

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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J & W JANITORIAL COMPANY,                    )  
                                                  :  
                  Plaintiff,                    )  
                                                  :  
                  vs.                            )  
                                                  :  
THE INDUSTRIAL COMMISSION OF                )  
UTAH and FRANK L. TILT,                    :  
Father of JEFFREY MATTHEW                   )  
TILT, Deceased.                            :  
                                                  )  
                  Defendants.                    :

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WRIT OF REVIEW FROM AN ORDER OF  
THE INDUSTRIAL COMMISSION OF UTAH

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BRIEF OF DEFENDANT  
THE INDUSTRIAL COMMISSION OF UTAH

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FILED

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Clerk Supreme Court, Utah

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                                                      :  
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UTAH and FRANK L. TILT,                       :  
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Plaintiff,	)	
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vs.	)	Case No. 18130
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THE INDUSTRIAL COMMISSION OF	)	
UTAH and FRANK L. TILT,	:	
Father of JEFFREY MATTHEW	)	
TILT, Deceased.	:	
	)	
Defendants.	:	

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NATURE OF THE CASE

The Plaintiff, J & W Janitorial Service, was found to be liable for death benefits as a result of the work-related accident which resulted in the death of Jeffrey M. Tilt, age 18, on the 9th day of May, 1981.

DISPOSITION BY THE INDUSTRIAL COMMISSION

An order was made by the administrative law judge, and affirmed by the Industrial Commission, that Jeffrey M. Tilt was an employee of the Plaintiff and that deceased "was killed while in the course and scope of his employment with J & W Janitorial."

STATEMENT OF FACTS

The Plaintiff in this action operated a business to provide janitorial services to companies in Salt Lake City. The Plaintiff operated under the name of J & W Janitorial



Service, a sole proprietorship owned by Mr. and Mrs. Jerry Johnson.

For reasons attributed to necessity in obtaining a business license, and to avoid liability and payment of taxes, Plaintiff did not have workmen's compensation insurance, nor did he make any deductions from "employees'" wages for taxes. R. 49-50.

One of Plaintiff's janitorial accounts was Sorority Food, a bakery located at 443 West Fourth North. Three of Plaintiff's employees would clean the bakery each night. They would arrive about 7:00 p.m. and work until about 1:30 or 2:00 a.m. and "go home earlier or later" depending on when they came and when they completed their work. R. 48.

There was a question as to whether there was supervision and the three witnesses all gave different answers on who was foreman and in charge. R. 48, 64, 72, 74. Besides the deceased, the other two working the night of the accident were Carry Dannenberg, brother-in-law to the owner, R. 62, and Trevor Hilderbrant. Dannenberg was phoned by Mr. Johnson's father and told to get someone to help that night as Glen (the father) would not be at the bakery. Dannenberg, it seems, contacted Jeff Tilt and picked up Tilt and Hilderbrant at the home of Hilderbrant. The three cleaned the bakery the night of May 9, 1981. During what seems to be horseplay by the three employees, an accident occurred when Tilt was in the large

dough mixer and Hilderbrant pushed the button that actuated the mixer after Tilt had said something like "open the door." R. 61.

Dannenberg asked Tilt to work that night. He took Tilt to work and presumably would have driven Hilderbrant and Tilt to the Salt Palace as Hilderbrant was going to purchase concert tickets. R. 67. And the reason Dannenberg gave for staying "after work" was to wait for the beer to "get cold in the freezer." R. 59.

The only witness to the accident, and the only people in the building at the time, other than deceased, were Dannenberg, the brother-in-law of the owner and Hilderbrant, the one who pushed the wrong button which caused the tragic accident.

### ARGUMENT

#### POINT I: THE FINDING BY THE INDUSTRIAL COMMISSION THAT THE ACCIDENT WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT MUST BE AFFIRMED ON APPEAL

As stated in Kaiser Steel Corp. v. Monfredi, and reaffirmed in Sabo's Electronic Service v. Sabo, and in Kinchele v. State Insurance Fund, #17624, filed November 5, 1982, the scope of review in Industrial Commission cases is limited to:

[W]hether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them.



Only then should the Commission's findings be displaced.

And in cases involving the question of "in the course of employment" this court has consistently held that where the evidence is conflicting:

[a]s to whether accident arose out of or in the course of the employee's employment, finding of commission will not be reviewed on appeal. Commercial Casualty Insurance Co. v. Industrial Comm., 71 Utah 395, 266 P. 721; Norris v. Industrial Comm., 90 Utah 256, 61 P.2d 413; West v. Industrial Comm., 90 Utah 262, 61 P.2d 418.

After a reading of the transcript of the hearing it is most plain that the testimony of the Plaintiff owner and his two employees was entirely self-serving and such evidence is neither competent nor credible.

POINT II: EMPLOYEE'S ACCIDENT AND DEATH AROSE  
OUT OF OR IN THE COURSE OF HIS EMPLOYMENT

A. The Utah Statute Encompasses  
the Facts of this Case.

Utah Code Ann. §35-1-45 (1953) reads:

Compensation for industrial accidents to be paid--Every employee mentioned in section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as herein provided.

The usual statute reads "arising out of and in the course of employment. Both factors are necessary for

compensation to be paid in those 42 states with that language, Larson's Law of Workmen's Compensation, Section 6.20. Larson notes that Utah is the only state which uses the more broad language of "arising out of or in the course of employment."

This court has stated that this difference in the Utah statute, which was changed from and to or in 1919, is the reason why cases cited from other jurisdictions often have no application under our statute. M & K Corp. v. Ind. Comm., 189 P.2d 132.

When the legislature in 1919 amended the original act, which contained the conjunctive "and," and substituted the disjunctive "or," it intended to give the statute the effect stated. Tavey v. Industrial Comm., 106 Utah 489, 150 P.2d 379.

B. Deviation from Regular Work may  
be in the "Course of Employment."

This case is another example of the foreseeable actions of young men in which this court has ruled that the employee has not departed from the course of his employment. In Twin Peaks Canning Co. v. Ind. Comm., 57 Utah 589, 196 P. 853, this court held, as defined in M & K Corp., supra:

In the case of Twin Peaks Canning Co. v. Industrial Commission, supra, a boy who was employed by the Canning Company while the machinery was stopped and he had nothing else to do, took an elevator, which he had been forbidden to use, on to a floor where his duties did not require him to go and there, while engaged in some horseplay, which was of no benefit to his employer, was accidentally killed. We held that he had not departed from the course of his employment on the ground that what he was doing was what could be expected under the

circumstances and it was therefore incidental to his work.

There the employee at the time of the accident was not doing anything which his employment required him to do or which had any tendency to benefit his employer. He engaged in some horseplay which involved the use of an elevator some distance from his work which he was forbidden to use, at a time when there was no work for him to do. Such activities were the sole cause of his death.

In the present case three young men, 18 and 19 years of age, are left to themselves to clean a bakery. With fork lifts and machinery at hand horseplay is the inevitable.

Larsen says in Sec. 23.65:

If the primary test in horseplay cases is deviation from the employment, the question whether the horseplay involved the dropping of active duties calling for claimant's attention as distinguished from the mere killing of time while claimant had nothing to do assumes considerable importance. There are two reasons for this: first, if there were no duties to be performed, there were none to be abandoned; and second, it is common knowledge, embodied in more than one old saw, that idleness breeds mischief, so that if idleness is a fixture of the employment, its handmaiden mischief is also.

Most cases now give considerable weight to this factor in dealing with participants in horseplay. They recognized that workmen whose jobs call for vigorous physical activity cannot be expected, during idle periods, to sit with folded hands in an attitude of contemplation. They must do something, and the most natural thing in the world to do is to joke, scuffle, spar, and play with the equipment and apparatus of the plant.

Larsen in Sec. 23.42 cites the case of Peet v. Gardner Oil, 492 S.W.2d 103 (Missouri):

Peet v. Gardner Oil Co., 492 S.W. 2d 103 (Mo.App. 1973). Claimant, a 17-year-old boy, worked in the employer's filling station under the supervision of another 17-year-old, D.S. While in the process of closing the station for the night, D.S. threw a sponge at claimant; claimant fell over a bucket; claimant picked up a bucket and chased D.S.; D.S. closed a door to bar claimant; and claimant tripped, with his arm going through a glass panel. The Court of Appeals held the resulting injuries compensable, stressing the inevitability of some horseplay when two 17-year-olds are left alone.

### C. After Working Hours

Appellant goes to considerable length to argue that the time between the conclusion of cleaning the bakery and the time of the accident was of such duration to take the employee out of the "course of employment." For the following reasons the Industrial Commission correctly ruled that the employee was in the course of his employment at the time of the accident:

1. The employee was injured on the premises where the work is to be performed. In Edwards v. Ind. Comm., 48 P.2d 459, this Court held that the test of whether an employee was in the course of his employment is:

Ordinarily where an employee is present at the place of work, even though he has not started work but is there to begin work or is there on the premises on his way to perform his duties, the accident is compensable. This is on the theory that the course of his employment must start somewhere. When he arrives at the place of work, even though he has not started his work, the course of his employment begins. On the other hand, it is a general rule that no compensation is recoverable by an employee who is injured while off the premises on his way to or from his work.



It is true that this case deals with where work had not yet started. However, the principle should be the same where the employee was on the premises because work had just been completed.

2. The testimony is not to be relied upon as to when work was completed and when injury occurred.

3. The employee was on the premises because he was brought there by the employer, or his agents, and would leave when his employer, or agents, wanted to leave.

4. Testimony was conflicting and the witnesses were led into testimony that would show a lapse of time between the job completion and the accident.

Counsel suggested employees stayed at the bakery to keep warm. R. 69. And the employee, Dannenberg, said the reason they stayed at the bakery was "we were waiting for the beer to get cold in the freezer."

The picture that is seen of what was happening that May night is not entirely clear but some of the impressions are very vivid.

Three young men, friends for many years, were employed to clean the bakery. They had only their own supervision and the environment was conducive to having fun. It appears that they brought beer with them and consumed some during the night. Other than the horseplay and a clogged drain we know little of the work activity. The only two witnesses to the accident testified that the work had been completed. But

