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Jared Looser v. The Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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Barton, Klemm & Gowans; Owen and Ward; Roy G. Haslamn; Attorneys for Plaintiff;

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

FILED

FEB 24 1959

JARED LOOSER,

Plaintiff

Clk. Supreme Court, Utah

vs.

THE INDUSTRIAL COMMISSION OF
UTAH, THE STATE INSURANCE
FUND, and SPORTS CARS INCOR-
PORATED,

Case
No. 8972

Defendants

BRIEF OF PLAINTIFF

BARTON, KLEMM & GOWANS
410 Continental Bank Building,
Salt Lake City, Utah

OWEN AND WARD
AND ROY G. HASLAM
141 East Second South Street,
Salt Lake City, Utah

Attorneys for Plaintiff

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THE INDUSTRIAL COMMISSION OF
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Defendants

Case
No. 8972

BRIEF OF PLAINTIFF

NATURE OF THE CASE

The plaintiff was permanently injured on May 25, 1957, at LaJunta, Colorado, when the left rear wheel of the vehicle he was driving collapsed, causing it to leave the road and turn over, pinning him in his seat. The plaintiff was employed as a mechanic and test driver by the defendant, Sports Cars Incorporated. He applied for compensation.

After a contested hearing, compensation was denied and the plaintiff brings this review.

SPECIFICATIONS OF ERROR

Plaintiff contends that the Industrial Commission erred:

1. In concluding that the accident which caused Mr. Looser's injuries did not arise out of or in the course of his employment.

2. In denying the plaintiff's Application for Rehearing.

3. In failing to make written Findings of Fact and Conclusions of Law.

4. In ruling that any document, other than a brief, filed after the thirty-day statutory period has passed cannot be considered by the Commission in reaching its decision regarding a pending application for rehearing.

5. In filing its denial for a rehearing while the petitioner's motion for an Order to grant plaintiff time to respond to the Memorandum of the Defendants was pending before the commission.

STATEMENT OF FACTS

Plaintiff was regularly employed as a mechanic and occasional test driver by the defendant, Sports

Cars Incorporated, and had been employed by the Company in that capacity for over one year. (R12) Under the terms of the employment contract, plaintiff was paid a guaranteed wage of \$80.00 per week, or 60 per cent of what was charged customers of the company for the work which he performed each week, whichever was greater. His average monthly income for the first five months of 1957 was \$604.00. (R 12)

About three weeks prior to the accident involved herein, Mr. Ernest Schettler, the President and General Manager of the defendant, Sports Cars Incorporated, suggested to the plaintiff that he should prepare his own automobile, an MGA sports car, for racing competition. Mr. Schettler said that the Company would pay for all the parts used to prepare the Looser automobile for racing, but insisted that any trophies that were won in competition had to be given to the Company to be placed in the Company showcase for advertising purposes. (R 14)

On a prior occasion, Mr. Schettler had told the plaintiff that by showing the people what defendant's cars would do in competition they received much better advertisement than if they put a story in the newspaper. (R 22)

The plaintiff refused to race his car, asserting that he could not afford it, and that racing was too hard on it. (R 38)

During this conversation, M. Ralph Bowyer, the Vice-President and Service Manager of the Defendant Company, who was the immediate supervisor of the plaintiff, entered the room. After hearing part of the conversation, he said, "If Chad (the plaintiff) has to drive in the race, he can drive a company car." (R 15) No more was said about racing at that time.

The following day, Mr. Vaughn Funk, the Secretary and Sales Manager of the Corporation, approached the plaintiff and told him to prepare a company car for racing competition, suggesting that they should test the car at LaJunta, Colorado, at a race scheduled there on May 25, 1957. (R 15) The following day, during the Company lunch hour, the plaintiff asked Mr. Schettler if he should prepare the Company car for racing in accordance with the previous instructions given to him by Mr. Funk. Mr. Schettler authorized him to proceed, telling him at that time that the company would pay for the parts which were necessary to complete the work. (R 17)

The plaintiff, assisted by Mr. Funk and a fellow employee, Paul E. Krug, then prepared the car for racing. The labor was done without any special compensation from the Company. The Company furnished and paid for all of the parts used in connection therewith. This involved considerable expense to the Company. (R 18, 19)

On Friday, May 24, 1957, at about 1:00 p.m., the plaintiff and Mr. Funk drove to LaJunta, Colorado, to participate in the forthcoming race. (R 24) Mr. Funk paid the gasoline and oil expenses incurred on the trip, but each of the participants paid for his own meals and living expenses during the trip and while at the site of the races. Also, each participant paid his own entry fee prior to the race.

A few days before leaving for the race, plaintiff was contacted by Mr. John Brophy. Upon learning that the defendant company was planning to test one of its MGA cars at the LaJunta Race, Mr. Brophy requested that Mr. Looser do the last minute racing tune-up and adjustment work on his car at the site of the race. In accordance with Mr. Brophy's instructions, the defendant charged him in advance for any anticipated labor to be performed on his car in LaJunta. (R31, 32) Just prior to the accident at the Colorado track, plaintiff performed the work as agreed. (R 23, 24)

Immediately prior to the commencement of the racing competition both Mr. Funk and the plaintiff, individually, engaged in familiarization trials with the racing car to enable them to test the track and determine whether the car was functioning properly. Mr. Looser asked Mr. Funk if he could take the car out on the track first, and the latter consented. They then took turns trying out the car, each going for

a few laps at a time. On one occasion, Mr. Funk disapproved of the manner in which the plaintiff was driving the vehicle. To show his disapproval and to correct the situation, he stepped onto the signal lane and motioned the plaintiff to slow down. Mr. Looser then stopped the car and asked Mr. Funk if he wanted to take the car out. Funk answered that he didn't want to take the car out, but that he just wanted Looser to slow down. (R 65, 66) Shortly thereafter, while plaintiff was rounding a turn, the left rear wheel of the vehicle collapsed, causing it to leave the track and turn over, pinning the plaintiff in his seat. As a result of this incident, plaintiff suffered a fractured dislocation of the lower dorsal spine with paraplegia. The attending physician reported that the patient will be permanently and totally disabled for the rest of his life, due to complete paralysis of all body parts below the waist. (R 10)

After a contested hearing, the Industrial Commission of Utah rendered its written decision adverse to the plaintiff. (R 70, 71) However, no written findings of fact or conclusions of law were ever made and filed in this matter by the commissioner.

On August 13, 1958, the plaintiff petitioned the defendant Industrial Commission of Utah for a rehearing of his claim for Workman's Compensation benefits. The application for rehearing was filed within the statutory period required for such applications. (R 72, 73)

On September 11, 1958, plaintiff submitted his Supplement to Application for Rehearing which was then pending before the Commission. The Supplement was filed after the statutory period had elapsed for the filing of Applications for Rehearing, but prior to rendering of the decision of the Commission on plaintiff's pending Application for Rehearing.

On September 16, 1958, the plaintiff made application to the Industrial Commission for an Order for Examination of Records. (R79) The commissioner answered the application by letter dated September 22, 1958, denying authority to order the production of such records. It was suggested by the commissioner that plaintiff file a Subpeona duces tecum to accomplish his purpose. (R 80)

On September 24, 1958, plaintiff answered the letter of the commissioner. In the text of his answering letter, plaintiff asked that such letter be considered as a request for the issuance of the Subpeona Duces Tecum referred to above. (R 82, 83) The following day, the commissioner sent blank subpoena forms to plaintiff's attorney.

On September 25, 1958, plaintiff filed a Second Supplement to Pending Application for Rehearing with the commission. (R 87, 88) This second Supplement was also filed after the statutory period for the filing of Applications for Rehearing had elapsed, but

before the Commission rendered its decision denying the pending Application for Rehearing. Both the Supplements to the Pending Application for Rehearing alleged the discovery of new evidence which was not available to the plaintiff at the time of the hearing.

On September 29, 1958, the defendants filed a Memorandum of Defendants. (R 89-93)

On September 30th, 1958, the plaintiff prepared and mailed a Motion requesting permission to answer the Memorandum of Defendants. (R 96) The records of the commission show that the Motion was received on October 1, 1958.

On the 3rd day of October, 1958, the plaintiff received an Order of the commission denying his Application for Rehearing. (R 94, 95) The postmark on the envelope was dated October 2, 1958. In the Order, the commission ruled that any document, other than a brief, filed after the 30-day statutory period had elapsed could not be considered by the commission in reaching its decision in regard to the pending Application for Rehearing.

ARGUMENT

I. THE WORKMEN'S COMPENSATION ACT SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF COMPENSATION.

In compensation cases, the Utah Supreme Court has uniformly held that all doubtful cases should be resolved in favor of awarding compensation. See *M. & K. Corporation v. Industrial Commission*, 112 Utah 488, 189 P. 2nd 132, *Chandler vs. Industrial Commission*, 55 Utah 213, 184 P. 1020, *Salt Lake City v. Industrial Commission*, 140 P. 2nd 644, 104 Utah 436.

In the *M. & K. Corporation* case, the Court said:

“We have also repeatedly held that this statute should be liberally construed and if there is any doubt respecting the right to compensation, it should be resolved in favor of recovery.” (Citing many cases.)

For a recent discussion of current trends toward liberalization in awarding Workmen's Compensation benefits, see 6 Utah L. Rev. 290 (1958).

II. UNDER UTAH STATUTES COMPENSATION SHOULD BE AWARDED IF EITHER (A) THE ACCIDENT ARISES OUT OF THE EMPLOYMENT, OR (B) IN THE COURSE OF THE EMPLOYMENT.

The Utah Supreme Court has consistently held

that recovery of Workman's Compensation under Section 35-1-45, Utah Code Annotated, 1953, may be based on either one of two things: (a) That the accident arose out of the employment, or (b) That it occurred in the course of his employment. Prior to 1919 the Section used the word "and," but in 1919 the Legislature substituted the word "or" and since that date this court has consistently held that only one or the other need be shown. This is pointed out in numerous cases, one of the more recent being *M. & K. Corporation*, supra, 112 Utah 488, in which the court says:

"Since the 1919 amendment to that section (42-1-43) when the word 'or' which we have italicized above was substituted for the word 'and' it is not necessary for the accident to arise both out of and occur in the course of his employment, it is sufficient if the accident only arises in the course of his employment. Workmen's Compensation statutes both in this country and throughout the British Empire usually require, as did ours before the amendment, that the accident arise both out of and in the course of the employment, and this must be kept in mind in considering the decisions of other jurisdictions. We have often pointed out this distinction and indicated in many cases that the recovery was allowed on that account and that it probably would not have been allowed without the amendment."

There are numerous Utah cases to the same effect. See *Tavey v. Industrial Commission*, 106 Utah 489, 150 P. 2nd 379; *Park Utah Consolidated Mines*

Co. v. Industrial Commission, 103 Utah 64, 133 P. 2nd 314; *Cudahy Packing Co. v. Industrial Commission*, 60 Utah 161, 207 P. 148, and other cases cited therein.

III. THE INDUSTRIAL COMMISSION SHOULD HAVE CONSIDERED THE ALLEGATIONS CONTAINED IN THE TWO SUPPLEMENTS TO PENDING APPLICATION FOR REHEARING BEFORE GRANTING OR DENYING PLAINTIFF'S APPLICATION FOR REHEARING.

The commissioner states in his Order denying plaintiff's Application for Rehearing that no document, other than a brief, filed after the statutory period has passed could be considered by the commission in arriving at its decision. The plaintiff has been unable to find any indication in either judicial precedent or statute that allegations contained in supplements to pending applications for rehearing should not be considered by the commission. It is obvious from the record that the commission had not yet arrived at its decision to deny the application when the supplements were filed. Therefore, there was no reason to refuse to consider the information found in the supplements. In doing so, the commissioner's action was arbitrary and unreasonable. The information was in the file at the time the case was reconsidered and the decision was made. The fact that the supplements were filed after the thirty day period had run did not result in any inconvenience

or delay to the commission. Therefore, the Order denying the application for rehearing was not based on the information which was available to the commission when it rendered its decision, and the proceeding should be sent back to the industrial body to be reheard and redetermined.

If the commission had recognized the supplements for rehearing, it would have been compelled to grant a rehearing to the plaintiff. The supplements allege that new evidence was discovered that was not available to the plaintiff at the time of the initial hearing. If the allegations of the plaintiff can be proved at a rehearing of the matter, the commission would be compelled to reverse its decision and award the plaintiff compensation under the Workmen's Compensation Act. In the case of *Jensen v. Logan City*, 89 Utah 347, 57 P. 2nd 708, the Utah Supreme Court stated the following in regards to the granting of a new trial on the grounds of newly discovered evidence:

“While the granting or refusing of the motion lies in the sound discretion of the court, where there is grave suspicion that justice may have miscarried because of the lack of enlightenment on a vital point which new evidence will apparently supply, and the other elements attendant on obtaining a new trial on the ground of newly discovered evidence are present, it would be an abuse of sound discretion not to grant the same.”

In plaintiff's first Supplement to Pending Application for Rehearing, it is alleged that newly discovered evidence favorable to plaintiff and not previously available to him at the time of the hearing had been determined and discovered. The application contained allegations as to the purported testimony, if sworn and allowed to testify, of John P. Brophy, who was a contestant in the race at which the plaintiff sustained his injuries. (R 75) It indicates that Mr. Brophy had a conversation with the Vice-President and Service Manager of the corporation six weeks before the accident. At that time, the company representative promised Mr. Brophy that if he would undertake the expense of having his car reworked in preparation for the LaJunta race at the company shop, he would have Mr. Looser available at LaJunta to tune up and repair the car and make all necessary pre-race adjustments. He also promised to supply all parts and tools which might be required for said tune-up, repairs and adjustments. (R 75)

This evidence, if allowed, would have conclusively sustained the allegations of the plaintiff that he was in the course of his employment at the time of the accident, and would have shown that the accident arose out of his employment. Therefore, the court should annul the decision of the commission and order that the matter be reheard to enable the plaintiff to present the newly discovered evidence.

See *Miner v. Industrial Commission*, 202 P. 2d 557, 115 Utah 88.

IV. THE COMMISSION ERRED IN FILING ITS ORDER DENYING THE APPLICATION FOR REHEARING WHILE PLAINTIFF'S MOTION REQUESTING PERMISSION TO ANSWER DEFENDANT'S MEMORANDUM WAS AWAITING ACTION BY THE COMMISSION.

On October 1, 1958, the plaintiff filed a motion requesting permission to answer the Memorandum of defendants filed with the commission on September 29, 1958. Without acting upon plaintiff's motion in any way, the commission made its Order denying the plaintiff's Application for Rehearing. Common trial practices require that when a motion is filed in a case pending before the Court, it must be ruled upon before the case can proceed. In other words, the Motion suspends further proceedings until it is disposed of by the Court. By ignoring plaintiff's Motion, the commission committed prejudicial error. Its failure to act on the pending Motion rendered its decision premature. The case was not ready for a decision because an important procedural step had not been completed. Although the instant case is before an administrative body rather than a judicial one, the requirements of procedural fair play demand that the plaintiff's Motion to answer defendant's Memorandum of Authorities should be granted or denied. In this case, the commission arbitrarily ignored plaintiff's Motion. In doing so it violated the rudimentary requirements of procedural due process provided to the plaintiff by the provisions of

the Constitution of the United States. Therefore, the decision rendered by the commission should be annulled, and the commission should be ordered to rehear the matter now before the Court.

See *Morgan vs. United States*, 304 U.S. 1-82 L. Ed. 1129.

V. THE INDUSTRIAL COMMISSION OF UTAH IS REQUIRED BY LAW TO MAKE WRITTEN FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

The Industrial Commission of Utah failed to file written findings of facts and conclusions of law with its secretary after the hearing of this matter. It merely rendered its decision, wherein the commissioner reviewed parts of the evidence and held against the plaintiff. Under the Utah Workman's Compensation Statutes, the Industrial Commission is expressly required to make Findings of Fact and Conclusions of Law in writing and file the same with its secretary after each formal hearing.

35-1-85 Utah Code Annotated, 1953, reads as follows:

“DUTY OF COMMISSION TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW -- FILING -- CONCLUSIVENESS ON QUESTIONS OF FACT -- REVIEW -- COURT JUDGMENT.

“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. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the award."

Prior to 1949 the above statute did not include the first sentence as quoted above. In that year the Legislature amended the statute and added the first sentence as it now appears. The lawmakers left the wording of the former statute intact, but added the first sentence of the statute at that time. Utah cases decided by the Supreme Court of Utah prior to the amendment held that written findings of fact and conclusions of law were not necessary.

See: *Jones vs. Industrial Commission*, 90 Utah 121, 61 P2d 10. *Salt Lake City v. Industrial Commission*, 103 Utah 581, 137 P2d 364.

By amending the statute the Legislature made it mandatory that findings of fact and conclusions of law be made in writing and filed with the secretary of the commission in each case. Plaintiff has

been unable to find any Utah cases dealing with this statute since it was amended. However, in other states having statutes similar to those in Utah, the courts have universally held that if the trial court or commission fails to make findings of fact and conclusions of law in writing, the decision of the hearing body must be reversed. Among these are the States of California and Kentucky.

The California Labor Code, Section 5313, reads as follows:

FINDINGS OF FACT AND AWARD, ORDER, ETC.: WHEN TO BE MADE BY COMMISSION: REPORT: SEPARATE STATEMENT OF FACTS AND CONCLUSIONS:

“The commission, panel, every referee or commissioner shall, within thirty days after testimony is closed make and file findings upon all facts involved in controversy and an award, order or decision, stating the determination as to the rights of the parties, and in addition thereto and concurrently therewith shall make and file a written report. Such report shall separately state the findings of fact and conclusions of law. The findings, decisions, order, or award and the accompanying report shall, if made by the commission and panel, be signed by a majority of the commission.”

Recent California cases which hold that the Industrial Commission must comply with the above

statute are *Pierson v. Industrial Commission*, 98, Cal. 2d. 598, 220 p2d 794 and *Dawson et al v. Industrial Commission et al.*, 54 Cal. App. 2d 594, 129 P2d 479, (1942).

In the Pierson case the California court set forth the requirements under the above statute as follows:

“The commission should make specific findings on all material issues presented in a claim for compensation.” (Quoting many cases)

“The findings of the commission should conform to the general rules applicable to findings in trials which are conducted in the Superior Court.” (Quoting many cases)

The court held that in view of the failure of the commission to find or determine the issue of joint employment, the award would be annulled and cause remanded for further proceedings on that issue.

Section 4933 of the Kentucky Statutes relating to the administration of the Kentucky Workman's Compensation Law provides as follows:

“The board or any of its members shall hear the parties at issue and their representatives and witnesses shall determine the dispute in a summary manner. The award, together with a statement of findings of fact, rulings of law and other matters pertinent to the question at issue, shall be filed with the record of pro-

ceedings and a copy of the award shall immediately be sent to the parties in dispute.”

Typical of all the Kentucky decisions pertaining to the above statute is the case of *Yeager v. Mengel Company*, 242 Kentucky 543. 46 S.W. 2d, 1076. In that case the Court stated the law as follows:

“The identical question has been presented to this court in a number of recent cases, and we find the prevailing rule to be that, where there is a dispute in the facts or as to the natural inferences to be drawn from the proof, and the award is not accompanied with a statement of the findings of fact, etc., as required by the statute, the case will be remanded back through the Circuit Court to the compensation board, with directions to make the award in strict conformity with the statute.”
(Citing many cases)

In the instant case the Utah law is very specific. The amendment to the statute makes written findings of fact and conclusions of law mandatory. Since the Industrial Commission failed to follow the requirements of the statute, it is impossible to tell what facts were found in reaching the decision and upon what conclusions of law the decision is based. Because of the failure to conform to the laws of the State of Utah, the commission’s decision cannot stand and must be sent back for a rehearing.

VI. THE ACCIDENT INVOLVED HERE AROSE OUT OF PLAINTIFF'S EMPLOYMENT.

The decision shows that the Industrial Commission concerned itself primarily, if not exclusively, with the question of whether or not the plaintiff was acting in the course of his employment when he was injured. The commissioner touched on certain facts which indicated that he placed the issue as one of whether or not the defendant could control the activities of the plaintiff at the LaJunta race. Let us concede, for purposes of this argument, that he was not in the course of his employment when he was injured. Nevertheless, the Utah statutes under the cases cited in point II above, allow recovery if the accident which resulted in Mr. Looser's injury arose out of his employment.

We submit that except for the fact that plaintiff was employed by the company, he would never have been injured. The record shows that the President of the defendant company urged the plaintiff to take part in racing activities with his own automobile, but he wanted the trophies won in such activities to be placed in the company showcase for advertising purposes. (R14) However, plaintiff refused to race his own car, claiming that racing was too hard on it. Then Vaughn Funk, an officer of the corporation, told the plaintiff to fix up a company car for racing purposes. The record further shows that other company cars had been raced at similar

aces in previous years. (R 22) Mr. Schettler, the company President, had told the plaintiff that he considered such activities as good advertising for the corporation. (R 22) Mr. Schettler admitted on cross-examination that the company experienced an increase in business around race time. (R54) Because the plaintiff was paid on a commission basis for the work which he performed (R 12), he had a pecuniary interest in an increase of the company's business volume. To facilitate the participation of the company in future races, he even volunteered to do the labor on the racing vehicle without special charge. The company did not hesitate to furnish all of the parts free of charge for this venture. Are we to assume that the defendant would give over \$250.00 in parts (R 18, 19) and risk damage to a \$5,000.00 vehicle because it wanted to keep its employees happy? This would be a ridiculous assumption. However, the commission arrived at just such a conclusion. It is obvious that the company was happy to see the plaintiff go to the race. It not only encouraged him to do so, but also cheered his decision to go. It even allowed him time off to travel to the site of the race. (R 24) The fact that he was willing to prepare the car for them without special labor costs should not be used to deprive him of the benefits to which he is entitled under the Workman's Compensation Act.

Cases cited hereinafter will demonstrate that it is not necessary that the racing of company vehicles

be specifically required of an employee before he can recover compensation under the provisions of the Act. All that is required is that the participation in races be reasonably related or incident to the employment. If it is, and an injury results therefrom, then the injury results from an accident which arises out of the employment. The cases are uniform to the effect that the words "arising out of" are construed to refer to the origin or cause of the injury, and involve the idea that the accident is in some sense due to or caused by the employment, and the words "in the course of" refer to the time, place, and circumstances under which it occurred. See *Utah Apex Mining Company v. Industrial Commission*, *supra*.

The case of *Reinert v. Industrial Accident Commission*, 139 Cal. App. 2d 851, 294 P. 2d. 713, is factually related to the case before the court. In that case, the plaintiff was employed as a recreational director at a camp set up for girl scouts. She was allowed to take advantage of the recreational facilities available near her employment. She was injured while riding horseback on her day off. The California court held that the injury arose from an accident arising out of and in the course of her employment even though she was riding for her own recreation and was in an area off the premises of the employer and not under its control. The court thought that the most significant consideration was whether or

not the activity was related to the employment or contemplated as part of the employment, and the fact that the injury occurred on premises not owned or controlled by the employer was not important. Other cases which follow the rule that the injury is compensable if received in an accident occurring while the employee is doing those reasonable things which his employment expressly or impliedly authorizes him to do are: *Employer's Group v. Industrial Accident Commission*, 37 Cal. App. 2d 567, 99P. 2d 1089, 1092, *Phoenix Indemnity Co. v. Industrial Accident Commission*, 31 Cal. 2d 856, 193 P. 2d 745.

Another California case which is closely related to the above cases is that of *Winter v. Industrial Accident Commission*, 129 Cal. App. 2d 174. 276 P. 2d 691. That case involved a claim for compensation by a golf caddy who lost an eye while playing golf. The injury occurred on the claimant's day off, while he was engaged in recreational activity permitted by the employer. The club where the claimant was employed allowed its caddies to use the facilities provided for its members and customers on Monday of each week, that day being their day off. Significant in this case is the fact that permission to use the facilities of the employer was based solely upon the fact that the claimant was employed as a caddy. In allowing compensation, the Court made the following statement:

“It was the employment which created the facts and conditions that brought the petitioner to the premises of his employer to engage in the permitted and encouraged recreational activity. The accident could have happened only at one place and the presence of the petitioner was due to his employment.”

The plaintiff is of the opinion that the *Winter* case and the instant case are very closely related. Mr. Looser would not have been engaged in racing if he hadn't been encouraged and permitted by his employer to do so. Sports Car Incorporated even furnished the vehicle which was used in the race.

We submit that in the instant case it was the plaintiff's employment which created the facts and circumstances that took the plaintiff to La Junta, Colorado, to engage in competitive racing. The accident could have happened at only one place, and the presence of the plaintiff was due to his employment.

VII. THE PLAINTIFF WAS ACTING IN THE COURSE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED.

We believe that a reading of the decision of the Industrial Commission shows that the commission concerned itself primarily, if not exclusively, with the question of whether or not the defendant had

the right to control the plaintiff's activities at the time of the injury. It held that no such right of control was present. We wish to point out that the commission completely ignored the uncontradicted testimony of Mr. Vaughn Funk, an officer of the corporation, showing that he exercised actual control over the plaintiff's activities at the time of the accident. Mr. Funk testified that he stepped out into the signal lane of the track during the pre-race trials and motioned to Mr. Looser to slow down. Plaintiff saw the signal, stopped the vehicle and asked Funk if he wished to drive. He answered that he did not want to drive, but that he merely wanted Looser to slow down. The plaintiff complied with these instructions. (R 66) The commission made no mention of this incident in its decision, even though the incident shows the exercise of actual control by an officer of the defendant corporation over the manner in which plaintiff operated the vehicle on the track. In ignoring this uncontradicted testimony, the commission erred. Therefore, the Court should vacate the decision and instruct the Commission to award compensation to the plaintiff as prayed in this appeal. See *Kent v. Industrial Commission*, 89 U. 381, 57, P. 2d 724; and *Spencer v. Industrial Commission* 40 P. 2d 188. 87 U. 336.

While at the cite of the La Junta races, and prior to the accident, the plaintiff did last minute tune-up and adjustment work on a vehicle belong-

ing to one John Brophy, a regular customer of the defendant corporation. The work was done in accordance with an agreement made with the customer several days before the race. Although this was not the primary purpose of the trip to La Junta, the record shows that company business was performed by the plaintiff at the cite of the races, and that the employer benefited therefrom by receiving money from Mr. Brophy for those services. The record shows that advance payment was made for such services, Mr. Brophy having paid the company before leaving Salt Lake City for La Junta. A duty then arose which obligated the company to perform services for the customer at the cite of the race. Mr. Looser could hardly have refused to render such services upon his arrival in La Junta. He had a duty to perform such services, on behalf of his employer, on the Brophy car in La Junta. Where such a duty exists, the injury arose out of or in the course of plaintiff's employment. See *Stroud v. Industrial Commission*, 272 P. 2d 187, 2 U. 2d 270.

We are of the opinion that the Industrial Commission failed to recognize the true significance of the service being rendered to the defendant corporation by the plaintiff. The commissioner's decision stated that the defendant may have received some incidental advertising benefit, but he disregarded it as a factor to be considered in rendering the decision. We submit that the commission erred in

failing to recognize the proper significance of this benefit to the company when it reached its decision.

There are many cases which have allowed compensation to employees who were injured while participating in company sponsored recreational activities. The courts have generally allowed recovery in cases where the employer has received substantial benefit in the form of good will through public interest in teams sponsored as part of company recreational activity. These cases usually involve situations where the company receives advertising benefit from the company sponsored team, but is not engaged in the business of sports promotion as part of its usual course of business.

Holst v. New York Stock Exchange, 252, App. Div. 233, 299 N.Y.S. 255, is a case that involved a youth employed by the stock exchange as a page. He was injured while playing soccer on a team maintained by his employer. The officials of the stock exchange assisted in organizing the soccer and other athletic teams, and the employees were urged to engage in these competitive sports. The employees were given time off for practice and for competitive games, and at times, consideration was given to the athletic prowess of the applicants when the new employees were hired. The New York court held that the maintenance of the terms was a matter of business to the stock exchange, and that the claim-

ant was engaged in his employment when he was injured.

Another case which supports the above proposition is that of *LeBar v. Ewald Bros. Dairy*, 217 Minn. 16, 13 N. W. 2d 729. The facts of that case showed that Ewald Bros. Dairy was engaged in the dairy business. However, the company sponsored a softball team for its employees. It furnished balls, bats and other equipment, including shirts with the name of "Ewald" printed on the back. It never required its employees to play on a team or attend the games. Such participation by the employees was entirely voluntary. The games were played after the regular hours of employment. LeBar was injured while playing in a softball game. In awarding compensation, the Court said:

"Concededly, respondent when playing on the team when injured was not engaged in any actual work of the dairy business. It occurred after his regular hours of work. His employers had not ordered him to be there. He knew he lost no wage, nor did he endanger his position as an employee by not participating in the game."

The court held that the injury arose out of and in the course of employment. It held that the injury was incident to and a part of the company's business. See also *Piusinski v. Transit Valley Country Club*, 259 App. Div. 765, 18 N. Y. S. 2d, 316; *Dower v.*

Saratoga Springs, Comm., 267 App. Div. 928, 46 N. Y. S. 2d 822; *Linderman v. Cownie Furs*, 234 Iowa 708, 13 N. W. 2d 677; *University of Denver v. Nemeth*, 257 P. 2d 423.

In the Utah case of *Auerbach v. Industrial Commission*, 195 P. 2d 245, 113 U. 347, the Utah court holds contrary to the above. However, it is the contention of the plaintiff that the instant case should be distinguished from the *Auerbach* case. In the *Auerbach* decision, the Utah court refused to allow compensation to a company employee who was injured while on a trip to play basketball for a team sponsored by the Auerbach Company. In that case, the company was engaged in the business of selling dry goods, and the sponsoring of athletic teams was not its primary activity. Any benefit which resulted therefrom was of no consequence.

The Utah court indicated that the Auerbach Company was in the business of selling dry goods, not in the promotion of sporting events.

In the instant case, however, the activity was directly related to the business of the company. Sports Cars Incorporated was in the business of selling MGA sports cars. Racing was its best type of advertising. It is difficult to conceive that the company would supply an expensive car merely for the purpose of providing recreation and thrills for its employees.

It is conceded that the plaintiff was not hired as a race driver, but the facts show that the company had no such drivers. The employees and officers did that kind of work in addition to their other duties. The fact that none of them were hired especially for this limited purpose does not take them out of the course of their employment, while engaging in those activities.

CONCLUSION

In the light of the foregoing facts and authorities, it is respectfully submitted that the decision of the Industrial Commission be vacated, and that the commission be ordered to award compensation to the plaintiff in accordance with the laws of the State of Utah, or that the commission be ordered to grant a rehearing of the evidence in the above case.

Respectfully Submitted,

BARTON, KLEMM & GOWANS
410 Continental Bank Building,
Salt Lake City, Utah

OWEN AND WARD
AND ROY G. HASLAM
141 East Second South Street,
Salt Lake City, Utah
Attorneys for Plaintiff