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IN THE SUPREME COURT OF THE STATE OF UTAH

G. V. MOSER,

Plaintiff-Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH: CARLYLE F. GRONNING, JOHN R. SCHONE, and STEPHEN M. HADLEY, its members; COMMERCIAL CARRIERS, INC., and FIREMAN'S FUND,

Defendants-Respondents.

No. 11031

BRIEF OF APPELLANT

Appeal from An Order of The Industrial Commission of Utah Denying Plaintiff's Petition For Re-hearing

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FILED
OCT 1 ? 1967
Clerk, Supreme Court, Utah

PRINTED BY SALT LAKE TIMES

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STATEMENT OF CASE

This is an appeal from an Order of the Industrial Commission of Utah denying plaintiff's claim for Workmen's Compensation.

STATEMENT OF FACTS

Appellant is a truck driver and has been for forty (40) or forty-five (45) years (Tr. 6). In 1965, he leased a tractor or truck to Western Auto Transport Company, and drove the tractor as an employee of Western Auto until it was sold to Commercial Carriers, Inc., during or about 1960. When the Change of Ownership was made, plaintiff and the other driver employees retained their seniority status and continued working substantially under the same lease arrangements as before. The particular Leased Equipment Agreement under which plaintiff was working on September 9, 1965, is attached as Exhibit "A" to plaintiff's Petition for Writ of Review on file herein. The Agreement required that Commercial Carriers, Inc., have exclusive control over the tractor and that the tractor be "operated only by employees of the Company selected by the Company, paid by the Company, and carried on the Company's payroll". The Agreement also provided "that the Company shall be fully responsible to the Shipper and the public for the direction, conduct, condition and operation of the leased equipment while operated by the Company under this lease", and that "the Company shall have the right to use said leased motor vehicle equipment for any lawful purpose in connection with its transportation business and shall have full possession and control of said motor vehicle equipment for the full period of this lease". The Agreement further provided that the Company would provide at its sole expense whatever insurance it deemed neces-

sary and which was required by law and that "the Company shall also comply with the Workmen's Compensation Laws with respect to all employees engaged in operation under this agreement . . . "

The business of the Company (Commercial Carriers, Inc.,) was and is to transport automobiles, which it does by using tractors to pull trailers loaded with automobiles or to pull trailers unloaded when they are "dead headed" or moving empty to a point where they can again be loaded for another haul. These trailers are owned by Commercial Carriers, Inc. The Company operates by virtue of holding certain Common Carrier permits. The Appellant is not a licensed common carrier (Tr. 9).

Pursuant to said Leased Equipment Agreement and others like it which preceded it, Appellant had for many years driven the tractor pulling loads of cars both intrastate and interstate, and being gone from his home and the Company's Salt Lake Terminal most of the time, day and night, on the Company's business. He drives the tractor, pulling the company's trailer both loaded and empty whenever and wherever the Company directs.

Appellant's pay as an employee of the Company is determined by the amount of revenue which the Company receives from its customers. This revenue, of course, is limited to the times when the trailer is being pulled with a load of cars. There is no revenue for the Company or its employees when the trailer is moving empty (Tr. 9).

As a driver employee of the Company, appellant received, as provided by the Agreement, 65% of the revenue produced by the tractor and trailer that he operated. But out of this 65%, the Company deducted all operating and maintenance expense of the tractor and trailer, expenses which under the Agreement, it was his obligation to bear. From the Company's 35%, the Company bore all insurance expense including Workmen's Compensation, the expense of most of the road permits, and the social security tax. The Company also withheld and paid to the Internal Revenue Service and the State Tax Commission the drivers' Federal and State Income Withholding Tax.

Although the amount of a driver's wages is determined by the amount of revenue-paying miles he drives, he is considered to be on the job the moment he steps on the truck or while checking the equipment and starting it (Tr. 8). According to I.C.C. regulations this time is included in the driver's logging or on-duty time, and is included in figuring the maximum hours he is permitted to drive, namely, seventy hours in any eight consecutive days and nights (Tr. 7 and 8), and this rule applied to the time Moser spent trying to get the truck started on the morning of September 9, 1965, when he was injured (Tr. 8). Appellant's uncontroverted testimony in this respect as elicited from Moser by respondents' representative at the hearing as appears on pp. 7-8 of the transcript is confirmed by the Safety Regulations of the I.C.C., which provide as follows:

"Section 195.2 DEFINITIONS - As used

in this part, the following words and terms are construed to mean:

(a) On-duty time. * * * The term "On-duty time" shall include: * * *

(4) All time, other than driving time, in or upon any motor vehicle except time spent resting in a sleeper berth as defined in Section 195.2(g). * * * *

(7) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle; * * * ."

On September 8, 1965, Appellant returned to Salt Lake from Vernal, Utah, where he had delivered a trailer load of cars. He arrived at Salt Lake 11:00 or 12:00 o'clock at night, signed in at the yard, went to his home in Bountiful, and slept the balance of the night, planning to return to the yard the next morning (Tr. 7). He left the tractor and trailer at a lot near his home in Bountiful while he slept (Tr. 6). Knowing that he was to work the next morning (Tr. 7), he left his home with his suitcase on his way to work, went to the lot where the truck and trailer unit was parked, and tried to start the truck, but it wouldn't start (Tr. 3). After working on it awhile, he went back to his home and called his employer on the 'phone. He talked with Norman C. Gordon, the Company's terminal manager in Salt Lake City (Tr. 10), and told him he couldn't get the truck started (Tr. 9). As related by Moser, Norman told him "to check it out for ignition and gas and see what was wrong if I could, and if I couldn't do it why he'd send help out to me" (Tr. 3).

Inasmuch as the battery was low, he took his wife in his car to the truck so that she could help him get started (Tr. 3). What happend then, as stated by Moser, follows: "I jumped cables that goes to the truck and she turned it over and I checked the ignition. I had spark, and I checked for gas and I wasn't getting any gas, so I drained out a little out of the truck and poured it in the carburetor, and she started it, but it stopped. I thought, well, I'll pour a little more in and if it starts then I'll keep dribbling a little in. Which you shouldn't do, I guess.

"Anyhow, it backfired that time, and I was standing up on the bumper leaning over, and I jumped back and when I did, I had this can of gas and threw it all over my right side, and it immediately caught me on fire. Well, my wife, and my sister-in-law happened to be there too. If they hadn't been, I would have burned up. Because nobody else was close enough to do anything. They finally got the fire out, pulled my overalls off, and got the fire out, and then I put the fire out in the truck after that" (Tr. 4).

ARGUMENT

POINT I

IN DENYING APPELLANT'S CLAIM FOR WORKMEN'S COMPENSATION THE COMMISSION BASED ITS DECISION ON FINDINGS OF FACT WHICH ARE EITHER NOT

SUPPORTED BY THE RECORD AND THEREFORE ARBITRARY AND CAPRICIOUS OR ARE NOT LEGALLY SIGNIFICANT UNDER THE CIRCUMSTANCES OF THIS CASE.

There are two statements in the Commission's Order which are directly contrary to the only evidence in the record. The first is the finding that "Applicant was a licensed common carrier." The second is the finding that "at the time of the explosion applicant was not on his way to the terminal". The facts are that applicant was not a licensed common carrier. His employer was. And applicant was on his way to the terminal at the time of the "explosion". We shall now review the record on these matters.

The fact that Commercial Carriers, Inc., was the licensed Common Carrier and not Mr. Moser is stated on page 9 of the Transcript as follows:

> "The Referee: Are you a certified carrer in interstate commerce?
> Answer: A Common Carrier?
> The Referee: Yes.
> The Witness: *They are*, Yes.
> The Referee: A Common Carrier?
> The Witness: Yes. *They Are* all over the United States." (Our emphasis).

The foregoing is the only evidence as to who had a license. The answer is simply that Commercial Carriers, Inc., had a Common Carrier license, not Mr. Moser.

As to the other erroneous finding of fact which the Commission makes, the only evidence as to where Mr. Moser was going when he was injured is as follows:

On page 2 of the transcript after referring to the morning of September 9, Mr. Moser states: "I left my home with my suitcase, and I went down to where my truck was parked, ready to go to work." When he coudn't get the truck started, he called his employer, who then gave him instructions as to what to do to get it started.

On page 6 of the Transcript, during Mr. Robertson's cross examination of Mr. Moser, we read:

> Question: Do you report to work ever morning?
>
> Answer: Yes, whenever I'm in. You know, if I'm home. When I finish a trip, I report in the next morning. That is what I was doing.
>
> Question: When had you made your last trip?
>
> Answer: I got in—well, I signed in down to the yard. I think it was right around midnight. I had come in from Vernal. I made a trip to Vernal, and it was 11:00 or 12:00 o'clock at night and I went home, slept all night, and *was going down the next morning*." (Our emphasis).

Again on pp. 7-8, we read (Moser still being cross-examined by Robertson:

> Question: On the morning of the accident, had you called to see if you were to work that day?
>
> Answer: Well, I knew I was to work.

Question: When did you find that out?

Answer: I could tell when I signed in how many was ahead of me and I knew I'd get out.

Question: What would be the usual course in your reporting?

Answer: Well, at that time, we had a 9:00 dispatcher, who was supposed to be down there at 9:00, and he set up whatever loads he had drivers in for. And the first one in on the list would take his load, see. So that is why I was going down there at 9:00 and that is why at five minutes to 9:00 . . . when I couldn't get my truck started . . . I called him and told him I couldn't start it. Because I couldn't get there at 9:00 o'clock, see . . .

The foregoing evidence establishes conclusively that when Appellant left his home that morning he was, in fact, on his way to the Terminal and the only thing that prevented his accomplishing that objective was the accident he suffered while trying to get the motor started. Instead of going to the Terminal as he intended he went to the hospital (Tr. 4) because of the accident.

All of the findings of fact upon which the Commission bases its conclusions of law with respect to Appellant's not being an employee when the accident occurred—at least as such facts appear in the Order—areas follows:

1. "At the time of the explosion Applicant was not on his way to the terminal."

2. "Applicant was a licensed common carrier."

3. "He was not paid time or mileage for the thirteen miles from his home to the terminal."

4. "Applicant did receive wages but the wages were paid because the I.C.C. required it. However, the wages were deducted from the 65% of the freight charges."

We have shown from the record that the first two findings of fact are in error, completely without foundation of any evidence, and contrary to the evidence. If these findings were intended to support the conclusions of law then the Order necessarily is arbitrary and capricious, being without factual foundation, and is in error for these reasons alone.

As to the last two findings about wages we observe that in determining whether Appellant was injured "in the course of his employment" the absence of wages at the time of injury is not an important factor by the weight of authority. In *Horovitz, Current Trends In Workmen's Compensation,* we read at pages 770-771:

> "The overwhelming weight of authority regards the absence of wages as irrelevant on the issue of arising in the course of the employment. While payment of wages for the period in question strengthens the fact that the injury occurred in the course of the employment, as paid time is rarely other than 'in the course of' the employment, the absence of payment is usually of little, if any, importance. In short, 'in the course of' is not limited to the time for which wages are paid."

POINT II.

THE COMMISSION'S ORDER DENYING APPELLANT'S CLAIM ON THE GROUND THAT APPELLANT WAS NOT AN EMPLOYEE WITHIN THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT IS BASED UPON LEGAL CONCLUSIONS WHICH ARE CONTRARY TO LAW.

The Commisson in its Order observes that the "applicant did sustain an injury by accident. The only issue is whether it was in the course of his employment at the time of the accident." In solving this issue the Commission makes the findings of fact referred to above in Point I and then gives what may be identified as its conclusions of law as follows:

> 1. "His work began when he reached the terminal and not when he left home."
>
> 2. "Applicant was not an employee of the Commercial Carriers, Inc., within the meaning of the Workmen's Compensation Act, when the accident occurred."

Based on these legal conclusions, the Commission entered its Order denying the claim.

It would thus appear from the Commission's view of the issue involved and from its findings of fact and conclusions of law that the Commission has considered this case as one in which the claimant fails as an employee in the course of his employment because he, at the time of the accident, had not yet reported for work.

It is our position that Appellant was an employee of Commercial Carriers, Inc., and in the course of his employment at the time of the accident for the following reasons:

1. He had left his home and was on his way to the Terminal to do his employer's work.

2. He was trying to start the truck when the accident occurred.

3. He was following his employer's specific instructions as to how to try to get the engine started when the accident occurred.

4. He was working on the engine of the truck which, under a lease agreement, belonged to and was under the exclusive control of his employer. Also, the Company's trailer was attached to the truck.

5. The truck and trailer not only were in the control, use, possession or ownership of the employer, but they were in constant use by the appellant, exclusively operated by appellant for his employer, and essential in all the work appellant was doing for the employer.

6. Under the Agreement the truck was to be operated only by an employee of the Company selected by the Company; and Appellant was the employee selected by the Company to operate it; and at the time of the accident he was in the process of trying to operate it in furtherance of the Company's business.

We believe this case has an element creating an "in the course of his employment" situation independent

of elements which would place it in the category of an exception to the "going and coming" to work rule. That element is the fact that when Appellant was injured he was following specific instructions of his employer as to what to do to try to get the engine started. If this element were not sufficient by itself to place Appellant "in the course of his employment," it certainly adds to all the factors which bring this case within the exceptions to the "going and coming" rule.

A brief statement of the rule and the need for a developing of exceptions thereto is well stated in *O'Brien vs. First Camden National Bank and Trust Company,* 37 N.J. 158, 179 A2d 740 (1940):

> "In the administration of workmen's compensation laws, a doctrine grew up known as the 'going and coming' rule. In the jurisdictions where adopted, it signified that until an employee came on the employer's premises he was not in the course of employment; also that at the end of the work period on leaving the premises he stepped out of the course of employment. In short, injuries received en route to and from work were said to be non-compensable . . . The sweeping generality of the rule inevitably spawned exceptions . . . The various exceptions adopted have in turn brought back into sharper focus the basic statutory test of compensability, that is, whether under the facts and circumstances of the particular situation the injury arose out of and in the course of the employment. Too easy reference to the subordinate going and coming precept manifestly pointed in the direction of injustice in particular fact complexes.

> Application of this basic test to the facts in a given case must be engaged in with an appreciation of the beneficient social purpose of workmen's compensation. When so applied, if it can be said reasonably that the employee is serving an incidental interest of his employer at the time of injury, the right to compensation exists."

Recently, this court had occasion to express its approval of a view in harmony with the foregoing in the case of *Bailey vs. Utah State Industrial Commission,* 16 Utah 2d 208, 398 P.2d 545. This case was an appeal from an order of the Industrial Commission denying applicant an award for the death of Bailey. Prior to his death the deceased owned and operated a service station in Lehi and was injured as a sole proprietor. He was thus employer and employee. The applicant usually left his home from 5:00 A.M. to 5:30 A.M. and drove, in his station wagon, to the service station which he customarily opened at 6:00 A.M. On September 23, 1963, at approximately 5:45 A.M., Bailey was killed in a one-car (his station wagon) accident at a point less than a mile from his business and on the highway leading thereto.

The commission, in denying the claim, determined that the accident did not occur in the course of employment, because the deceased was not on a special mission but was merely on his way to his place of employment. In reversing the Commission, the Court said:

> "There are cases and authority to the effect that, when an employee is required by his em-

ployer to bring his own vehicle to the place of business for use there, the employee is covered while going to and from work in the vehicle.

"It is undisputed that the station wagon involved was used by the deceased in his business and somewhat necessary thereto. He used it for emergency calls at all hours, carried in it some necessary tools and implements to service or repair customers' automobiles and permitted customers to use it while their cars were being serviced at his station. * * *

"Under the uncontradicted evidence, it appears that the station wagon * * * was an instrumentality of decedent's business and was subject to that use. It was the deceased's regular and definite duty to take the vehicle in the mornings to the station for its use in the business. In doing so, he was performing for his employer (himself) a substantial service required by his employment (business) at the place and in the manner so required. Under these circumstances, we hold that the deceased sustained his fatal injuries in an accident that occurred in the course of his employment."

Surely, if Bailey's death was compensable because he was driving to work in his own car which was used in his business for emergency calls at all hours, Appellant's injuries should be compensable inasmuch as he was trying to start his employer's truck and trailer unit so he could go to work and use it constantly in the employers' business.

A case very much in point is *Borak vs. H. E. Westerman Lumber Company,* 239 Minn. 327, 58 N.W. 2d 567 (1953). In this case, a lumberyard manager died

from carbon monoxide poisoning while attempting to start his own automobile at his home preparatory to going to work. He was expected to have his car at his place of employment to make deliveries and inspections. The employer paid his mileage when he was on company business, but did not pay mileage for the trip to and from work. The death was held to be compensable. The Court said:

> "In our opinion, the testimony was sufficiently positive and unimpeached to justify a finding that decedent had to have his car in connection with his business. If so, it follows that he had to get it started. There appears to be sufficient evidence here to indicate that he was working on the car, or was attempting to get it started when the fatal accident occurred. * * *
>
> "In view of our holding that the record convinces us that as a matter of law decedent used or was expected to use his car almost daily in connection with his employment, we must conclude under the facts and circumstances here that as a practical matter, part of his services in connection with his employment, was to take his car with him to the lumber yard in order to have it ready when needed, rather than then having to go back home and get it each time. It is our opinion that such service required his presence in his garage to start his car at the time of the injury and that his accidental death arose out of and in the course of his employment."

This case is cited with approval in *Larson's Workmen's Compensation Law*. In paragraph 17.50 of this authority we read:

"Closely analogous to the employer's conveyance rule in principle is the holding that the course of employment embraces the trip to and from work if the employee as part of his job is required to bring with him his own car, truck, or motorcycle. The same theory applies; the obligations of the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise he would have the option of avoiding. Since this is the theory, it is immaterial whether the employee is compensated for the expenses of the trip."

In *Horovitz, Current Trends in Workmen's Compensation,* pages 667-682, we read:

"The narrow rule that a worker is not in the course of his employment until he crosses the employment threshold is itself subject to many exceptions. Off-premise injuries to or from work, in both liberal and narrow states, are compensable * * * (6) where the employee is required to bring his automobile to his place of business for use there. Other exceptions undoubtedly are equally justified, dependent on their own peculiar circumstances."

In the case of *Knowles vs. North Dakota Workmen's Compensation Bureau* (1925) 52 N.D. 563, 203 N.W. 895, plaintiff was employed as a mechanic and truck driver. He had borrowed a truck from his employer for his personal use on a Sunday. After using the truck, he took it back to his employer's garage, but it was locked, and a foreman told the plaintiff to take the truck home and bring it to the garage the following

morning. In attempting to crank the truck at his home the next morning, he was injured. The court held that the injury sustained was in the course of his employment. Said the Court:

> "When he was cranking the truck on Monday morning, preparatory to delivering it at the shops, he had ceased to be about his own business, and was executing the orders of his master in the ordinary and actual course of his employment, and pursuant to the contract of service * * *. In the circumstances, regardless of where the truck happened to be, it was the duty of the plaintiff as a servant to bring it to the shops, not because he had borrowed it for his own use the day before, but because he was ordered to do so by his master in connection with the usual course of duty. He was on the business of his employer."

All of these cases and authorities support the validity of Appellant's claim. They also support our view that the Commission has drawn conclusions of law which are neither supported by the actual facts of the record, nor the law of the State of Utah as set forth recently by this Court, nor by the text book authorities, nor by the authority of the cases generally.

CONCLUSION

Appellant is entitled to be compensated for his injuries because at the time of his accident, Appellant was an employee of Commercial Carriers, Inc., and

acting in the course of his employment. The employment agreement under which he worked as an employee and the uncontroverted facts as they appear in the transcript record of the hearing show that Appellant at the time of his accident had left his home and was on his way to the employer's Terminal to do his employer's work. He was engaged in an effort to start his employer's truck in the manner directed by his employer, and the truck and trailer as a unit was operated by Appellant exclusively and full time in his employer's business.

The Commission in denying Appellant's claim has acted arbitrarily and capriciously and contrary to law as the law should be applied to the facts of this case.

Respectfully submitted,

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