

1967

G. V. Moser v. The Industrial Commission of Utah:
Carlyle F. Gronning, John R. Schone, and Stephen
M. Hadley, Its Members; Commercial Carriers,
Inc., and Fireman's Fund : Breif of Respondent

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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. GRON-
NING, JOHN R. SCHONE, and
STEPHEN M. HADLEY, its mem-
bers; COMMERCIAL CARRIERS,
INC., and FIREMAN'S FUND,**

Defendants-Respondents.

No. 11031

BRIEF OF RESPONDENT

**Appeal from an Order of The Industrial Commission
of Utah Denying Plaintiff's Petition for Re-hearing**

CHRISTENSEN & JENSEN
1205 Continental Bank Bldg.
Salt Lake City, Utah
Attorneys for Respondents

A. PARK SMOOT
847 East 4th South
Salt Lake City, Utah
Attorney for Appellant

FILED

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Clk. Supreme Court, Utah

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
DISPOSITION BEFORE THE INDUSTRIAL COMMISSION	2
RELIEF SOUGHT IN THIS COURT.....	3
ARGUMENT	3
THE ORDER OF THE COMMISSION IS SUPPORTED BY THE LAW AND THE RECORD.	
1. The Law Defining "Course of Employment".....	3
2. The Commission's Order is Supported by the Re- corded Evidence.	9
CONCLUSION	11

CASES CITED

Bailey v. Utah State Industrial Commission, 16 Ut. 2d 208, 398 P.2d 545	6
Chandler v. Industrial Commission, 60 Ut. 387, 208 P. 499.....	9
Covey Ballard Motor Company v. Industrial Commission, 64 Ut. 1, 227 P. 1028.....	7
Fidelity & Casualty Company, et al. v. Industrial Commission et al., 79 Ut. 189, 8 P.2d 617.....	6
Kahn Bros. v. Industrial Commission, 75 Ut. 145, 283 P. 1054	9
Knowles v. North Dakota Workmen's Compensation Bureau, 52 N.D. 563, 203 N.W. 895.....	4
Morgan v. Industrial Commission of Utah, 92 Ut. 129, 66 P.2d 144	4
Roberts v. Industrial Commission of Utah, 87 Ut. 10, 47 P.2d 1052	3
Starr Piano Co. v. Industrial Accident Commission, 181 Cal. 433 184 P. 860	4
Wilson v. Industrial Commission, 116 Ut. 46, 207 P.2d 1116....	8

TEXTS

58 Majur., Workmen's Compensation, §210, 212, 217.....	3, 4
Horowitz, Current Trends in Workmen's Compensation, p. 677..	6

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Defendants-Respondents.

No. 11031

BRIEF OF RESPONDENTS

STATEMENT OF CASE

This is a claim for compensation benefits under the Workmen's Compensation Act of Utah for injuries sustained by the plaintiff in an accident which he claims arose out of, or in the course of, his employment.

STATEMENT OF FACTS

Plaintiff is a truck driver, and has driven for Commercial Carriers, Inc. for a little over ten years (Tr. 6). He owns his own tractor, and leases it to Commercial Carriers (Tr. 6). Commercial supplies trailers and loads (Tr. 6, 7). He is paid by the loaded trip mile (Tr. 8, 9, 11). His day starts when he leaves the yard with a load (Tr. 10). He customarily keeps his tractor on a lot near his home in Bountiful, Utah (Tr. 6). When he

finishes a trip, he reports in the next morning for work (Tr. 6), receiving assignments from the dispatcher (Tr. 7).

On the night prior to the morning of the accident plaintiff had just completed a trip to Vernal, Utah (Tr. 7). He signed in at the company yard at about midnight, after he completed the trip (Tr. 7). He then drove home, slept and left his house in the morning, intending to return to the yard (Tr. 7). He was not able to start his truck and telephoned the dispatch office (Tr. 3). The dispatcher suggested that he check the truck for ignition and gas and see what the problem was (Tr. 3). He added that if plaintiff were not able to correct the problem, he would send help (Tr. 3). In an effort to start the truck, the plaintiff poured gasoline into the carburetor while his wife was operating the starter. A fire resulted and he was injured (Tr. 4).

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

Testimony in the captioned matter was held before a hearing officer on November 29, 1965. A ruling was handed down by the Commission on January 25, 1966, adverse to the plaintiff. The Commission determined that the plaintiff did sustain an injury by accident, but that it was not in the course of his employment. The plaintiff subsequently petitioned for rehearing and reversal of the Commission's order denying his claim. The petition was denied. This appeal followed.

RELIEF SOUGHT IN THIS COURT

Defendants seek an affirmance of the order of the Industrial Commission.

ARGUMENT

THE ORDER OF THE COMMISSION IS
SUPPORTED BY THE LAW AND THE
RECORD.1. *The Law Defining "Course of Employment"*

"Course of employment" is a concept which depends upon the peculiar circumstances of each case. The question may not be resolved by reference to any fixed formula. (58 Amjur. Workmen's Compensation, §210). In very general terms, when an accident takes place within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto, or as sometimes stated, where he is engaged in the furtherance of his employer's business, he is considered to be in the course of his employment. (*Id.* §212). The hazards encountered by employees while going to or returning from their regular place of employment before reaching or after reaching the employer's premises, are not ordinarily incident to the employment, and for this reason injuries resulting from such hazards are in most instances held not to be compensable, as arising out of and in the course of employment. (See *Roberts v. Industrial Commission of Utah*, 7 Ut. 10, 47 P.2d 1052, and *Starr Piano*

Co. v. Industrial Accident Commission, 181 Cal. 433, 184 P. 860) (58 Amjur. §217).

It is true that this general rule is subject in most jurisdictions to some exceptions which depend upon the nature, circumstances and conditions of the particular employment and the course of the injury. The principal exceptions are where the employer provides the transportation or remunerates the employee for the time or expense involved or where the employee performs or expects to perform such substantial task or duty in connection with his employment at home or enroute. (See *Morgan v. Industrial Commission of Utah*, 66 P.2d 144, 92 U. 129) (58 Amjur. §217). A further exception to the general rule of noncompensability has been made in some instances where the employee does not work regular hours or is subject to call, but not all authorities recognize such an exception. (58 Amjur. §217). The presence or absence of control by the employer over the acts and movements of the employee while traveling to or from work, while a factor to be considered in determining whether an injury received while so traveling is compensable, as arising out of and in the course of employment, is not decisive. (*Id.* at §217).

In support of his brief, the plaintiff has cited the case of *Knowles v. North Dakota Workmen's Compensation Bureau*, 1925, 52 N.D. 563, 203 N.W. 895. The court, in that case, turned its decision on the fact that the applicant in that matter had instructions from a superior to deliver the employer's truck at the shops

on the morning he was injured, because it was needed or intended for certain specific purposes. One of the officers or employees of the company testified that applicant was on duty when he was injured. The court went on to say that applicant had been engaged on his own business (he had borrowed the vehicle from his employer) and was not within the course of his employment and tried to deliver the company vehicle back to the warehouse but found it locked. If, in this attempt, he had been injured, he would not have been within the course of his employment. However, upon finding the warehouse locked, he sought instructions from his superiors, who told him to take the truck to his home and in the morning to drive it, not to the warehouse where it had been delivered to him, but to the shops where some work was to be done with it that very morning and by the applicant himself. The court said:

“It is not a case where an employee is injured on the way to or from work; he was actually at work, obedient to the orders of the employer to deliver the truck at the place where work was to be done with it.”

In effect, applicant was a servant who owed the implicit obedience incident to that status to begin his services under the labor contract by fetching the truck to the shops, where he and it would be put into active service. The court was making a distinction from a bailee-bailor relationship.

The Borak case, also cited by the plaintiff in support of his position, may be distinguished under the rules

set down in a treatise cited by plaintiff, that is, Horowitz Current Trends in Workmen's Compensation. On page 677 of that work, it is stated that the general rule that a worker is not in the course of his employment until he crosses the employment threshold, is subject to some exceptions. For instance, off-premise injuries to or from work in both liberal and narrow states, are compensable if the employee is on his way to or from work in a vehicle owned or supplied by the employer and where the employer has promised, or by custom pays for transportation to and from work. An exception has also been made in "on call" situations which involve living on the premises, as with domestic servants, nurses, etc., or where a garage mechanic brings his own car to work for tow and repair service, etc. The Borak case is distinguishable from the instant situation in this particular. Additionally, the Utah court has not seen fit to extend the coverage of Workmen's Compensation to this extent.

Bailey v. Utah State Industrial Commission, 398 P.2d 545, 16 Ut. 2d 208 (1965) is a case cited by plaintiff. That case is distinguishable from the instant case, in that (and Judge Callister called it a "close" case) the applicant was injured on his way to work and his car was constantly used for emergency calls at all hours. Further, in support of its decision, the court, in *Bailey*, cited certain Utah cases which it is productive to examine.

Fidelity & Casualty Company et al. v. Industrial Commission et al., 8 P.2d 617, 79 Ut. 189, was a case in

which a mother sought compensation for the death of her son. He was employed by a drug company and his employment required him to use a bicycle for the delivery of Kodak films. He was additionally required to pick up certain films on his way to work and deliver them to the plant of his employer. He was supposed to arrive at work at 8:00 a.m. on the morning of the injury which resulted in his death. He had left home but had not yet arrived at the place where he was to pick up the films when he was hurt. The court denied compensation on the ground that he was outside the course of his employment. They stated the general rule that an injury sustained by an employee while going to or returning from his place of work is not an injury arising out of and in the course of his employment and hence, an injury thus sustained is not compensable under Workmen's Compensation. It also stated that the Utah court is committed to such a doctrine. The court said that he was not under the control of his employer and the time when he was to enter upon his employment had not yet arrived.

Covey Ballard Motor Company v. Industrial Commission, 64 Ut. 1, 227 P. 1028 is a case in which a commission salesman who had a duty to be at all times on the lookout for prospective purchasers and who was paid on a commission, was injured at 9:45 p.m., while driving his car from the motor company to his home. The court held that the injury did not occur in the course of his employment. It said the applicant was riding in his own car and selected his own route and that he had

no prospective purchaser in view and none in mind, but was simply going home after his day's work. The court said that if it had been shown that he was doing something which a salesman usually does to secure a purchaser for the wares that he is selling, there might then be some basis upon which the award could be sustained. In effect, the court stated that he was not employed, that is, performing any function for his employer as part of his job at that specific time.

In the *Wilson v. Industrial Commission* case, 116 Ut. 46, 207 P.2d 1116, a claim was made by dependents of a deceased party for an Industrial Commission award. The decedent was a foreman and had been instructed by his employer to go out to Magna and bring an automobile back to Salt Lake City but to complete repairs on it in Magna before bringing it back. The method of returning the automobile was left entirely up to the decedent. On his way out to Magna, decedent sustained fatal injuries while riding as a passenger in the automobile of another party hired by decedent's employer to assist decedent. Decedent had no regular hours, though he was ordinarily expected to commence work at 8:00 A.M. The accident happened at about 8:15 A.M. The accident did not happen within the course of decedent's employment. The court stated the general rule, with which the claimant agreed, but the claimant pressed for application of the exception that an injury sustained by an employee, either on his employer's or his own time, arises out of his employment if the employee is injured while upon a mission for the employer.

The court cited *Chandler v. Industrial Commission*, 60 Ut. 387, 208 P. 499, for the proposition that an award should be sustained and a claim granted where the accident occurred during a trip which was a distinct part of a definite duty — more than merely going to work, and actually an errand for his employer at the time of the accident, and also cited the *Kahn Bros. v. Industrial Commission* case, 75 Ut. 145, 283 P. 1054, for the same proposition. Judge Latimer, then, speaking for the court in the Wilson case, said that unless the contract of employment contemplated that the employer-employee relationship would commence when deceased left his home, it would be necessary for the status to be created by some special mission enroute to work before deceased would be within the protection of the Workmen's Compensation Act. It held that this was not the case.

In conclusion, the essence of the Utah decisions is that in order for the exception to the general rule to apply, the employee must be engaged in some activity other than simply going to or from work, and that activity must be on behalf of his employer.

2. *The Commission's Order is Supported by the Recorded Evidence.*

The evidence as recorded in the transcript of proceedings clearly supports a finding that the plaintiff was not in the course of his employment at the time he was injured. On the night prior to his accident, the plaintiff had returned from a trip to Vernal, Utah, arriving in Salt Lake City around 11:00 or 12:00 o'clock

at night (Tr. 7). He signed in at the yard on his arrival, terminating that trip, and then, as was his habit, drove his tractor directly to his home in Bountiful, a town located some 12 or 13 miles north of Salt Lake City (Tr. 6, 7). On the day of the accident, the plaintiff left his home shortly before 9:00 a.m. (Tr. 3, 7, 8), and attempted to start his truck (Tr. 3). In his own words, "he was ready to go to work" (Tr. 3). He called the company dispatcher and told him he could not start the truck. The dispatcher logically suggested that he check it out for ignition and gas. He further suggested that if the plaintiff could not start the truck then, the employer would send help to him (Tr. 3). In an effort to start the truck, plaintiff poured gasoline in the carburetor, while his wife was operating the starter. Not surprisingly, a fire started. He was burned and this claim resulted (Tr. 3-4). Plaintiff's employment arrangement as a trucker for Commercial Carriers, Inc. involved his being paid a salary based on the loaded trip mile (Tr. 5, 12). For pay purposes, mileage begins when he leaves the yard with a load. The ICC regulations require that he log all his miles, (Tr. 9) but clearly for inspection and safety reasons (Tr. 12). Even if we were to accept plaintiff's construction of the ICC regulations, that the ICC regulation set the course of employment limits, (Tr. 8) his work could not in logic conceivably begin under that theory until and unless the truck were moving and accumulating mileage. He is not paid for the miles from his home to the yard. Plaintiff owns his own tractor, which he leases to Commercial Carriers,

Inc. (Tr. 6). The company owns the trailer (Tr. 6). When plaintiff is in town, he reports in for work in the morning (Tr. 6-8). When completing a trip he signs in at the yard, establishing his availability for a new trip and his priority relative thereto (Tr. 7). His work begins when his dispatcher assigns a load to him, though he estimated, due to his seniority, that he would be given a load that morning. This was simply a calculation based on past experience, and he certainly could have been in error. More importantly, it is obvious that this calculation could only have been confirmed by the dispatcher the next day, and until it was, he did not have a load to carry and was not assured of pay for that day. The dispatching begins at 9:00 a.m. Essentially, then, at the time he was injured, plaintiff was just short of even being on his way to work. Whether or not plaintiff himself was a licensed common carrier, a point raised by Plaintiff, is not material in the light of the law as applied to the record.

CONCLUSION

There is no justification under Utah Workmen's Compensation Law for rehearing this matter or for a reversal or modifying the Commission's determination therein. Viewed most favorably to plaintiff's position, within the scope of the case law, the course of his employment began when he left the terminal with a load destined for Vernal and ended when he signed in at the Salt Lake City terminal. Since he was not on any particular assignment or mission in behalf of his employer

at the time of injury, the act of attempting to start his tractor did not place him in an area exceptional to the general rule of law defining the course of employment. The Commission has not acted arbitrarily, capriciously or contrary to law, and its determination should be sustained and the petition for rehearing denied.

Respectfully submitted,

CHRISTENSEN & JENSEN

By Norman S. Johnson

Attorneys for Defendants-
Respondents

1205 Continental Bank Bldg.
Salt Lake City, Utah