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GENEINNE ELLEN DAVIS, Petitioner/Appellant, Lewis Ray Davis, Decedent, vs. UTAH LABOR COMMISSION, AIR SYSTEMS INC. and/or ACUITY MUTUAL INSURANCE, Respondents/Appellees. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GENEINNE ELLEN DAVIS, Petitioner/Appellant, Lewis Ray Davis, Decedent, vs. UTAH LABOR COMMISSION, AIR SYSTEMS INC. and/or ACUITY MUTUAL INSURANCE, Respondents/Appellees.	Utah Court of Appeals Case No. 20161081-CA Utah Labor Commission Case No. 15-0654

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STANDARD OF REVIEW

Whether the Utah Labor "[C]ommission "correctly or incorrectly denied benefits is a traditional mixed question of law and fact."[1] The Commission's determination on "fact-like" and/or "*not* law-like" mixed questions is entitled to deference on review by this Court.[2] "Whether benefits are barred by the 'going and coming' rule is such a mixed question."[3] Due to the "varied factual postures possible in going and coming cases and the fact-intensive nature of the question, the matter does not lend itself easily to consistent resolution through a uniform body of appellate precedent."[4] Because the Labor Commission has "firsthand exposure to the evidence . . . their view of the matter is superior to [that of the appellate courts]," and their decision denying benefits is therefore entitled to deference.[5] There does not appear to be a dispute between the parties with regard to the applicable standard of review as Appellant, Geneinne Davis ("Davis"), agrees that the Commission's decision denying benefits is entitled to deference from this Court.[6]

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[1] *Jex. v. Utah Labor Comm'n*, 2013 UT 40, ¶ 15, 306 P.3d 799.
[2] *Id.*
[3] *Id.* at ¶ 16.
[4] *Id.* (internal quotation marks omitted).
[5] *Id.*
[6] Br. of Appellant, 7.

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STATEMENT REGARDING FACTS

The findings of fact made by the Labor Commission in this matter are undisputed, as acknowledged by Davis.[7] In addition to providing an accurate recitation of the Labor Commission's and ALJ's findings of fact, Davis's Brief includes reference to "similar facts in the record," consisting of citations to the transcript from the evidentiary hearing.[8] Davis concedes, however, that these additional transcript statements "do not contradict any of the facts as stated by the Labor Commission or the adopted facts of the ALJ." As such, there does not appear to be a factual challenge made by Davis, and there is no argument that the ALJ or Labor Commission made or relied upon erroneous factual findings in issuing its denial of benefits.

Davis accurately cites the Labor Commission's findings of fact. Therefore, as contemplated by the Appellate Rules, Respondents will not burden the Court with a duplicative recitation of those facts.[9] With regard to Davis's inclusion of transcript citations as "similar facts in the record," although Davis accurately quotes those citations, they are either immaterial to the issue on appeal, or are consistent with and/or duplicative of the findings made by the Labor Commission—which Davis concedes are not contradicted thereby. At issue in this matter is solely whether the Labor Commission

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[7] *See* Br. of Appellant, 5 ("The findings by the commission and ALJ are accurate . . . and are not contested.").
[8] Br. of Appellant, 12–15.
[9] Utah R. App. P. 24(b); *See* R. at 26–27; 53-54 for the findings of fact made by the ALJ Commission.

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correctly applied the law to the uncontradicted facts. It is undisputed that the record accurately reflects those facts.

SUMMARY OF ARGUMENTS

Davis's request that this Court overturn the findings of the ALJ and Utah Labor Commission is contrary to Utah law pertaining to commuting employees. The going and coming rule dictates that employee commutes are not within the course of employment as commuting employees are generally not sufficiently controlled by, nor do they provide sufficient benefit to their employer during travel to and from work. It is well established that although an employee's arrival at work does further an employer's interests, it is not a meaningful "benefit" to the employer when considering whether a commute falls within the course of employment.

Neither the instrumentality exception to the going and coming rule, nor any of the other exceptions potentially implicated by these facts, remove this case from the general rule. Mr. Davis was provided an Air Systems vehicle for the primary purpose of facilitating his arrival at work—an insufficient benefit to trigger the exception. Mr. Davis's occasional use of the vehicle to perform work related tasks conferred insufficient benefit upon Air Systems. Likewise, his use of that vehicle was subject to insufficient control from Air Systems—poignantly illustrated by Mr. Davis's personal choice to commute to work in Park City via a high-mountain pass instead of the typical I-80 route. Due to the lack of any sufficient evidence of Air System's benefit from or control over

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the vehicle operated by Mr. Davis, the ALJ's and Labor Commission's denial of benefits under the going and coming rule must be upheld.

ARGUMENT

At issue in this appeal is the question of whether, during a commute from his home to his work at a Park City jobsite via Guardsman Pass (a high-mountain road connecting the Salt Lake Valley to Park City and the Heber Valley), Lewis Davis ("Mr. Davis") was in the course and scope of his employment. The law governing commuting cases such as this has been well defined by this state's appellate courts through the adoption and development of a judicial doctrine known as the "going and coming rule."[10] That rule holds that "accidents occurring to the employee while going to and from work are generally not compensable because they are outside the course of employment."[11] Sound policy underlies the going and coming rule, namely, that "it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit."[12]

In limited circumstances, Utah cases have recognized exceptions to the general going and coming rule.[13] One such exception, invoked by Davis, is the "instrumentality exception," which provides that in certain circumstances, even during a commute, a "vehicle may be in the course of employment if it is an instrumentality of the employer's

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[10] *Jex*, 2013 UT 40, ¶ 18.
[11] *Id.*
[12] *Id.* at ¶ 34.
[13] *Id.* at ¶ 18.

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business in light of the employer's benefit from and control over it."[14] Both factors, control and benefit, must be present and are evaluated on a sliding scale—requiring a much stronger showing of one factor upon a minimal finding of the other factor—to answer the statutory question of whether the commute was in the course of employment.

Here, it is undisputed that during his commute on the morning of the accident, Mr. Davis was doing nothing more than driving to work at a jobsite in Park City via the scenic, but ultimately fatally dangerous, route of his choosing. It is likewise undisputed that Mr. Davis was not performing any special errand or task on behalf of Air Systems that morning, including transporting company materials, tools, or co-workers, and that he was neither paid for the commute, nor directed by Air Systems in what route he should take.

Mr. Davis's death was tragic. However, that truth does not overcome the fact that his accident occurred during an ordinary commute with no employer benefit or control sufficient to bring it within the course of employment—as found by the Labor Commission. Davis's argument can be distilled down to her reliance upon two unchallenged facts—both of which were considered by the ALJ and Labor Commission in denying benefits. Stated succinctly, Davis argues that because Air Systems owned the

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[14] *Id.* at ¶ 19. Other limited exceptions to the rule also exist, such as the "special errand" exception. *Id.* at ¶ 18. None, other than the instrumentality exception, are argued for here. In fact, Davis concedes that the special errand exception does not apply, as she concedes that all of the Commission's and ALJ's findings of fact are correct. One such finding expressly states that Lewis Davis "was not performing any job-related service to Air Systems on the morning of the accident . . . . Additionally, Mr. Davis was not engaged in a special errand for Air Systems." (R. at 55).

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vehicle, and because Mr. Davis occasionally, on an as needed basis, ran errands or hauled materials for Air Systems during his commutes to or from work, that the instrumentality exception is triggered bringing all commutes by Mr. Davis within the course of employment.

This appeal presents a contrast between multiple exceptions to the general going and coming rule. Ultimately, Mr. Davis's commute satisfies none of the exceptions. He was performing no errand or activity for Air Systems during this commute, and the instrumentality exception requires benefit to, and control by, the employer that Mr. Davis's sporadic errand running did not satisfy. Because there is no exception to bring Mr. Davis's ordinary commute within the course of employment, the Labor Commission's denial of benefits must be upheld. In any event, Mr. Davis's choice to drive over a mountain pass on the morning of the accident removed him from any possible course of employment, and serves as an independent bar to Davis's request for benefits.

I. Mr. Davis's occasional errands would not have met the "special errand exception" to the going and coming rule.

It is undisputed that Mr. Davis was not performing any task or errand for his employer at the time of the accident. Had he been doing so, the special errand exception would have been implicated by his commute. However, even if Mr. Davis had stopped by the Air Systems shop or a vendor on his way to work that day, as he occasionally did, it is unlikely that such an errand would have qualified him for the special errand exception

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based upon the criteria outlined by this state's high court.[15] In "errand on the way to or from work" cases such as this, the pertinent analysis includes:

> First, the court must consider the relative regularity or unusualness of the particular journey. . . [I]f [the journey] is relatively regular, whether every day, or at frequent intervals, the case begins with a strong presumption that the employee's going and coming trip is expected to be no different from that of any other employee with reasonably regular hours and place of work. Indeed, we [have] declined to find that an employee had engaged in a special errand where the activity, travel to an early morning meeting, was not an "unusual occurrence."
>
> Second, the relative burden or "onerousness" of the journey on the employee should be compared with the extent of the task to be performed at the end of the journey. If a janitor walks five blocks to spend two hours working at a church in the evening, it would be difficult to conclude that the journey is a significant part of the total service. But if a janitor makes a longer journey merely to spend one instant turning on the lights, it is easier to say that the essence of the service was the making of the journey. . . .
>
> Third . . . the suddenness of the assignment from the employer should also be considered. For example, if an employee must suddenly drop everything to travel at the employer's request, then that indicates that the travel itself could be part of the service rendered.[16]

Here, Mr. Davis's "occasional" stops for supplies at the Air Systems shop, or at a local vendor on his way to the jobsite in Park City over the course of six months, establishes that such errands were known to occur.[17] Such stops would have constituted only an insignificant portion of his commute, and, as compared to the full day of work lying ahead of Mr. Davis in Park City, an insubstantial portion of his service to his

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[15] *See Drake v. Indus. Comm'n of Utah*, 939 P.2d 177 (Utah 1997).
[16] *Drake*, 939 P.2d at 183–84 (internal formatting omitted).
[17] Davis failed to elicit testimony during the hearing establishing the specific frequency of such stops during Mr. Davis's commutes. The testimony on record establishes that such stops happened "occasionally," on essentially an as-needed basis as determined by Mr. Davis. R. 58 at 34:1–12.

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employer on those days. Finally, there is no evidence of any emergency requests for urgent pickups. Indeed, trial testimony shows that it was Mr. Davis who would place the orders at vendors or the Air Systems shop, so he would have known in advance of any needed stops.[18] As such, even on those days where Mr. Davis was actually performing some employment errand during his commute, none of the "special errand" factors would weigh in favor of bringing those commutes within the course of employment.

Because even the clearest examples of Mr. Davis's service to Air Systems during his commutes would fail to bring his commutes within the course of employment, his commute on the day in question, where he was undisputedly performing no service to the employer, cannot constitute a basis for an award of benefits. Not only was Mr. Davis not performing a special errand during the commute at issue, that commute, as found by both the ALJ and the Labor Commission, fails to satisfy the instrumentality exception due to the lack of Air System's control over, and benefit from it.

II. Mr. Davis's use of the Air Systems vehicle did not make it an all-purpose instrumentality of Air Systems's business.

To benefit from the instrumentality exception to the going and coming rule, a vehicle must be shown to be an "all-purpose" instrumentality of an employer's business in light of the employer's control over and benefit from it—thereby bringing *all* travel in that vehicle within the course of employment.[19] Two established propositions of law

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[18] R. 58 at 34:1–12.

[19] *See Jex*, 2013 UT 40 at ¶19, n.2 (noting that the concept of a "limited-purpose instrumentality" is likely a fiction, as it is likely subsumed within the special errand exception).

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weighing heavily on this inquiry must be stated at the outset, as they resolve the majority of Davis's arguments on appeal. "First, the benefit of having employees show up to work is not a meaningful one in light of the going and coming rule."[20] Second, employer ownership of a vehicle does not automatically trigger the instrumentality exception absent a showing of sufficient employer control over *and* benefit from that vehicle.[21]

a. Air Systems received insufficient benefit from Mr. Davis's use of the vehicle.

It is an undisputed finding of fact of the Labor Commission that Air System's "main purpose of providing trucks to employees like Mr. Davis was to help them get to and from a construction project."[22] The owner of Air Systems testified that "the truck is like a perk where I'm providing the gas to get guys to the job, because construction workers are notorious for not having driver's licenses, they're out of gas all the time. It's just part of the construction industry."[23] Utah law dictates that Air Systems's provision of trucks to some of its employees to ensure that they could show up at work, is not a "benefit" for purposes of the instrumentality analysis.[24]

The Utah Supreme Court has expressly rejected the inference (as expressed in *Salt Lake City Corporation*) that mere incidental benefit to an employer is alone sufficient to

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[20] *Jex*, 2013 UT 40 at ¶ 49.
[21] *See, e.g., VanLeeuwen v. Indus. Comm'n of Utah*, 901 P.2d 281 (Utah Ct. App. 1995) (finding company-owned vehicle was not instrumentality for lack of sufficient employer benefit and control).
[22] R. at 54.
[23] R. 58 at 36:20–25.
[24] *Jex*, 2013 UT 40 at ¶ 20 ("the benefit of having employees show up to work is not a meaningful one in light of the going and coming rule").

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bring an otherwise ordinary commute within the course of employment.[25] Beyond aiding the arrival of Mr. Davis to work, the only other function of the truck was to occasionally haul tools and materials. Any benefit to Air Systems from these occasional errands is incidental in comparison to the main purpose of the vehicle, and is insufficient to trigger the instrumentality exception.

In *VanLeeuwen*, this Court analyzed a strikingly similar set of facts to those present here.[26] There, an employee was also injured in an accident during a commute in a company vehicle. This Court similarly found that "the primary benefit to Custom [the employer] in providing VanLeeuwen with a company-owned truck was his arrival at work," and addressed somewhat jointly the benefit and control prongs of the instrumentality analysis as follows:

> VanLeeuwen was not performing any service arising out of and in the course of his employment on the morning of the accident. Custom did not require VanLeeuwen to perform any job-related service or use the vehicle as a business instrumentality while traveling to or from work. VanLeeuwen was not on an employment related "special errand" or "special mission" at the time of the accident. VanLeeuwen was not being compensated for his time spent traveling between his home and Custom's office. The accident did not occur on Custom's premises, nor did VanLeeuwen's duties require him to be at the place where the accident occurred. The risk that caused the accident was one common to the traveling public and was not created by duties connected with his employment. We therefore conclude that the Commission's finding that VanLeeuwen received the majority of the benefit from his use of the truck was supported by substantial evidence.[27]

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[25] *Jex*, 2013 UT 40 at ¶¶ 28, 33–34 (citing *Bailey v. Indus. Comm'n*, 398 P.2d 545, 546–47 (Utah 1965) (calling an award of benefits a "close call" even upon a finding that a vehicle conferred "substantial" benefit upon the employer, and upon proof of "extensive employer control")).

[26] *VanLeeuwen*, 901 P.2d at 285.

[27] *Id.*

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Each element addressed in *VanLeewen* has the same outcome here. Mr. Davis was not performing any job-related service or errand while commuting that morning. Mr. Davis was not being compensated, was not on employer premises, and was at the place where the accident occurred only because of his own volitional choice to travel a more dangerous route to work. The purpose of Mr. Davis's commute was merely for his arrival at work. Although highlighted by Davis, the *VanLeeuwen* Court's consideration of the benefit to the employee, while not strictly relevant to the inquiry, does not invalidate its finding, or its conclusion based thereupon, that the only benefit received by the employer was the irrelevant benefit of VanLeewuen's arrival at work.

In *Jex*, the Utah Supreme Court analyzed a similar set of circumstances where an employee argued that his vehicle had become an all-purpose instrumentality of his employer due to his use of the same to the benefit of his employer.[28] The Court found that while Jex's activities did benefit the employer to some small degree—which activities included arrival at work,[29] easier accessibility of Jex's own tools in his truck, and occasional use of his chain and truck to tow a trailer and run errands—the benefits were "not significant enough to sustain the overarching result sought by Jex—the conclusion that every work commute . . . occurred within an instrumentality of his employer."[30]

The Court found the benefits rendered by Jex were not comparable to those found sufficient in other cases, such as *Bailey*, where the Court found the use of a company car

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[28] *Jex*, 2013 UT 40 at ¶¶ 48–51.
[29] Which the Court promptly clarified does not constitute a "benefit" under the instrumentality analysis. *Id.* at ¶ 49.
[30] *Id.* at ¶ 48.

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conferred a "substantial service" to the employer, a service station, since "it was regularly used to respond to emergency calls at all hours, to carry tools and implements necessary to service or repair customer automobiles, and as a loaner to customers."[31] Even in *Bailey*, however, where the vehicle conferred a "substantial benefit" to the employer, the Court "called the case 'a close one' and only narrowly awarded benefits even though extensive employer control was proven."[32]

Similarly here, beyond the main purpose of his arrival at work, the record demonstrates that Mr. Davis kept personal tools in the Air Systems truck, and that he occasionally used the truck to haul or pick-up other construction tools or materials from vendors or the Air Systems shop as needed—although the record is clear that Mr. Davis made no such pick-ups and was hauling no materials on the date of the accident.[33]

As in *Jex*, the benefits to Air Systems from Mr. Davis's activities are insignificant compared to those benefits found to be *barely sufficient* in other cases, such as *Bailey* (even in combination with a high degree of control), where the vehicle was on call at all hours, carried the implements necessary to make repairs during those all hours service calls, and was actually used as a loaner vehicle to customers.

The benefits from Mr. Davis's use of the truck similarly pale in comparison to even those "incidental benefits"[34] to the employer in *Salt Lake City Corp.* There, the

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[31] *Id.* at ¶ 49.
[32] *Id.*
[33] R. at 54.
[34] An approach repudiated by the Court in *Jex*. *Id.* at ¶ 33 (citing to *Salt lake City Corp.*, and holding that "[m]ere incidental benefit is not sufficient").

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officer's travel in a police car benefited the department by, among others, having more officers available for immediate response at all hours, and increased police presence and visibility. This is an important distinguishing factor, as a police car is essentially an extension of the officer; it is an inseparable component of a patrol officer's duties, and the mere presence of a police car on the roadway significantly furthers the department's interests in a way that no common employer's vehicle could do.[35]

No similar benefits to Air Systems were conferred by Mr. Davis's use of the truck. The truck was not used on an emergency basis, and contrary to Davis's assertions, there is no evidence that Mr. Davis was "on call" at any time, and particularly not at all hours of the day like the employees in *Bailey* and *Salt Lake City Corp.*[36] The Air Systems truck cannot be said to be compared to the unique utility of a police vehicle, or of a service and "loaner" vehicle in *Bailey*. Instead, the Air Systems truck was simply a commuter vehicle that was, on occasion, used to haul or pick-up. It is no different from the vehicles in *VanLeeuwen* and *Jex*, conferring insufficient benefit upon Air Systems. In combination with the lack of employer control, as detailed below, Mr. Davis's use of the Air Systems vehicle simply provided benefits too insignificant to sustain the requested overarching result of bringing every work commute within the course of employment.

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[35] *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 24, 153 P.3d 179.

[36] As noted above, the record demonstrates that it was Mr. Davis who dictated when he would need to make stops at the Air Systems shop or at vendors, as he was the one who placed the calls into the shops or vendors to order any parts, tools, or materials he deemed necessary for the job. R. 58 at 34:1–12. There is also no evidence whatsoever that Mr. Davis was ever called upon to make an emergency stop during a commute, or an after-hours call.

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b. Air Systems exercised no control during Mr. Davis's commute.

Employer control over a vehicle may be demonstrated by the existence of requirements or directives from the employer regarding the use of that vehicle.[37] No such indications of control exist in this case. The closest thing on record to a general directive from Air Systems regarding Mr. Davis's use of its vehicle was the requirement to regularly service the vehicle at Air Systems's expense, and to fuel the vehicle as needed using an Air Systems credit card.[38] However, those general directives of keeping gas in the truck and changing the oil demonstrate no substantive control by Air Systems as they are not peculiar to the employment, but are merely general requirements of the commuting public. Mr. Davis would have had to perform the same services to his own vehicle if he had used it to commute to work.

The remaining facts in the record, and those cited by Davis, fail to show that Air Systems controlled Mr. Davis's use of the truck in any significant manner. The record demonstrates that Mr. Davis kept his personal tools in the truck, and that he occasionally made stops to pick up materials or tools from Air Systems or vendors. When those stops occurred during Mr. Davis's commute, he was considered "on the clock" and was paid for that time, otherwise, he was not paid for his commuting time.[39]

Regarding Mr. Davis's personal tools, there exists no evidence that Air Systems requested or required that Mr. Davis keep them in the truck. Instead, to *avoid* the need for

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[37] *Jex*, 2013 UT 40, ¶ 47.
[38] R. 58 at 31:22–25; 37:24–38:9.
[39] R. at 54.

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employees to transport tools to and from the site, Air Systems provided a large "gang box" on site, in which tools were to be locked and kept on site during the duration of the project.[40] This was especially important on the Park City job where Mr. Davis had been working for most of his employment with Air Systems, as there was no parking available near the jobsite, making retrieval of personal or other tools from a vehicle inconvenient at best. Based upon the evidence on record, the presence of Mr. Davis's personal tools in the vehicle on the date of the accident does nothing to establish control.

It is undisputed that on the day of the accident, Mr. Davis had made no stops at the Air Systems office or at any vendor.[41] It is likewise undisputed that Mr. Davis was hauling no construction materials or tools belonging to Air Systems, and that he was not paid during his commute.[42] There is no evidence that Air Systems directed Mr. Davis to take any particular route to work on that day, or on any other. On the day of the accident, there is no indication whatsoever that Mr. Davis was under the supervision or control of Air Systems, or that he was engaging in anything other than an ordinary commute to his workplace.[43] Indeed, the simple fact that Mr. Davis had the freedom to choose to drive to work via a high-mountain route, as he had apparently done on prior occasions, instead of the more common and logical highway route, is evidence enough that he was subject only to his own control during his commutes.

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[40] R. 58 at 30:18–31:7.
[41] R. at 54.
[42] *Id.*
[43] *Id.*

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The occasional stops made by Mr. Davis during his commutes would, at best, trigger the application of the "special errand" exception to the going and coming rule on those particular days (as discussed above). The only pertinent testimony on that issue demonstrates the absence of Air Systems control, as it was Mr. Davis himself who dictated when those stops would be made by calling in his orders to the shop or to vendors.[44] Notwithstanding Davis's assumptions that Mr. Davis was, or could have been "on call," the record is devoid of evidence establishing that Mr. Davis was ever "on call" or that his commutes or off-work hours were ever interrupted by requests from Air Systems to make unplanned stops.

The simple fact of Air Systems's ownership of the vehicle does not change the nature of the inquiry.[45] Davis still must show that Air Systems exercised sufficient control (combined with sufficient benefit) to bring the commute within the course of employment. Davis asserts that because Air Systems owned the vehicle, Mr. Davis "could have been" on call during his commutes. Again, there is no evidence that Mr. Davis was ever "on call," so the assertion is purely hypothetical. In any event, the assumed *possibility* of being on call during a commute would apply equally to all commuting employees, whether in a company vehicle or not, making ownership irrelevant if no control was actually asserted by the employer.

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[44] R. 58 at 34:1–12.

[45] If employer ownership of a vehicle automatically equated to application of the instrumentality exception, then the results in *Bailey* and *VanLeeuwen*, where both vehicles were employer owned but benefits were denied, would not be possible.

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This Court's analysis in *VanLeeuwen* is again instructive based upon the striking similarity of facts. There, an employee driving a company vehicle was injured during his commute, but found outside the course of employment due to the lack of employer control and benefit.[46] Measuring control, this Court noted that the employee was performing no job-related service on the day of the accident, was not being compensated for his commute, and the employer exercised no control over the route of the commute.[47] The facts of this case on these points are identical. Based thereupon, this Court found that the employer's control over VanLeeuwen "was no greater than its control over any other employee travelling to and from work."[48] As was the case with VanLeeuwen, Mr. Davis's duties did not "require him to be at the place where the accident occurred. The risk that caused the accident was one common to the traveling public and was not created by duties connected with the employment."[49]

As in *VanLeeuwen*, Mr. Davis was simply involved in an ordinary commute on the day of the accident. Unfortunatley, Mr. Davis chose to drive the extraordinary route over Guardsman Pass that ultimately claimed his life. However, as the *Jex* Court noted, an employee's "unilateral decisions" cannot bring a commute within the course of employment.[50] Mr. Davis made his own choice to commute on a dangerous route, and to carry his personal tools in the truck as opposed to storing them in the "gang box." There

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[46] *VanLeeuwen*, 901 P.2d at 285.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Jex*, 2013 UT 40, ¶ 47.

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is no evidence that these activities were required by Air Systems. At best, there may exist some "mutual convenience" between Mr. Davis's choices and Air Systems's interests, but the *Jex* Court found that to be insufficient to show control.[51]

To apply the instrumentality exception, this Court must determine that Air Systems's benefit from and control over Mr. Davis's use of the truck were significant enough to justify an overarching finding that *all commutes* by Mr. Davis in that vehicle, whether ordinary or not, were within the course of employment. The well-accepted going and coming rule opposes that finding. The exceptions to the going and coming rule are not intended to be expansively construed.[52] Instead, the foregoing precedent dictates that the instrumentality exception is not a low bar, and that even in cases with proof of significant employer benefit and control, such as *Bailey*, it is narrowly applied.[53]

Here, the required analysis of control and benefit supports the Commission's conclusion that Mr. Davis's accident did not occur within the course of employment. Air Systems received, at most, incidental benefit from Mr. Davis's use of the company vehicle—its undisputed primary purpose being his arrival at work—and there is no evidence demonstrating any exercise of control by Air Systems during his commutes. The evidence is simply insufficient to sustain the sweeping result of bringing *all* of Mr. Davis's otherwise ordinary commutes within the course of employment. This is the precise reason for the going and coming rule, a rule correctly applied by the ALJ and

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[51] *Id.*
[52] *Id.* at ¶¶ 22–23.
[53] *Jex.* 2013 UT 40, ¶ 49.

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Labor Commission. This Court should afford those findings the deference to which they are entitled, and should affirm the denial of benefits.

III. Mr. Davis's choice of route also bars compensation.

Serving as an independent bar to Davis's claim for benefits is Mr. Davis's choice to drive to work on the more dangerous route over Guardsman Pass on the day of his accident—a detour that ultimately claimed his life. The record demonstrates that the accident occurred at the summit of Guardsman Pass, where, on a 90 degree turn, Mr. Davis's right back tire got caught on a crevice on the side of the road where the roadway was apparently breaking away.[54] Mr. Davis's passenger-side tires left the roadway onto "a steep, soft shoulder . . . [and the vehicle] over-turned multiple times down a steep embankment, about 500 feet."[55]

The risks presented by Mr. Davis's choice of route, as compared with those ordinary risks of highway travel that would have been presented on the regular, I-80 route, are obvious. While it is possible to leave the roadway on any road, Mr. Davis's unfortunate demise was caused by the fact that he was on a steep, winding mountain road where the roadway is edged by steep drop-offs—and, as Davis testified,[56] lacks the necessary guardrails that are commonplace where an established interstate roadway presents such immediate and obvious hazards.

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[54] R. at 23; R. 58 at 26:8–21.
[55] *Id.*
[56] R. 58 at 22:19–20.

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Another related exception to the going and coming rule, and yet another exception for which Mr. Davis's commute does not qualify, is the special hazards exception. The principles underlying this exception demonstrate the sound basis for the denial of the requested benefits in this circumstance. Considered in two Utah cases that reached the Supreme Court of the United States, this exception allows travel to work to be brought within the course of employment where the only route, or the most customary route, presents special hazards that an employee must confront to enter his employment.[57] In both cases, the route into and out of the employees' workplace required them to cross railroad tracks, one on foot, the other by car, and in doing so both employees were injured.[58]

In discussing this exception, and these cases, Professor Larson notes that the availability of an alternate route to avoid such hazards is a key consideration that limits application of the exception.[59] Stating the generally accepted proposition of law, Professor Larson notes that the special hazards exception is not applicable "if a reasonably safe and convenient route is available, and if the employee chooses a substantially more dangerous route."[60] The Court discussed this consideration in *Bountiful Brick Co.*, finding the same inapplicable as the alternate, and arguably safer

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[57] *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418 (1923); *Bountiful Brick Co. v. Giles*, 276 U.S. 154 (1928).
[58] *Parramore*, 263 U.S. 418, 421–22; *Bountiful Brick Co.*, 276 U.S. 154, 156–57.
[59] Larson's Workers' Compensation, Desk Ed. § 13.01[3][g].
[60] *Id.*

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route "was long, circuitous and inconvenient, and, so far as the evidence shows, not used."[61]

Mr. Davis was not *required* to travel the more dangerous route over Guardsman Pass, nor was that the only route, or even the most customary route to Park City. Instead, as this Court will undoubtedly recognize, the regular and most accepted route Park City from the Salt Lake Valley is the well-established and maintained interstate highway, I-80. Davis's testimony at the hearing acknowledged that I-80 was Mr. Davis's regular route, noting that he had only "periodically" driven the Guardsman Pass route.[62] Davis's testimony also establishes that the regular I-80 route was essentially the same distance in miles (although the mountain pass takes significantly longer to traverse), and there is no argument that I-80 is somehow more inconvenient or circuitous than Guardsman Pass, or that it simply isn't used by those travelling to Park City.

Had this case presented the opposite facts, and Guardsman Pass was the *only* route available for Mr. Davis to reach his employment, a different result may be reached. But, based upon these facts, the principle underlying this exception cuts strongly against an award of benefits. Mr. Davis's unilateral choice to forego the regular and safer route in favor of Guardsman Pass removes any possibility of compensation for the accident that was caused by the very risks of that route.

Finally, the same result is reached under one additional principle of workers' compensation law—that of deviations from the course of employment. Here, we assume,

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[61] *Bountiful Brick Co.*, 276 U.S. at 157.
[62] R. 58 at 21:16–20; 23:6–13.

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arguendo and notwithstanding the above arguments to the contrary, that Mr. Davis was within the course of employment during his commute. For essentially the same reasons outlined in the discussion of special hazards above, Mr. Davis's choice of route over Guardsman Pass removed him from any possible course of employment.

On the topic of deviations, Professor Larson addresses situations like the one presented here by Mr. Davis's choice of route, stating that "If the incidents of the deviation itself are operative to producing the accident, this in itself will weigh heavily on the side of non-compensability."[63] The facts make clear that Mr. Davis's choice of route was "operative to producing the accident." Guardsman Pass is a steep, winding mountain road. At the scene of the accident, the roadway presented a 90 degree turn, crumbling roadway, and a soft shoulder edged by a steep mountainside without the benefit of a guardrail. Mr. Davis's choice of the more leisurely and scenic—but ultimately more dangerous route, is of great consequence, as it is that decision that presented the very hazards that ultimately claimed his life. Even if he had been within the course of employment during his commute that day, Mr. Davis's deviation therefrom via his unreasonable and personal choice of route is sufficient by itself to justify the denial of benefits.

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[63] Larson's Workers' Compensation, Desk Ed. § 17.06[1].

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Conclusion

In denying benefits in this matter, the ALJ and Labor Commission properly analyzed the pertinent facts of this case, including Air Systems's ownership of the vehicle, and Mr. Davis's occasional use of that vehicle to perform employment duties. The Commission correctly applied the going and coming rule in determining that Mr. Davis was involved in nothing more than an ordinary commute on the date of the accident, and that the risks to which he was exposed were therefore common to the public and cannot be tied to Mr. Davis's employment. The expansive result of bringing *all* of Mr. Davis's commutes within the course of employment is not justified by the facts of this matter. Beyond that correct finding, the additional grounds detailed herein, based primarily upon Mr. Davis's personal choice to travel the more-dangerous route that claimed his life, provide an independent basis for the denial of benefits. Based upon the foregoing, the Commission's decision should be affirmed.

Dated this 10TH day of May, 2017

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CERTIFICATE OF COMPLIANCE

Attorney for Appellees, Cody G. Kesler, certifies that this Brief of Appellees complies with the requirements of Utah Rules of Appellate Procedure 24(f)(1) and 27.

1. This Brief of Appellees contains a total of 5,557 words, excluding portions of the Brief exempted by the aforementioned rules.

2. This Brief of Appellees complies with the typeface requirements and has been prepared using a proportionally spaced typeface in Microsoft Word 2013 in size 13 Times New Roman font.

Dated this 10TH day of May, 2017

RICHARDS BRANDT MILLER NELSON

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellees was mailed on this 10TH day of MAY, 2017, to the following:

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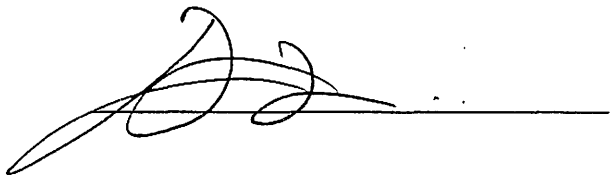

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