1983

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

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

# PLAINTIFF'S REPLY BRIEF

ORIGINAL PROCEEDING TO REVIEW AN AWARD

OF THE INDUSTRIAL COMMISSION OF UTAH

JAMES B. LEE
and
ERIE V. BOORMAN
of and for
PARSONS, BEHLE & LATIMER
185 South State Street,
Suite 600,
Salt Lake City, Utah 84111
Telephone: 532-1234

Attorneys for Plaintiff

David L. Wilkinson
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Defendant,
Industrial Commission of Utah

Donovan Snyder, Esq.
205 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorney for Defendant Rose K. Georgas

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| | ) | CASE NO. 19036 |
| Plaintiff, | ) | |
| v. | ) | |
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JAMES B. LEE
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PARSONS, BEHLE & LATIMER
185 South State Street,
Suite 600,
Salt Lake City, Utah 84111
Telephone: 532-1234

Attorneys for Plaintiff

David L. Wilkinson
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Defendant,
Industrial Commission of Utah

Donovan Snyder, Esq.
205 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorney for Defendant Rose K. Georgas

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LEE
BOORMAN
and for
SONS, BEHLE & LATIMER
Attorneys for Plaintiff Kennecott
Corporation,
185 South State Street
Post Office Box 11898
Salt Lake City, Utah 84147

IN THE SUPREME COURT OF THE STATE OF UTAH

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|---|---|
| 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 REPLY BRIEF<br>Case No. 19036 |

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## 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 Claim No. 82001754. The Order was affirmed by the Industrial Commission on February 2, 1983. On March 4, 1983 plaintiff filed this action with the Supreme Court of Utah.

## III. RELIEF SOUGHT ON REVIEW

Plaintiff, Kennecott Corporation, seeks to have the Order issued by the Industrial Commission through its Administrative Law Judge on November 18, 1982, and affirmed by the Commission on February 2, 1983, set aside in its entirety. The arguments and authorities in support of plaintiff's request for relief are set forth in Plaintiff's Brief heretofore filed in this action on April 22, 1983.

This Reply Brief is in response to contentions, arguments and authorities set forth in the Brief of Defendant Rose K. Georgas which was filed with this Court on May 23, 1983.

## IV. BACKGROUND FACTS

The basic facts necessary to the determination of this controversy are essentially those set forth in Plaintiff's Brief (pp. 3-5) and are not in dispute except for alleged differences noted in the Brief of Defendant Rose K. Georgas. Such differences--even if established--are not of material significance insofar as the basic positions of the parties are concerned. Plaintiff's position with respect to such differences and to the legal principles of Utah Workmen's Compensation law

to be applied to the acknowledged facts of this controversy are set forth in the Argument portion of this Reply Brief.

## V. STATEMENT OF POINTS

1. UNDER THE UTAH WORKMEN'S COMPENSATION ACT AS CONSISTENTLY INTERPRETED BY THIS COURT, THERE IS NO INFERENCE OR PRESUMPTION OF COMPENSABILITY; THE BURDEN IS UPON THE CLAIMANT TO ESTABLISH THE COMPENSABILITY OF THE INJURY OR DEATH.

2. CONTRARY TO THE CONTENTION OF DEFENDANT, THE CLAIMANT MUST SHOW A CAUSAL RELATIONSHIP BETWEEN DECEDENT'S EMPLOYMENT DUTIES WITH PLAINTIFF AND HIS DEATH AT THE NO. 9 SETTLING TANK ON PLAINTIFF'S PREMISES.

3. THE ONLY REASONABLE CONCLUSION FROM THE EVIDENCE IN THE RECORD IS THAT DECEDENT'S DEATH AT THE NO. 9 SETTLING TANK WAS NOT CAUSUALLY RELATED TO HIS EMPLOYMENT DUTIES.

## VI. ARGUMENT

1. UNDER THE UTAH WORKMEN'S COMPENSATION ACT AS CONSISTENTLY INTERPRETED BY THIS COURT, THERE IS NO INFERENCE OR PRESUMPTION OF COMPENSABILITY; THE BURDEN IS UPON THE CLAIMANT TO ESTABLISH THE COMPENSABILITY OF THE INJURY OR DEATH.

The main thrust of defendant's argument--despite her detailed overemphasis of the well-acknowledged and, in this case, irrelevant, distinction between "course of employment" and "arising out of employment"--is that there is or should be

an inference or presumption of compensability where the death takes place on the premises of the employer during the working hours of the decedent employee. She further asserts that death under such circumstances relieves her from her burden of proof to establish all the elements of compensability in this case.

Such contentions are contrary to established Utah Workmen's Compensation law. There is no presumption or inference of compensability, either by statutory provision or by court decisions, in the Utah Workmen's Compensation Act. Defendant has referred to no language in the statute, and there is none, which specifies or even suggests a presumption of compensability. Nor has defendant referred to any decisions of this Court in support of such contentions. Instead she has asked the acceptance by this Court of Professor Larson's "theory" which presumes that an unexplained death occurring on the premises during working hours is work related because "death has removed the only possible witness who could prove causal connection." That theory has not been, nor should it now be, accepted as applicable to the Utah Workmen's Compensation Act. It was rejected by the Court of Appeals of Oregon in the Matter of Raines, Or. App., 585 P.2d 721 (1978) with the following language which is appropriate also to this case:

> Compensation for injury or death of a worker is created by statute. We decline to amend the Act by adjusting the statutory burden of proof through a judicially created presumption.

Utah Workmen's Compensation Act, like the Oregon Act, imposes liability upon the employer regardless of fault and also like the Oregon Act, consistently and uniformly has been interpreted to place the burden of proof upon the claimant to establish all the elements of compensability.

As stated in Plaintiff's Brief (pp 6-11) this Court consistently has held that the claimant has the burden of proof to establish entitlement to compensation benefits, including the burden of showing the causal relationship of the duties of employment to the unexpected injury or death which occurred.

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, 642

P.2d 722. The Court reaffirmed its definition and requirements for 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 Thurman, 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).

In summary, it is clear from the cases submitted above, as well as from the language of the Utah Workmen's Compensation statute, that defendant's reliance upon a presumption or inference of compensability in this case is untenable. It has no support in the language of the statute and in effect has been rejected by this Court, as indicated in the cases set forth above and others too numerous to mention. 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 claimant must establish proof of the causal relationship of the duties of the employment to the injury or death.

2. CONTRARY TO THE CONTENTION OF DEFENDANT, THE [illegible] MUST SHOW A CAUSAL RELATIONSHIP BETWEEN DECEDENT'S EMPLOYMENT DUTIES WITH PLAINTIFF AND HIS DEATH AT THE NO. 9 SETTLING TANK ON PLAINTIFF'S PREMISES.

Defendant has asserted repeatedly in her brief that she is not required to show a causal relationship between decedent's death at the No. 9 settling tank of plaintiff and the duties of decedent's employment. Such assertion flies in the face of the specific language found in the Sabo decision that:

> The accident must result in an injury which is causally related to the work being done. 642 P.2d at 725. (Emphasis added).

And further:

> Proof of the causal relationship of duties of employment to unexpected injury is simply lacking. 642 P.2d at 726. (Emphasis added).

The above requirement of causal relationship between the injury or death and the work being done was reconfirmed by this Court in Pittsburgh Testing Laboratory & Liberty Mutual Insurance Co. v. Keller, Utah, 657 P.2d 1367 at 1370 (1983) with the following language:

> Our comment in Sabo concerning a back injury is equally applicable to the questions generated by Mr. Keller's heart disease:
>
> > The accident must result in an injury which is causally related to the work being done. The mere showing of injury does not ipso facto mean that a compensable accident has occurred. (Emphasis added).

The cases mentioned above definitely confirm the requirement of compensability that there must be a causal relationship between the injury or death on the one hand and the duties of employment or the work being done on the other. Therefore, defendant's contention that there need be no such causal connection with employment duties is erroneous and contrary to established Utah Workmen's Compensation law.

Another erroneous and unsupported assumption in defendant's brief on the important issue of causal relationship and employment duties is her insistence that plaintiff has considered only the direct employment duties in its causal relationship argument. Nothing is further from the truth. Kennecott has acknowledged from the beginning of this controversy and indeed has specifically recognized in Plaintiff's Brief on file with this Court (pp. 12, 13 and 20) that for purposes of compensability under the Utah 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. Kennecott has specifically referred to and recognized this now well-established principle of Workmen's Compensation Law as found in such cases as 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

in a safe and sufficient running condition. As noted by plaintiff, the Court stated as follows:

> 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 added).

However, Kennecott has pointed out also that 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). In that case 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 of the house a few moments before.

Plaintiff also has recognized the application of the rationale of United States Steel Corp. v. Draper, Utah, 613 P.2d 508 (1980) in which running to the possible assistance of a fellow employee, as established by affirmative evidence in the record, was found to be "reasonably expected" of and thus "incidental" to the employment duties. This rationale was cited--also as found in Plaintiff's Brief (p. 21)--by this Court in the recent case of J & W Janitorial Co. v. Industrial

Commission, Utah, 661 P.2d 949 (1983). There 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 within the contemplation of the Utah Workmen's Compensation Act.

Defendant has cited Professor Larson's treatise in support of her position. Yet even Professor Larson at the very beginning of Chapter IV on Course of Employment makes it clear that the activity in question must have a purpose related to the employment in order for the injury to be considered as having arisen in the course of employment. He states as follows in Section 14.00:

> An injury is said to arise in the course of the employment when it takes place within the period of employment at a place where the employee reasonably may be and while he is fulfilling his duties or engaged in doing something incidental thereto. (Emphasis supplied).

And further:

> The course of employment requirement tests work-connection as to time, place and activity; That is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.

In summary, it was claimant's burden in this case to prove that decedent's death was causally related to the duties

employment with plaintiff and to do so claimant must [illegible] decedent's presence at the No. 9 settling tank was reasonably necessary and incidental to his employment duties.

3. THE ONLY REASONABLE CONCLUSION FROM THE EVIDENCE IN THE RECORD IS THAT DECEDENT'S DEATH AT THE NO. 9 SETTLING TANK WAS NOT CAUSALLY RELATED TO HIS EMPLOYMENT DUTIES.

The basic issue in this case is whether or not there is substantial evidence in the record to support the finding of the Industrial Commission, that decedent's death at the No. 9 settling tank of Kennecott was causally related to his employment duties.

Plaintiff is aware of the many authorities defining the scope of review in Industrial Commission cases, including the most recent decisions of this Court with respect to the limitations of its inquiry in Workmen's Compensation matters. We are aware also, as this Court stated in the Sabo case that the inquiry is limited to:

> . . . whether the Commission's findings are 'arbitrary or 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.

These inquiry limitations were reiterated and reaffirmed by this Court through Justice Durham in the recent case of Ogden

Standard Examiner v. Industrial Commission, case No. [illegible], April 20, 1983.

Plaintiff's position in this case is wholly consistent with the principles and the intent of the language set forth above. It is plaintiff's contention that the claimant in this case, as a matter of law, did not sustain her burden to show the requisite causal relationship between decedent's death at the No. 9 settling tank and his employment duties, either primary or incidental. Therefore, as Justice Howe stated in the J & W Janitorial 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 . . . [decedent] was not killed in an accident which arose "out of or in the course of employment." 661 P.2d at 951. (emphasis added).

It was defendant's burden to supply the required causal nexus between decedent's employment duties and his presence at the No. 9 settling tank. No evidence was produced by defendant 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, either primary or incidental. The evidence is undisputed, indeed acknowledged by defendant, that none of decedent's work

... tripper operator required or involved in any way his ... at the No. 9 settling tank where he was found. (see ... and also R. 110, 112). Therefore, it was incumbent upon defendant to show a reasonable "incidental" work relationship between decedent's presence at the No. 9 settling tank and his employment duties as was found in the Hafer's case (526 P.2d at 1189) or 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 was found in the Draper case. (613 P.2d 508, 509). In both of those cases affirmative evidence by the claimant provided the "reasonably expected" or "reasonably incidental" causal connection between the work duties and the injury or death.

In this case, no reasonable expectation or explanation of any kind was advanced by defendant or the Commission 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 decedent went to the old operations center to get a drink; in any event, that would not explain why he went to the No. 9 pond.

Defendant has made no effort to present evidence which would connect in any way decedent's presence at the No. 9 settling ... with his employment duties or which would qualify for compensation under the rationale of the Draper case as one of

"those things which it should reasonably be expected ... employee would do in connection with those [work] duties." Instead she has relied upon the "course of employment" argument which she has asserted dispenses with the requirement of the causal connection between the decedent's death and his employment duties so long as decedent's "accident" caused his death while he was still employed on the premises of plaintiff. See defendant's brief, p. 12.

As mentioned above, that contention is contrary to Utah Workmen's Compensation law as consistently interpreted by the decisions of this Court. It is not enough that an identifiable accident occurred which resulted in the injury or death complained of. As stated by Justice Hall in the Sabo decision (642 P.2d at 725) and again by Justice Durham speaking for a unanimous court in Pittsburgh Testing Laboratory & Liberty Mutual Insurance Company v. Keller, Utah, 657 P.2d 1367 at 1370 (1983):

> The accident must result in an injury which is causally related to the work being done. The mere showing of injury does not ipso facto mean that a compensable accident has occurred.

In summary, it was defendant's burden to show that decedent's presence at the No. 9 settling tank where he died was in some causal fashion "incidental" to his work or employment duties, or that his death at the No. 9 settling tank

as a result of his having engaged in one of "those ... which it should reasonably be expected an employee would ... in connection with [work] duties." No evidence was presented or referred to by defendant to show that crucial causal nexus in this case. Therefore, defendant has failed to sustain her burden to establish the elements of a compensable accident.

Although it was the claimant's burden to establish the elements of compensability in this case, plaintiff nevertheless affirmatively produced evidence which showed that there was no causal relationship whatever between decedent's activities or presence at the No. 9 settling tank and his work or employment duties, either primary or incidental. Plaintiff's evidence shows (R. 132) that decedent's body was found in the No. 9 settling tank (Exhibit D-2, Area No. 9) which 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), ... or from his change room or lunchroom (Area 2, Exhibit D-2) ... to or from his area of work activities (Areas 3, 4 and 5, Exhibit D-2). Plaintiff's evidence also showed, without any

controversy by defendant, that none of decedent's duties 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).

Defendant's Brief (p. 9) suggests the availability of drinking water at the old operations center (Exhibit 2, Area 8) as an employment-related reason for decedent's presence at the No. 9 settling tank. Such suggestion is completely inconsistent with defendant's earlier acknowledgment (R. 212) that:

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

Thus, even assuming the validity of the unsupported conjecture that decedent left the lunchroom (Exhibit 2, Area 2) and went to the old operations center (Exhibit 2, Area 8) to get a drink of water, even defendant has admitted that it would not provide any employment related explanation for decedent's presence at the No. 9 settling tank where he was found. Plaintiff's uncontroverted evidence is that the No. 9 settling tank is 200 yards away from the old operations center and in the opposite traveled direction from decedent's work station or any of his other employment related activities. (R. 126). Plaintiff's evidence also showed (Ex. D-4, D-5 and R. 129) that the 200 yard walkway from the old operations plant (Ex. D-2, Area 8) to

9 settling tank is not only narrow but contains ... hazards and obstructions.

The above evidence, uncontroverted in the record, shows affirmatively that decedent's presence at the No. 9 settling tank was not and could not in any reasonable way be characterized as one of "those things which it should reasonably be expected an employee would do in connection with those [work] duties" in order to qualify for compensation under the Draper case rationale referred to in defendant's Brief.

In summary, not only is the record devoid of any evidence showing a causal connection between decedent's death at the No. 9 settling tank and his employment duties with plaintiff, it contains direct testimony and exhibits specifically negating any such causal relationship. This Court has set forth in Hafer's and in Draper the course of employment causal connection requirements for compensability under the Utah Work Compensation Act. Defendant has failed completely to sustain her burden of proof to satisfy such requirements. Under such circumstances, the only reasonable conclusion from the record evidence here is that decedent was not killed by accident arising "out of or in the course of his employment" within the contemplation of the language or the intent of the Utah Workmen's ...pensation Act.

## VII. CONCLUSION

The legal issues in this case have been clearly defined. Both defendant and plaintiff have set forth their contentions with respect to those issues. There is no dispute as to the evidentiary facts presented by the parties in support of their respective positions and plaintiff has pointed out crucial areas in which no supporting evidence has been presented or referred to.

From the evidence in the record and from the absence in the record of other required supporting evidence, plaintiff believes the following conclusions to be inescapable under established Utah Workmen's Compensation law:

1. There is no inference or presumption of compensability applicable to the circumstances of this case;

2. Claimant has the burden of proof to establish the compensability of decedent's death at the No. 9 settling tank;

3. Claimant must establish as a crucial requirement of compensability a causal connection between decedent's death at the No. 9 settling tank and his employment duties, direct or incidental;

4. There is no evidence in the record to support a finding that decedent's presence at the No. 9 settling tank was "incidental" to his employment duties with plaintiff under the principles set forth in Hafer's case or that it was "one of those things which it should reasonably be expected an employee

... in connection with those [work] duties" under the ... of the Draper decision of this court; in fact plain... evidence specifically negates such a finding;

5. The only reasonable conclusion from the evidence in the record is that decedent's death at the No. 9 settling tank was not causally related to his employment duties;

6. The Industrial Commission's award of benefits entered on November 18, 1982, and affirmed by the Commission February 2, 1983, was contrary to law and should be set aside in its entirety.

Defendant has urged application of the recognized rule of construction which resolves any doubt regarding compensation in favor of recovery. Such rule should not apply, however, where to do so would mean to ignore the compensability requirements of the statute and the burden of proof principles so well established by this Court in the interpretation of the Utah Workmen's Compensation Act. See J & W Janitorial case, supra, where the Court found, as plaintiff here contends, that the only reasonable conclusion from the evidence in the record was that decedent was not killed in an accident which arose out of or in the course of his employment. (661 P.2d at 951).

With respect to Workmen's Compensation statutory construction, the employer's position is represented by lan... of this Court in Intermountain Smelting Corp. v.

Capitano, Utah, 610 P.2d 334 (1980), which is particularly applicable to this case:

> The statute must also be considered from the standpoint of the employer. The Workmen's Compensation Act imposes liability upon him regardless of fault; and, as in all statutes which impose burdens for responsibilities upon a person, one is entitled to rely on a strict application of the statute as to the extent of his responsibility.

To sustain the defendant's position and the Industrial Commission's award would, in effect, make plaintiff the insurer of all injuries to or death of its employees occurring on its premises during the hours of employment. The Utah Act neither requires nor suggests any such result particularly where, as here, the only reasonable conclusion from the evidence in the record is that decedent's death was not causally related to his employment duties.

RESPECTFULLY submitted this 8th day of July, 1983.

James B Lee
JAMES B. LEE

Erie V. Boorman
ERIE V. BOORMAN
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff
185 South State Street
P. O. Box 11898
Salt Lake City, UT 84147
Telephone: (801) 532-1234

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Plaintiff's Reply Brief in Case No. 19036, postage prepaid, this 8th day of July, 1983 to:

Donovan Snyder, Esq.
205 East Broadway, Suite 100
Salt Lake City, Utah 84111
Attorney for Defendant Rose K. Georgas

David L. Wilkinson
236 State Capitol
Salt Lake City, Utah 84114
Attorney for defendant Industrial
Commission of Utah

Eric D. Georgas