1982

J&W Janitorial Co. v. Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

J & W JANITORIAL COMPANY, Plaintiff, vs. THE INDUSTRIAL COMMISSION OF UTAH and FRANK L. TILT, Father of JEFFREY MATTHEW TILT, Deceased, Defendants.	:	Case No. 18130

WRIT OF REVIEW FROM AN ORDER OF

THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFF

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AUTHORITY CITED

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BRIEF OF PLAINTIFF

NATURE OF THE CASE

A writ of review was filed by the plaintiff, J and W Janitorial Service, to review an order of the Industrial Commission holding it liable for compensation benefits as a result of the death of Jeffrey Matthew Tilt, which included the payment of statutory funeral benefits to the father of the deceased as well as the payment of an award to the Second Injury Fund which is mandated by statute in cases of death by industrial accident where the deceased has no dependents.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held September 26, 1981 before an Administrative Law Judge of the Industrial Commission on the application of

Frank L. Tilt for benefits he claimed as a result of the death of his son who was alleged to be an employee of J and W Janitorial Service at the time of his fatal accident. On October 6, 1981 the Industrial Commission entered an order which contained its findings that (a) the deceased was an employee of the plaintiff at the time of his death and was not an independent contractor; (b) the deceased died in an accident which arose out of his employment; (c) the parents of the deceased were not dependent upon him within the meaning of the compensation act and, therefore, were entitled only to the statutory burial expenses of $1,000 as provided by Utah Code Ann. (1953) Sec. 35-1-81, as amended, and (d) the plaintiff was liable to the Second Injury Fund pursuant to Utah Code Ann. (1953) Sec. 35-1-68, as amended, for the sum of $18,720.00 as a result of the death by industrial accident of an employee with no dependents from which the Administrator of the Second Injury Fund agreed to forego $3,000 to be deducted and payed to the father of the deceased as additional reimbursement for burial expenses.

On October 19, 1981 the plaintiff filed a motion for review in which it was requested that the Industrial Commission review the transcript of the hearing and accept memoranda from the parties. On October 28, the Commission entered its order denying the motion for review without having requested a transcript of the hearing. Plaintiff filed a motion for reconsideration of the Commission's order November 5, 1981 on the ground that the Commission had failed to review the evidence or receive memoranda

of law. No ruling on the motion for reconsideration was made within the time allowed for petitioning for review of the Commission's final order and plaintiff's petition was filed November 25, 1981. On April 6, 1982 two members of the Commission entered an order denying plaintiff's motion for reconsideration with Commissioner Hadley dissenting after having reviewed the evidence.

RELIEF SOUGHT ON APPEAL

Plaintiff respectfully requests that the order of the Industrial Commission be reversed on the ground that the Commission erroniously concluded as a matter of law that the death of the deceased arose out of or in the course of his employment.

STATEMENT OF FACTS

J and W Janitorial Service is a sole proprietorship owned by Mr. and Mrs. Jerry Johnson. They are engaged in the business of contracting to provide janitorial services to the owners of several buildings in the Salt Lake City area. (R 35-36) At the time in issue here, Mr. Johnson employed three persons in addition to himself to service his janitorial accounts. (R 36) (These employees, including the deceased, were actually considered independent contractors by the parties themselves, (R 36-37) but the plaintiff has not appealed from the Commission's finding that the deceased was a "statutory employee" for the purposes of workmen's compensation as defined by Utah Code Ann. (1953) Sec. 35-1-42, as amended, and he will be referred to as an employee throughout).

One of the plaintiff's service contracts was with a bakery. Every evening at approximately 7:00 p.m., plaintiff's employees went to the bakery to clean large mixing and baking equipment and to sweep out the premises. (R 36) On the average night, the plaintiff's crew of three people finished cleaning the bakery at about 1:30 a.m. (R 41) Among the machines they cleaned was a large mixer about six and a half feet high, five feet wide and five feet deep with a platform behind it from which bakery workers poured flour and other ingrediants, and upon which plaintiff's employees stood to sweep and hose out the tank. (R 41) Mr. Johnson testified that a crew of three workers which ordinarily included his father worked the bakery job and that, after having trained them, he did not regularly go on to the job site to supervise their work. (R 43,48)

The deceased, Jeffrey Matthew Tilt, worked for the plaintiff on approximately fifteen to eighteen occasions at the bakery during December 1980 and January, 1981 after which he quit his employment without explanation. (R 38) On the night of his death, May 9, 1981, one member of the plaintiff's regular crew, Mr. Johnson's father, was unavailable to work at the bakery. (R 44) One of Mr. Johnson's other crew member, Cary Dannenberg was a close friend of the deceased and asked him to fill in that night for Mr. Johnson's father. (R 55)

Mr. Dannenberg, the deceased, and the third crew member, Trevor Hildebrand, arrived at the bakery at approximately 7:00 p.m. that evening. (R 40) (The plaintiff proferred testimony from Mr.

Dannenberg at the hearing that the three brought beer with them when they went to work. The Administrative Law Judge sustained the Second Injury Fund's objection to this evidence. (R 56-59) The two surviving crew members testified that they finished their work around 2:00 a.m. (R 59,68) Mr. Hildebrand stated that they decided to remain on the bakery premises rather than leave as they usually did because they intended to spend the night outside the Salt Palace in a line of people waiting to buy concert tickets and wanted to "kill some time" at the bakery where it was warm. (R 46,69)

After they finished working, the deceased and Trevor Hildebrand began playing hide and seek around the bakery and playing with the fork lifts. (R 61,70) Approximately forty-five minutes later, (R 70) as Trevor and Cary were drinking beer, Trevor hit Cary in the arm causing him to drop his beer bottle and break it. They were cleaning up the broken glass when they heard the deceased yell from what appeared to be his position on the platform behind the large mixer. He asked them to "open the door". Trevor reached for the button near where he was standing which opened the door to the bakery and, by mistake, pushed an adjacent switch which activated the mixer. Tragically, the deceased was not on the platform but was inside the mixer at the time and was killed instantly. (R 60,70)

Though the Administrative Law Judge sustained objections to testimony on the subject and indicated that he would not rely on it, the other crew members testified that the deceased had been

drinking beer throughout the night at work and had taken drugs. (R 68,69,71)

Mr. Johnson and his two employees who witnessed the death stated that they had never at any time previously seen anyone climb down into the mixer, and had never seen anyone play hide and seek around the mixers or on the premises at all. (R 41, 65,67,70) Counsel for the plaintiff attempted to examine Mr. Tilt about whether he had ever known beforehand that any employees had consumed beer or drugs on the bakery premises, but the Administrative Law Judge ruled that the question was irrelevant. (R 42) The plaintiff wished to proffer his testimony that he had never known of any employees drinking or taking drugs on the job, and that the one time an employee came to work under the influence of alcohol he was sent home.

ARGUMENT

POINT I. AN INJURY WHICH OCCURS AFTER WORKING HOURS IS COMPENSABLE ONLY WHEN THE EMPLOYEE IS ENGAGING IN ACTIVITIES REASONABLY INCIDENT TO HIS EMPLOYMENT.

The issue to be decided in this case is whether the deceased's death was by an accident "arising out of or in the course of his employment" within the meaning of Utah Code Ann. (1953) Sec. 35-1-45. Where, as in this instance, the facts and circumstances of the accident are established by the testimony of two eyewitnesses, and are uncontradicted in every essential respect, this court's authority on review is invoked to determine whether the law was correctly applied to the facts of the case.

It is undisputed that the deceased's accident occurred after

he and his co-workers had completed their janitorial work. In evaluating whether or not an after-hours injury on the premises of employment is compensable, Professor Arthur Larson (hereinafter referred to as "Larson") in his treatise Workmen's Compensation Law states the following rule at Vol. 1A, Sec. 21.60 p. 5-36 and 5-40.

> The course of employment, for employees having a fixed time and place of work, embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts. The rule is not confined to activities that are necessary; it is sufficient if they can be said to be reasonably incidental to the work.
>
> * * *
>
> Although a reasonable interval is allowed before actual working time during which an injury would normally be compensable, if the employee merely loiters around the work place before or after hours, the employee may be found to have been outside the course of his employment.

Professor Larson's views are consistent with this court's recent holding in United States Steel Corp. v. Draper, 613 P.2d 508, 509 (Utah 1980) that

> The scope of one's employment includes not only the specific duties assigned but also those things which it should reasonably be expected an employee would do in connection with those duties . . .

The deceased in this case had a fixed place of work, the bakery, and fixed time for performing his work, that is, from 7:00 p.m. when the bakery's operation was shut down until all the routine janitorial services were performed, ordinarily at

approximately 1:30 a.m. (R 41) Given the fact that his work had been completed for approximately 45 minutes (R 70), the relevant inquiry appears to be whether at the time he died the deceased was engaging in activities "reasonably incidental" to his work, to use Larson's phrase, or activities "reasonably expected . . . in connection with those duties", as this court has stated the rule.

The plaintiff submits that when an employee remains on the premises of employment after working hours to "kill time" where it is warm before standing in line overnight for concert tickets, and where he spends that time drinking beer and playing hide and seek, he is engaging in activities which are not reasonably related to his duties and therefore do not arise out of or in the course of his employment.

A review of cases cited by Larson, supra, Vol 1A Sec. 21.60 reveals that when an employee has remained at the workplace after hours to change his clothes, to put away his tools, to shower, or to close up the building, his activities are generally thought to be incidental to his employment and resultant accidents are usually compensable. On the other hand, where it is found that the employee remained at the workplace for purely personal reasons, and, especially when he simply engaged in frolic for his own amusement, it is generally held that the course of employment does not extend beyond the normal hours of employment to encompass such activity. In the case of Trotter v. County of Monmouth, 144 N.J. Super. 430, 365 A.2d 137 (1976) a county maintainence worker

returned to the shop after completing his assignments for the day but shortly before quitting time. He saw a motorcycle parked there which belonged to a co-worker and began riding it on and off county property and after the time at which other workers were dismissed by their foreman. Workmen's compensation coverage was held not to extend to his accident.

Similarly, in the case of Sumner v. Coe, 40 Or. App. 815, 596 P.2d 617 (Or. App. 1979) the court held that when an employee was injured while riding after work across the employer's parking lot on the hood of a fellow worker's car,he was not engaging in activity reasonably related to his employment, and was outside the course of his employment at the time. The same result was reached by the California Appellate Court in Seymour v. Setzer Forest Products, 124 Ca. App. 2d 608, 268 P.2d 1084 (Cal. App. 1954) when an employee who had come to work early was injured while visiting and chatting with other employees. The court concluded that because his reasons for being on the premises were personal and were not related to any service to his employer, the accident which occurred was not compensable.

The fact that the fatal accident in issue here occurred after normal working hours does not per se render the death outside the coverage of the compensation act. However, when it is undisputed that the activities of the deceased at the time were in no way reasonably incidental to the discharge of his duties, the accident, as a matter of law, was one which did not arise out of or in the course of his employment.

POINT II. THE ACTIVITIES OF THE DECEASED CONSTITUTED A SUBSTANTIAL DEVIATION FROM THE COURSE OF HIS EMPLOYMENT.

Professor Larson notes that even where some reasonable activity of an employee may bring a period of time he spends at the workplace after his normal hours within the course of his employment, he may still "break the link with employment" by engaging in a substantial deviation from the course of his employment such as would render an accident during normal hours uncompensable, 1A Larson, supra, Sec. 21.60 at p.5-41. And, inasmuch as the deceased was engaging in play at the time of his death, it is also useful to analyze the facts of this case by application of the legal test for determining the compensability of horseplay which may be applied to injuries regardless of when they occur.

In the case of Prows v. Industrial Comm'n. of Utah, 610 P.2d 1362 (Utah 1980) this court reviewed at length the factors which should be considered in determining whether an injury which occurs during "horseplay" arises out of or in the course of employment within the meaning of Utah Code Ann. (1953) Sec. 35-1-45. The court adopted Professor Larson's view that horseplay should be treated like other instances of deviation from the course of employment;if the deviation is insignificant, the accident is said to occur in the course of the worker's employment; if the deviation is substantial a resultant accident is not compensable. This court stated the test to be as follows:

> Whether initiation of or participation in horseplay is a deviation from course of employment depends on (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

610 P.2d at 1365.

In the Prows case, the court applied this test to the evidence and reversed the Commission's order denying benefits. The claimant was employed to deliver medical supplies and was injured when struck by a piece of wood shot at him with a rubber band. The evidence established that the deviation was brief in duration, occurring during a lull in work activities, and that it happened as the employee was otherwise properly engaged in moving medical supplies. There was evidence that employees had engaged in rubber band fights with great frequency prior to the claimant's accident, and the court concluded that the ready accessibility of rubber bands and the nature of the claimant's work loading and unloading supplies made it reasonable to expect that horseplay of that kind would occur on the job.

The plaintiff respectfully contends that the four part test of the Prows case, when applied to the facts of the case at bar, establishes as a matter of law that the deceased had substantially deviated from the course of his employment at the time of his death.

(1) Extent and seriousness of deviation. The first part of the Larson test as adopted in Prows focuses on the duration of time involved in the horseplay and whether the conduct itself was a trivial or a substantial alteration of behavior from that which is ordinarily incident to the performance of employment duties. The court in Prows, supra, 610 P.2d at 1366 quoted with approval Larson's statement that

> The substantial character of a horseplay deviation should not be judged by the seriousness of its consequences in the light of hindsight, but by the extent of the work-departure in itself. This is not always easy to do, especially when a trifling incident escalates or explodes into a major tragedy.

This court added its observation that,

> We think the converse of this principle is likewise true; the fact that a major tragedy has occurred should not dictate an award of compensation when that tragedy resulted from a deviation so extensive and serious that the employment can be said to have been abandoned.

In contrast to the claimant in Prows who "momentarily set aside his duties and took up the challenge", (to engage in a rubber band fight), 610 P.2d at 1366, the deceased in the case at bar spent three quarters of an hour running around the bakery, meddling with bakery equipment, playing hide and seek, and drinking beer. (R 61,70) His activities were not simply a trivial deviation from the normal work of a janitor but a serious departure from conduct which benefited his employer to conduct which was exclusively for amusement, and extreme in the risks to his safety which it created. The plaintiff submits that, as a matter

of law, the deceased's deviation from his duties at the time of his death was serious and extensive.

(2) Completeness of the deviation. The second prong of the test concerns the extent to which the horseplay was "co-mingled with the performance of duty." The court in Prows noted that at the time the rubber band fight began, the claimant was engaged in the discharge of his duties and that, had he not been injured, "he would presumably have completed loading the truck and carried on with his deliveries." 610 P.2d at 1366.

In contrast to the actions of the claimant in Prows, the deceased in this case was finished with his work at the time of his injury and had completely abandoned any performance of janitorial duties. Had he not been injured he would not have resumed his work, but would have gone on to the Salt Palace to wait for concert tickets. There is no sense whatsoever in which it could be said that his hide and seek game was "co-mingled with the performance of duty."

(3) Extent to which horseplay has become a part of the employment. The court in Prows adopted Larson's explanation of this factor that

> The controlling issue is whether the custom had in fact become a part of the employment; the employer's knowledge of it can make it neither more nor less a part of the employment—at most it is evidence of incorporation of the practice into the employment. (italics in original)

610 P.2d at 1336-1337.

In the case at bar, the applicant, whose burden it was to

establish the compensability of his son's death, introduced no evidence that horseplay such as occurred the night of the accident, that is, beer drinking, hide and seek, and climbing in mixers, had become a customary practice. On the contrary, the only evidence in the record on this issue is the testimony of the deceased's employer and his two co-workers that no one had ever been seen inside a mixer, and that the employees never before played hide and seek around the bakery. As noted, the plaintiff also attempted to introduce evidence that beer drinking had never before been observed on the job. (R 41,42,65,67,70)

(4) Extent to which nature of employment may be expected to include some such horseplay.

Explaining the final issue which arises under the Larson test, the court in Prows stated that

> This element of Larson's approach focuses on the foreseeability of horseplay in any given employment environment and on the particular act of horseplay involved. Considerations which may enter into the analysis of this point include whether the work involves lulls in employment activity or is essentially continuous, and the existence of instrumentalities which are part of the work environment and which are readily usable in horseplay situations. This list is not intended to be exhaustive but rather illustrative of the possibilities.

610 P.2d at 1367.

The applicant introduced no evidence from which it could be found that the kind of horseplay the deceased engaged in was foreseeable. The deceased's job was not one which involved lulls such as are common for many workers who must wait for others to complete certain tasks, or for certain events to occur, before

they can continue with their duties. The janitorial duties involved here were continuous, according to the testimony of the witnesses, requiring each worker to go about his cleaning assignment without necessary interruption or interrelation with the performance of others. (R 40)

Though the instrumentality of injury in this case was part of the work of the deceased in the sense that the mixer was cleaned by plaintiff's employees, it was never necessary to climb into the mixer to clean it and both its size and the presence of an attached platform suggest that it was neither designed to be entered nor easily accessible for that purpose. The fourth aspect of the test is the forseeability of the kind of horseplay which resulted in injury and, unlike the universally forseeable use of rubber bands as instruments of playful combat, the evidence in this case is that no one could reasonably have forseen that anyone would climb down into a mixer.

The Industrial Commission did not articulate any legal theory by which it reached the conclusion that the applicant sustained his burden of proof in this matter. The Commission stated simply as its "finding of fact" the following legal conclusion:

> In dealing with the issue of whether or not the deceased was killed while in the course and scope of his employment the contention by the employer that the applicant was engaged in horseplay does not by itself defeat the applicant's claim. I have considered this defense and while it is a close question I find that the deceased, Jeffrey Tilt, was killed while in the course and scope of his employment with J & W Janitorial.

Plaintiff respectfully submits, however, that when the law

of the Prows case is applied to the undisputed facts of this case, the only reasonable conclusion is that the deceased was not acting in the course of his employment when he died.

The plaintiff's position is further supported by the early Utah case of Twin Peaks Canning Co. v. Industrial Comm'n., 57 Utah 589, 196 Pac. 853 (1921) which also concerned the compensability of a death which occurred during horseplay. In that case, a fourteen year old boy was crushed when riding on the top of an elevator cage which was mistakenly activated. Though the court did not articulate the legal standard announced later in Prows, this court noted that the Twin Peaks decision was founded on the same general principles, Prows, supra, 610 P.2d at 1365.

In Twin Peaks, supra, the court referred to the course of employment issue as a close one, but resolved it in favor of compensability on the basis of evidence that, (a) the deceased and other children had frequently used and played on the elevator in question; (b) the accident occurred during a lunch break lull in working hours, and (c) the propensity of children of the age of the deceased to engage in unreasonable forms of horseplay made it forseeable that an injury on the elevator should occur. None of the factors which the court in Twin Peaks considered to be dispositive of the issue in favor of compensability are present in the case at bar.

The plaintiff submits that the Industrial Commission misapplied the law when a majority of its members concluded that the deceased died in an accident which arose out of or in the course

of his employment.

POINT III. EVIDENCE THAT THE DECEASED WAS DRINKING ALCOHOL AND USING DRUGS AT THE TIME OF HIS DEATH IS RELEVANT TO THE PLAINTIFF'S CLAIM THAT HE HAD ABANDONED HIS EMPLOYMENT AT THE TIME OF HIS ACCIDENT.

Plaintiff repeatedly posed questions to the co-workers of the deceased about his use of alcohol and drugs at the time of the accident. The Administrative Law Judge sustained every objection from the Administrator of the Second Injury Fund to this evidence though some of the answers of the witnesses to the questions propounded are part of the record. (R 42,46,56-59,68,69)

The plaintiff respectfully submits that the Administrative Law Judge erred in refusing to consider plaintiff's evidence that the deceased was drinking and using drugs at the time of his death and further contends that this evidence substantiates plaintiff's claim that the deceased was outside the course of his employment when he died.

Professor Larson in his treatise, supra, at Vol 1A Sec. 34.00, p.6-60 states the rule that,

> Voluntary intoxication which renders an employee incapable of performing his work is a departure from the course of his employment.

Even in states like Utah where intoxication is not a bar to a workmen's compensation recovery, (Utah Code Ann. (1953) Sec. 35-1-14 provides, instead, for a reduction in benefits where an injured employee was intoxicated, except in cases of injury resulting in death) evidence of intoxication may establish that

the claimant was unable to perform his employment duties at the time of his accident, and so had abandoned the course of his employment. Embree v. Industrial Commission, 21 Ariz. App. 411, 520 P.2d 324 (1974); Steffes v. 93 Leasing Co., Inc., 580 P.2d 450 (Mont. 1978)

In cases where it is not asserted that an injured worker was so intoxicated as to be totally unable to perform work related activities, evidence of drinking has been relied on by the Industrial Commission and by this court, along with other circumstances, in resolving the question whether at the time of an accident an employee whose working hours are flexible was engaged in work related activity or in purely social activity. Those cases include Martinson v. W-M Insurance Co., 606 P.2d 256 (Utah 1980) where this court affirmed the Industrial Commission's ruling that an insurance salesman's driving trip which resulted in injury was a social excursion and not a part of his employment, and Morley v. Industrial Commission, 23 Utah 2d 131, 459 P.2d 212 (1969) when the court affirmed the Commission's rejection of a construction company owner's claim that his accident after drinking beer at a bar was employment related.

Intoxication by alcohol is a defense to a claim for compensation benefits, as is intoxication by drugs, when it results in incapacity to perform job functions. Furthermore, in any case where the employer claims that an injured employee was not acting in the course of his employment when he is injured, evidence of drinking or using drugs, like evidence of all the worker's activi-

ties at the time of the accident is probative of the issue. In this case, the testimony plaintiff sought to adduce further substantiates the obvious inference of other evidence, that before his death the deceased had totally abandoned activities related to his job and was engaging in conduct which was neither incidental nor related in any way to performance of those duties.

CONCLUSION

The tragedy of Jeffrey Matthew Tilt's death cannot be overstated. However, as this court has observed, it is not the seriousness of the consequences of an employee's activities by which their relation to his employment is measured, but by application of principles of law which define the contour of the employment relationship.

The death of an employee is compensable under Utah workmen's compensation law if it occurs as the result of the performance of his duties or activities reasonably related to his duties, United States Steel Corp. v. Draper, supra. The fact that an accident happens after normal working hours does not mean that it is outside the protection of the compensation act if a worker is engaged in activities reasonably incidental to his employment duties. The fact that an injury occurs as the result of horseplay does not relieve an employer of liablity if the employee engaged in only a minor deviation from his employment.

When the law is applied to the uncontested facts of this case, however, the conclusion is inescapable that Mr. Tilt's death did not arise out of or in the course of his employment.

He remained at the bakery after hours for purely personal reasons and for a period of forty five minutes engaged in a form of horseplay which was completely disassociated from his duties, extremely hazardous and highly out of the ordinary. His use of drugs and alcohol is a relevant factor in assessing his legal status at the time of the accident and further substantiates the plaintiff's contention that he had abandoned his employment at the time of his accident.

The plaintiff respectfully requests that the court reverse the decision of the Industrial Commission.

DATED this _____day of May, 1982.

Timothy C Houpt

TIMOTHY C. HOUPT
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Plaintiff were mailed this _____day of May, 1982, postage prepaid to the following:

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