1983

Kennecott Corporation, Kennecott Minerals Company Division v. The Industrial Commission Of Utah, And Rose K. Georgas, Widow Of Alex Demetrios Georgas : Plaintiff's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * * *

[illegible] CORPORATION, [illegible] MINERALS COMPANY [illegible] DIVISION,	)
Plaintiff,	) CASE NO. 19036
v.	)
THE INDUSTRIAL COMMISSION OF UTAH, and Rose K. Georgas, Widow of Alex Demetrios Georgas,	)
Defendants.	)

PLAINTIFF'S BRIEF

ORIGINAL PROCEEDING TO REVIEW AN AWARD

OF THE INDUSTRIAL COMMISSION OF UTAH

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IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * * *

[illegible]PORATION, [illegible]RALS COMPANY, Plaintiff, v. THE INDUSTRIAL COMMISSION OF [illegible]AH, and Rose K. Georgas, [illegible] of Alex Demetrios Georgas, Defendants.	CASE NO. 19036

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IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 82001754

* * * * * * * *

KENNECOTT CORPORATION, KENNECOTT MINERALS COMPANY DIVISION, Plaintiff, vs. THE INDUSTRIAL COMMISSION OF UTAH, and Rose K. Georgas, widow of Alex Demetrios Georgas, Defendants.	)	PLAINTIFF'S BRIEF Case No. 19036

* * * * * * * *

I. STATEMENT OF NATURE OF CASE

This is an original proceeding before the Supreme Court of Utah for the purpose of having the lawfulness of an Order dated November 18, 1982 and finalized on February 2, 1983 by the Industrial Commission of Utah in proceedings entitled Rose K. Georgas, widow of Alex Demetrios Georgas, Applicant, v.

Kennecott Corporation, Defendant, File No. 82001754, inquire into and determined as provided by § 35-1-83, Utah Code Ann. 1953, as amended.

II. DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

On November 18, 1982, the Industrial Commission of Utah, through Administrative Law Judge Timothy C. Allen in Claim No. 82001754, denied Kennecott's Motion to Dismiss and issued Findings of Fact, Conclusions of Law and Order in favor of applicant Rose K. Georgas, widow of Alex Demetrios Georgas, and against plaintiff Kennecott Corporation. Kennecott on December 11, 1982 filed with the Commission a Motion for Reconsideration or Review requesting review and reconsideration by the Industrial Commission of the Order awarding benefits and reversal of the same. The Motion for Reconsideration and Review was denied by Denial of Motion for Review entered by the Industrial Commission on February 2, 1983. Plaintiff thereupon filed this action with the Supreme Court of Utah on March 4, 1983.

III. RELIEF SOUGHT ON REVIEW

Plaintiff, Kennecott Corporation, upon this review seeks to have the Order issued by the Industrial Commission on November 18, 1982 and finalized on February 2, 1983, set aside in its entirety.

IV. STATEMENT OF FACTS

The essential facts pertinent to this controversy are not in dispute and may be summarized as follows:

The deceased, Alex Demetrios Georgas, on November 16, 1981 and for many years prior thereto, was employed as a tripper operator at plaintiff's Bingham Mine precipitation plant. The record shows that his job was a "sit down" type job involving a minimal amount of physical exertion while operating by means of automatic controls a traveling tripper and certain conveyor belts. (R. 189, Ex. D-1, R. 115, 121 and 122). On November 16, 1981 he reported to work at his usual time of 3:00 P.M. and worked until his luncheon break at approximately 6:30 P.M. (R. 131).

The record shows without any controversy by either party that on the day in question the deceased up to and including the last time he was seen at the lunchroom during the luncheon break had made no complaints and had shown no physical or medical problems of any kind. (R. 86, 95, 105 and 131-32). The record also shows that the deceased called his daughter at home near the end of his lunch period and that he seemed perfectly normal at that time. (R. 98 and 99).

No one saw the deceased leave the lunchroom following the above-mentioned telephone call but when he failed to return to his tripper operator work station at the end of the lunch

period a search was initiated. (R. 132). He was not located nor had he been seen at any of the precipitator plant work areas and it was not until approximately 11:15 P.M. that his body was located floating face down and resting against the retaining wall of the No. 9 settling tank of the unoccupied old copper launder plant. (R. 140-42). This settling tank is located perhaps a quarter of a mile away from any possible work areas or travel routes of the deceased and is accessible only by a narrow pathway containing numerous hazards and obstacles. (R. 126, 130 and 186, Ex. D-4, 5.)

The body of the deceased was removed from the tank and taken to the State Medical Examiner's office for an autopsy which revealed that the deceased had "drowned in a copper precipitation tank." (R. 36). The report further indicated that the deceased had arteriosclerotic cardiovascular disease which possibly contributed to his drowning. Plaintiff's medical witness confirmed the existence of serious cardiovascular disease in decedent but did not rule out drowning as the ultimate cause of his death.

The evidence was uncontroverted that there were no direct, indirect or even incidental duties related to the deceased's employment as a tripper operator which would require or even explain his presence at the No. 9 settling tank where he was found. (R. 130). This was specifically acknowledged

...t's (defendant herein) Memorandum in Support of Claim ... Dependents' and Burial Benefits (R. 210) as follows:

> It is unknown why Mr. Georgas was at the place where his death occurred. It is clear, however, that there was nothing directly connected with his occupational duties as a tripper operator which required his presence at the settling tank pond. . . .

And again in the same Memorandum (R. 212):

> The record here reflects that decedent was last seen alive by his co-workers during the lunch break. The record reflects that the drinking water supply in the operations center where the workers ate their lunch was inoperative and that drinking water was available in the old operations center which sits just to the west of the settling pond. It is nothing more than speculation to say that the decedent went to the old operations center to get a drink and, in any event, that would not explain why he went to the No. 9 pond. (Emphasis supplied)

In addition, there was no evidence presented or even claimed to indicate a possible work relationship between decedent's cardiovascular disease and his employment duties. Nevertheless, the Administrative Law Judge found that decedent was in the course of his employment at the time of his untimely death and that his death was "by accident arising out of or in the course of his employment" under the Utah Workmen's Compensation Act. He awarded death benefits to decedent's widow Rose K. Georgas, defendant herein, for the use and benefit of herself and her minor dependent children. (R. 234-38).

On December 3, 1982, plaintiff filed Motion for Reconsideration or Review which was denied by the Commission. Denial of Motion for Review dated February 2, 1983. Plaintiff thereupon filed this action on March 4, 1983 for the purpose of having the above-described Order inquired into and set aside.

V. STATEMENT OF POINTS

1. UNDER UTAH WORKMEN'S COMPENSATION LAW, AS INTERPRETED BY THIS COURT, THE CLAIMANT MUST ESTABLISH A CAUSAL RELATIONSHIP BETWEEN DECEDENT'S EMPLOYMENT DUTIES AND HIS INJURY OR DEATH.

2. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT DECEDENT'S DEATH AT THE NO. 1 SETTLING TANK WAS CAUSALLY RELATED TO HIS EMPLOYMENT DUTIES.

3. THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION IN ADOPTING THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT DECEDENT WAS "IN THE COURSE OF HIS EMPLOYMENT" AT THE NO. 1 SETTLING TANK WHERE HIS DEATH OCCURRED.

VI. ARGUMENT

1. UNDER UTAH WORKMEN'S COMPENSATION LAW, AS INTERPRETED BY THIS COURT, THE CLAIMANT MUST ESTABLISH A CAUSAL RELATIONSHIP BETWEEN DECEDENT'S EMPLOYMENT DUTIES AND HIS INJURY OR DEATH.

Section 35-1-45, Utah Code Ann. 1953 sets forth the statutory requirements for compensation in industrial accident

35-1-45. Every employee mentioned in section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as is herein provided.

It is established Utah law that the mere occurrence of an injury or death, by heart attack or otherwise, on the premises of the employer during working hours does not make such injury or death compensable under this Section. In order to be compensable as an "accident arising out of or in the course of employment" there must also be a causal relationship between the injury or death and the employee's employment duties. This was recognized by the Utah Supreme Court as early as 1948 in M & K Corp. v. Industrial Commission, 112 Utah 486, 493, 189 P.2d 132 where the following language is found:

> However . . . even under the liberal provisions of our statute we have refused to open the door to a recovery for all injuries, without any causal relationship between the employment and the accident merely because the accident occurs on the premises of the employer during the hours of employment . . .

See also, Nuzum v. Roosendahl Construction and Mining Corp., [illegible] 565 P.2d 1144 (1977) where this Court found compensability in a heart attack case. The evidence there showed

physical exertion greater than usual while performing assigned employment duties. This increased exertion was found to have placed added strain upon an already weakened heart sufficient to constitute a material contributing factor to the heart attack which followed. Nevertheless, even the majority states as follows:

> As a caveat against any misunderstanding of the conclusion we reach herein, we make the following observation: We do not say that any time a person dies (or suffers injury or disability) while on the job and performing his duties in the usual way that that is necessarily a compensable accident. 565 P.2d at 1146.

In Redman Warehousing Corp. v. Industrial Commission, 22 Utah 2d 398, 454 P.2d 283 (1969), the Court stated:

> The claimant has not met the onus of proving an "accident" in the course of his employment that "caused" the "injury" of which he complained, which burden is his. 454 P.2d at 285 (emphasis added).

And further:

> To conclude otherwise would insure every truck driver, every railroad engineer, every airplane pilot, and a lot of others, against the physiological malfunction or physical collapse of any of hundreds of human organs, completely unproven as to cause, but compensable only by virtue of the happenstance that the malfunction, collapse or injury occurred while the employee was on the job, and not at home or elsewhere. 454 P.2d at 285.

The above language was referred to by this Court as recently as February, 1982 in Sabo's Electronic Service v. Sabo, Utah, [illegible]

The Court reaffirmed its definition and requirements of a compensable "accident" under the terms of the Utah Workmen's Compensation Act, saying that "the mere showing of injury does not ipso facto mean that a compensable accident has occurred." The Court cited such recent decisions as Church of Jesus Christ of Latter-Day Saints v. Industrial Commission and Inurman, Utah, 590 P.2d 328 (1979) and Farmers Grain Co-op v. Mason, Utah, 606 P.2d 237 (1980) and stated once again that the applicant bears the burden of showing the causal relationship of his duties of employment to the unexpected injury which occurred. (Sabo case, 642 P.2d at 726)

Thus, it is apparent that this Court consistently has held, as Chief Justice Hall clearly outlined in his opinion in Sabo, that there must be an identifiable accident and further that the applicant must establish proof of the causal relationship of the duties of the employment to the injury or death.

Defendant has contended that she need not prove a causal relationship between decedent's work duties and his death at the No. 9 settling tank because this is a workmen's compensation case and not a civil tort action. She cites as authority Prows v. Industrial Commission of Utah, Utah, 610 P.2d 1362 (1980), in which this Court used the following language:

> This Court, along with the courts of other jurisdictions, has recognized that concepts

> of negligence, contributory negligence, fault, and similar tort concepts have no place within the remedial framework of the Compensation Act. . . .

Defendant has erroneously included causation as one of the "similar tort concepts" having no place in the determination of compensability in workmen's compensation cases. Such contention is wholly untenable as this Court has held many times.

It has long been recognized -- and plaintiff acknowledges -- that an employee's fault, negligence, or contributory negligence does not destroy the right to compensation. That is the basic premise for the entire enactment of workmen's compensation legislation. Such recognition, however, has never been held by this Court to affect the critical requirement in workmen's compensation matters that the claimant must prove the causal relationship between the injury or death on the one hand and the duties of employment on the other. As mentioned above, this Court in the 1982 Sabo decision, supra, unanimously held that the injury or death must be causally related to the work being done and that the claimant bears the burden of proving the causal relationship of the duties of employment to the injury or death. (642 P.2d at 726.) It is still true as stated by this Court in Higley v. Industrial Commission, 75 Utah 361, 285 P. 306 (1930):

> To sustain this burden it is not enough to show a state of facts which is equally consistent with no right of compensation as it

> is with such right. Surmise, conjecture, guess or speculation is not sufficient to justify a finding in the plaintiff's behalf.

In this case defendant has acknowledged that it is unknown why decedent was at the place where his death occurred and that it would be nothing more than speculation to offer any specific explanation tending to show a causal relationship between his death and his work duties. Therefore, the rationale expressed by Justice Stewart speaking for this Court in a unanimous decision in the recent case of Staheli v. Farmers' Cooperative of Southern Utah, Utah, 655 P.2d 680 (1982) applies directly and equally to this workmen's compensation case:

> When the proximate cause of an injury is left to speculation, the claim fails as a matter of law . . .

Plaintiff is well aware that "course of employment" under Utah law includes more than the express duties assigned to an employee while he is performing his assigned work on the premises of the employer. The scope and course of one's employment in a given case can include not only the direct and primary duties of the assigned job but also those things which are reasonably necessary and incidental thereto. See, Hafer's, Inc. v. Industrial Commission, Utah, 526 P.2d 1188 (1974) where this Court held that the evidence affirmatively showed that the assigned duties of the applicant traveling salesman included as incidental thereto keeping his car in a safe and efficient

running condition. An injury which occurred while he was repairing the car shock absorbers was found to be within the course of his employment. The language of the Court:

> Nevertheless, the scope of one's employment includes not only those things which are the direct and primary duties of the assigned job but also those things which are reasonably necessary and incidental thereto. (Emphasis supplied) 526 P.2d at 1189.

However, there is a distinction between activities which are considered "incidental" to an employee's employment and those which are not. Such a distinction was made, clearly and meaningfully, by the Court in Rowley v. Industrial Commission, 15 Utah 2d 330, 392 P.2d 1016 (1964). The Court held that a real estate salesman was not acting in the course of his employment when he left the house that he had sold and proceeded to help the purchaser free his automobile which was stuck in the snow. This was so even though he had been within the course of his employment when checking the utilities in the house a few moments before.

In summary, the requirements for a compensable injury or death under the Utah Workmen's Compensation Act as enunciated by this Court in the decisions mentioned above and reconfirmed recently in the Sabo case (642 P.2d 722 at 725) and in Pittsburgh Testing Laboratory and Liberty Mutual Insurance Co. v. Keller, Utah, 657 P.2d 1367 at 1370 (1983) are now so

established as to be beyond controversy. Those require-

> 1. The applicant must establish that the injury or death was caused by an identifiable accident;
>
> 2. The injury or death must be causally related to the duties of employment; and
>
> 3. That for purposes of compensability under the Act, the duties of employment include not only the direct and primary duties of the assigned job but also those things which are reasonably necessary and incidental thereto.

The burden is upon the applicant to satisfy those requirements in order to establish a compensable injury or death under the Utah Workmen's Compensation Act. As mentioned above and as will be shown in plaintiff's following argument, the applicant in this case has failed completely to establish the requisite causal connection between decedent's employment duties, primary or incidental, and his untimely death at the No. 9 settling tank located on plaintiff's premises.

2. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT DECEDENT'S DEATH AT THE NO. 9 SETTLING TANK WAS CAUSALLY RELATED TO HIS EMPLOYMENT DUTIES.

The duties of the decedent, Alex Georgas, as precipitation plant tripper operator are set forth in Exhibit D-1 (R. 189) and may be briefly summarized as follows:

Operates the traveling tripper to direct the flow of scrap iron to each of the precipitation or stripping cones from the reversible feeder conveyor.

Observes level of scrap iron in cones and maintains the level in each cone as directed.

Informs crane operator when necessary to increase flow of scrap iron from apron feeder on the gantry.

Activates control to start and stop conveyors.

Performs minor adjustments and lubrication to tripper; removes scrap iron from tripper and reversible conveyor idlers and rollers when necessary to prevent damage and to maintain proper operation; keeps tripper area clean and orderly.

In his performance of the work duties described above, decedent's work routine--as brought out clearly at the hearing by his supervisors--was wholly predictable (R. 124--Davies, R. 177, 178--Deneris) and consisted of the following: Decedent parked in the employee parking lot directly in front of the precipitation plant office building (designated in Exhibit D-2 as Area No. 1) and proceeded directly to his locker in that building (Ex. D-2, Area 2) where he changed clothes, put on his hard hat and other work equipment. He next walked to the precipitation plant and went up the stairs to his work station as a tripper operator at the top of the precipitation plant (Ex. D-2, Areas 3, 4 and 5). He worked steadily at the push-button controls of the tripper operator cab until designated lunch time, then went back down the stairs to the lunch

in the precipitation plant office building for lunch (Area 3). He reported at the hearing that decedent always placed a telephone call to his wife and/or daughter at their home in Salt Lake City during the luncheon break, after which he completed his lunch and then proceeded directly back to his work station for the remainder of his work shift. Upon completion of the work shift, decedent returned to the change room (Area 2) where he changed clotnes then walked to his car at the parking lot (Area 1) and drove to his home in Salt Lake City. It is significant to note that none of the daily work activities nor the "going to and from" activities of decedent called for or even reasonably explained his presence at the No. 9 settling tank where he was found on November 16, 1981. (Ex. D-2, Area 9)

While there is considerable evidence in the record as to decedent's severely diseased heart condition and speculation as to its possible contribution to his death, there is no evidence in the record tending to show any relationship between that diseased heart condition and deceased's employment duties, primary or incidental. Foreman Davies testified that there was only minimal physical exertion on the tripper operator job (R. 131). There was no claim or even suggestion of any causal relationship between decedent's job duties and his heart problems and the Administrative Law Judge found that his heart

problems were nonindustrial in nature. Thus, in this case we do not have a job exertion caused heart attack such as that referred to by this Court in the recent case of United States Steel Corp. v. Draper, Utah 613 P.2d 508 (1980) in which exertion in running to the possible assistance of a fellow employee was found to be "reasonably expected" of and thus "incidental" to the employment duties.

It is equally clear that decedent's death at the No. 9 settling tank likewise had no causal relationship to his employment duties, primary or incidental, as a tripper operator at plaintiff's precipitation plant. The evidence shows (R. 132) that decedent's body was found in the No. 9 settling tank which is designated as Area No. 9 in Exhibit D-2. The No. 9 settling tank is inaccessible by any direct route from decedent's precipitation plant tripper operator work station (R. 126, 127; see also, Exhibit D-3, R. 186). The two locations are separated by a 10 foot cement wall, several railroad tracks and a ditch and steep embankment (R. 127 and 128). The No. 9 tank is also far removed from and is not passed, traversed or connected with decedent's travel route to or from the parking lot (Area 1, Exhibit D-2), to or from his change room or lunchroom (Area 2, Exhibit D-2) or to or from his area of work activities (Areas 3, 4 and 5, Exhibit D-2). As stated above, the evidence is undisputed also that none of decedent's

as tripper operator required or involved in any way his presence at the No. 9 settling tank where he was found. (See R. 130 and also R. 110, 112).

There was no evidence offered to show a reasonably possible "incidental" work relationship between the decedent's activities at the No. 9 settling tank and his precipitation plant tripper operator job duties. Under such circumstances it could hardly be said that decedent's presence at the No. 9 settling tank would be one of "those things which it should reasonably be expected an employee would do in connection with those [work] duties" as found by the Commission and by this Court in the Draper case. (613 P.2d 508, 509)

In this case no reasonable expectation or explanation of any kind has been advanced to account for decedent's presence at the No. 9 settling tank. This was acknowledged by counsel for defendant (R. 212):

> . . . it is nothing more than speculation to say that the decedent went to the old operation center to get a drink, in any event, that would not explain why he went to the No. 9 pond.

In view of the above, it was reversible error for the Administrative Law Judge to combine such acknowledged conjectures and speculations with an equally serious and wholly unsupportable misstatement of fact and declare that decedent was "in the course of his employment" at the No. 9 settling tank where his

idiopathic fall--also conjectural--caused him to fall into the settling tank where he was found. In the first place, the Administrative Law Judge admitted, it was pure conjecture to conclude that decedent left the office and change room building and went to the old operations center (Ex. D-2, Area 8) for the purpose of getting a drink because the drinking water was off at the change room building. Even assuming, however, the validity of such a conjecture, no explanation whatever has been offered to account for decedent's presence at the No. 9 settling tank where his death occurred.

The Administrative Law Judge found that the site of available drinking water was "adjacent to" the site where decedent was found. (R. 235) Such finding was grossly inaccurate and completely unsupported by the record. The record is clear and uncontroverted that the No. 9 settling tank is 200 yards away from the old operations center and in the opposite travel direction to decedent's work station. (R. 126). Moreover, it is clear from the record (Ex. D-4, D-2 and R. 129) that the 200 yard walkway from the old operations plant (Ex. D-2, Area 8) to the No. 9 settling tank where decedent's death occurred (D-2, Area 9) is not only narrow but contains numerous hazards and obstructions. Therefore--as stated by claimant's Memorandum in Support of Benefits

even assuming a possible workrelated reason (obtaining drinking water) for decedent's presence at the old operations building, there is no reasonable explanation whatever for his presence 200 yards away at the No. 9 settling tank where his death occurred. The claimant (defendant herein) has failed completely her burden to establish that decedent's death at the No. 9 settling tank was causally related to his work duties.

It is not enough for defendant or the Administrative Law Judge to say that decedent would not have died by drowning "but for" his employment with plaintiff. Nor is it sufficient to say that since decedent was not forbidden to go to the No 9 settling tank that he then must still be considered in the course of his employment even though no explanation--work related or otherwise--has been offered to account for his presence at that site. This Court many times has held that it is the claimant's burden to establish the causal nexus between his injury or death on the one hand and his work duties on the other. No evidence tending to show such causal nexus was presented in this case. In fact, Kennecott has affirmatively produced evidence which shows clearly that there was no causal relationship whatever between decedent's activities or presence at the No. 9 settling tank and his work duties, primary or incidental, for his employer.

It is clear from the above that this is not a case like Draper where claimant's affirmative evidence provided a reasonable explanation for the activities which were found to be reasonably "incidental" to the decedent's employment; nor is it like Hafer's, Inc. v. Industrial Commission, Utah, 526 P.2d 1188 (1974) where affirmative evidence showed that the assigned duties of the applicant traveling salesman included as incidental thereto keeping his car in a safe and efficient running condition. As noted before, the Court stated:

> Nevertheless, the scope of one's employment includes not only those things which are the direct and primary duties of the assigned job but also those things which are reasonably necessary and incidental thereto. 526 P.2d at 1189. (Emphasis supplied)

This language has been cited many times by this Court and sets forth current Utah law as interpreted by this Court for determining whether or not the requisite causal relationship exists in any given case between the injury or death on the one hand and the employment duties, primary or incidental, on the other. It covers both the Draper and Hafer's cases where the acts involved were found to be reasonably related to the duties which the employee was hired or authorized to perform. It covers the Rowley case, supra, where the activities were found not to be reasonably related to the employment duties of the real estate salesman involved. Indeed, it covers also Tavey v. Industrial Commission, 106 Utah 489, 150 P.2d 379 (1944) cited

defendant and the Administrative Law Judge. In Tavey, unlike this case, applicant's injury occurred while she was performing the very duties she was hired and assigned to perform. Finally, it covers this Court's March 18, 1983 Decision in J & W Janitorial Co. v. Industrial Commission and Tilt, Case No. 18130. It was held that decedent's activities on the employer's premises were not those things an employee reasonably could be expected to do in connection with work duties and, therefore, the Industrial Commission Award was an unreasonable and improper expansion by the Commission of the scope and/or course of employment duties under the Utah Workmen's Compensation Act.

It is plaintiff's position that the same law, the same standards and the same criteria apply to decedent's death in this case. It was defendant's burden to establish the requisite causal relationship between decedent's death at the No. 9 settling tank and his employment duties, primary or incidental, with plaintiff. There is no evidence in the record to support such a finding. The evidence was uncontroverted and indeed acknowledged that decedent's actual work duties did not require, nor were they in any way connected with, his presence at the No. 9 settling tank which was far removed from and inaccessible to his precipitation plant area of operation. It

was uncontroverted and acknowledged also that the site of decedent's death was not passed or traversed by decedent or [illegible] reasonably accessible to him in going to or from his parking lot, to or from his change room or lunchroom, to or from his area of work activities or even to or from a source of available drinking water. Finally, there was no evidence presented or referred to which provides a reasonable workrelated explanation for decedent's presence at the No. 9 settling tank. Defendant has failed completely to establish the causal relationship required by the Act between decedent's death and his duties of employment.

Plaintiff is well aware of the rule of construction stated by Justice Howe in the J & W Janitorial Co. case:

> We acknowledge the recognized rule of construction which resolves any doubt regarding compensation in favor of recovery. McPhie v. Industrial Commission, Utah, 567 P.2d 153 (1977). And, we are mindful of the deference this Court gives the Industrial Commission's decisions on review. Kaiser Steel Corp. v. Monfredi, Utah, 631 P.2d 888 (1981). Nonetheless, the only reasonable conclusion from the evidence here was that Jeffrey was not killed in an accident which arose "out of or in the course of employment." (Green sheet, Case No. 18130)

So it is in this case. The Administrative Law Judge found that decedent had an "idiopathic fall" at the No. 9 settling tank. There is no substantial evidence--not even a medical opinion--that he "probably" had such an idiopathic fall. The findings

was predicated on speculation. From the evidence in [illegible], it could have been conjectured also that decedent tripped or stumbled, that he was pushed or, indeed, that he jumped into the No. 9 settling tank.

From the critical standpoint of causal relationship, however, the same causal nexus requirements apply to the accidental falling by or deliberate pushing of decedent as would apply to the "idiopathic fall" doctrine applied by the Administrative Law Judge. That basic requirement--which is completely missing in this case--is the causal nexus between decedent's presence at the No. 9 settling tank and his employment duties, either primary or incidental. As indicated before it has been acknowledged that decedent's work duties had no conceivable relationship to his presence at the No. 9 settling tank. Nor is there any evidence that he was engaged at that location in "those things which it should reasonably be expected an employee would do in connection with [work] duties." United States Steel Corp. v. Draper, quoted by Justice Howe in reversing the Industrial Commission Order in the J & W Janitorial Co. case.

Claimant has failed to establish that decedent's "idiopathic fall" or his accident at the No. 9 settling tank was a fall or an accident in the course of his employment. The only reasonable conclusion from the evidence in the record is

that decedent was not killed in an accident which arose "o
or in the course of his employment."

3. THE INDUSTRIAL COMMISSION ABUSED ITS DISCRE
IN ADOPTING THE ADMINISTRATIVE LAW JUDGE'S FINDING
DECEDENT WAS "IN THE COURSE OF HIS EMPLOYMENT" AT THE NO.
SETTLING TANK WHERE HIS DEATH OCCURRED.

The Administrative Law Judge's finding (adopted by
Commission) that decedent could have gone to the old operatio
center (Ex. D-2, Area 8) for a drink of water was nothing b
conjecture based on the testimony that there was drinking wat
available at Area 8 while there was no drinking water availab
in the change room (Area 2) where decedent last was seen.
finding that decedent had an "idiopathic fall" at the No.
settling tank likewise is sheer speculation. There is no ev
dence in the record to support such conjecture. It co
equally be said that decedent fell or that he stumbled into t
No. 9 settling tank, hit his head on the wall and th
drowned. However, the glaring misstatement and wholly unsu
portable finding by the Administrative Law Judge is that t
decedent was in the course of his employment because the si
of his death (Ex. D-2, Area 9) was "adjacent to" the availabl
drinking water in the old operations building (Area 8)
stated above, there is no evidence to support such a findi
In fact, the clear evidence in the record (R. 186, Ex. D-4 a

and the record testimony (R. 126) completely contradict such a finding. No evidence was produced by claimant or referred to by the Administrative Law Judge or the Commission to explain decedent's presence at the No. 9 settling tank or to causally connect it with his employment duties, primary or incidental. In summary, the finding that decedent was in the course of his employment at the site of his death was erroneous, wholly unsupported by any evidence in the record and, therefore, an abuse of discretion.

CONCLUSION

This case calls for direct application of two well-established principles of workmen's compensation law as interpreted and consistently followed by this Court:

1. Claimant (defendant herein) must establish a causal relationship between the injury or death by accident on the one hand and the employment duties, primary or incidental, on the other.

2. Employment duties for purposes of determining such causal relationship include not only the primary or authorized and assigned work duties but also those duties and activities which are reasonably necessary and incidental thereto.

Defendants have acknowledged that the employment duties of the decedent Alex Georgas neither required nor involved in any way his presence or activity at the No. 9

settling tank. Likewise defendants have failed t
decedent's presence or activities at the No. 9 Sett
location were necessary or incidental in any reasonable se
any of his employment duties or activities, primary or in
dental. Finally, there is no showing that deceased was at the
location engaged in "those things which it should reasonab
expected an employee would do in connection with his
duties." The record evidence fails completely to establish the
requisite reasonable causal relationship between decedent's
death and his work duties. The only reasonable conclusion from
the evidence is that decedent was not killed in an accident
which arose "out of or in the course of employment" within the
contemplation of the Utah Workmen's Compensation Act as inter-
preted by this Court. Therefore, the Order awarding benefits
should be set aside in its entirety.

RESPECTFULLY submitted this 22nd day of April, 1983.

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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing PLAINTIFF'S BRIEF in Case No. 19816, postage prepaid, this 22nd day of April, 1983, to:

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