

1963

Larry Nicholson v. The Industrial Comm. Of Utah et al : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

CITY OF UTAH
OCT 23 1963
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LARRY NICHOLSON, *Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION OF UTAH, AMERICANA CORPORATION and FIREMAN'S FUND INSURANCE COMPANY,

Defendants.

Case No.
9888

BRIEF OF PLAINTIFF

Writ of Certiorari to Review an Order of the
Industrial Commission of Utah

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Clerk, Supreme Court, Utah

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**IN THE SUPREME COURT
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LARRY NICHOLSON, *Plaintiff,*

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FUND INSURANCE COMPANY,

Defendants.

Case No.
9888

BRIEF OF PLAINTIFF

STATEMENT OF THE KIND OF CASE

This is a proceeding under the Industrial Act for recovery of workmen's compensation benefits claimed by plaintiff for the loss of an eye arising in the course of his employment with the defendant, Americana Corporation.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

Hearings were held in this case in October and November of 1961. On January 17, 1962, the Industrial Commission made an order denying plaintiff's claim upon the ground that plaintiff was not an "employee" entitled to the benefits of the workmen's compensation laws. Plaintiff thereupon appealed to the Supreme Court of Utah. The Supreme Court concluded that plaintiff was an "employee" and on November 26, 1962, handed down its decision reversing the Industrial Commission. Although evidence had previously been heard on all issues, the defendants sought another hearing on the ground that additional evidence had been "developed" on the issue of course of employment (R. 8). The Commission set the case for hearing on February 11, 1963, at which time further evidence was taken. On the 28th day of February, 1963, the Commission made and entered its order by which it found that plaintiff was not in the course of his employment at the time of the accident. The order again denied the benefits of the Compensation Act. Plaintiff petitioned for rehearing and rehearing was denied on March 29, 1963.

RELIEF SOUGHT ON APPEAL

The case is before this Court on a writ of certiorari. Plaintiff seeks reversal of the order of the Industrial Commission and an order directing judgment in favor of plaintiff, or that failing, a new hearing.

STATEMENT OF FACTS

Plaintiff's evidence shows that on June 27, 1961, plaintiff was removing a sales kit from the rear seat of his automobile in preparation for a demonstration of the sales materials. In doing so, he dislodged a seat cover hook which, when stretched back into place, slipped out of his hand and drove a metal fastener into his eye. The result was complete loss of sight in his right eye. Defendants denied liability contending that plaintiff was not an employee and that the accident did not occur in the course of employment. This Court in a previous appeal held that plaintiff was an "employee" of the defendant within the meaning of the Industrial Act. *Nicholson v. Industrial Commission*, 14 Utah 2d 3, 376 P.2d 386. The issue presented in this appeal is whether or not the Commission has erred in arriving at a finding that the accident was not employment connected.

At the time of the accident plaintiff was an employee of Americana under an employment agreement which required him to devote his "entire time and services" to the sale of his employer's publications, and to represent the employer "in the manner directed" (Exhibit 2). The plaintiff was required by Americana to furnish his own automobile and the same was used regularly in company business (R. 19, 67). Sales work was performed by making appointments in advance with prospective purchasers. The sales presentation (pitch) was then made in the home. In the course of his work

plaintiff was furnished with a sales demonstration kit containing materials to be used with the pitch. The sales materials or "broadsides" were withdrawn from the sales kit in a predetermined sequence so as to coordinate the use of visual aids with the pitch.

The accident occurred at the home of a fellow salesman, Dean Ellis. Nicholson had gone to the Ellis home in preparation for a sales trip to be taken by Nicholson and Ellis with the district manager and area manager of Americana Corporation. As part of the preparation for this trip Nicholson had planned to show Ellis a new sales pitch on a publication of the Americana Corporation known as the "Classics Series." Ellis had specifically requested of his superiors in the company that he be instructed on this sales pitch, and Nicholson had been directed by his area manager and also the district manager to show the pitch to Ellis. Plaintiff's evidence shows that the accident occurred while he was removing the sales kit from the rear seat of his automobile so that he could show the Classics pitch to Ellis and arrange the materials therein in proper order for sales presentations to be made later that day.

Plaintiff explained the accident as follows:

(R. 39-40)

"Q. All right. Then what happened that day? Starting with the morning, if you will. I think you said you made some appointments for that evening?

A. Yes, sir. Well, the events of that day were briefly I made appointments for later on in the

afternoon, and later on that day I had gone over to Dean's and cleaned up my car, washed my car, and swept it out, and then told Dean—he was eating lunch at the time—so I told him I'd be back in a couple of hours, and I took my wife to a dentist appointment, picked up some shirts I had laundered, and come back to Dean's for business and to arrange our trip, and I told Dean I was going out to the car to—

Q. Before we get into that. When you returned to his house the second time, and while you were there is when the accident had occurred; is that correct?

A. Yes, sir."

(R. 41)

"Q. Now then, after you arrived at his house the second time, will you relate what happened?

A. I got to the house, and talked to Dean. I knocked on the door, and he said he was going to be out in back with his kids, so I says: 'Well, since we have a little time right now,' he had asked me to run through the classics—we had talked about it before—I says: 'Just a minute. I'll go get the kit, because I'll have to organize it before I can make a pitch, and also I'll run through, take a half hour and show you the classics.'

(R. 43)

"Q. Now when you went out to get the kit from the car, relate exactly what happened.

A. I opened the door on the right-hand side, pushed the seat forward and slid the kit out, and on sliding it out, I knocked loose one of the straps, elasticized straps that hold down the

Terrycloth seat covers—there are, oh, about or 10 straps that hold it down—and, knocking it loose, I set the kit on the ground, reached in to refasten the elasticized strap, which has a little metal “S” hook on it, and in stretching it or looking for a place to refasten it, the hook slipped out of my fingers and slipped back to go into my eye. It pierced my eyelid, going through my eye.”

This testimony was given at the first hearing on October 16, 1961. There was no other evidence offered at that time as to the details of the accident. There was evidence corroborating the fact that plaintiff and Ellis were due on a sales trip the day of the accident and that plaintiff had been directed by his superiors to instruct Ellis on the Classics pitch.

At the final hearing on February 11, 1963, defendants called three witnesses on the issue of course of employment: Dean Ellis (an employee of defendant Americana) and Mr. and Mrs. Leo Linford (estranged in-laws of the plaintiff Nicholson).

Though Ellis had never previously testified in this case, defense counsel sought to show by his testimony that he had been coached by plaintiff (R. 18). This effort was unsuccessful. On cross examination, Ellis as defendant's employee and witness, gave the following significant testimony:

(R. 21)

“Q. Now did you associate with Mr. Nicholson prior to the accident, on a social basis?

A. Uh-uh.

Q. *What contact you did have was strictly on a business basis; is that correct?*

A. Yes.

Q. That is you were selling for Americana, and he was selling for Americana?

A. (Nodding head in the affirmative.)

Q. Answer that audibly.

A. Yes."

(R. 24-26)

"Q. Now Mr. Nicholson was down at your home on the day of the accident? Was that correct.

A. Yes.

Q. *Why was he there?*

A. *Well, basically to get me and get ready for this trip, and then he was going to show me this stuff too.*

Q. Were you making a sales trip on that day?

A. Yes. They were waiting for us in Brigham.

Q. For Americana?

A. Well, both. Americana and, if I learned, the Harvard Classics. If I got it by then.

Q. Well, the Classics was being sold by the Americana people; is that correct?

A. Yes.

Q. So this trip was being taken for the purpose of selling the books of the Americana Company?

A. Yes.

Q. And when you say they were waiting for you in Brigham City, this is Gene Smith and Harry Pledger and one other salesman; is that correct?

A. I don't know if it was one or two. But some of the office from Ogden.

Q. *Now was there any other reason at all for Mr. Nicholson to be at your home on that day?*

A. No.

Q. Now he came twice that day to your home, didn't he?

MR. CHRISTENSEN: I'm going to object here to your leading, Mr. Macfarlane.

MR. MACFARLANE: It's your witness.

THE REFEREE: Go ahead.

A. What?

MR. MACFARLANE: Q. Mr. Nicholson had been to your home twice on that day, hadn't he?

A. Yes.

Q. And the first time—

A. Well, yes, he was there twice. Totally.

Q. And the first time he came to your home you were eating lunch; is that correct?

A. Yes.

Q. About what time was that?

A. I don't remember exactly. It was in the afternoon sometime. We eat lunch there, you

know, as a rule it's not 12:00 o'clock, because we run an orchard, and it was later in the afternoon, but I don't know exactly what time.

Q. All right. Did he leave, after he came and found you eating your lunch?

A. Well, he went out and straightened up his car, and then went to pick up his wife."

(R. 27-31)

"Q. Now then, after he straightened up his car he did leave, and then subsequently returned to your place; is that correct?

A. Uh-huh.

Q. When he returned, where were you?

A. In the house.

Q. What were you doing in the house?

A. I don't know.

Q. Had you made any preparations for this trip?

A. Yes.

Q. Did you have a sales kit?

A. Just after he came I went out and got my sales kit, and was finishing straightening it up. You always go through your sales kit before you go on a trip, so you can make a presentation in a house. And I went out on the back lawn. Now I may have even been out on the back lawn when he came. I don't know whether this was when he came, or just after, or what.

Q. Well, when he arrived at your house, were you or had you just been in the course of preparing your sales kit for this trip?

A. Yes.

Q. And in preparing your sales kit, it is necessary to take the materials out and arrange them in a specific order; is that correct?

A. Yes.

Q. And then you put new contracts and new what they call broadsides into the kit itself; is that correct?

A. Yes.

Q. And this is what you were doing when Larry came the second time?

A. Yes.

Q. Now when he came up to your house the second time, did he come up to the front door and knock? Or do you know?

A. I guess.

Q. Did you have a conversation with him?

A. Yes.

Q. And do you recall the substance of that conversation?

A. As to the detail, or to—*Just that I was to go get my stuff ready, and he was going to get his stuff and come around, and that was basically it.*

Q. *Now when you say he was going to get his stuff, what do you mean by that?*

A. His kit. Out of his car.

Q. Now did he ever return with his kit?

A. No.

Q. And what is the next thing that you knew?

A. *My wife came out to the back door and hollered that Larry had been hurt, and this was*

about, oh, several minutes later. I mean it didn't just happen, you know, bang, bang. Two or three minutes later my wife came out, and I wondered where Larry was. I thought it was him, but she said he was hurt. Then I went in the house, and he was lying on the front room floor, with blood all over his face.

* * *

Q. And where was the sales kit, Mr. Nicholson's kit, when you returned?

A. Well, Larry had asked me to go back and get the stuff that was out on the lawn. The stuff he had out.

Q. Now where with reference to the door of the automobile, or the automobile of Mr. Nicholson, was the sales kit? I know you don't know how many inches or how many feet, but was it close, or far, or—

A. Well, it was there by the side of the car.

Q. Now you and Mr. Nicholson were going to make a trip to Brigham City later that day to sell Americana, and that was why Mr. Nicholson was there; is that correct?

A. Yes.

Q. Now do you know whether or not Mr. Nicholson was going to show you the Classics on that day?

A. Yes.

Q. Was he?

A. Yes.

Q. Was he going to show you the Classics before this sales trip was made?

A. Yes." (Emphasis added).

Defendants apparently contend that the accident occurred while Nicholson was engaged in installing a new set of seat covers on his automobile. In support of this contention defendants called Leo and Lorna Linford, former in-laws of Nicholson. Neither of these people had any personal knowledge of the circumstances of the accident but testified as to purported admissions made by Nicholson following the accident.

Lorna Linford testified that Nicholson told her:

(R. 36-37)

“ . . . he had been washing his car and putting this new seat cover on. He said he was just on the last part when this pin that hooks the seat cover flipped and hit him in the eye.”

Defense counsel asked Mrs. Linford if Nicholson had ever used the word “coached” with reference to his conversations with Ellis, and she replied, “I don’t recall” (R. 37). Counsel asked if Nicholson ever used the term that he was going to “work out an angle,” and Mrs. Linford replied, “I don’t recall right now. I don’t know” (R. 38). Defense counsel was then permitted over timely objection to, in effect, impeach his own witness by referring her to a statement she had given to Fireman’s Fund Insurance Company in November of 1962, whereupon she testified that Nicholson had said “he was going to work it so that he would get more for his eye” and “he was going to take the insurance company for all they were worth” (R. 39-40). Mrs. Linford testified that she contacted the insurance

company on her own initiative in November of 1962 (R. 40).

The cross examination of Mrs. Linford was very revealing. After the first hearings in October and November of 1961 and before November of 1962 when the Linfords contacted Fireman's Fund Insurance Company, several significant events occurred. Nicholson had been married to Linfords' daughter, Darlene. They were divorced in the fall of 1961 (R. 41). Darlene went to California and the two children of the marriage (Curtis and Sherry) remained with the Linfords in their home (R. 41). The Linfords were very attached to these children. In December of 1961, Nicholson took custody of Curtis, though the Linfords were very much opposed to allowing him to take the child from their home (R. 43). Mrs. Linford acknowledged that there was a feeling of "animosity and bitterness" that developed as a result of the divorce and Nicholson's assumption of the custody of his child (R. 44). Nicholson continued to visit his daughter, Sherry, at the Linford home, but notwithstanding his requests he was not permitted to take the child at any time for a full day (R. 45). Meanwhile, Darlene was sent to prison in California for misapplication of bank funds (R. 46). Mrs. Linford testified that she felt Nicholson was to blame for the divorce of her daughter and that he was also to blame for the trouble Darlene got into in California (R. 46-47). In August of 1962, Mrs. Linford took Sherry to California with her to visit Darlene (R. 47). She planned to stay "a week or a little longer"

(R. 47). Upon learning that his child was to be taken out of the state, Nicholson filed a petition for custody of Sherry in the District Court of Weber County naming the Linfords as defendants. Mrs. Linford learned of the petition when she arrived in California and she stayed there for two months moving from place to place because of the "trouble he was causing" (R. 50). Darlene was released from prison in October of 1962, and Mrs. Linford remained in California with her a while, moving from Los Angeles to San Francisco (R. 53). She then left Darlene, instructing her not to tell Nicholson where she was (R. 53). Mrs. Linford returned to Utah with the custody of Sherry still very much in her mind. Asked as to her attitude in November of 1962 (when the insurance company was contacted), Mrs. Linford testified:

(R. 55-56)

"Q. Yours was an attitude of considerable bitterness toward Mr. Larry Nicholson at that time, was it not?

A. For all the expense and trouble he had caused. *He had called our home, and threatened that he would use every cent that he would get from this insurance company to do everything he could.*

Q. *So that in contacting the insurance company, your motive was to hurt him at that time; isn't that correct?*

A. *For all he had put us through, yes.*

Q. And isn't it a fact that you had told him on

many occasions prior to November of 1962, that you hoped that he would get his money? That he was entitled to it?

A. I hoped he got something from it, yes. Because he was entitled for having his eye hurt.

Q. Didn't you tell him you thought he was entitled to be compensated?

A. To get something, yes . . ." (Emphasis added).

Mrs. Linford was apparently concerned as to how Nicholson would use the money he got from the insurance company. Notwithstanding her instruction to Darlene not to communicate with Larry, Darlene called Larry and arranged to place Sherry in her father's custody (R. 54-55). Both Curtis and Sherry were in their father's custody at the time of the second hearing.

Leo Linford was called by defendants pursuant to subpoena. Defense counsel stated at the commencement of the hearing that Leo Linford had called him from Ogden about 7:00 o'clock a.m. that morning to advise counsel that Linford "had only a little French car and the highway patrol was not letting sports cars on the highway" and that Mrs. Linford "was in California" and "not available at the present time" (R. 13, 14). Counsel advised Linford that he would have to contact the Industrial Commission to be excused. Shortly after the commencement of the hearing, which started at 9:00 o'clock a.m., Linford and his wife walked into the hearing room (See R. 21).

The exclusion rule had been invoked and Linford did not have the opportunity to hear his wife testify before he took the stand. His wife had testified that she and her husband took the initiative in contacting the insurance company in November of 1962 (R. 40). Leo Linford said that he didn't remember whether he contacted the insurance company or whether the company contacted him (R. 66, 67), though he did remember clearly some purported conversations that took place a year prior to the contact with the insurance company (R. 67).

Leo Linford testified over objection that he "believed" that Dean Ellis was in the hospital room on the day of the accident along with Nicholson's parents (R. 61) and that Ellis "said that Larry Nicholson was putting seat covers on his car, after having washed it, and that the last hook that he had to fasten didn't make the connection and sprung out and hit him in the eye" (R. 63). Linford said that Larry later told him "the same story" (R. 64). Linford also stated that Nicholson said "he had worked out an angle" (R. 64) and that he was "going to have to work on Mr. Ellis." Linford said he thought the latter conversation took place after the first hearing in October of 1961 (R. 66).

Linford's cross examination, like that of his wife, disclosed that there was a great deal of antagonism between him and Larry as a result of the divorce, his daughter's imprisonment and the custody fight for Nicholson's two children (R. 70-72).

Larry Nicholson was called at the final hearing and he testified again that he went to the Ellis home twice on the day of the accident. On the first occasion Ellis was eating his lunch and so Nicholson washed his car and cleaned it out lightly (R. 77). Nicholson then left to handle some personal business, after which he returned again to the Ellis home (R. 77). On the second occasion he took no action to clean the car or set it in order (R. 78). Defense counsel objected to going into the details of the accident since Nicholson's testimony was already in the record from the first hearing (about 16 months before) (R. 78). Plaintiff's counsel refrained from again eliciting the details of the accident from Nicholson upon the assurance from the Commissioner that the earlier testimony would be reviewed and considered in deciding the case (R. 78. See also R. 12).

Nicholson testified that the seat covers were not new and that he had purchased them several months before (R. 79). This was corroborated by Ellis (R. 17). He said that when the custody fight was initiated in August of 1962, Leo Linford threatened to shoot him (R. 81). He denied that he had told the Linfords that he was putting on new seat covers when the accident occurred or that he had said he was working an angle or coaching Ellis (R. 79-80).

Larry Nicholson's father, Robert A. Nicholson, testified that in August of 1962, Leo Linford called him and told him that he (Linford) "had told Larry what he would do to him. He advised me to keep Larry away

from him. *That he was certainly going to even the score*" (R. 83-84). Larry's father testified that Linford called him again (during the course of the custody fight) and told him how upset he was with Larry (R. 84). Robert Nicholson denied that the Linfords were ever in the hospital room with him and his wife and Larry (R. 87) and testified that the Linfords had never had any discussion with Larry about the accident in Mr. Nicholson's presence (R. 87).

Ellis was recalled and testified that he never told the Linfords that the accident occurred while seat covers were being installed (R. 91). He said that Larry had not told him what to say or how to say it (R. 91).

At the close of the evidence the case was taken under advisement, and on the 28th day of February the Commission handed down its decision whereby it concluded that Nicholson was not in the course of his employment at the time of the accident.

This appeal challenges that finding.

ARGUMENT

POINT I.

THE ORDER OF THE COMMISSION SHOWS ON ITS FACE THAT THE COMMISSION, CONTRARY TO THE STIPULATED PLAN OF PROCEDURE, IGNORED THE EVIDENCE OFFERED AT THE FIRST

HEARING AND ERRONEOUSLY INTERPRETED THE EVIDENCE RECEIVED AT THE FINAL HEARING.

Plaintiff's testimony on the occurrence of the accident was taken before Roland G. Robinson, Jr., referee, on October 16, 1961. The final hearing on February 11, 1963, was conducted by Commissioner Otto A. Wiesley. At the commencement of that hearing the following understanding was had between counsel and the referee:

(R. 12)

“MR. MACFARLANE: As I understand it, the purpose of this hearing is in effect the re-opening of the record, to take additional evidence on the issue of course of employment.

MR. CHRISTENSEN: Right.

THE REFEREE: Yes.

MR. MACFARLANE: And we would expect, if it's agreeable with the Commission, that all evidence heretofore received would be considered in determining that question, together with what additional evidence might be adduced at this time.

MR. CHRISTENSEN: Yes.

THE REFEREE: That is absolutely necessary. The whole record is in evidence.

MR. CHRISTENSEN: Yes. We understood that.

THE REFEREE: You may proceed then, Mr. Christensen.”

During the course of the hearing plaintiff's counsel sought to review some of the testimony of Nicholson pertaining to the details of the accident, and the following discussion took place:

(R. 78)

"Q. And why were you there on the second occasion?

MR. CHRISTENSEN: I'm going to object to all this as repetitious.

A. Company business.

MR. CHRISTENSEN: The whole thing is in the original transcript.

THE REFEREE: I haven't read the transcript for some time. I wouldn't remember.

MR. CHRISTENSEN: I read it last night, Mr. Commissioner. It was there then.

THE REFEREE: If it is in the record, Mr. Macfarlane, of course we'll agree no purpose can be served by repeating it now.

MR. MACFARLANE: Will your practice be, Mr. Wiesley, to await the preparation of a transcript in this hearing, and then read it all over and consider it all?

THE REFEREE: Oh, yes. We'd have to, yes.

MR. MACFARLANE: All right."

It was thus clear that all of the testimony previously offered on the issue of course of employment was to be considered by the Commission in arriving at a finding.

The order of the Commission demonstrates that the testimony offered at the first hearing was ignored. The first paragraph of the order discussing the evidence says:

(R. 94)

“Mr. Ellis (companion salesman) testified that the eye injury occurred when applicant went to get his stuff (sales kit) out of the car. *It seems more probable that a pin would flip and strike an eye during the process of pinning seat covers than when removing a sales kit from a car.*” (Emphasis added).

Plaintiff gave the following testimony at the first hearing:

(R. 43)

“A. I opened the door on the right-hand side, pushed the seat forward and slid the kit out, and on sliding it out I knocked loose one of the straps, elasticized straps that hold down the Terrycloth seat covers—there are, oh, about 8 or 10 straps that hold it down—and, knocking it loose, I set the kit on the ground, reached in to refasten the elasticized strap, which has a little metal “S” hook on it, and in stretching it out looking for a place to refasten it, the hook slipped out of my fingers and slipped back to go into my eye. It pierced my eyelid, going through my eye.”

The quoted portion of the Commission’s order shows that the commissioners assumed applicant’s contention to be that the strap in some unexplained way flipped into his eye when the kit was being removed. Such

an assumption could not have prevailed had the Commission considered the testimony offered at the first hearing. The damaging nature of the unwarranted assumption is obvious. The possibility of a fastener striking an eye while removing the kit from the vehicle is remote. The prospect of injury in refastening the strap is just as great as the prospect of injury in initially installing the strap.

The order next recites:

(R. 95)

“It was never established why the sales kit was outside the car on the ground, but nearby, after the injury occurred. It may have been placed there by applicant so he could go about installing seat covers. He may have dropped them there following the eye injury. Had his eye been struck while removing the kit from the car, he most likely would have dropped them instantly *in* the car.”

There are only two possible explanations for a statement such as this: Either (1) the Commission failed to consider plaintiff's testimony, or (2) the Commission did not exercise good faith in reviewing the record. We choose to believe the first alternative. Either would be grounds for reversal. Contrary to the order, it *was* established why the sales kit was outside the car on the ground after the injury occurred. After testifying that a strap was dislodged as the sales kit was slid out, Nicholson said:

(R. 43)

“I set the kit on the ground, reached in to refasten the elasticized strap, which has a little metal “S” hook on it, and in stretching it out looking for a place to refasten it, the hook slipped out of my fingers and slipped back to go into my eye.”

Not having considered this testimony the Commission could not understand why the kit did not drop instantly *in* the car.

Thus, in failing to review or to consider the plaintiff's testimony the Commission was laboring under the following false and unwarranted assumptions:

- (1) That plaintiff contended the accident to have occurred when the sales kit was slid out of the automobile;
- (2) That plaintiff made no explanation of the presence of the kit outside of the automobile.

These false assumptions led to the conclusions (a) that it was more probable that a pin would flip into plaintiff's eye while attaching seat covers than while removing a kit from the car; (b) that had the accident occurred as plaintiff contended, he would have naturally dropped the kit *in* the car; and (c) that the presence of the kit outside of the car actually corroborated the contention that plaintiff was installing seat covers at the time of the accident. The foregoing conclusions were all fundamental to the determination which the Commission made and were all based upon false assumptions

which could not have been made had the Commission considered the testimony offered at the first hearing.

The order of the Commission also shows a careless appraisal of the testimony of the Linfords. In reviewing such testimony the order says:

(R. 95)

“She testified that she took the initiative in conveying the information to the insurance adjuster *after* the divorce of her daughter from the applicant. One would not expect a mother-in-law to volunteer such information when family relations are as they should be. One might, after a divorce and bitter feelings generated over custody of children.”

The evidence was that the divorce occurred in the fall of 1961. There was no testimony to the effect that the divorce proceedings followed the hearings of October and November, 1961. This was not the fact. Though we do not consider this to be of great importance, it appears from the foregoing portion of the order that the Commission considered the date of the divorce to be important and acted on an erroneous assumption in that regard.

The order of the Commission next reads:

(R. 95)

“We doubt that she [Mrs. Linford] would so readily have admitted taking the initiative in conveying information to the insurance adjuster if it were not factual.”

This statement is incredibly naive and contradictory. It assumes that the witness (Mrs. Linford) would have lied about contacting the insurance company if the information she had was not factual and that the very fact that she admitted making the initial contact with the insurance company bolsters her credibility. Mrs. Linford perhaps concluded that she was not in a position to deny that she made the initial contact with the insurance adjuster confronting her at the hearing. Further, she had every reason to give the insurance company information which would prevent Nicholson from succeeding in his claim. She was forced to admit the bitter and hostile attitude she had toward Larry. A custody battle in which the Linfords were vitally interested was being waged at the time. Mrs. Linford testified that Nicholson had threatened to use the money he obtained in the settlement in carrying on the battle. There was ample explanation for her initiative in contacting the insurance company. It is interesting to note that rather than believe that Mrs. Linford was motivated by her admitted desire to "hurt Larry" (R. 56), the Commission finds that she must have been telling the truth because *otherwise she would have lied* about contacting the adjuster herself.

In the very next paragraph of the order the Commission acknowledges that "the father-in-law said the insurance adjuster solicited the information rather than he and his wife had taken the initiative." No comment is made on this finding, but under the process of reasoning followed in the preceding paragraph of the Com-

mission's order it follows that one of the Linfords is not telling the truth and that the rest of their testimony is therefore unworthy of belief (R. 95). Actually the evidence showed that the father-in-law "could not remember" who made the contact (R. 66, 67). Having concluded, as it did however, and considering the weight apparently placed on the initial contact, it is difficult to see how the Commission could reconcile the conflicting statements of these two witnesses upon which it bases the entire order. The Commission also ignores the fact that Leo Linford obviously lied to Mr. Christensen when he told him on the morning of the hearing that Mrs. Linford was in California and would be unable to attend the hearing that morning (R. 13, 14, 21).

The order of the Commission next says:

(R. 95)

"Applicant testified that to the best of his recollection he told his family that he got the hook into his eye when attempting to refasten the seat cover. This occurred at the hospital."

The applicant did not testify that he had any such conversation at the hospital. On the contrary, he was under sedation at the time the Linfords claim to have visited him in the hospital room and not able to discuss the accident (R. 79). He did testify that in explaining the accident he simply said that the injury occurred while attempting to refasten the seat cover hook (R. 79).

The Commission next finds:

(R. 95)

“In spite of the family differences over the divorce and custody of the children, we choose to believe the testimony of Lorna Linford and her husband, Leo George Linford.”

It is submitted that a reading of the opinion will demonstrate that the Commission “chose” to believe the Linfords without considering the testimony of Nicholson. But what significance lies in the testimony of the Linfords? If true, the Commission could believe that Nicholson admitted that he was putting on seat covers at the time of the accident; that he had an “angle,” and that he was going to get Ellis to go along with him. None of these conclusions should defeat recovery. Nicholson was in the act of fastening a seat cover hook. If he said he was going to work “an angle,” this cannot be fairly construed to mean that the claim was fabricated or fraudulent without some explanation of the details. Fraud and fabrication are not proved in such a manner. The statement that he was going to “work on Ellis” also falls short of the evidentiary requirements of proof of fraud and fabrication. In believing the Linfords the Commission received no assistance whatever as what actually occurred at the time Nicholson lost his eye. Neither of the Linfords were present or claim to have any personal knowledge of the circumstances of the accident, and the Commission failed to take into account that the defense witness Ellis (who was defendant’s employee at the time of the accident) corroborated plaintiff’s version of the

accident. Instead of taking this into account, the Commission saw fit to comment that Ellis (a defense witness) was "evasive" (R. 95) and to attach that stigma to plaintiff.

Finally, the Commission concludes that Nicholson was not in the course of his employment (a) because he and Ellis were not on their way to Brigham City at the time of the injury; (b) because replacing or fastening seat covers was not done in the course of employment; and (c) because the instruction in the sale of Classics had not begun at the time of the accident. Such conclusions callously ignore the fact that no sales presentation could be made and no instructions on the Classics pitch commenced until the sales kit was removed from the rear seat of plaintiff's automobile, and that as an incident to the removal of the kit plaintiff was required to replace a fastener dislodged by the removal of the kit. The accident was thus occasioned as a direct result of necessary employment connected activity.

There is not a single paragraph of the Commission's order (following the recital of the history of the case) which does not contain significant error. It is respectfully submitted that the Commission "chose" to decide this case for the defendants on the basis of the final hearing only, without consideration of the evidence offered at the first hearing and without a fair and impartial consideration of the evidence received at the final hearing.

POINT II.

THE UNDISPUTED EVIDENCE COMPELS A FINDING THAT THE PLAINTIFF WAS IN THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

The Industrial Commission acts in excess of its powers when it arbitrarily disregards or unreasonably refuses to believe material, substantial, competent and uncontradicted evidence. *Dale v. Industrial Commission*, 115 Utah 311, 204 P.2d 462; *Jones v. California Packing Corp.*, 121 Utah 612, 244 P.2d 640; *Woodburn v. Industrial Comm.*, 111 Utah 393, 181 P.2d 209. This is such a case.

A review of the entire record establishes the following undisputed facts. When Nicholson was employed by Americana, he was required to furnish his own automobile. He used his automobile in his work and it was essential to the performance of his duties. The district manager of the defendant, as well as Nicholson and Ellis, testified that a sales trip to Brigham City had been planned for the day of the accident. Nicholson was to take his automobile on this trip, and Ellis was to take his. Nicholson went to the Ellis home on the day of the accident to prepare for the trip. Nicholson had no reason to go to the Ellis home except for business purposes, and his sole motive in going there on the day of the accident was to instruct Ellis on the Classics pitch and prepare for the sales trip.

The accident occurred while Nicholson was fastening a seat cover hook. Nicholson testified that the hook was being refastened after having become dislodged by the sales kit, and defendants apparently contend that a set of seat covers was being installed. In either event, preparations for the sales trip were under way. Nicholson had embarked upon his work in going to Ellis' home to arrange his sales kit and demonstrate the Classics pitch. The accident occurred under plaintiffs' evidence as an incident to removal of the sales kit from his automobile. Under defendants' theory it occurred while plaintiff was conditioning his car for use.

The Commission recognized that Nicholson's trip to the Ellis home was in contemplation of a sales trip (R. 95), but concluded that the accident was not within the scope of the Act because the trip had not actually started and instruction on the Classics pitch had not commenced (R. 95). This narrow construction of the Act is not in accordance with the cases.

Our statute permits recovery for injury "arising out of or in the course of . . . employment, wheresoever such injury occurred" (§35-1-45, U.C.A., 1953). The words "arising out of" refer to the origin or cause of injury, and the words "in the course of" refer to the time, place and circumstances of the injury. *Utah Apex Mining Company v. Industrial Commission*, 67 Utah 537, 248 Pac. 490. This Court has held that the statute should be liberally construed and that if there is any doubt respecting the right to compensation, such doubt

should be resolved in favor of recovery. *Chandler v. Industrial Commission*, 55 Utah 213, 184 Pac. 1020; *M & K Corp. v. Industrial Commission*, 112 Utah 488, 189 P.2d 132.

Clearly if the accident occurred as an incident to removal of the sales kit, it “arose out of” and “in the course of” employment. Under the circumstances of this case it cannot in good faith be contended that transportation and removal of the kit was not employment connected. These were essential acts in the performance of the employer’s work, and incidents directly connected with such acts are likewise employment connected. Plaintiff contends that the Commission was arbitrary and capricious in refusing to adopt Nicholson’s version of the accident because his testimony was corroborated by defendant’s own witness and employee. The testimony of Ellis established (1) that Nicholson had come to his home solely for a business purpose; (2) that Ellis had requested instruction on the Classics pitch and Nicholson had agreed to furnish it; (3) that Nicholson and Ellis discussed preparations for the trip upon Nicholson’s arrival; (4) that Nicholson went out to his car to get his sales kit; (5) that “two or three minutes” later Ellis’ wife came to him to report that Nicholson had been injured; (6) that Nicholson was found by Ellis with his injured eye, and (7) that Nicholson’s sales kit was found beside his car after the accident. The defendants should be bound by the testimony of their witness in the foregoing important particulars.

The contention that the Commission acted arbitrarily does not ignore the testimony of the Linfords. Such testimony is in the category of that referred to in Jones on Evidence (2nd Ed.), page 620:

“It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself. These and similar considerations have often led the courts to declare that admissions are evidence of low grade—the weakest and *most unsatisfactory* form of evidence.”

It is the rule in many jurisdictions that admissions inconsistent with a party's testimony go merely to the credibility of the witness and have no probative value as direct evidence. *Eastman v. Lake Shore & M. S. Ry. Co.*, 101 Mich. 597, 60 N.W. 309; *Allen v. Large*, 239 S.W. 2d 225; *Gams v. Oberholtzer*, 50 Wash. 2d 174, 310 P.2d 240. Under this rule Nicholson's testimony as corroborated by Ellis stands uncontradicted by direct evidence. If the testimony of the Linfords is given the probative force of direct evidence, such

testimony when analytically considered still does not impeach the evidence offered by Nicholson and Ellis.

But even assuming, arguendo, that the plaintiff was installing or replacing seat covers at the time of his accident, such work, under the circumstances of this case, was still within the scope of the Act. It is undisputed that plaintiff was making preparations for a sales trip and that he was to use his own automobile in connection with such trip. He had embarked upon his master's business in going to the Ellis home with a business motive. The fact that he may have been conditioning his own automobile is not fatal to his cause.

In *Struve v. City of Fremont*, 125 Neb. 463, 250 N.W. 663, the applicant was killed by carbon monoxide gas while tuning up his automobile used principally in the employer's business. The accident occurred early in the morning while the applicant was "preparing" to attend a convention in his employer's business. The court said:

"The deceased was preparing his car to carry him to his fireman's duty, it matters not whether to his morning inspection or to Omaha to his fireman's school."

It was held that the accident was within the scope of his employment.

In *Green v. Hiestand Bros., et al.*, 103 Pa. Super. Ct. 515, 157 Atl. 44, the employee, a traveling salesman, was repairing his car in order to complete his employ-

ment for the day and in doing so was overcome by carbon monoxide gas. In holding that the accident was in the course of employment, the court said:

“We think the only legitimate inferences to be drawn . . . are that the decedent’s employment for July 9, 1930, had not been terminated at the time of his accidental death and that the accident happened while he was repairing an instrumentality (necessary to the proper rendition of the services required of him) preparatory to going to the Noel Bakery to make a collection for his employers.”

In *Derleth v. Roach & Seeber Co.*, 227 Mich. 258, 198 N.W. 948, the employee suffered an accident while preparing his own automobile for use on the following day in connection with his employment. He was testing his batteries in order to insure that he would be able to make the trip by automobile. The court held that the accident arose out of and in the course of his employment.

In *Kingsley v. Donovan*, 169 App. Div. 828, 155 N.Y. Supp. 801, the employee used a motorcycle in going to and from work. He received an injury while engaged in cleaning the motorcycle after arrival at work, and the New York court held that the accident was compensable.

In *Hilyard v. Lohmann-Johnson Drilling Co.*, 167 Kan. 177, 211 P.2d 89, the employee was working on his own personal car which had no connection with his employment whatever. It was shown, however, to be

a common custom for employees to work on their personal cars in their spare time while on the job. In determining that the accident occurred "in the course of" employment, the court simply commented that at the time the claimant sustained his injuries he was in his employer's services. The court then went on to conclude that the accident also "arose out of" the employment. In so holding the court said:

" . . . At 58 Am. Jur., Workmen's Compensation, § 235, it is said: 'An injury is not necessarily rendered noncompensable by the fact that at the time of its occurrence the employee was engaged in the performance of some act for the benefit of himself or a third person, since such an act may, in many instances, be so related to or connected with the employment as to make it a reasonable incident thereof.' . . . It is not essential that the employee be engaged in an act directly beneficial to his employer in order that the resulting injury may be said to have arisen out of the employment, and the fact that the employee's action may have been impelled by a personal motive does not prevent the application of the compensation statute.

* * *

"The words 'causal connection' certainly do not mean that the accident must have resulted directly and immediately from performance of the work for which the workman was employed. Such a narrowed interpretation would mean that whenever a workman was not directly engaged in the actual work to be done he would be without protection under the law. . . ."

An analysis of the entire record reveals that regardless of the motive and the reason for fastening the seat cover strap, Nicholson was in preparation for sales services and was working on an instrumentality necessary for use in such services. He had gone to the Ellis home with one motive, and that was in furtherance of his work with the defendant Americana.

Though it may be argued that there would be personal benefit to Nicholson in placing his own personal automobile in order, it cannot be logically contended that this had no connection whatever with his employment. The law does not require that the salesman be actually engaged in the sale of books at the time an injury occurs. Preparation of the automobile was a necessary incident to his employment. We understand the general rule to be that even where an act incidental to employment is performed for the employee's benefit, it will not preclude compensation. This rule is stated in 99 C.J.S. 744-745 as follows:

“ . . . The fact that the incidental act which caused the injury was performed for the employee's benefit will not necessarily preclude compensation where the act was performed in the course of employment or where such activity had *become an incident to the employment*. . . . It is not essential that the employee be engaged in an act directly beneficial to his employer in order that the resulting injury may be said to have arisen out of the employment, and the fact that the employee's action may have been im-

pelled by a personal motive does not prevent the application of the compensation statute.

* * *

“Where the employee is primarily engaged in carrying out his employer’s purposes, and his conduct for personal reasons is merely incidental thereto, he is acting in the course of his employment. Where the act is within the employment, it is immaterial that the predominate motive of the employee is to benefit himself. . . . ”

It is earnestly submitted that a review of the entire record compels the conclusion that the accident arose out of or in the course of Nicholson’s employment with Americana.

POINT III.

THE COMMISSION ABUSED ITS DISCRETION IN THE CONDUCT OF THE HEARING AND ERRED IN REFUSING TO GRANT PLAINTIFF’S PETITION FOR RE-HEARING.

A review of the entire transcript of the final hearing will demonstrate that the Linfords, whose testimony forms the basis of the Commission’s order, were apparently reluctant to appear at the hearing. They had contacted the insurance company during the heat of a custody battle and furnished written statements. Then at the time of the hearing when it became necessary for them to go under oath and testify, Mr. Linford

called counsel with a flimsy excuse for his own inability to attend and an apparent untruth about his wife being out of the state. The record will show that Mrs. Linford would not state under oath the claim she apparently initially made to the insurance company until defense counsel was permitted to in effect impeach her by asking leading questions and referring her to a statement taken for the defendants' own use (R. 37-40). Though we recognize that the Commission is not bound by formal rules of evidence, it appears to the plaintiff that it was an abuse of the Commission's discretion for it to allow testimony which it considered so vital to be wrung out of defense witnesses by impeachment tactics.

The record also shows the impatience of the Commission in permitting a broad scope of cross examination of the Linfords (R. 46, 50, 51, 72). Further, it appears that defendants' request to offer additional evidence following the first appeal was readily granted (R. 8, 9), whereas plaintiff's request for a rehearing to offer additional evidence was promptly denied (R. 96, 97, 99). Taking the record as a whole, plaintiff contends that he was deprived of a fair hearing of the issues.

CONCLUSION

It is respectfully submitted that the order of the Industrial Commission is contrary to law and that the same should be reversed with instructions to award com-

pensation in accordance with the Industrial Act, or in the alternative, that the matter should be remanded for further hearing.

Respectfully submitted,

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