

1963

The State Insurance Fund v. The Industrial Commission of Utah and Mary Merkley Sander : Plaintiff's Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *State Insurance Fund v. Industrial Comm. Of Utah*, No. 10008 (Utah Supreme Court, 1963).
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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1963

THE STATE INSURANCE FUND,
(administered by the
Director of Finance),

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH and MARY
MERKLEY SANDER,

Defendants.

Supreme Court, Utah

Case No.
10008

PLAINTIFF'S BRIEF

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NATURE OF THE CASE

This case calls for the Supreme Court's review of the Industrial Commission's proceedings and decision awarding Workmen's Compensation benefits to Mary Merkley Sander, relating to the death of her husband, Isabrand Sander, for the purpose of determining whether the Commission exceeded its powers and whether the findings of fact support the Commission's award.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

On July 10, 1963, the Industrial Commission held a hearing on Mrs. Sander's application. On August 12, 1963 the Industrial Commission rendered its decision in the form of an Order. The Commission held that Mr. Sander's death on August 4, 1962, resulted from an accident in the course of his employment. The Commission ordered the employer and the State Insurance Fund to pay a total of \$11,170 compensation to Mary Merkley Sander, plus \$525 funeral expenses.

RELIEF SOUGHT IN PETITION

The Plaintiff, the State Insurance Fund, in this certiorari proceeding, seeks to have the Supreme Court of Utah reverse, vacate and annul the award which the Industrial Commission made in its decision and order dated August 12, 1963.

STATEMENT OF FACTS

In the morning of Saturday, August 4, 1962, Mr. Isabrand Sander was driving an Oldsmobile automobile in a westerly direction on 4th South Street in Salt Lake City, and the automobile crashed into a concrete bridge near 10th West Street, causing injuries to Mr. Sander, resulting in almost instant death. Mr. Sander's widow, Mary Merkley Sander, filed an application with the Industrial Com-

mission of Utah on April 10, 1963, in which she alleged that Isabrand Sander's fatal injuries were received while he was in the course of his employment as the president of I. Sander, Inc. She therefore requested the benefits provided by the Utah Workmen's Compensation law. The employer corporation's Workmen's Compensation insurance carrier was the State Insurance Fund, which denied any liability. The Industrial Commission held a hearing on July 10, 1963.

On August 12, 1963 the Industrial Commission rendered its decision in the form of an Order (R. 97), in which it said that although there was no evidence, other than custom, to support a finding that Mr. Sander was in the course of his employment, his death was compensable; and the Commission ordered the State Insurance Fund to pay a total of \$11,710 compensation to Mrs. Sander, plus \$525 funeral expenses. On September 3, 1963 the Fund filed an Application for Rehearing, which the Commission denied on September 23, 1963.

Many years ago Mr. Sander started his oil and gas distribution business when he was living at Heber City, Utah. Later he incorporated this business under the name of I. Sander, Inc. In 1950 the company's headquarters were moved to Salt Lake City; and Mr. and Mrs. Sander also moved their residence to Salt Lake City. At first the company's office was in one room of the home of Mr. and Mrs. Hosford at 219 Douglas Street. (Mrs. Hosford was one of Sander's daughters.) In the meantime Mrs.

Sander's sister bought the Ivanhoe Apartments at 415, 417 and 419 East 3rd South in Salt Lake City. In order to help her fill up some of the apartments, Mr. and Mrs. Sanders rented and moved into Apt. 8 of the Ivanhoe Apts. Also in 1953 the offices of I. Sander, Inc. were moved from the Hosford residence to Apartment 14 of the Ivanhoe Apts., which is at 419 East 3rd South. In 1956 the company's business activities required more space and different arrangements. So the company purchased some ground and built a building at 1815 West 5th South in Salt Lake City for use as its office and trucking terminal. (R. 15 and 57) All of the company's employees, their desks and other office equipment were moved from 419 East 3rd South to the company's offices at 1815 West 5th South, with the exception of Mr. Sander's desk and some other equipment, which were left in Apt. No. 14 at 419 East 3rd South, for his convenience, etc. (R. 22)

During the three year period the company had its office in Apt. 14 at 419 East 3rd South, the company issued its checks to pay the rent and all of the other expenses. There was a little vagueness in the testimony about the arrangements for payment of the \$70 monthly rental of Apt. 14 after the company's office was moved to west 5th South in 1956. Mr. Hosford, who was the general manager, testified that the company increased Mr. Sander's salary by an amount sufficient to equal the monthly rental, and Mr. Sander then paid the rental for Apt. 14 from his own money. But Mr. Hosford said he

could not remember what amounts Mr. Sander's salary was increased from and to. (R. 15-16) Mr. James Heber Moulton was the company's office manager and he made out the payroll checks each month. He testified that, according to the way he remembered it, Mr. Sander's salary was \$2,000 per month at that time, and Mr. Sander volunteered to pay the rent on Apt. 14 out of his own salary. This was agreeable to Mr. Hosford and Mr. Moulton, so Mr. Sander did that from then on. (R. 58) At a later period, when the company's financial position was not very healthy, Mr. Sander's salary was reduced to \$1,000 per month; and he continued to pay the \$70 monthly rental for Apt. 14 from his own salary. (R. 59)

ARGUMENT POINT 1

THERE WAS NO COMPETENT EVIDENCE TO SUPPORT THE INDUSTRIAL COMMISSION'S FINDING AND CONCLUSION THAT THE DECEASED, ISABRAND SANDER, WAS IN THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE FATAL COLLISION.

Mr. Isabrand Sander was 72 years old in 1962. He was still president of the corporation which he had founded, but it was quite apparent that he was in substantially a "retired" status. He had transferred practically all of his stock (ownership in the corporation), to his several children during the years preceding his death. (R. 28) His son-in-law, Mr. Hosford, was the general manager of the company

and was directly in charge of the company's business. Mr. Sander still gave the other officers of the company his advice and counsel on various occasions; but for most purposes he had retired from active participation in the affairs of the company.

The so-called "office" in Apt. 14 at 419 East 3rd South, had Mr. Sander's desk in it, and a typewriter and filing cabinets, and there was also a television set, a contour chair, a davenport, a bed, as well as a stove, refrigerator, kitchen table and chairs. This "office" apartment was on the same floor as Apartment No. 8, in which Mr. and Mrs. Sander lived. He was the only one whose "office" was supposed to be located in Apt. No. 14. Apparently he could use this apartment in the same way as some men use their den in their home, as a more-or-less private or semi-private unit to which they can escape temporarily at periods from the other members of their family, and in which they can have some privacy to engage in such serious or frivolous pastimes as they might be inclined. Mr. Sander could devote as much or as little time to thinking about the company's welfare and general activities as he might choose to do, and in discussions with the company's personnel. He was not required to punch a time-clock or to spend any particular hours in Apt. No. 14 or at the 5th South office of the company, or in the performance of any other service for the company. He also could devote whatever time he wished to his own personal affairs or matters having nothing to do with the business of the company. His time was his own to do with as he saw fit.

The third paragraph of the Industrial Commission's decision (R. 97) reads as follows:

The only issue to be resolved by the Commission is whether the deceased was in the course of his employment by I. Sander, Inc. on August 4, 1962, or more particularly at the time of the fatal accident, 9:40 A.M. Was he in fact on his way to the west side office at 1815 West 5th South Street, Salt Lake City, Utah?

The Commission was in error in assuming that the first sentence and the second sentence meant the same thing. The first sentence correctly stated the main issue to be whether Mr. Sander "was in the course of his employment * * * at the time of the fatal accident." The next sentence: "Was he in fact on his way to the west side office?" is not the same question. It is not complete. Even if he were on his way to the company's office at 1815 West 5th South, that fact alone would not be sufficient to bring him into the course of his employment and under the coverage of the Utah Workmen's Compensation law. Any employee, whether he is the president of the company or holds some lesser job, must be doing something more than being "on his way to" the company's office, in order to be covered. He is not covered when he is on his way from his home to his employer's place of business in the morning (or the commencement of his shift). Neither is he covered when going to or returning from lunch or other meal. *Goodyear Tire & Rubber Co. vs. Ind. Comm.*, 100 Utah 8, 110 P.2d 334.

The last sentence of the fourth paragraph of the Commission's decision (R. 97), quotes the witness, Gregory F. Hosford (who was a son-in-law of Mr. and Mrs. Sander), as testifying that Mr. Sander "was enroute from the office at 419 East 3rd South to the office at 1815 West 5th South." That testimony of Mr. Hosford (R. 18), was nothing but hearsay; and it was his own guess or conclusion. Mr. Hosford himself admitted that he was not in Salt Lake City at the time of Mr. Sander's collision. He was in Fillmore at that time. He first learned of the accident when Mr. Moulton told him about it over the telephone. (R. 20) It is interesting to note that Hosford also jumped to an erroneous conclusion in testifying that Mr. Moulton was on duty at the west side office that morning. (R. 20) Actually Mr. Moulton spent most of the morning attending a family gathering in a building some distance away from the company's office. (R. 56) On cross examination Mr. Hosford testified that he left Salt Lake City about 8:00 A.M. on August 4, 1962 and he flew to Filmore on some business for the company. He did not see Mr. Sander at all that day, and he did not have any conversation with him. (R. 37)

The sixth paragraph of the Industrial Commission's decision (R. 97), reads:

Although we have no evidence, other than custom, we believe that the evidence adduced supports a finding that the deceased was on his way from the east side office to the west side office at the time of the fatal injury.

We assume that the Commission was making a finding and conclusion to that effect. There might have been some basis for the Commission to find that Mr. Sander "was on his way to the west side office" that morning. Both his custom and Mrs. Sander's testimony that he may have told her, while they were eating breakfast, that he intended going to the 5th South office that morning (R. 52), might lend some support to such a finding. But the Commission apparently overlooked an important point. There was absolutely no evidence in the record, either of custom or otherwise, upon which to base a finding that Mr. Sander "was on his way *from* the east side office." (Emphasis added.)

The only testimony from anyone who actually saw Mr. Sander or had any conversation with him on the morning of August 4, 1962, came from his wife, the applicant in the Industrial Commission's proceedings. Mr. and Mrs. Sander slept in separate bedrooms in their apartment. She testified that when she arose that morning she first went to his room. He was already up. (R. 48) She saw him in the bathroom, and said, "Well, good morning." When he finished in the bathroom he went over to Apt. 14. She prepared their breakfast, then called him on the telephone about 7:30. He came over to their apartment (No. 8) and they ate breakfast together. She first testified that she did not remember of him telling her, while they were eating breakfast, that he was going to the 5th South office that morning. (R. 50) Later she said that he may or may not

have told her that he was going to the 5th South office that morning. (R. 52) She testified that customarily he did go down to the 5th South office on Saturday mornings.

Mrs. Sander did not know at what time Mr. Sander had gone out and driven away in the Oldsmobile. The first that she knew he was gone was when she looked out of their kitchen window and she noticed that the Oldsmobile was not there. She estimated that that was about 9:30 A.M. (R. 51)

There was no proof as to what Mr. Sander was doing in Apt. 14 for that part of the time he may have been there between 7 A.M. and 7:30 A.M. that day; whether he was working, or reading the morning newspaper or listening to news on the radio or TV, or taking a nap, or any of the various things which different men in Salt Lake City do between 7:00 and 7:30 in the morning on Saturdays. Mrs. Sander did not know what he was doing in Apt. 14 that morning. He did not tell her that he was working. (R. 49) There is no evidence of any kind that he did any work for the corporation that morning. The mere fact that he might have done some work in Apt. 14 would not necessarily mean that he had entered on duty for the company shortly after 7 A.M. and that all of his actions and movements after 7 A.M. that day must be considered as coming within the scope of his employment.

There is also a lack of any competent evidence to prove what Mr. Sander might have been doing

after he finished eating his breakfast and before the Oldsmobile he was driving crashed into the concrete bridge later that morning. With such lack of proof, any finding or inference which the Industrial Commission might make, to the effect that after his breakfast Mr. Sander went back to Apt. 14 and then later went *from there* to the 5th South office, is clearly unsupported by competent evidence.

It is our contention that there was no proof that it was Mr. Sander's custom to go from what the Commission called the "east side office" (Apt. 14 in the Ivanhoe Apartments), to the company's main office on 5th South on Saturday mornings generally, or on that Saturday morning, August 4, 1962 in particular.

Mr. Hosford testified that Mr. Sander "periodically would come down to 1815 West 5th South to see us." (R. 17) He also explained that his understanding relating to Mr. Sander's movements on the day of his death, were based on his knowledge of his custom for the previous 13 years (R. 37); also what he (Hosford) was told over the telephone while he was in Fillmore, and what he was told when he returned to Salt Lake City. (R. 19 and 37) But even Mr. Hosford (who was apparently doing all he could to make the case compensable), did not state that it was Mr. Sander's custom to go *from* Apt. 14 at 419 E. 3rd South, on the occasions when he would come down to the 5th South office. It would have been only hearsay if he had so testified.

Mr. Moulton testified that Mr. Sander came down to the 5th South office often. (R.54) When asked what he meant by "often," he said that in one period Mr. Sander had spent the whole day there for two weeks at a time. Then there were "other times when we'd go for a whole week without seeing him." On August 4, 1962 Mr. Moulton did not know whether Mr. Sander was coming down to the 5th South office. (R. 55-56) He had not talked with him on the phone. Both he and Mr. Nelson, the accountant, testified that they did not have any arrangements to meet Mr. Sander at the 5th South office that morning; and there was no special meeting planned for that morning. (R. 68)

Mr. Nelson, and his son who took care of the lawn, were the only employees of the company at the 5th South office after Moulton left for his family gathering. (R. 65 and 67)

There was considerable effort on the part of applicant's attorney and witnesses to establish that Mr. Sander had been working on a device, somewhat like a miniature slot machine, which might be used as a sales promotion scheme by service stations to influence customers to buy gasoline at their particular stations in hopes of getting their purchase free, if three numbers of the same kind came up on the device. (R. 19, 54 and 69) Mr. Sander had one of those devices in the trunk of his Oldsmobile at the time of the fatal crash. At least it was there the following Monday or Tuesday when Mr. Hosford and Mr. Moulton and Mr. Nelson examined the trunk

of the wrecked car. (R. 19, 55 and 69) Mr. Sander had been working on that device for quite a while prior to that day, and he no doubt had been carrying it in his automobile for some considerable time. There was no evidence that he was making any special trip to the company's 5th South office that morning in connection with that device, or for any other purpose; and the Industrial Commission's decision so held. (R. 97) Therefore it cannot have any significance in the consideration of the question of whether he was in the course of his employment that morning. In the case of *Greer vs. Ind. Comm.*, 74 Utah 379, 279 Pac. 900, the Utah Supreme Court held that carrying of a tool or other object relating to the employer's business, must have been the main purpose of the trip in order to be under the coverage of the Workmen's Compensation law, and not just *incidental* to the trip of the employee in going to or from work.

There was also some testimony that the corporation paid the monthly charge for the telephone which Mr. Sander had in Apt. 14 of the Ivanhoe Apartments, in his own name under an unlisted number. (R. 14 and 58) That fact was not of particular importance. The company also paid the telephone bill on Mr. Hosford's home telephone; and probably also on Mr. Moulton's. (R. 30-31) That was done because all of those phones were used relating to the company's business on occasions.

In the discussion of our present case, the case of *Vitagraph, Inc., vs. Ind. Comm.*, 96 Utah 190, 85

P.2d 601, contains some points which are helpful. Mr. P. O. Perry was employed on a part time basis by Vitagraph, Inc. to be present at times when their pictures were being shown in different theatres in Salt Lake City. He would check the number of paying customers and at a later time make a written report and mail it to the company's office. After one such evening at the Southeast Theatre he put the tallying machine in his pocket and started to go to his home. While crossing a street for the purpose of boarding a bus he was struck by an automobile and injured. He had intended preparing his report at home that evening or the following morning, as he usually did. On some occasions he had prepared the report before leaving the theatre. The Industrial Commission awarded compensation to Mr. Perry. The Supreme Court annulled the award. The Court held that the accident was not in the course of his employment. At page 194 of the Court's opinion, it said:

The question as to when one is in the course of his employment has often been before the courts. Certain indicia to guide one in answering the question have been laid down by the courts but no fixed rule can be promulgated and each case must be determined largely from its own facts. It seems definitely settled that if a workman is injured in the normal course of things, in going to or from his work or place of employment, that is the result of the general hazards which all must meet and assume and is not in the course of his employment.

At page 201 of the Court's opinion is a quote from a previous case of *Greer vs. Ind. Comm.*, 74 Utah 379, 279 Pac. 900:

But the mission (for the employer) must be the major factor in the journey or movement, and not merely incidental thereto; that is to say if incidental to the main purpose of going to or from the place of employment, it would not bring such person under the protection of the Act. * * * Under the facts in the instant case, it is clear that the deceased was not upon any *special mission* for his employer at the time of the accident. There was nothing he was doing for his master at the time which exposed him to the perils of the street. He was merely going from his home to his place of employment. The fact that he was carrying the saw was merely incidental. * * * In this case the deceased was not injured while he was sharpening the saw at his home. The accident did not occur while he was actually engaged in the performance of a duty for the employer. The dangers of the street between his home and the stockyards were not incident to his employment, but were dangers common to all.

To the same effect as the above mentioned Greer case, is one cited in 99 Corpus Juris Secundum,, Section 232 relating to the "going and coming rule," namely *Sylvan vs. Sylvan Bros.*, 82 SE2d 794, 225 S. C. 429:

Injuries sustained by executive who slipped and fell on sidewalk on the way from

home to place of employment was neither in course of, nor arising out of, his employment, notwithstanding he was carrying business papers which he had prepared in his home previous evening; the journey to and from home to place of employment was not in course of employment, because main purpose of it was to go home or to return to place of employment, and journey would be made irrespective of homework which employee might be carrying.

We are familiar with the case of *Morgan vs. Ind Comm.*, 92 Utah 129, 66 P.2d 144, which the defendants may cite in their argument. Samuel Morgan was the principal of the Davis County High School at Kaysville. On the afternoon of Sunday, Feb. 2, 1936, he went from his home to the school building for the purpose of making up his monthly report to the school district office, which he had been unable to complete the previous Friday and Saturday; also he was going to return some account books, etc. to his office safe. After entering the building he found that he had left his personal keys at home, including the key to the principal's office. He returned home to obtain the key. He was detained at home by his lunch and some visitors and some other things of a personal nature; so he did not start back to the school building until 10 o'clock that evening. When he was walking on the roadway between his home and the school building he was struck by an automobile and injured. After hearing his case, the Industrial Commission denied his claim for compensation benefits. The Supreme Court of Utah re-

versed the Commission's decision. The Court held that Mr. Morgan was on a special trip for his employer at the time of his accident and was therefore covered by the W. C. law.

Although the Supreme Court's decision in the Morgan case was by a unanimous opinion, Justice Wolfe wrote a concurring opinion. But four years later, in the case of *Goodyear Tire & Rubber Co. vs. Ind. Comm.*, 100 Utah 8, 110 P.2d 334, Justice Wolfe also wrote a concurring opinion, in which he said (at page 11):

If the case of *Morgan vs. Industrial Comm. of Utah* is correctly decided it is in point for the application herein and should be conclusive. But I do not think it was correctly decided. * * * where an employee is returning to do overtime work of the same nature as his regular work and where he stays over the regular time to perform it, he cannot be said to be on a special errand for his employer. Morgan was, within limits, his own boss. He had certain duties to perform at the school. Whether he performed them during regular hours or during such times as he might himself choose, would not put him on the course of a special errand so as to make his coming to and going from the locale of his work a part of the special errand. I am forced, therefore, to conclude that the Morgan case was wrongly decided and that my own concurring opinion failed to note the distinction between ordinary work performed out of hours — there being more of it done — and the special errand where the employment sets the travel-

er forth upon a journey for some special purpose and exposes him to its perils."

In the above mentioned case of *Goodyear Tire & Rubber Co. vs. Ind Comm.*, the employee, Lee James Harris, was working overtime on the evening of May 8, 1939. Before the work was finished he borrowed the company motorcycle, drove home to dinner, took his little sister for a ride, ate his dinner; and on the return trip to his employer's premises he had an accident. The Industrial Commission awarded Workmen's Compensation benefits to Harris; but the Supreme Court of Utah annulled the award. The Court's opinion said that it was immaterial whether Harris was specifically directed to go to dinner or not. At page 10 it said:

The specific direction merely fixed the time of going, but did not control Harris' actions while going to, eating, or returning from dinner. Stress has been laid on the fact that Harris was working overtime and the accident did not happen during regular working hours. That, too, we believe to be immaterial, as no effort was made to control his actions while absent for dinner.

POINT 2

BECAUSE OF THE LACK OF COMPETENT EVIDENCE TO SUPPORT AN AWARD, THE INDUSTRIAL COMMISSION WAS REQUIRED BY LAW TO DENY COMPENSATION BENEFITS TO DECEASED'S DEPENDENT.

In the case of *Wherritt vs. Ind. Comm.*, 100 Utah 68, 110 P.2d 374, Dr. Barton H. Wherritt died

from injuries which he received when his automobile plunged over an embankment in City Creek Canyon about midnight, Feb. 4, 1940. That day Dr. Wherritt had worked at the Intermountain Clinic until about 6 P.M., when he went home to dinner. About 8:45 P.M. he left home, telling his wife that he had some work to do at the Clinic and some calls to make at the hospital. She also testified that he had earlier told her that he had to take some samples to the State Board of Health laboratory (in the State Capitol Building) to be analyzed. He was seen at the Clinic at 9:50 P.M. and at the L.D.S. Hospital about 10:40 P.M. His fatal accident was about midnight on Wasatch Boulevard north of the State Capitol. There was nothing in the record to show that he left any samples at the Board of Health laboratory that night, or that he had them in his car, or that he took any samples from the Clinic. In sustaining the Industrial Commission's denial of compensation in that case, the Supreme Court of Utah, at page 70, said:

The question left unanswered by the evidence is what Dr. Barton H. Wherritt was doing at the time of the accident. Was he about his employer's business or was he on an errand of his own?

The burden of proof is upon applicant to establish her claim for compensation. *Higley vs. Ind. Comm.*, 75 Utah 361, 285 Pac. 306; *Bingham Mines Co. vs. Alsop*. 59 Utah 306, 203 Pac. 644.

Where the industrial Commission is driven to surmise or conjecture, the injured person or his dependents cannot recover compensation benefits. The fact finder is not bound to adopt the theory of the applicant even if there is some evidence to support it. *Sugar vs. Ind. Comm.*, 94 Utah 56, 75 P.2d 311. Surmise, conjecture, guess or speculation is not sufficient to justify a finding in behalf of the applicant. *Higley vs. Ind. Comm.*, 75 Utah 361, 285 Pac. 306.

It certainly cannot be presumed that an officer of a company, whether he is partially retired or otherwise, is in the course of his employment for the whole 24 hours of every day, just because he might, during that period of the day when he is at home, or while driving between his home and the place of business, or while he is eating his meals, or is shaving himself, or while he is in bed unable to sleep, or on any other such occasion he might be thinking about some of the company's business affairs, or "trying to solve a problem," or "mulling things over in his mind," etc.

Hearsay evidence, although allowable in an Industrial Commission hearing, is not sufficient upon which to base an award. *John Scowcroft & Sons Co. vs. Ind. Comm.*, 70 Utah 116, 258 Pac. 339; *Vecchio vs. Ind. Comm.*, 82 Utah 128, 22 P.2d 212; *Fish Lake Resort Co. vs. Ind. Comm.*, 73 Utah 479, 275 Pac. 580.

In the case of *Diaz vs. Ind. Comm.*, 80 Utah 77, 13 P.2d 307, at page 86 of the Court's opinion is the following:

* * * it * * * is urged by the defendants that * * * the commission was not bound by the usual common law or statutory rules of evidence. * * * In support of that the cases of *Garfield Smelting Co. vs. Ind. Comm.*, 53 Utah 133, 178 Pac. 57, and *Rockefeller vs. Ind. Comm.*, 58 Utah 124, 197 Pac. 1038, are cited. * * * In the Garfield case a statement is made that the commission in its investigations may have recourse to hearsay evidence, but at the same time the court in most emphatic language also said: "Yet when it makes its findings every finding of fact must be based on some competent evidence."

and at page 87 of the Court's opinion:

If a material finding is not supported by sufficient or is against the legal competent evidence, it will be disapproved and set aside.

CONCLUSION

For the foregoing reasons the decision and order of the Industrial Commission dated August 12, 1963, should be annulled by this Court.

Respectfully submitted,

F. A. TROTTIER,
Attorney for Plaintiff,