1964

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH and MARY MERKLEY SANDER,

Defendants.

Case No. 10008

DEFENDANT'S BRIEF

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NATURE OF THE CASE

On the morning of August 4th, at approximately 9:40 A.M., Mr. Isabrand Sander was found dead in his automobile after it had crashed into an abutment on a bridge at 1135 West 4th South, Salt Lake City, Utah. (R. 1.) On August 17th, 1962, a report of the accident was filed with the Utah State Industrial Commission. (R. 1.) Mrs. Mary Merkley Sander filed a dependent's application to settle the industrial accident claim with the Industrial Commission on April 10, 1963 (R. 2), and

hearings were held pursuant to the application under the Workmen's Compensation Act on July 10, 1963.

On August 12, 1963, the Industrial Commission issued its order in the matter. The Commission found in favor of the applicant:

> "The accident occurred at 4th South and 10th West. This was no doubt the customary route to the West Side Office. It was also customary for deceased to visit the West Side Office, not regularly but certainly occasionally on company business including Saturdays.
>
> "Although we have no evidence other than custom, we believe that the evidenced 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." (R. 97, 98.)

The State Insurance Fund applied to the Industrial Commission for a rehearing of the claim on August 30, 1963. (R. 99.) The Industrial Commission denied the application in an order dated September 23, 1963. (R. 100.) The case has come to the Supreme Court after plaintiff's Petition for Writ of Certiorari (R. 101) was granted on the 17th day of October, 1963, and a Writ issued pursuant thereto.

DISPOSITION SOUGHT BY THE DEFENDANT-APPLICANT

The Industrial Commission and the deceased's widow, Mary Merkley Sander, ask that the Utah

Supreme Court affirm the Order (R. 97-98) of the Industrial Commission which found that at the time of his death, Mr. Isabrand Sander was within the course of his employment and that his widow is therefore entitled to the benefits of the deceased's Workmen's Compensation Insurance.

STATEMENT OF THE FACTS

On Saturday, August 4th, the day of the accident, Mr. Sander, as was his long-time custom, arose, washed, and dressed early in the morning before 7:00 A.M. (R. 48.) There was no indication that Mr. Sander was not entering upon his usual working day. He greeted his wife with the words, "Well, good morning." (R. 48.) After dressing, Mr. Sander went out the front door leading from his apartment at 417 East Third South, walked outside to the front door of the apartment at 419 East Third South, (R. 29.) and then went into his East Side Office which was located in this wing of the apartment house. In the meantime, Mrs. Sander was preparing breakfast. (R. 42, 49.) At about 7:30, as was customary (R. 42), Mrs. Sander dialed the unlisted telephone number to Mr. Sander's East Side Office and notified him that breakfast was ready. (R. 42.) Mr. Sander then returned to his residence at 417 East Third South by the same route and he and his wife ate breakfast together. Mr. Sander did not converse with his wife about his proposed itinerary for the day. It was not his custom to speak with his wife concerning his business affairs, (R.

50). Mr. Sander was an extremely industrious, thrifty, energetic, hardworking, active and vigorous man (R. 43, 44, 20) and was fully capable of taking care of his own affairs. (R. 50.) They never took very much time to eat because Mr. Sander was always in a hurry to get back to work. "I would say maybe about a half-hour maybe, before he went back, I would say." (R. 49, 50.)

This was the last time that Mrs. Sander or any other person to the knowledge of anyone saw or heard from Mr. Sander until the time of his instant death at 9:40 A.M. caused by his automobile crashing into an abutment on a bridge at 1135 West 4th South Street, Salt Lake City, Utah. (R. 1, 51.) This location was on the direct route which led from the East Side Office of I. Sander, Inc. to the West Side Office. (R. 97.) Mr. Moulton, the executive vice-president of I. Sander, Inc., was on his way to the West Side Office as he "came down" 5th South Street at about the time of the accident, and saw but did not recognize the crashed car of Mr. Sander. (R. 63-64.)

As a general rule and habit, Mr. Sander would "return to his office immediately" after eating breakfast in his residence apartment. (R. 42, 61, 62, 63.) This included Saturdays. (R. 42, 20.) Other officers of the company were so certain that Mr. Sander would be in his East Side Office at 8:00 in the morning that they would occasionally call there for a conference with Mr. Sander at 8:00

A.M. without even making prior arrangements or an appointment. (R. 63.) Mr. Sander maintained extremely regular hours at his East Side Office. He could usually be reached at his office by telephone at any time of the day after 8:00 A.M. (R. 68.)

At about 9:30 on this Saturday morning, Mrs. Sander looked out the window and saw that her husband's Oldsmobile, the automobile in which he was driving when the collision occurred (R. 24.) was gone from the apartment. (R. 51.) The company paid for the insurance on this automobile (R. 22) and also for the gasoline, oil, and other automobile maintenance items which could be purchased on Mr. Sander's company service-station credit card. (R. 22-23.) Mr. Sander used this particular Oldsmobile on company business most of the time, although he also owned a Lincoln Continental. (R. 34-35.)

Mr. Sander periodically visited the West Side Office to check records, have stenographic work done, and hold consultations, (R. 17, 54.) Often he would not phone or make arrangements in advance — he would just drive down. (R. 54.) Mr. Sander had been working on a promotional device. The device worked somewhat like a slot machine, and if three markers came up the same, the customer would get his gasoline free. (R. 17-19.) Mr. Sander had a model of this device with him in the trunk of his car when he was killed. (R. 18.) Mr. Sander was aware of a pressing company problem about a ser-

vice station option and highway-access rights at a location in Fillmore. (R. 32-34.) There is not one scintilla of testimony or evidence in the entire record that Mr. Sander was at the time of his death doing anything else but going from his East Side Office to his West Side Office.

ARGUMENT

POINT ONE

THE FINDING OF THE INDUSTRIAL COMMISSION THAT THE DECEASED ISABRAND SANDER WAS WITHIN THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE FATAL COLLISION IS BASED ON SUFFICIENT, COMPETENT EVIDENCE.

The question to be decided in this case is whether or not there was sufficient, competent evidence to support the finding and Order (R. 97) of the Industrial Commission that Mr. Isabrand Sander, at the time of his death, was within the course of his employment. Plaintiff contends that there was "no competent evidence to support the Industrial Commission's finding . . ." (Brief, p. 5.) If the Commission based its Order (R. 97) on any competent evidence whatsoever, the commission's award should be affirmed.

It must be firmly stated and constantly kept in mind that, "To accomplish its salutary purposes, the [Workmen's Compensation] Act should be liberally construed in favor of coverage of the claimant." *Maryland Casualty Co. v. Industrial Commission*, 12 Utah 2d 223, 225, 364 P. 2d 1020 (1961); *Looser*

v. Industrial Commission, 9 Utah 2d 81, 83, 337 P. 2d 965 (1959).

In *Chandler v. Industrial Commission*, 55 Utah 213, 184 P. 1020, (1919), the Utah Supreme Court overruled a decision of the Industrial Commision denying an award, where the issue was whether or not the employee was within the course of his employment:

> ". . . Whether a particular injury is occasioned by an accident arising out of the employment may present a more or less perplexing question, and with respect to which reasonable men may differ . . ."
>
> "We are reminded that our statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice."
>
> "We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be." (55 Utah 213 at pages 216-218.)

In order to further this salutary purpose of the Workmen's Compensation Act, the rules of evidence before the Commission in its hearing are much more liberal than those which prevail in the courts of law. Section 35-1-88, U.C.A. (1953) provides:

> "Rules of evidence before commission. The comission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure,

other than as herein provided; but may make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title."

The Court commenting on substantially the same section in *Ogden Iron Works v. Industrial Commission*, 102 Utah 492, 132 P. 2d 376 (1942) stated that the section

> ". . . plainly changes the rule of evidence within the Act . . . Much could be said in favor of a thesis that the Commission could act and base an award upon any kind of evidence; that since the Act authorizes the Commission to receive hearsay evidence, and therefore an award may be based thereon. * * *" (102 Utah at page 498.)

The next step in procedure in a Workman's Compensation case, after the Commission has made its finding and published its Order, occurs if either party to the action appeals the Commission's decision. Here again, great weight and scope of authority is given to the decision of the Industrial Commission.

> ". . . (B)elieving the facts as related by the applicant widow and her witnesses . . . is a prerogative reserved to the Commission, with which we do not interfere short of arbitrary action not based on competent, believable evidence. * * *" John G. Hendrie Company vs. Industrial Commission, 12 Utah 2d 80, 81-82, 362 P. 2d 752 (1961). See also, *inter alia*, *J.B. and R.E. Walker, Inc. v. Industrial Com-*

mission, 7 Utah 2d 132, 320 P. 2d 650, 651 (1957).

". . . (T)he Commission's findings are binding on this Court unless it can be shown as a matter of law that they are so unreasonable as to be arbitrary or capricious. * * *" Holland v. Industrial Commission, 5 Utah 2d 105, 106, 297 P. 2d 230.

" 'It was not intended . . . that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission.' * * *" Lorange v. Industrial Commission, 107 Utah 261, 264, 152 P. 2d 272.

With this background of the Workmen's Compensation Act's purpose, the procedure in its hearings, and the rules for appellate review, let us proceed to the evidence in the case at bar. Plaintiff contends that the deceased, Mr. Isabrand Sander, "was in substantially a 'retired' status" at the time of his death. (Brief, p. 5) This statement is in direct contradiction to the testimony of *every witness who testified at the hearing.* (R. 16, 33, 40, 43, 49, 50, 54, 68, 69.)

Plaintiff next contends that the office which I. Sander, Inc. maintained at 419 East 3rd South was not an office at all. On cross-examination, Mrs. Sander testified that this office had never been used for residential purposes since 1950. (R. 45.) Mr. Sander never slept in this office. (R. 52.) Plaintiff contends that Mr. Sander could devote as much or as little time as he wished to company affairs in this office, and that he did not have to punch a time

clock. That Mr. Sander did not punch a time clock is irrelevant — very few executives do. What is extraordinary concerning Mr. Sander in this regard is the regularity of hours which he kept in his East Side Office, far more regular, we might dare say, than the hours of most company presidents. Conferences were held in the East Side Office regularly. (R. 17.) Mr. Nelson, a company employee, testified that ". . . usually any time we'd want to contact him (Mr. Sander) we would call his office and contact him." (R. 69.) As to conducting "personal affairs" (Brief, p. 6) in his office, besides the fact that most executives have occasion to conduct some personal business in their offices, Mr. James Moulton, executive vice-president of the company, testified that to his knowledge Mr. Sander in fact had very little personal business at all to perform. "When he was awake, he was either working or churching." (R. 60.)

The uncontradicted evidence clearly establishes proof the company had an East Side Office and a West Side Office and that Mr. Sander's regular desk was in the East Side Office although he used a table for a desk at the West Side Office (R. 11, 12, 56) when necessary. The company paid the telephone bill at the East Side Office. (R. 12.) There was a logical business reason for maintaining a separate office on the east side of town: the office was near the offices of Standard Oil, which was the main customer of I. Sander, Inc. (R. 16.)

There was not one iota of testimony from any of the witnesses that the East Side Office was ever used by Mr. Sander for anything but business purposes. There was a bed in the office kept there for emergencies when the apartment clientele might have more guests than they could accommodate, but Mr. Sander had never slept there. (R. 52.) There was no extension telephone between Mr. Sander's office and his apartment. (R. 42.) I. Sander, Inc. paid the entire telephone bill for the office at 419 East Third South. There is no evidence whatsoever in the record that the Company paid the telephone bill for the telephone in Mr. Sander's residence apartment, as it did in his office.

Mail was regularly addressed to I. Sander, Inc., 419 East Third South, Salt Lake City, Utah, the East Side office of I. Sander, Inc. (R. 32.) Mr. Sander was paid $1000 per month as president. Mr. Hosford, the present president does not appear from the record to be paying the rent out of his salary as president. He is paid $100.00 per month less than Mr. Sander, $900.00. In sum, this is the office which the plaintiff terms Mr. Sander's "den". (Brief, P. 6.) The above brief recital of facts incidental to the East Side Office shows the fallacy of this term — in fact, judging from the testimony of Mr. Sander's widow and business associates, Mr. Sander's character was such that he might have found great difficulty in finding a use for a "den" for "serious or frivolous pastimes." (Brief, p. 6.)

Plaintiff admits that Mr. Sander was in "Apt. 14" between 7:00 A.M. and 7:30 A.M. on the morning on which he was killed. (Brief, p. 10.) Plaintiff infers that this did not necessarily place Mr. Sander within the course of his employment, in that we do not know for an absolute fact that Mr. Sander did any work while he was in Apt. 14, the East Side Office of I. Sander, Inc., between 7:00 and 7:30 A.M. This contention is directly contrary to the rule set forth in *Edward v. Industrial Commission*, 87 Utah 127, 130, 48 P. 2d 459:

> "As stated in *Wheeler's* Case, 131 Me. 81, 159 A. 331, the test is not so much as to whether the employer owns or controls the place where the injury occurred, but rather, whether it happens on the premises where the work is to be performed. *Ordinarily where an employee is present at the place of work, even though he has not started work but is there to begin work or is there on the premises on his way to perform his duties, the accident is compensable.* This is on the theory that the course of his employment must start somewhere. When he arrives at the place of work, the course of his employment begins." See also Bountiful Brick Co. v. Giles, 276 U.S. 154, 72 L.Ed. 507, 48 S. Ct. 221, *Affirming*, 68 Utah 600, 251 P. 555.

Assuming Mr. Sander was reading the newspaper in his office at 7:00 A.M., and further assuming *arguendo* that said reading had nothing to do with his course of employment (which is unlikely in the case of a president of a petroleum distribut-

ing company), if, as the Commission found as a fact, Mr. Sander was in his office and this office was his place of work, he had embarked on the course of his employment.

Having disposed of some of the less significant arguments advanced by the plaintiff, it is appropriate that we advance to the very crux of this case: Was Mr. Sander in his course of employment when he was killed? The question presents no hard and fast means of solution, since Mr. Sander did not live to present testimony, nor did Mr. Sander set out in writing or orally state his proposed schedule for the day. However, this same problem has presented itself to the Supreme Court of this State and the courts of several others states, and an equitable method has been stated for resolving this problem.

In the case of *Ogden Iron Works v. Industrial Commission*, 102 Utah 492, 132 P. 2d 376, Justice Larson initiated his discussion of the case with a question similar to that above, and then proceeded to reason forth the solution:

> "Does the evidence justify a finding that deceased, on March 24th, while in the course of his employment at the boring machine, bumped his head? *There is no testimony of any eyewitness* to the bump, *and deceased made no report thereof to the management of the employer.* * * *" (102 Utah 492 at page 497.)

> "Much could be said in favor of a thesis that the Commission could act and base an award

upon any kind of evidence; . . . The difficulty in proving the cause of death or of any injury, where the person injured dies as a result thereof, has long been recognized. * * *" (Id. at page 499.)

"The question is whether there is any evidence, *competent* in a Court of law which when supported and corroborate dby the hearsay evidence, justifies or sustains the findings of the Commission. * * *" (Id at page 502.)

The Court then discussed the nature of this "competent" evidence. Like Mr. Sander, the deceased in the *Ogden Iron* case (Id at page 502.) went to work on the morning of his accident. Just as Mr. Sander "customarily" drove down to the West Side Office on Saturdays (R. 51) and "as a general rule and habit" returned to his East Side Office immediately after breakfast (R. 42), so in the *Ogden Iron* case there was testimony that " men . . . *frequently* bumped their heads on the lever or the rail; . . ." (102 Utah 492, 502.)

After discussing several other facts which the Court deemed significant, none of which were conclusive, the Court concluded:

"We are not prepared to say that the Commisssion could not, *from these facts infer* and find that the bump on the head was received while at work at the boring machine . . ." *(Ibid.)* (Emphasis added.)

The Court affirmed the award of the Commission.

A very similar problem was presented to the Supreme Court of Utah in *Salt Lake County v. Industrial Commission*, 101 Utah 167, 120 P. 2d 321 (1941). The deceased died of Rocky Mountain spotted fever. He had been working for the County in the canyons clearying brush, but of course the ticks which cause the disease are found not only in the canyon during working hours, but throughout the entire intermountain area at all hours. Justice Wolfe in this case characterized the facts as being in near "equipoise." The only evidence that the deceased had contracted the disease while in the course of his employment was that he had said that something had bit his finger a few days before his death while he was working and four witnesses testified to the actual presence of ticks at a point three miles from the place the deceased had been working. In affirming an award of the Commission, the Court stated:

> "There is nothing appearing of record which is intrinsically discrediting to the uncontradicted testimony of the witnesses nor is such testimony wholly from interested witnesses. Further, the evidence as appears in the record not only carries 'a measure of conviction' to the reasonable mind, but is sufficient to throw the mind off equipoise, *raising the inference that the deceased picked up the tick in the course of his employment.* * * *" (101 Utah 167 at page 173.)

The applicant-defendant submits that the consistent, uncontradicted, and overwhelming testi-

mony of the witness in the case at bar concerning the unusually strong and long-standing habits and customs of the deceased was sufficient evidence to "throw the mind off equipoise, raising the inference that the deceased [was] in the course of his employment." *(Ibid.)*

The case of *Dole v. Industrial Commission*, 115 Utah 311, 204 P. 2d 462 (1949) indicates the extent to which the Utah Supreme Court has liberally interpreted the Workmen's Compensation Act in order to accomplish its "salutary purpose." In this case, the Industrial Commission had *denied* plaintiff compensation for injury to his eye on the grounds that the plaintiff had not suffered the accident as he claimed, or that there was no causal connection between the accident and the injury. The Supreme Court annulled the order of the Commission and granted the award, stating:

> "If the rule announced in the *Smith* case were to be extended to the facts in this case, then an injured employee who could not produce witnesses to the accident might be denied recovery. The only important similarity in the facts of the two cases are that in both instances the employer was alone at the time the claimed accident occurred, and, hence, had exclusive knowledge as to whether or not the accident happened. * * *" (115 Utah 311, 314.)

The court then proceeded to point out the "consistent acts and conduct of this plaintiff." (Id. at page 315.)

Justice Wolfe dissented, and wrote a long opinion based largely on a policy of upholding the decision of the commission:

> " 'The findings and conclusions of the commission of questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. * * *" (Id. at page 324.)

The same sense of justice and equity which induced the Court to go so far as to vacate the order of the Commission denying compensation in the *Dole* case should prevail in the case at bar. In this case, we do not have an "injured employee who could not produce witnesses to the accident . . ." *(Ibid.)* We have an employee who was killed almost instantaneously but who regularly, customarily, and habitually went to his East Side Office before breakfast at about 8:00 A.M., (R. 41, 42, 44), an employee in a collision while on a route which would have taken him directly from his East Side Office to his West Side Office at the time of 9:40 A.M., a trip which he customarily made on Saturdays. (R. 46.) In essence, annulment of this claim would serve to exclude from the provisions of the Workmen's Compensation Act all persons who hold positions which allow and require that they decide for themselves where and when their services are best needed in the interests of the company. There is always the possibility that the employee was in fact on personal business at the time he was instantaneously killed.

He might even keep a log book of whence he was coming and whither he was going, but to no avail, for these would be mere self-serving declarations, or as plaintiff terms it "hearsay." (Brief, p. 20.)

The case of *Kahn Bros. Co. v. Industrial Commission*, 75 Utah 145, 283 P. 1054 (1929) illustrates the indisputable rule that when an employee travels from one situs of employment to another situs, and the purpose of traveling is substantially that of fulfilling a mission of the employer, the employee is within the course of employment. In the *Kahn Bros.* case, the Supreme Court upheld an award of the Commission to an employee who was doing the type of traveling mentioned. The applicant went to his office in the morning, just as Mr. Sander did in the case at bar.

> "On the day of the accident, [after leaving his office], Doe visited the bank, made his deposit, ate his lunch at home, and had proceeded from his home toward the post office, when struck by an automobile . . . He was then on his way, by the most direct route, to the post office, for the purpose of collecting the company's mail. * * *" (75 Utah 145, 147.)
>
> ". . . [W]here an employee, either on his employer's or his own time, is upon some substantial mission for the employer growing out of his employment . . ., the employee is within the provision of the act. The mission for the employer must be the major factor in the journey or movement and not merely incidental thereto . . . From the undisputed evi-

dence we are of the opinion that the applicant was, while on his way to the post office, in the performance of a special mission for his employer. He was doing the errand he was directed to do. He resumed the purpose of his employment when he left home bound for the post office and the other offices where his business called him." *(Ibid.)*

The evidence in the case at bar is indisputable that Mr. Sander did in fact go to his East Side Office at about 7:00 A.M. on the date of his death (Brief, p. 10), thus entering upon his course of employment (Edwards v. Industrial Commission, *supra*) *just as Mr. Doe* entered upon the coure of his employment when he began work at Kahn Bros. in the morning. Like Mr. Doe in the *Kahn Bros.* case, Mr. Sander interupted his work for a few minutes to come home and eat breakfast with his wife at 7:30 A.M. (Brief, p. 9.) After Mr. Doe ate lunch, he began walking towards the post office as he customarily did for the purpose of picking up the company mail. Of course, Mr. Doe was not struck by an automobile while the mail was being handed to him. There is no evidence in the case that he *told* anyone on this particular occasion that he would pick up the mail after he had eaten lunch. It is *possible* that he was not going to the post office at all — on this one occasion he might have decided to go downtown and do some shopping for himself. But just as surely as the Court in the *Kahn Bros.* case would not indulge in such speculation, so the Commission has not so speculated in the case at bar.

Mr. Sander was just as punctilious and regular in returning to his office after breakfast as was Mr. Doe in going to the post ofice to pick up the company mail after lunch. (R. 49-50, 42, 63.) For the same reason that the Court found that Mr. Doe was in the course of his employment when struck by an automobile, the Commission found that Mr. Sander was within the course of his employment when driving from his East Side Office to his West Side Office. (R. 97, 98.)

Plaintiff has not presented even a different theory of what the deceased might have been doing at the time of his death, although even the wildest theory would have been admissible before the Commission in view of the liberal rules regarding hearsay. The plaintiff in effect is saying: "You can't prove what the deceased was doing for one hour and forty minutes. We don't know either, but since you can't prove what he was doing for the hour and forty minutes, the Court must say that the Commission erred and that the deceased was not within the course of his employment when he was killed." If this view were to be taken by the Supreme Court, it would be all but impossible for the dependent of an executive to receive Workmen's Compensation benefits if the executive were instantly killed in an automobile accident. Such an interpretation is manifestly contrary to the intent of the Legislature in extending the salutary benefits of the Workmen's Compensation Act to executives, and contrary to

the liberal interpretation which the Court has long given to the interpretation of the Act in favor of compensating the dependents of a deceased employee and in upholding the decisions of the Industrial Commission.

In *Peterson v. Industrial Commission*, 102 Utah 175, 129 P. 2d 563 (1942), the Supreme Court vacated an order of the Industrial Commission *denying compensation* to the dependents of the deceased. The Court discussed at length the rules to be applied in examining evidence presented to the Commission when the Commission's order is appealed, and one quotation which the Court made is especially pertinent to the case at bar:

> [In Kavalinakis v. Industrial Commission, 67 Utah 174, 246 P. 698], Justice Frick on page 181 of 67 Utah, on page 700 of 246 P. put it thus:
>
> " 'The commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and to act upon *credible evidence which is unquestioned and undisputed.*' " (102 Utah 175, 178.)

The problem of the difficulty of proving whether an employee of a company who has considerable if not total freedom in his methods of carrying out his duties for the company and who is killed instantaneously in an automobile collision has not been a problem for the Utah Supreme Court alone.

The case of *Greenwald, Inc. v. Powdermaker*,

Md., 183 A. 601 (1936) is extremely similar to the case at bar in facts, procedure, and reasoning. Extensive quotation from the case seems in order in view of the striking similarities:

> "In this workmen's compensation case, the claimant is the widow of Louis Powdermaker, who was killed, on May 29, 1933, in a collision between his automobile and a street railway car on Liberty Heights Avenue in Baltimore. At the time of the accident and for many years, Mr. Powdermaker was employed as a salesman by Greenwald, Inc., in its business of selling meat to retail dealers. It was his duty to visit such dealers and obtain orders for meat to be thereafter delivered. In that service he used his own automobile. According to the testimony in the record, he would *customarily* call upon prospective customers during the forenoon and then return to his home, where he would communicate by telephone with his employer's office to learn the exact price quotations for the day and also telephone customers in continuing and completing his sales negotiations. It was while he was homeward bound, about half past 11 o'clock in the morning, which was the *usual time* of his return with a view to using his telephone for the purposes just indicated, that he became involved in the accident which ended his life. The claim of his widow under the Workmen's Compensation Act . . . was sustained by the State Industrial Accident Commission, and its decision was affirmed, on the appeal of the employer and insurer, by the court of common pleas of Baltimore city. On their further appeal to this court, the principal question to be determined is *whether the*

evidence has a legally sufficient tendency to prove that the accidental and fatal injury to the claimant's husband was suffered in the course of his employment. * * *" (183 A. 601, 602.) (Emphasis added.)

There follows excerpts from the testimony of both the deceased's wife and adult son concerning the customs and habits of the deceased in his working activities, which the court introduced as follows:

"The testimony of the claimant as to her husband's *customary activities* as a salesman for Greenwald, Inc. was in part as follows: * * *" *(Ibid.Q)* (Emphasis added.)

"An adult son of Mr. Powdermaker thus described his father's *business habits* as a salesman for Greenwald, Inc. * * *" (Id. at page 603.) (Emphasis added.)

The court continues:

"The employer and insurer produced testimony from which it could be inferred that Mr. Powdermaker's last business transaction on the morning of the accident was the collection of rent from the tenants of two houses which he owned, and that he was proceeding from one of these houses to his own home when he was fatally injured. * * *" (Id. at page 603.)

How similar is this to the statement in plaintiff's brief, pages 10-11:

"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."

However, the Maryland Court continued:

"But it is *inferable* from the other evidence in the case that he had been engaged during that morning in the performance of his salesmanship duties, including collection of account of sales, and was driving to his home with a view to serving further the objects of his employment by the use of his telephone at the period of the day when he *customarily* used that method of promoting his employer's business. The commission and the jury concluded from the evidence in the record that the claimant's husband, after deviating temporarily from the course of his employment in order to make his rent collections, had resumed his service to the employer when he was proceeding homeward for the purposes of the communiactions which were *habitually* necessary in his sale operations." (183 P. 601, 603.)

This is very similar to the facts in the case at bar. It is "inferable" that when Mr. Sander went to his East office at 7:00 A.M. that while there he was performing some type of work within the ambit of the duties of the president of a company. We may assume that Mr. Sander was not within the course of his employment while at his residence apartment at 7:30 A.M. to eat breakfast: he was "deviating temporarily from the course of his employment . . ."

(Ibid.) Assuming for the sake of argument that Mr. Sander did not return again to the East Side Office, his work day had already begun, and when he was proceeding to the West Side Office, he ". . . had resumed his service to the employer . . .," and was within the course of his employment when killed.

The Court *supra*, proceeds:

> "In our opinion *the evidence was legally sufficient* to permit the inference, actually drawn alike by the commission and the jury, that the claimant lost her husband in consequence of an accidental injury in the course of his employment. * * *" (Id. at page 603) (Emphasis added)
>
> ". . . The objections to the testimony as to the *customary routine* of the claimant's husband in the performance of his employment duties were also properly overruled." (Id. at page 604.) (Emphasis added)

In *Brown v. R. J. Brown Co.*, Mo., 172, S.W. 2d 645 (1943), the deceased was president of a wholesale dealership which handled "Pennzoil". Three days before the accident, deceased was told by his supplier to sell more "Pennzoil." Deceased sold "Pennzoil" at three different spots on day of death, then traded his older car for a new one at 7:00 P.M. He was driving alone on a highway which would have taken him back to his own wholesale dealer's office. He was alone when killed when his car collided with a tree. He had not told anyone at his last stop exactly where he was going or what he was going to do. The collision occurred at 9:15

at night. The Mo. Supreme Ct. upheld the decision of the Commission and the Mo. Cir. Ct. that at the time of the collision, the deceased was "in the course of employment" of R. J. Brown Co. ("Pennzoil") and his widow was thus entitled to the benefits of insurance taken out by R. J. Brown Co. for deceased under the Mo. Workmen's Compensation Act (similar to Utah's).

The finding of the Industrial Commission that the deceased was within the course of his employment at the time of the fatal collision is therefore based on competent evidence. The Commission found that the actions of the deceased on this particular morning, as far as they were directly observed, were perfectly consistent with Mr. Sander's customs and habits and the fact that he was subsequently found dead in his automobile on a route which would lead him to his West Side Office at 9:40 A.M. The arguments brought forth by plaintiff are in essence only wild theories, could-have-beens, remote *possibilities*, but highly improbable. As the cases and the logical purposes of the Act show, it has never been the policy of the courts, nor does it appear to have been within the purview of the legislature, that well-founded claims should be defeated by a barrage of guesses about what could have happened.

The case of *Sylvan v. Sylvan Bros.*, 225 S.C. 429, 82 S.E. 2d 794 (1954) is cited by the plaintiff (Brief, pp. 15-16) as standing for the proposition of law that "Injuries sustained by executives who

slipped and fell on sidewalk on the way from home to place of employment. [etc., p. 16.] This case is clearly distinguishable on its facts from the case at bar, and has been so explicitly distinguished by the Supreme Court of South Carolina in a more recent case.

In the *Sylvan* case, "The claimant was in the habit of doing 'paperwork' including the preparatin of advertisements, in his hotel room, *which was his home at night,* and when he fell on the street he had in his pocket papers of the business upon which he had worked in his room *on the night before.*" (82 S.E. 2d 794, 795.) In the case at bar:

1. The room in which Mr. Sander did his paperwork was not his "home." (Transcript, page 47.) The room which Mr. Sander used as his office, never had been his "home". (Transcript, pages 40-41.)

2. There is no evidence in the *Sylvan* case, *even* had the claimant's hotel room been considered an office as well as a home, that the claimant, Mr. Sylvan, *actually did any work in that hotel room which would place him within the scope of his employment on the day and at the time he was injured.* Mr. Sylvan himself was alive to testify that he did the paperwork in his hotel room the *preceding night.* In the case at bar, there is competent testimony to the effect that the deceased, Mr. Sander, went to his office at 7:00 A.M. and

again at 8:00 A.M. (R. 49), thereby entering upon the course of his employment, after which time he never departed therefrom until the time and place of the collision in which he was killed.

In the *Sylvan* case, it is stated: "Nor is it contended that the corporation paid the room rent and made claimant's hotel room its place of business." In the case at bar, Gregory Hosford, general manager of I. Sander, Inc. at the time of the death of the deceased, directly testified: "When we moved some of the office personnel from 419 East 3rd South to 1815 West 5th South, *we* determined that *we* would maintain the office up there, and the question of rent came up, and in discussing this with Mr. Sander he felt — and we felt along with him — that the best thing to do was to compensate him in salary sufficient so that he paid the rent himself. * * *" (Transcript, page 10) (Emphasis added.) Mr. Hosford, the present president of I. Sander, Inc. is paid $900 per month. Mr. Sander, the deceased, was paid $1000 per month, the increase being an indirect means for the corporation to pay for the East Side Office. (R. 15, 16.)

The record in the case at bar, contrary to the Sylvan case, conclusively shows that the room at 419 East 3rd South was the corporation's place of business. (R. 21-22.)

In the *Sylvan* case, the opinion indicates that Mr. Sylvan had an office in his downtown depart-

ment store, and that "the taking of the 'paperwork' to his room was, therefore, for his own convenience." (82 S.E. 2d 794, 796.) Mr. Sander had no regular desk or place to work at his West Side Office (R. 56) and the maintenance of the East Side Office was not for mere convenience, but also because of its proximity to the offices of Standard Oil Co., I. Sander, Inc.'s largest customer (R. 76.)

It should be further noted that all of the cases and texts cited in the *Sylvan* case deal with the question, undisputed in the case, of a person who does work *at home* and is then injured while traveling to his place of business. The case at bar does not involve the question of Mr. Sander going from his *home*, where he did work, to his office. The Commission as triers of the facts found that the room located at 419 East Third South was *in fact* the "East Side Office" of I. Sander, Inc. (R. 97.) There was no finding in the *Sylvan* case that the hotel room in question in that case was found by the commission to have been Mr. Sylvan's "office". It would have been "arbitrary and capricious" for the Commission to have found in the case at bar that I. Sander, Inc. did not in fact maintain two offices, especially when sound business reasons were testified to for so maintaining two offices.

It should be further noted that the *Sylvan* case contains a lengthy, well-reasoned, and well-documented dissenting opinion, in which Justice Taylor stated, *inter alia*, that the award should have been

affirmed because claimant ". . . at the time of injury . . . was on his way from one place of business to the other within the purview of the Workmen's Compensation Act. * * *" (82 S.E. 2d 794, 802.)

The case of *Halpern v. De Jay Stores, Inc.*, 236 S.C. 587, 115 S.E. 2d 297 (1960) presents a factual situation more closely in point with the case at bar than did the *Sylvan* case. The issue in the case was the same as that in the case at bar: Whether the deceased when killed in an automobile collision was in the course of his employment. Like the case at bar, the deceased reported into his office in the morning. "There was a credit manager of the store whose duty it was to collect delinquent accounts. When he failed he turned the accounts over to the deceased manager who tried to make collections by personal visits to the debtors. This was the scope of the duties of his employment." (115 S.E. 2d 297, 298.)

Like the facts in the case at bar, the case arose over a dispute whether at the time of the collision the deceased was on his own personal business or within the scope of the duties of his employment in going to the homes of delinquent debtors and attempting to collect on the accounts.

> ". . . The credit manager testified that the deceased, after verifying that the credit manager would be in the store on that day, on the morning of the day of the accident took information cards of several delinquents and said to the witness, 'Well, I think — I think maybe I'll get out a little bit and loosen up

my muscles, relax a bit * * * and (the deceased said) in the meantim while I'm out I can attend to a few things * * * might even take to a run up to Chester.' The witness knew that the deceased had an acquaintance in Chester." (Id. at pages 298-299.)

At the time of the accident, the deceased had passed the turn to the debtor's house by 1.2 miles, and was on the road, possibly headed toward Chester. The Court upheld the finding of the Commission that the deceased was within the scope of his employment, stating:

"There was no name sign on the Camp Ground Road, where the deceased should have turned left on his way to the debtor's home, but only a small sign showing the number of this secondary road. There are many such roads intersecting the Old Winnsboro Road to decendent's left as he traveled it."

"In the face of these facts, it cannot be said that the conclusion of the Commission that, in effect, the deceased was on his way to see the debtor, and not in route to Chester on a personal mission as contended by the appellants, was without evidence to sustain the finding. Possibly the deceased was on his way to Chester but he had not reached that point of departure from his duties when he met his death, according to the information which he had in the store and in his pocket. The latter is rather strong evidence that he intended to attempt the collection of the delinquent account although he never reached the home of the debtor . . ." (Id. at page 299-300.)

". . . Nor is Sylvan v. Sylvan Bros., 225 S.C.

> 429, 82 S.E. 2d 794 . . . in point, *there the employee was injured on a city street while en route to work. (Ibid.)*

Again, plaintiff's entire argument regarding the case of *Vitagraph, Inc. v. Industrial Commission*, 96 Utah 190, 85 P. 2d 601 (1938) (Brief p. 13) rests on the proposition directly contrary to the finding of fact of the Industrial Commission: ". . . the deceased was on his way from the East Side *Office* to the West Side *Office* at the time of the fatal injury." In the Vitagraph case, *supra*, the court at 85 P. 2d 601, 605 stated: "This case to be compensable at all must come within the exception that where the employee, either on the employer's or his own time, is upon some substantial mission for the employer growing out of his employment." The court concluded that there was no special mission:

> ". . . *In going to his home* he was not on a mission or errand for his employer, nor was he performing a duty for his employer." (Id. at page 606.)

In the case at bar, the deceased was not going from *home* to work or from work to *home;* rather, he was going from one office, one place of business, to another. To say that the deceased was not traveling to the West Side Office for business reasons, within the course of his employment, would be completely contrary to all of the evidence relating not only to the deceased's business habits, but also to his particular character trait of industriousness.

What has been said concerning the *Vitagraph* case applies equally to the case of *Greer v. Industrial Commission*, 74 Utah 379, 279 P. 900 (Brief p. 15): the Greer case also presented the factual situation of an employee going on what he contended was a "special mission" from his place of employment *to his home*, not to another office of his employer, as in the case at bar.

Again, plaintiff in his discussion of the case of *Morgan v. Industrial Commission*, 92 Utah 129, 66 P. 2d 144 (Brief P. 16) and *Goodyear Tire & Rubber Co. v. Industrial Commission*, 100 Utah 8, 110 P. 2d 334 (1941), rests his entire argument on the assumption that the deceased in the case before us was travelling from his *home* to what plaintiff concedes may have been his West Side Office. Whether there was a "special mission" from *home* to place of business is the entire question in these two cases, not whether a trip from one situs of employment to another situs of employment placed the party in question in the course of his employment. As Justice Wolfe stated in the *Goodyear* case in his concurring opinion, quoted by the plaintiff:

> "I hope I have shown that the distinction sought to be made in the prevailing opinion . . . is not a tenable distinction when the two cases are viewed as they should be, that is, from the point of departure from the home to the place of business. * * *" (100 Utah 8, 13-14).

In commenting upon plaintiff's Point 2 and

cases cited therein, the following distinctions and observations seem pertinent. The applicant agrees fully with the statement quoted by defendant from the *Wherritt* case: "The burden of proof is upon applicant to establish her claim for compensation . . ." (Brief, p. 19.) In that case the Commission held that the applicant had failed in this burden. The Supreme Court merely refused to reverse the Commission's finding. The defendant-applicant in the case at bar has sustained her burden of proof *before the Commission*, to which this quotation refers.

Plaintiff makes the general statement that all of the testimony in the case is "hearsay". Defendant-applicant has analyzed case after case, analogizing the fact situations and the testimony given in the case at bar, showing their similarities, pointing out exactly how evidence of a similar nature in other cases has been held sufficient and competent to sustain an award of the Industrial Commission. Plaintiff rests on a broad generalization.

Plaintiff cites *Fish Lake Resort Co. v. Industrial Commission*, 73 Utah 471, 275 P. 580 (1929) (Brief, p. 20) on hearsay testimony. It should be noted that at least six witnesses testified in the *Fish Lake* case that the deceased was merely fishing for his own personal pleasure at the time of his death. No witnesses testified in the case at bar that deceased was driving for pleasure.

The case of *Scowcroft & Sons Co. v. Industrial*

Commission, 70 Utah 116, 258 P. 339 (1927), (Brief p. 20) is not in point. The issues in this case were dependency and the amount of the award, not course of employment as in the case at bar.

Plaintiff's citation of *Vecchio v. Industrial Commission*, 82 Utah 128, 22 P. 2d 212 (1933) (Brief p. 20) is particularly interesting. In this case, the Commission *denied* an award to the applicant, and the Supreme Court *reversed the denial of compensation.* The Court stated at 82 Utah 128, 136:

> "Assuming that all the testimony that could be by any rule classed as hearsay is equally balanced by circumstances or selfserving and disserving statements, and what consideration, if any, may be given to such (and we think such testimony tends to support rather than to destroy *the reasonable inference that logically and naturally results from the competent evidence)*, we are of the opinion the inference is supported clearly within the rule of *Cudahy Packing Co. v. Brown*, . . . [61 Utah 29, 210 P. 608 (1922)]" (Emphasis on first phrase in quotation added.)

The *Cudahy Packing Co.* case, supra, which was followed in the *Vecchio* case, supra, in *overruling* a decision of the Commission denying compensation is directly relevant to the competence of the evidence upon which the Commission based its decision in the case at bar, and which evidence the plaintiff assails.

Defendant-applicant recognizes the fact that the

Supreme Court *annulled* the award granted to the applicant in the *Cudahy Packing Co.* case. Yet the rules of that case regarding the compentency of evidence given in proceedings of the Industrial Commission, when the evidence is submitted to the Supreme Court for review, have been cited with approval in later decisions. These rules regarding the competency of evidence plainly support the competency of the evidence in the case at bar.

Before discussing the law enunciated in the *Cudahy Packing* case, it should be noted that the award of the Industrial Commission in that case was annulled because there was not even any evidence from which the Commission's could *infer* that the deceased even suffered a *scratch* causing blood poisoning, much less a scratch occurring during the course of his employment. The Court stated at 61 Utah 29, 33:

> "This court . . . is committed to the doctrine that *facts may be inferred from the surrounding circumstances* of any particular case, and that the *absence* of direct testimony is not conclusive that an injury did not occur, but that the Commission . . . has the right to make such *reasonable inferences* from the facts proven as in its judgment may be consistent with the contention of either party . . . In this case, however, from the nature of the injury, there is *nothing* to establish the fact that the accident from which the injury resulted occurred at plaintiff's plant. From the testimony it might just as reasonably be *inferred* that the accident occurred at the home of the

> deceased, or that it occurred on his way either to or from his work. No one saw the cut, *if there was a cut, or scratch upon the hand, fingers, or arm. In fact, it is not shown that one ever existed.* Until some proof is adduced showing that an accident happened at the plant of the plaintiff or facts proven from which it *can reasonably be inferred* that such accident did happen at plaintiff's plant, we do not see how there is any substantial or any evidence [sic] save hearsay testimony from which the *inference can be deduced* that death resulted from an accident in the course of deceased's employment."

Defendant-applicant submits that in the case at bar there is evidence which satisfies what the Court in the *Cudahy Packing* case stated was lacking.

In the case of *Diaz v. Industrial Commission*, 80 Utah 77, 13 P. 2d 307 (1932), (Brief p. 20) the Court was confronted with expert medical testimony concerning the cause of the death of the employee of the mining company. The evidence in the case is so dissimilar to that in the case at bar as to only obfuscate the issues. Defendant-applicant submits that the Commission's findings in the case at bar were not only supported by "sufficient" evidence, but that plaintiff failed to adduce *any contradictory* legally competent evidence.

CONCLUSION

For the foregoing reasons, defendant-applicant requests the Court to affirm the Order of the Industrial Commission of the State of Utah granting Workmen's Compensation benefits to Mary Merkley Sander, widow of the deceased Isabrand Sander.

Respectfully submitted,

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