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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT CORPORATION, KENNECOTT MINERALS COMPANY DIVISION,

Plaintiff,

-v-

THE INDUSTRIAL COMMISSION OF UTAH, and Rose K. Georgas, Widow of Alex Demetrios Georgas,

Defendants.

Case No. 19036

BRIEF OF DEFENDANT ROSE K. GEORGAS

ORIGINAL PROCEEDING TO REVIEW AN AWARD OF THE INDUSTRIAL COMMISSION OF UTAH

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MAY 23 1983
Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT CORPORATION, KENNECOTT MINERALS COMPANY DIVISION,	:	
Plaintiff,	:	
-v-	:	Case No. 19036
THE INDUSTRIAL COMMISSION OF UTAH, and Rose K. Georgas, Widow of Alex Demetrios Georgas,	:	
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IN THE SUPREME COURT OF THE STATE OF UTAH

[illegible] CORPORATION,
[illegible] MINERALS COMPANY :
[illegible]

Plaintiff, :

-v- :

THE INDUSTRIAL COMMISSION :
OF UTAH, and Rose K. Georgas, :
Widow of Alex Demetrios
Georgas, :

Defendants. :

BRIEF OF DEFENDANT
ROSE K. GEORGAS

Case No. 19036

I. STATEMENT OF NATURE OF CASE

This is a proceeding to review the lawfulness of an award by the Industrial Commission of Utah to the dependents of Alex Demetrios Georgas, deceased.

II. DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

On November 18, 1982, Administrative Law Judge Timothy C. Allen issued Findings of Fact, Conclusions of Law and Order granting benefits to the dependents of Alex Demetrios Georgas in Case No. 82001754. Said Order was affirmed by the Industrial Commission on February 2, 1983.

III. RELIEF SOUGHT ON APPEAL

Defendant Rose K. Georgas, for herself and the dependent children of Alex Demetrios Georgas, seek affirmance of the Order [illegible] Industrial Commission, and, pursuant to Section 35-1-38, [illegible] Annotated, 1953, as amended, request a preferential setting of this matter on the calendar of the Utah Supreme Court.

IV. STATEMENT OF FACTS

Defendant Rose K. Georgas agrees with the St[illegible] Facts set forth in Plaintiff's Brief, with the following [illegible]

With respect to the luncheon break of Mr. Georgas November 16, 1981, the testimony of his daughter, Vassie, [illegible] that she was called by Mr. Georgas at approximately 5:30 p.m., November 16, 1981, while he apparently was on his lunch break. (See Plaintiff's Brief, p. 3).

On p. 4 of Plaintiff's Brief, the following is stated regarding the location of the settling tank in which the body [illegible] the deceased was found: "This settling tank is located perhaps quarter of a mile away from any possible work areas or travel [illegible] of the deceased..." There is no testimony or other evidence [illegible] the record suggesting a distance between the points indicated. Exhibit D-2 would suggest that the decedent's work station is [illegible] imately 200-300 yards from the settling tank. Again on p. 4, [illegible] statement is made: "Plaintiff's medical witness ... did not [illegible] out drowning as the ultimate cause of his [decedent's] death." In fact, that witness specifically confirmed death by drowning. (R 161, 170).

Also on p. 4, Plaintiff states: "The evidence was uncontroverted that there were no direct, indirect, or even inc[illegible] duties related to the deceased's employment as a tripper operat[illegible] which would require or even explain his presence at the No. 9 settling tank where he was found." The analysis of incident[illegible] employment is a legal issue which will be addressed in the A[illegible] portion of this brief.

V. STATEMENT OF POINTS

1. THE INDUSTRIAL COMMISSION CORRECTLY APPLIED [illegible] OF EMPLOYMENT" ANALYSIS AS TO CAUSATION IN AWARDING [illegible] TO THE WIDOW AND CHILDREN OF THE DECEASED WORKER.

2. THE INDUSTRIAL COMMISSION'S FINDINGS AND ORDER ARE NOT "ARBITRARY AND CAPRICIOUS," OR "WHOLLY WITHOUT CAUSE," OR CONTRARY TO THE "ONE [INEVITABLE] CONCLUSION FROM THE EVIDENCE" OR WITHOUT "ANY SUBSTANTIAL EVIDENCE TO SUPPORT THEM," AND THEREFORE SHOULD BE AFFIRMED.

VI. ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION CORECTLY APPLIED "COURSE OF EMPLOYMENT" ANALYSIS AS TO CAUSATION IN AWARDING BENEFITS TO THE WIDOW AND CHILDREN OF THE DECEASED WORKER.

In its Brief, Plaintiff focuses on an alleged failure of proof of causal connection between the decedent's employment and his death. Although there are some statements which may be interpreted to the contrary, it appears that Plaintiff does not dispute that decedent's death was "by accident..." Section 35-1-45. There is clearly substantial evidence in the record to support the finding of the Industrial Commission that the decedent was killed by accident. The issue as framed by Plaintiff, therefore, is that there must be a causal relationship between the death and the employee's employment <u>duties</u>. This, it is respectfully submitted, is a misaprehension and misapplication of the appropriate analysis to be applied in determining whether the employee was killed "in the course of his employment..." <u>Id</u>.

From its opening Motion to Dismiss to its Reply defendant's Memorandum in Support of Claim for Dependents' Burial Benefits to its Motion for Reconsideration or Review Brief to this Court, Plaintiff has consistently failed to apply the appropriate causation analysis related to death in the course of employment. The failure to apply correct causation principles and the insistence on applying causation principles applicable to tort law has resulted in Plaintiff's claim of no substantial evidence to support the award of the Commission.

In pointing out the uniqueness of Utah's compensation statute in requiring that injury or death arise out of or in the course of employment, the Utah Supreme Court in M & K Corporation v. Industrial Commission, 112 Utah 488, 189 P.2d 132, 134 (1948), stated:

> The distinction being that in order for an accident to arise out of the employment a more definite and closer causal relationship is required than is necessary for an accident to arise in the course of employment, but in the latter a closer relationship must exist as to time and place and as to the nature and type of work being performed, in other words the requirement that the accident arise in the course of the employment is satisfied if it occurs while the employee is rendering service to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service.

Plaintiff's conceptual difficulty arises from its insistence that there be some causal connection between the injury or death and the duties of the worker's employment. Causal relation

[illegible] between the employment and the accident is a much different [illegible] than causal relationship between the duties of employment and the accident, for it is generally recognized that the mere fact that the expressed duties of employment are not being performed, does not imply that a worker is out of the course of his employment. This is a natural consequence of the fact that "the requirement that the accident arise in the course of the employment is satisfied if it occurs while the employee is rendering service to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service." Id. This point was emphasized in Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980), where this Court stated:

> It must be kept clearly in mind that the statute requires that the injury arise in the course of employment, not that the injured worker be in the course of his employment. 610 P.2d at 1363, n. 3).

See also, Wilson v. Sears Roebuck & Co., 14 Utah 2d 360, 384 P.2d 400 (1963), where this Court stated that "an employee does not necessarily and ipso facto lose his status as such when the noon whistle blows," and Askren v. Industrial Commission, 15 Utah 2d 275, 391 P.2d 302 (1964), where compensation was granted to a worker who was injured during a lunch break.

Plaintiff's confusion is further pointed out by its reliance on Staheli v. Farmers' Cooperative of Southern Utah, 655 P.2d 680 (Utah 1982), for the proposition that "[w]hen the proximate cause of an injury is left to speculation, the claim fails as a matter of law..." It is clear that the tort concept of "proximate

cause" has no place in a worker's compensation case. In [illegible] Industrial Commission, supra, the Court stated:

> 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. 610 P.2d at 1364. (Emphasis added.)

The causation principle at work in compensation cases [illegible] the connection between the accident and the injury or death. In Redman Warehousing Corp. v. Industrial Commission, 22 Utah 2d 39[illegible] 454 P.2d 283, 285 (1969), this 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. (Emphasis added.)

Thus, the issue presented by "course of employment" analysis is whether the worker had so departed from the time, spa[illegible] and incidents of his employment that it can be inferred that he intended to abandon his job temporarily. Cf. 1A Larson, The Law of Workmen's Compensation (1979), Section 21.00, p. 5-4. In the context of the instant case, the record contains substantial evide[illegible] supporting the finding of the Industrial Commission that decedent was in the course of his employment at the time of his death, as will be pointed out in Point II of this brief.

When the correct analytical structure appropriate [illegible] worker's compensation "course of employment" causation question is applied to this case, Plaintiff's causation analysis is sh[illegible]

be defective. When this defendant admitted in her Memorandum ... ort of Claim that there was nothing directly connected with ... 's occupational duties as a tripper operator which required his presence at the settling tank pond where his body was found, she was doing no more (and she so stated R. 210) than pointing out that this case would have to be approached from "course of employment" analysis rather than "arising out of" the employment analysis. The distinction is a valid one as shown by M & K Corporation v. Industrial Commission, supra. A correct application of the appropriate analytical structure shows that there was substantial evidence to support the award of compensation by the Industrial Commission.

POINT II

THE INDUSTRIAL COMMISSION'S FINDINGS ARE NOT "ARBITRARY AND CAPRICIOUS," OR "WHOLLY WITHOUT CAUSE," OR CONTRARY TO THE "ONE[INEVITABLE] CONCLUSION FROM THE EVIDENCE" OR WITHOUT "ANY SUBSTANTIAL EVIDENCE TO SUPPORT THEM," AND THEREFORE SHOULD BE AFFIRMED.

As recently stated by the Court in Ogden Standard Examiner v. Industrial Commission, No. 18311, filed April 20, 1983, Judge Durham stated for a unanimous Court:

> The standard of review utilized by this Court in Industrial Commission cases is stringent:
>
> > [Our inquiry is] whether the Comission's findings are 'arbitrary and capricious', or 'wholly without cause' or contrary to the 'one [inevitable] conclusion from the evidence' or without 'any substantial evidence' to support them. Only then should the Commission's findings be displaced. (Citing Sabo's Electronic Service v. Sabo, Utah, 642

P.2d 722, 725 (1982)(quoting *Kaiser Steel Corp. v. Monfreidi*, Utah, 631 P.2d 888, 890 (1981)).

A review of the record in the light of course [illegible]ment analysis reflects the following:

There is no dispute that decedent died at a time when he was at work, during his regular shift. The place of his death was on the Plaintiff's premises, some few hundred yards at most from the spot where he performed his duties as tripper operator. (Exhibit D-2). If his body had been found at the copper mine or at the smelter in Magna, it perhaps could be said that the distance involved showed an intent on decendent's part to abandon his employment. However, neither is the case here. As far as pure physical proximity goes, Plaintiff has adduced no evidence that decedent abandoned his employment. In fact, Plaintiff has emphasized, and the record supports, decedent's strict and rigid adherence to his work routine. (R. 124, 132, 149, 178). However, this evidence must be viewed as negativing any inference that decedent may have abandoned his employment. Such abandonment would, according to the undisputed evidence, have been totally out of character for decedent.

Furthermore, although it is true that there is no apparent reason for decedent being where he was at the time of his death in the light of the duties of a tripper operator, it is generally recognized that the mere fact that the expressed duties of employment are not being performed, does not imply that a worker is out of the course of his employment. In *United States*

[illegible] v. Draper, 613 P.2d 508, 509 (Utah 1980), this Court

> It is neither fair nor realistic that an employee will always keep within the narrow bounds of one assigned task.... The scope of one's employment includes not only the specific duties assigned, but also those things which it should reasonably be expected an employee would do in connection with those duties...

The record here reflects that the 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. (R. 138-139). Also, the available drinking water was on the same level as the settling pond. (R. 139). Unfortunately, death has sealed the lips of the only person who could say why decedent was where he was when he died. However, in the absence of any evidence to suggest that decedent or his fellow workers were forbidden by company rule or regulation from being by the pond, it cannot be said that decedent was so far removed from the incidents of his work, be it for meeting personal comfort needs or otherwise, that he can be said to have left the course of his employment.

This Court has consistently held that the worker's compensation statute should be liberally construed and if there is doubt respecting the right to compensation it should be resolved in favor of a recovery. See, e.g., M & K Corporation v. Industrial

Commission, supra, 189 P.2d at 134. This is a [illegible]ularly calls for a liberal and enlightened application [illegible] beneficent purposes of the compensation act. A worker has [illegible] while at the job and under circumstances which, while not certain in the light of "course of employment" analysis do not indicate other than the death is compensable. Here decedent's beneficiaries and dependents stand in no cognizably different position from the family of a worker killed in an industrial mishap in fully view [illegible] his fellow workers. Here, the death was unwitnessed but was, it is respectfully submitted, well within acceptable limits of time, place and incidents of employment so as to bring decedent's death within the course of his employment and his dependents within the category of those entitled to benefits.

This Court has consistently "refused to open the doors 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, e.g., M & K Corporation v. Industrial Commission, supra; Redman Warehousing Corp. v. Industrial Commission, supra. However, in a case such as this, there is much force to the logic behind the rule expressed in Section 10.32 of 1 Larson, The Law of Workmen's Compensation (1979), that where a decedent is found dead under circumstances indicating the death took place within the time and space limits of the employment, there should arise an inference that the death arose out of the employment. Larson indicates that this rule is accepted by 30 states, the

of Columbia, the 2nd, 3rd and 5th Circuit Courts of
nd England. Larson explains the rule as follows:

> The theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents suggests some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.
>
> * * *
>
> The fact the majority of courts will award compensation in this ... type of case is the best indication that there is a distinct compensation principle holding that unexplained deaths in the course of employment are compensable. (Footnote omitted). Id. at pp. 3-94 through 3-101.

Of course the reason Utah is not counted among the jurisdictions which have adopted this principle is the fact that claimants here need not prove both that the death arose out of and in the course of employment. However, there is much force to the logic of the rule in "course of employment" analysis in that "the death itself has removed the only possible witness" who could say why he was where he was, what he was doing, and what happened. According to Larson:

> [W]hen employees have died as the result of unwitnessed falls down elevator shafts, from buildings, from catwalks, from boats, or from trains, a noncompensable origin

> is virtually inconceivable. Suicide is ruled out by the universal presumption against suicide. And even if the fall itself was occassioned by a heart attack, epilepsy, or other personal weakness... this would not defeat the claim as long as the employment contributed such sources of increased danger as trains, trucks, and heights. (Footnotes omitted.) Id. at p. 3-103.

VII. CONCLUSION

The foregoing analysis has shown that, contrary to Plaintiff's assertions, there is substantial evidence in the rec to support the award of benefits to this defendant and her minor children for the death of Alex Demetrios Georgas. The fact that Plaintiff can even assert a failure of proof stems from its ref to recognize the appropriate causation principles operative in worker's compensation cases. Proximate cause analysis has no place in this setting; neither does the requirement for a causal link between the duties of a worker's employment and any claimed death or injury. Rather, the correct causation principle links the "accident" and the resulting death or injury. In this case, the "accident" was decedent's falling into the settling pond on Plaintiff's premises, whether as the result of slipping or some idiopathic condition of decedent, which accident clearly caused the death of decedent by drowning. Furthermore, there is not one iota of evidence to suggest that decedent abandoned his employment such that he thereby removed himself from the protection of the compensation act. It is, therefore, respectfully submitted that the award of the Industrial Commission should be affirmed.

DATED this 23rd day of May, 1983.

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By /S/
Donovan C. Snyder

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Defendant Rose K. Georgas were mailed, postage prepaid, this 23rd day of May, 1983, to: David L. Wilkinson, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, and to James B. Lee and Erie V. Boorman of PARSONS, BEHLE & LATIMER, 185 South State Street, Suite 600, Salt Lake City, Utah 84111.

/S/