

1957

J. B. & R. E. Walker, Inc., et al v. Industrial Commission et al : Plaintiff's Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Moreton, Christensen & Christensen; Attorneys for Plaintiff;

Recommended Citation

Brief of Appellant, *Walker Inc. v. Industrial Comm. Of Utah*, No. 8751 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2957

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

JAN 13 1958

LAW LIBRARY

FILED
NOV 13 1957

J. B. & R. E. WALKER, INC., et al., Cl.

Plaintiffs,

—vs.—

INDUSTRIAL COMMISSION, et al.,

Defendants.

Supreme Court, Utah

No. 8751

UNIVERSITY UTAH

JAN 10 1958

PLAINTIFF'S BRIEF

LAW LIBRARY

MORETON, CHRISTENSEN &
CHRISTENSEN

Attorneys for plaintiff

1205 Continental Bank Building

Salt Lake City, Utah

INDEX

	Page No.
FACTS	1
POINTS TO BE ARGUED.....	7
ARGUMENT	8
I. THE DECEASED, JOHN ROBERT DUKES BY ATTEMPTING TO OPERATE HIS EMPLOYER'S MACHINE, IN VIOLATION OF INSTRUCTIONS, DEPARTED FROM "THE COURSE OF HIS EM- PLOYMENT" AND THEREFORE HIS DEATH WAS NOT COMPENSABLE.	8
CONCLUSION	18

TEXTS CITED

1 Honnold on Workmen's Compensation, Sec. 114.....	16
Vol. I, Larson's Workmen's Compensation Law, Sec. 31.00, Page 457	11

CASES CITED

Angel v. Ind. Comm., 64 Ut. 105, 288 P. 509.....	9
Bischoff v. American Car & Foundry Co., 190 Mich. 229 157 N.W. 13.....	13
Black v. Town of Springfield, 217 S.C. 413, 60 S.E. (2d) 854..	15
Burch v. Rampano Iron Works, 210 App. Div. 506, 206 N.Y.S. 868	14
Buhler v. Maddison (Ut.), 166 Pac. (2d) 205.....	16
Christean v. Ind. Comm., 113 Ut. 45, 196 P. (2d) 502.....	9
Cohen v. Birmingham Fabricating Co., 224 Ala. 67, 193 So. 97	15
Luker Sand & Gravel Co. v. Ind. Comm., 82 Ut. 188, 23 P. (2d) 225.....	9
Holloway v. Ideal Seating Co., 313 Mich. 267, 211 N.W. (2d) 125	13
Holt v. Ind. Comm., 96 Ut. 484, 87 P. (2d) 686.....	9
Hyatt v. U.S. Rubber Reclaiming Co., 256 N.Y. 571, 177 N.E. 144	14
Industrial Comm. v. Evans, 52 Ut. 394, 174 P. 825.....	9
Kensington Steel Corp. v. Ind. Comm., 385 Ill. 504, 53 N.E. (2d) 395	14
Kasper v. Liberty Foundry Co., (Mo. App.), 54 S.W. (2d)	

M. & K. Corp v. Ind. Com., (Ut.), 189 Pac. (2d) 132.....	16
Miller v. Ind. Comm., 97 Utah 226, 92 P. (2d) 342.....	9
Rendino v. Continental Can Co., 226 N.Y. 565, 123 N.E. 886....	14
Rosenbaum v. Ind. Comm., 112 Ut. 109, 185 P. (2d) 511.....	9
Salt Lake City v. Ind. Comm., (Ut.), 137 Pac. (2d) 364.....	16
1002	11
Shoffler v. Lehigh Valley Coal Co., 290 Pac. 480, 139 A. 192....	14
93 Ut. 85, 71 P. (2d) 177.....	9
Sommerville v. Ind. Comm., 113 Utah 504, 196 P. (2d) 718....	9
Stover Bedding Co. v. Ind. Comm., 99 Ut. 423, 107 P. (2d)	
1027	9
Utah Copper Co. v. Ind. Comm., 217 Pac. 1005.....	15
Weber County-Ogden City Relief Committee v. Ind. Comm.,	

IN THE SUPREME COURT of the STATE OF UTAH

J. B. & R. E. WALKER, INC., et al.,
Plaintiffs,

—vs.—

INDUSTRIAL COMMISSION, et al.,
Defendants.

No. 8751

PLAINTIFF'S BRIEF

FACTS

Certiorari to the Industrial Commission of Utah to review an order granting death benefits under the Utah Compensation Act, to the surviving widow and minor child of John Robert Dukes, deceased. The facts of the case are substantially without dispute. They are established principally by the testimonies of two employees of the plaintiff employer, and may be summarized as follows:

Deceased was employed by J. B. and R. E. Walker, Inc., a Utah Corporation, engaged in the sand and gravel business, and hereinafter designated as Walker (R. 1, 9,

10). At the time of his employment, he had no particular knowledge of machinery, and he was neither qualified nor employed to operate any type of machinery (R. 10, 14, 24, 26). Dukes' title or assignment was as "helper to the plant operator" (R. 9, 10). His general duties, as such, were to keep the plant cleaned up, and to help lubricate the machinery (R. 10). He also might be assigned special duties by the plant operator (R. 10, 11).

As part of the equipment used by Walker in its operations was a machine designated as a Hough Loader (R. 11). It was a machine mounted on four wheels, with a scoop on the front, and which could be used to lift loads of gravel or sand from ground level up into a truck (R. 11). Although its general operation was somewhat similar to that of an ordinary automobile, there were some important differences, and because of certain peculiarities of the machine, its operation presented considerably more danger than the operation of an ordinary automobile. (R. 11, 13). Such peculiarities included the following: (1) The wheels had short centers and would react quicker and turn in tighter circles (R. 11). (2) Depression of the brake pedal would have the effect of disengaging the driving gears, an effect similar to the depression of a clutch pedal on an ordinary passenger automobile (R. 12). (3) Failure to apply full throttle would take away part of the power steering, making the machine more difficult to control (R. 12-13). (4) The machine was also top heavy, and therefore could easily be tipped over, especially on uneven ground (R. 14). In Walker's operations the machine was used for loading trucks and

was used in three different general plant areas, all of which were at different levels or elevations. Thus it was necessary from time to time to move it from one portion or area of the plant to another (R. 12, 13).

One of Walker's employees was regularly assigned to the operation of this machine, and he operated it about 90% of the time (R. 14-15, 17). However, the general supervisor, Mr. Reed, and several of the other employees (of whom Dukes was not one), were trained and qualified to operate it, and one of such persons could and did operate it in the absence of the regular operator (R. 17-18).

Besides the machine above described, Walker had various other types of machinery which were used in its operations. It was the usual practice of Walker to train all employees to operate all of the machines, so that each could perform any of the duties which might be required of them. Dukes had been promised that he would be taught to operate the various machines, including the Hough Loader, (R. 15, 19), but up to the time of the accident here involved, he had never received any training whatsoever in its operation (R. 15, 20-21), except that on one Sunday the supervisor, Mr. Reed, had given him sufficient instructions that he could drive it up the hill (R. 14, 16, 17). Dukes had also wanted to take the machine downhill on that same occasion, but had been specifically told by Reed not to take it downhill—that it was too dangerous. The exact testimony of Reed on this point is as follows:

“Q. At that time did you give him any instruction about taking the machine down the hill?

- A. He wanted to bring it down that day, and I told him no, that it was too dangerous. He didn't know enough about it." (R. 14).

Reed also told him not to get on the machine until he had learned to operate it:

- "Q. Did you tell him anything about getting into it or attempting to operate it?

- A. I told him that until he learned about it not to get on it." (R. 14).

Reed also promised Dukes that he would eventually be taught to operate the loader:

- "Q. Did you ever have any general discussion with Johnny Dukes about his being taught to operate this Hough loader at some time?

- A. Yes. I told him that if he would stay with the company, and work as he had been doing, why that he would eventually learn how to run the equipment, but that it just couldn't be done as quickly as he wanted it done.

- Q. Did you tell him, with reference to the Hough loader, that he would receive instructions in the operation of that when there was an opportunity to do so?

- A. That's right." (R. 15).

However, up to the time of the fatal accident, Dukes had never received any further training on the machine, and had never been authorized to operate it (R. 14).

On May 11, which was a Saturday, the plant was not operating, but a sort of skeleton crew was doing main-

tenance work (R. 16). Dukes had been detailed by Reed to work that day as "scale man." His duties were to weigh trucks which came in for loads of sand or gravel (R. 16). He was also directed to render any assistance requested by Jim Batt, who was working with troughing idlers on a conveyor belt (R. 16, 24).

On the afternoon of that date, a truck came in for a load of material. Dukes observed that the Hough Loader which would be used to load the truck, was not at that level. Dukes said he would go up to the upper level and get the loader and bring it down (R. 25). At that time Dukes was working with Batt, but Batt did not tell him to go get the loader, nor did he order him not to get the loader (R. 25). He merely inquired whether Dukes had ever operated the loader before and Dukes replied in the affirmative (R. 25, 30). At that time Mr. Reed and two other men, properly qualified to operate the loader were at the plant, and any of them could have brought the loader down from the upper level to the lower level (R. 17). In fact it had been the intention of Mr. Reed to take the loader down to the proper plant level when he completed checking some work with some welders (R. 22). Mr. Batt was also qualified to operate it and could have brought it down (R. 17, 18, 26).

Two or three minutes after Dukes left to get the loader, Batt, being concerned as to Dukes' ability to operate it, drove a truck up to the upper level and arrived there just as Dukes was starting up the loader (R. 25-26). Again Batt inquired whether he had "run it," to which Dukes replied, "Hell, yes." (R. 26). Dukes sig-

nalled Batt to precede him down the mountain, but Batt refused to do so (R. 26). Dukes started down the mountain and almost immediately overturned the loader, sustaining injuries to himself which proved to be fatal (R. 7).

The surviving widow and minor child of the deceased Dukes duly filed their application for compensation benefits (R. 1) and a hearing thereon was held by the Commission. Thereafter, the Commission entered its order, in favor of the applicants and awarding death benefits to them (R. 45-46). In its decision, the Commission specifically recognized that decedent had been instructed not to operate the loader until he had been taught to do so (R. 45). The Commission also recognized the real and sole issue in the case :

“Assuming that deceased was instructed not to operate the loader until he had learned how to operate it and assuming that he had not learned how to operate it as of May 11, 1957, *was deceased guilty of a departure from his employment or did he negligently perform a duty which he was permitted to do.*” (Emphasis ours.) (R. 45).

Having recognized the real issue the Commission then proceeded into the wilderness and occluded that issue by throwing up a smoke screen of false issues, as, for example, “who was to teach him when and how? Who was to determine when he was qualified?” Certainly these are responsibilities which would rest with the employer. It is not for the employee to determine when he is qualified to use the employer’s machinery. The Commission also seems to have been influenced by the fact that Batt

did not order the deceased *not* to operate the loader, although there is nothing in the record to indicate that Batt had any authority to restrain him from so doing.

The record is clear beyond question that deceased had been specifically instructed not to use the loader until he had been properly instructed in its operation, and the Commission so found the fact to be (R. 15-16). The record is equally clear that there were dangers inherent in the operation of the machine, which made it advisable for Walker to restrict its operation to those properly trained and qualified to do so. The applicants made no effort whatsoever to shoulder the burden of proof cast on them by law. No evidence was offered to suggest that Dukes was ever authorized, even by implication, to operate the machine. All of the evidence in the record comes from Walker's employees. All of it is to the effect that decedent had been specifically prohibited from operating the machine. Yet, in the face of such a record, the Commission found that deceased was killed within "the scope of his employment." (R. 46).

A petition for re-hearing was duly filed by the plaintiffs herein (R. 47), and said petition was duly denied (R. 48). Thereafter on petition of plaintiffs herein (R. 49), this court duly issued its writ of certiorari to the Commission (R. 52).

POINTS TO BE ARGUED

POINT I

THE DECEASED, JOHN ROBERT DUKES, BY ATTEMPTING TO OPERATE HIS EMPLOYER'S MACHINE, IN VIOLATION OF INSTRUCTIONS, DEPARTED FROM

"THE COURSE OF HIS EMPLOYMENT" AND THEREFORE HIS DEATH WAS NOT COMPENSABLE.

ARGUMENT

POINT I

THE DECEASED, JOHN ROBERT DUKES, BY ATTEMPTING TO OPERATE HIS EMPLOYER'S MACHINE, IN VIOLATION OF INSTRUCTIONS, DEPARTED FROM "THE COURSE OF HIS EMPLOYMENT" AND THEREFORE HIS DEATH WAS NOT COMPENSABLE.

We recognize, of course, that the evidence, and all reasonable inferences therefrom must be viewed in the light most favorable to the applicants; that the compensation act must be construed liberally in favor of the applicants, and that all doubts must be resolved in favor of the validity of the proceedings below. Conceding these points, as we must, and in light of those principles, we proceed to a consideration of the serious legal question involved.

The court's problem is not one of examining the record to determine whether there is any evidence to support the findings of the commission. The evidence is all one way, and the Commission found in accordance with it, that the deceased employee had been instructed not to use the machine until he had been instructed in its operation. The commission concluded, for reasons not entirely clear, that deceased while attempting to operate the machine, in direct violation of his employer's orders, was acting within the course of his employment. That conclusion is not the finding of an ultimate fact, but rather a conclusion of law, going to the very jurisdiction

of the Commission. As it has sometimes been put, perhaps inaccurately, this is the determination of a jurisdictional fact. It is, however, a matter for review by this Court. For, if deceased, as a matter of law was not engaged in the course of his employment, the Commission has no jurisdiction of the matter.

The principle that this court will review the jurisdictional facts and weigh them independently of the Commission, seems to have been established in the case of *Industrial Comm. v. Evans*, 52 Utah 394, 174 P. 825. This was one of the first cases decided under the Workmen's Compensation Act in this jurisdiction. It has been consistently followed since that time.

Angel v. Ind. Comm., 64 Utah 105, 288 P. 509;
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.

The particular problem presented in this case, is whether the deceased by undertaking to operate his employer's Hough Loader in direct violation of the instructions which he had received from his superior, departed from the scope of his employment, so as to take the accident out of the operation of the Compensation Act, or whether in disobeying his employer's orders, he was merely guilty of negligence, which would not affect the rights of his dependents to death benefits under the act. The Utah Act is silent as to the effect of a violation by an employee of rules or regulations of his employer. This is likewise true of the Compensation Acts of many of our sister states. The problem here presented is not novel to this court, and it has been treated judicially by the courts of many other states, and especially states which are heavily industrialized, and where problems of Workmen's Compensation frequently come before the court. We shall consider first, the decisions from other jurisdictions to set the stage for the treatment of the precedents of this court.

The authorities are in general agreement that where the prohibition relates merely to the *manner* of doing an authorized or required work, a violation on the part of the employee amounts to nothing more than negligence, which is not a defense under the Compensation Act, and therefore, recovery is permitted. However, where the regulation is not directed to the manner of performing the work, but rather is directed toward limiting or defining *the work to be accomplished*, a violation on the part of the employee in engaging in a *prohibited activity*

amounts to a departure from the course of his employment, and an injury sustained at such time, under well settled principles, is not compensable. The rules are well stated in Vol. 1, Larson's Workmen's Compensation Law, Sec. 31.00, page 457, as follows:

“When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to *method* of accomplishing that ultimate work, the act remains within the course of employment.”

Following the statement of the rule, in the textual discussion, the author cites many illustrations of cases where the rule has been applied.

In *Kasper v. Liberty Foundry Co.*, (Mo. App.), 54 S.W. (2d) 1002, a moulder, in violation of express orders of his employer, went into the grinding room, and attempted to do grinding work. A piece of emery flew into his eye, injuring it, for which he sought compensation. In denying compensation, the court said:

“If the employee is injured in the doing of something outside the regular duties for which he is employed, but which is not wholly beyond and disassociated from his employment proper, and tends ultimately to react to the employer's benefit, then, absent any question of the effect of the violation of a positive order not to have done such act, he is quite naturally to be held to have been injured by accident arising out of and in the course of his employment. But *the employer does have the undoubted right to limit the scope of*

his servant's employment. In the very nature of things, work falls into different classifications, some of which anyone may safely perform no matter how little his ability, but others of which are attended with risks and hazards which can be avoided only by those equipped with the requisite skill and experience to meet them. The recognition of this fact is required in the proper organization of any industrial plant, not only for the sake of efficiency with which we as a court are not so much concerned, but equally for the very important purpose of guarding against accident, and injury which do bring the Compensation Act into play. Consequently *an employee should not be permitted to intermeddle by his own violation with something entirely outside of the work for which he is employed, and then, when injured while so doing, to claim and receive compensation upon the plea that his act was designed for the gain of his employer as well.*" (Emphasis ours.)

On rehearing, the applicant argued that the provisions of a Missouri statute providing for a reduction of 15% of the amount of the award where the employee had violated orders, had been overlooked, and that the statute clearly indicated that a violation of orders would not result in defeating compensation. In rejecting this position, the same court said, commencing at page 1006 of 54 S.W. (2d):

"In other words, if there is no question about the employee having acted within the scope of his employment, though he may have done an authorized act in a forbidden manner, he is nevertheless entitled to compensation; but *the statute has no application to the case where the employee goes outside the duties for which he is employed*

and is injured while so doing, since to interpret the statute in that manner would have the effect of leaving it to the employee to select his own work, regardless of what the wishes of the employer might be, subject only to his compensation being reduced 15% for an injury received while he was acting in violation of the limitations fixed by his employer.” (Emphasis ours.)

In *Holloway v. Ideal Seating Co.*, 313 Mich. 267, 211 N. W. (2d) 125, a helper to a punch press operator was injured while operating the machine contrary to his employer’s express instructions to leave all machines alone. The Supreme Court of Michigan carefully reviewed the other decisions of that court, citing and quoting many cases illustrating the general rule. It quoted from *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229, 157 N.W. 13, as follows:

“The rule is sound. It may be modified in the case of an emergency or in other special circumstances. But, fundamentally, *the option is not in the employee to extend the course of his employment upon the sole ground that his act may be for the employer’s benefit. An employer has the right to prescribe the duties of an employee. If work is hazardous, he must have the right to protect himself against liability for accident by selecting competent persons to do it. Employees may not impose liability upon the employer by leaving the work they were hired to do and voluntarily and without his knowledge or acquiescence doing something else.*” (Emphasis ours.)

The court concluded that the accident did not arise out of the claimant’s employment within the meaning of the above rule, and therefore compensation was denied

A series of New York cases, well illustrate the rule.

In *Rendino v. Continental Can Company*, 226 N.Y. 565, 123 N.E. 886, the claimant was employed by the defendant to dip cans in a liquid. On the day of the accident, after finishing his own work, he attempted to operate a stamping machine in violation of orders and sustained an injury for which he sought compensation. In *Burch v. Rampano Iron Works*, 210 App. Div. 506, 206 N.Y.S. 868, an employee whose duty it was to operate an air hammer undertook to pull an iron clamp from a furnace in violation of specific instructions. In so doing he sustained an injury for which he sought compensation. In *Hyatt v. U.S. Rubber Reclaiming Co.*, 256 N.Y. 571, 177 N.E. 144, the claimant was a foreman in the tube department of a rubber reclaiming business. In violation of orders, he undertook to saw a board with a circular rip saw in the mechanical department. While so doing, he received an injury for which he sought compensation. In each of these three cases, the court held that the employee had departed from the course of his employment, and denied compensation.

In *Kensington Steel Corp. v. Industrial Comm.*, 385 Ill. 504, 53 N.E. (2d) 395, a truck driver attempted to repair a steel mill, believing it to be in need of repair, but when in fact it was not, and no emergency existed. The Illinois Supreme Court held, in accordance with the rule above stated, that the employee had departed from the scope of his employment. A similar holding was reached in *Shoffler v. Lehigh Valley Coal Co.*, 290 Pa. 480, 139 A. 192, where a spragger at defendant's coal mine attempted to operate a locomotive which was in violation

not only of his employer's rules, but also of state statute. And in *Cohen v. Birmingham Fabricating Co.*, 224 Ala. 67, 139 So. 97, defendant's sales manager was killed while unloading steel in violation of his employer's instructions. It was held that he was not in the course of his employment.

A case somewhat novel on its facts is *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E. (2d) 854. There the Chief of Police rode on the town fire engine to fires notwithstanding that he had been explicitly directed not to do so by both the Mayor and the Town Council. On one such adventure, he fell from the truck and was killed. The Supreme Court of South Carolina correctly held that he was not engaged in the course of his employment.

It will be noted that nearly all of the foregoing cases come from heavily industrialized states, where problems on Workmen's Compensation come frequently before the courts. It is interesting to note that the holdings of this court are entirely in accord with the decisions above cited.

Apparently the earliest Utah decision which treats this question and the one most similar in point of fact, (and therefore the one most helpful to this court in the determination of the case at bar), is *Utah Copper Co. v. Industrial Comm.*, 217 Pac. 1005. In that case a brakeman and fireman exchanged positions to equalize the hardships of stormy weather. Each was fully qualified to perform the work of the other, and the exchange was made with the consent of the engineer. The train became involved in a collision, and the brakeman, while acting

as fireman, was killed. This court held that he had departed from the scope of his employment, and his death was not compensable. The court quoted with approval from 1 Honnold on Workmen's Compensation, Sec. 114, as follows:

“An accident does not arise out of the employment, if, at the time, the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.”

The above rule has been consistently and repeatedly followed by this court in cases which have subsequently come before it for consideration and decision.

In *Salt Lake City v. Ind. Comm.*, (Ut.), 137 Pac. (2d) 364, compensation was denied to an employee who in violation of a rule of his employer attempted to salvage material from the city dump. While so engaged he became engaged in an altercation with another employee and was injured.

In *Buhler v. Maddison* (Ut.), 166 Pac. (2d) 205, the distinction between the doing of a prohibited act and the doing of a proper act in a prohibited manner was noted and recognized.

Apparently the most recent decision on the subject in this jurisdiction, is *M. & K. Corporation v. Industrial Comm.*, (Ut.), 189 Pac. (2d) 132. In that case a truck driver permitted his son, who was too young to have an operator's license, to operate his employer's truck in the course of his regular employment of transporting materials for his employer's benefit. The court held that this was doing a proper act in a prohibited manner rather

than doing a prohibited act. However, this court specifically recognized the rule, as laid down by Larson, in the following language:

“Not every violation by an employee of a statutory provision or of a rule or regulation of his employer constitutes a departure from the course of his employment. The general rule is that where the employee, at the time of the accident, is engaged in doing a thing or rendering a service which he is employed or authorized to do, either expressly or by the nature of and the surrounding facts and circumstances of his employment, or is doing something which is incidental thereto, but does such act or renders such service or incidental in an unlawful or forbidden manner, he does not thereby depart from the course of his employment even though the accident occurs as a consequence of such violation. It is only *when the act or service which the employee is performing is itself prohibited*, as distinguished from the manner in which the act is done or the services performed, *that the violation of the employer takes the employee outside of the course of his employment and defeats a recovery.*” (Emphasis ours.)

In concluding, the court observed:

“The true test is: Was the regulation calculated to limit the scope of the employment or was it calculated only to govern the manner of performing a more comprehensive task. * * *

“In this respect there is room for great divergence of opinion. No comprehensive, all inclusive rule has been or can be stated which will determine all cases, each case has to be determined on its own facts.”

CONCLUSION

We respectfully submit that under the authorities above cited, and quoted, there is no room for a finding that the deceased in this case was engaged in the course of his employment at the time of his injuries. The record is clear that he was engaged in the performance of an act repeatedly and specifically prohibited by his employer. In undertaking to do this act, deceased sought to impose upon his employer risks for his own safety, which the employer had not assumed, and also the risk of damage to his employer's machine. Well settled principles require that the claim be denied.

The order of the Industrial Commission should be set aside, and the Commission should be directed to enter an order denying the claim.

Respectfully submitted,

MORETON, CHRISTENSEN &
CHRISTENSEN

Attorneys for plaintiff

1205 Continental Bank Building

Salt Lake City, Utah