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# Joann L. Bailey et al v. Utah State Industrial Commission et al : Brief of Appellant

Utah Supreme Court

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Heber Grant Ivins; Attorney for Appellant;

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# In the Supreme Court of the State of Utah

JOANN L. BAILEY, a widow, and  
TODD F. BAILEY, minor son of  
FRANK DEE BAILEY, deceased,  
Plaintiffs and Appellants,

vs.

UTAH STATE INDUSTRIAL COMMISSION and UTAH STATE INSURANCE  
FUND,

Defendants and Respondents.

FILED

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Supreme Court, Utah

CASE  
NO. 10148

## BRIEF OF APPELLANT

Writ of Review of Order of  
Utah State Industrial Commission

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Defendants and Respondents.

CASE  
NO. 10148

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## BRIEF OF APPELLANT

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### STATEMENT OF KIND OF CASE

The appellant appeals from an Order of the Utah State Industrial Commission denying appellant's coverage and workmen's compensation.

### DISPOSITION IN INDUSTRIAL COMMISSION

Industrial Commission held that Frank Dee Bailey, deceased, was not acting within scope of his employment at time of his death on September 23, 1963.

## **RELIEF SOUGHT ON APPEAL**

Appellant submits that the decision of Industrial Commission should be reversed and appellants awarded coverage under Workmen's Compensation Act.

## **STATEMENT OF FACTS**

On the morning of September 23, 1963, Frank Dee Bailey was killed while driving a vehicle to Lehi, Utah. (R. 2). This accident occurred some 7/10 of a mile (R. 10) from Frank's American Oil Station, such business being solely owned and operated by deceased. (R. 6). At the time of the accident he was driving a vehicle being charged off as a business asset (R. 20); was in American Oil uniform (R. 7); was carrying a brief case with records of business, including daily inventory records (R. 8, 17); and was carrying the keys to the station. (R. 9).

The deceased often used the car in which he was riding to start other cars and carried battery cables for this purpose. (R. 8). He often left this car with a customer to use while servicing their vehicle. (R. 9A, 10, 20). Deceased also used vehicle to transport supplies for business. (R. 25).

There is no dispute as to the coverage or dependency of appellants. (R. 2).

## **ARGUMENT**

### **POINT I**

THE EVIDENCE ADDUCED AT ORIGINAL HEARING ESTABLISHED THAT FRANK DEE BAILEY, DECEASED, WAS IN COURSE OF EMPLOYMENT AT TIME OF DEATH.

This claim was filed under the provisions 35-1-45, U. C.A. 1953, which states that:

"Every employee . . . 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 . . ."  
(Emphasis ours)

This section in the opinion of the claimant, has been broadened by the passage of 35-1-43, U.C.A. 1953 Pocket Supplement, which is worded as follows:

"The words employee . . . as used in this title, shall be construed to mean:

(4) If the employer is a partnership, or sole proprietorship, such employer may elect to include as an "employee" within the provisions of this act, any member of such partnership, or the owner of the sole proprietorship, devoting full time to the partnership or proprietorship business." (Emphasis ours)

As stated, it is the contention of this claimant that the new provision of the law covering sole proprietors creates an entirely new legislative directive which must be dealt with by the Commission in an entirely different light. In the past the Commission has seen fit to award compensation to employees, who were employees in the strict sense, for injuries occurring off the actual plant premises.

See cases in point:

Bountiful Brick Co. v. Industrial Commission, 68 Utah 600, 251 P 555.

Kahn Brothers Co. v. Industrial Commission, 75 Utah 145, 283 P 1054.

Cudahay Packing Co. v. Industrial Commission, 60 Utah 161, 207 P 148.

Other jurisdictions have gone further and broadened the general rule to cover situations where the employee was not involved in traveling upon a normally used route for ingress and egress. These cases are found at 50 A.L.R. 2d 401, some of the leading cases being:

New York Casualty Co. v. Wetherell, 193 Fed. 2d 881.  
Kobe v. Industrial Commission, 35 Cal. 2d 33, 215 P 2d 736.

However, the case upon which the claimant relies most heavily is the precedent established in *Morgan v. Industrial Commission*, 92 Utah 129, 66 P 2d 144. In that case the injured employee was a school principal who went to the school building on a Sunday afternoon for purpose of returning account books and making up a report due at the office of the district secretary. Upon reaching the building, he found that he had left the keys to the building at home, returned to his residence and there partook of his lunch and was then detained by guests at the home, and later in the evening left the home to walk to the school and was injured en route. The court held in that case:

"Those cases where a superior must largely direct his own orbit of work on behalf of his master are in a different category from the class in which an employee has a customary place to work and customary hours during which to work, and is under the orders of another as to when and where he shall work . . . But even in the cases where there is a customary place and customary hours to work, an employee on a special errand away from the factory at the request of his employer is within the course of his employment. An accident occurring on an errand outside of hours specially or mainly for the employer is compensable.

In this case, Morgan, being the principal of the school, was largely *sui juris*. His master was the school district but he gave orders for it. His time and place of work was somewhat subject to his own selection. When he was on a special errand within the range of his duties by his own ordering, it was as if he had sent a teacher or the janitor on a special errand on school work . . .

In the instant case the claimant, himself a superior, put himself "on duty" when he left the house to carry out the purposes of his master on this special occasion. He was then in the course of his employment, which he would not have been had he been leaving his home to attach himself to his employment, the hours of which were blocked out by the school board . . . If the manager of a business, whose hours of work were largely self-imposed, left his house at night to meet a customer at a hotel on his master's business and was injured en route, he could recover compensation."

It seems incomprehensible to me that in the instant case the Commission could hold that Mr. Bailey was not killed while traveling on a mission which grew out of his business. The deceased was driving a car owned by the business (R. 20); used in its operation, attired in a distinctive uniform worn solely to perform his duties (R. 7); carried his brief case and records used in the business (R. 8, 17); a set of keys to the station and its pumps. (R. 9). How can it be said that such trip did not grow "out of" his employment?

Would not a Judge be covered while driving to the court house? Or would not the Commissioner be covered

while traveling to an Industrial Commission hearing in some distant city?

Certainly the Commission and the Court must broaden their concept of course of employment when dealing with a sole proprietor who has chosen to be covered under the Workmen's Compensation Act as he is vested with the responsibility of operating his business, and the law requires that it be on a full time basis in order for the coverage to be proper.

Since Mr Bailey was a sole proprietor and owner of the business he could select, on any given occasion, to choose his own hours, to change the hours of the operation of the business, and his compensation and income was only dependent upon his own initiative and the number of hours he chose to devote to the operation of the concern.

## POINT II

THAT THE COMMISSION WAS ARBITRARY IN PREVENTING OR DISSUADING APPELLANTS FROM PUTTING ON EVIDENCE IN COMMISSION HEARING AND THAT SUCH ACTION WAS ARBITRARY.

The Court has pointed out in numerous decisions, the most recent of which was a citation made in the case of Gary Wayne Harlan v. Industrial Commission of Utah, et al., No. 10026, which cites the case of Cooper v. Industrial Commission, 15 Utah 2d 91, 387 P 2d 689 (1963) in which the Court held:

"It is an elemental principal of justice that a party seeking adjudication of his rights should be neither prevented nor dissuaded from presenting any evidence

he desires which is competent and material to the issues."

In the instant case the Commission disallowed the introduction of the brief case, together with the records contained therein, from being introduced in evidence. (R. 9). The Commission disallowed any evidence tending to show the habits of Mr. Bailey following his arising at his residence and before arriving at his station. (R. 17).

The appellant contends that the habits of Mr. Bailey would become pertinent in view of there being no supporting evidence as to his specific undertaking at the time of his death other than to presume that he was following his normal habits.

It is felt that such action upon the part of the Commission is arbitrary and unreasonable and should justify rehearing.

### CONCLUSION

It is submitted that there is sufficient evidence under the amended statute to find that the deceased, Frank Dee Bailey, was acting in the course of his employment even though not on the actual premises of his business. It is also submitted that the action of the Commission at the time of the original hearing was arbitrary and unreasonable and this Court should allow rehearing if it is not found that the death occurred during the course of Mr. Bailey's employment.

Respectfully submitted,  
HEBER GRANT IVINS  
Attorney for Appellant