was not acting in the course of his employment as a salesman, but was acting in his capacity of an officer and director of the company, and therefore his injuries were not compensable.

Another case from the same jurisdiction is *Manfield & Firman Co. v. Manfield*, 90 Ind. App. 70, 182 N.E. 539 where the facts were as follows:

Applicant was secretary and treasurer of the company receiving an annual salary of \$6800. He owned 197 of the 299 shares of stock outstanding. He was injured in an automobile accident while engaged in the services of the corporation. The court said:

“In the case of *In re Raynes* (1917) 66 Ind. App. 321, 118 N.E. 387, the same question as to who is considered an employee is defined, and from that case and cases from other states we can safely say that a person may be a stockholder, and even a director, or an official of a corporation, and at the same time be an employee and entitled to compensation.

“In order to entitle such person to compensation in a general way, he must be an employee,

whose remuneration is popularly designated as wages, rather than salary; whose compensation is not munificent, who may reasonably be presumed to be dependent on his wages for the sustenance of himself and family, and whose wife and young children may reasonably be presumed without proof to be a dependent on him for support; whose labor is manual, or of like degree of industrial or commercial importance as manual labor when viewed from the standpoint of individual accomplishment.

* * *

“The disinction between employer and employee is clearly defined in the case of *Bowne v. Bowne Co. et al.*, 221 N.Y. 28, 116 N.E. 365, 366.

* * *

“In common speech the term ‘employee’ is usually not applied to higher officers of a corporation. In one sense the officers are employees, but in common speech they are not referred to as servants or employees. * * *

* * *

“In a technical sense, all persons who are officers and directors of a corporation are employees, for the reason that a corporation can only function through agents and employees, but, when we consider the Workmen’s Compensation Act, a substantial distinction is recognized.

“Those who own the majority of stock, dictate the policy of the corporation, and manage its prudential affairs are considered in the same category as partners in the management of a business.

“Manfield and Firman in real essence owned this business and managed it in form as a corporation, but in substance it was their business.”

We recognize of course, that there are many cases where an officer of a corporation has been allowed compensation benefits. However, an examination of those cases will reveal that where compensation has been allowed, the officer has had duties similar to those of other employees, and was engaged in such duties rather than executive or managerial duties, at the time of the accident and injury. In other cases, compensation has been allowed by virtue of specific statutory provisions not found in the Utah Act. Under acts similar to the Utah Act, and involving facts similar to those presented to the court in this case, the cases hold almost without exception that the claimant is not an employee within the meaning of the act, and that his injuries are not compensable.

CONCLUSION

The finding of the Industrial Commission that the decedent was killed while in the course and scope of his duties as a general partner of the partnership, and not in the scope or course of his duties as an official of any of the corporations, is supported by substantial evidence in the record, and may not be disturbed by this court upon

review. Even if it should be found that the decedent was acting partially in the scope of his duties as an officer of any of the corporations, he was nonetheless acting in an executive capacity, and not in the capacity of an “employee” within the meaning of that term, as used in the Workmen’s Compensation Act. The order of the Commission should be affirmed.

Respectfully submitted,

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& CHRISTENSEN

and

E. R. CALLISTER, Atty. Gen.

Attorneys for Defendants

SMITH vs. INDUSTRIAL COMMISSION - No. 8455ADDENDUM TO DEFENDANTS' BRIEF

At the oral argument of the above entitled case, this court granted to plaintiff permission to file a reply brief, answering Point II of defendants' brief. A copy of the plaintiff's reply brief was not served upon the defendants until the morning of the argument, and there was no opportunity to examine it at that time, or to make oral response to the contentions therein asserted. However, leave was granted to the defendants to file an amendment to their brief in accordance with the provisions of Rule 75(p)(2), as amended.

Under Point II of plaintiff's reply brief, commencing on page 12 thereof, plaintiff contends that the defendant insurance carrier is estopped to deny that the decedent was an "employee" of the corporate defendants, for the reason that the payroll reports on which the insurance premiums were calculated, indicated that the decedent was carried as an employee by one of the corporations, and that the insurance carrier accepted the premiums based in part, upon the salary paid to the decedent. The plaintiff's argument in this regard is without merit for the following reasons:

1. The applicable compensation insurance policy became effective April 1, 1954, less than three weeks prior to the date of the fatal accident. There had been no payroll premium audit by the insurance carrier up to that time, and therefore, nothing to give it either actual or constructive notice that the deceased was carried on the payroll report as an employee.

2. There is no evidence in the record that the insurance carrier, or any agent thereof, had actual or constructive notice that

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any of the corporations carried the defendant as an employee upon their payroll.

3. The corporation which did carry the decedent as an employee, listed him as an outside salesman. The insurance carrier would have no way of knowing that he was, in fact, a corporate executive, and not merely a salesman.

A similar contention was made by the claimant in the case of Intermountain Speedways vs. Ind. Comm., (Ut.), 126 Pac. (2d) 22. This court, in denying such contention said:

"* * *The fact that Speedways may have covered these drivers with insurance on the supposition that they were employees, may have been for reasons of caution or a mistaken idea that they were employees and the acceptance of premiums on the compensation paid contestants by the State Insurance Fund was not a binding admission that it considered them employees or an acceptance of their status as such. There is no showing that the Fund knew specifically that premiums were paid on money paid to drivers or that so knowing, it intended to insure the payment of compensation to such drivers regardless of their status."

To the same effect see also Hansen vs. Terminal Manufacturing Company, Inc., 201 Minn. 216, 275 N.W. 511, which was followed in Bendix v. Bendix, 217 Minn. 439, 14 N.W. (2d) 464, and Korovilas vs. Bon Ton Renovating Co., 219 Minn. 294, 17 N.W. (2d) 502.