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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

FILED

JUL 29 1964

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.

rk, Supreme Court, Utah

Case No.
10148

BRIEF OF DEFENDANTS

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UNIVERSITY OF UTAH

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BRIEF OF DEFENDANTS

STATEMENT OF KIND OF CASE

The Plaintiffs have appealed from the Order of the Industrial Commission of Utah denying the Plaintiffs' application for benefits under the Workmen's Compensation Act of the State of Utah. The Order of the Commission found that the deceased doing business as Frank's American Oil Station was insured by a policy issued by the State Insurance Fund as a self-employed individual within the mean-

ing of the Workmen's Compensation Act of the State of Utah. The Order of the Commission did deny that the deceased was in the course of his employment at the time the fatal accident occurred.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission held that deceased was on his way to work at the time the fatal accident occurred and was not acting within the course of his employment as a self-insured owner and operator of his business.

RELIEF SOUGHT ON APPEAL

Defendants submit that the decision of the Industrial Commission should be affirmed.

STATEMENT OF FACTS

Frank Dee Bailey, the deceased, was the owner and operator of a service station named Frank's American Oil Station, which was situated on State Street in Lehi, Utah, State Street being U. S. Highway 91 (R-15). He resided at 660 North 3rd West, American Fork, Utah (R-23 and 45). Mr. Bailey always opened the station. He left his home ordinarily between 5:00 and 5:30 a.m. and went directly to the station (R-16). His usual hours at the station were from 6:00 a.m. to 6:00 p.m. Being the proprietor he apparently went back and forth as occasion demanded. (R-19).

A fatal accident occurred involving Frank Dee Bailey on September 23, 1963, some seven-tenths of a mile south of Frank's American Oil Station. The accident occurred at 5:45 a.m. on U. S. Highway 91, as the deceased was traveling from his home in American Fork towards his service station located in Lehi, at which time deceased, driving a 1959 Pontiac station wagon, hit the first concrete pillar on the overhead bridge on Interstate 15, which was then under construction (R-45-46). The record is clear that he was not on any special mission, but was, at the time, going to work.

ARGUMENT

POINT I

ONE TRAVELING TO AND FROM HIS PLACE OF EMPLOYMENT IS NOT COVERED UNDER THE WORKMEN'S COMPENSATION ACT IN THE ABSENCE OF A SPECIAL MISSION FOR HIS EMPLOYER.

The service station operated by the deceased, Frank Dee Bailey, was situated in the town of Lehi, Utah, whereas his residence was at 660 North 3rd West, American Fork, Utah. The evidence is clear that the deceased, at the time he met with his fatal accident, was on his way from his home in American Fork, Utah to his station in Lehi, Utah. The Plaintiffs, herein, at the time of the hearing, made no effort to show that the deceased was on some special mission on behalf of his business. It appears clear

that he was on a direct route from his home to his place of business at the time of the accident. The accident occurred on U. S. Highway 91, between American Fork and Lehi, Utah (R 45).

It has consistently been held by the Supreme Court of the State of Utah, that as a general rule employment does not begin until the employee has reached the premises where the work is to be done; that normally coming and going to work is not within the course of employment in the absence of a special mission.

This rule has been held by our Supreme Court to apply to an automobile salesman who was driving home in his own car after a day's work when he was injured in an accident. The Court held that the accident did not occur in the course of the salesman's employment. *Covey-Ballard Motor Company vs. Industrial Commission*, 64 Utah 1, 227 P. 1028.

In *Wilson vs. Industrial Commission*, 116 Utah 46, 207 P. 2d. 1116, it was held that the injuries sustained by an automobile shop foreman as a result of an automobile accident while enroute to his regular place of employment in Magna, did not arise out of or in the course of his employment merely because on the evening prior to the accident the employer had instructed the foreman to complete repairs on an automobile and take it to Salt Lake City, since the employer's instructions did not send the foreman upon a special errand, but merely outlined what would be expected of him in performing his duties the next day.

At page 207 P. 2d. 1118 the Court said:

Even though decedent was foreman at any one or all of Wilson's shops, unless the contract of employment contemplated the employer-employee relationship would commence when deceased left his home, it would be necessary for the status to be created by some special mission enroute to work before deceased would be within the protection of the Workmen's Compensation Act. In view of the fact that during all of the time decedent had been on Wilson's regular pay roll as foreman, his work had been at the Magna shop, unless the trip on the morning of the accident was different from that on previous mornings and in the nature of a special mission, deceased's employment commenced at the time he arrived at that shop and not at the time he left his home in Salt Lake City. It, therefore, follows that if the instructions Wilson gave the decedent on the evening preceding the day of the accident merely outlined the duties deceased was expected to perform after he arrived at the Magna shop, then the employer-employee relationship would not come into existence until the deceased's arrival at the latter place.

In *Vitagraph, Inc. vs. Industrial Commission*, 85 P. 2d. 601, 96 Utah 190, at 603 P. 2d., the Court said:

It seems definitely settled that if a workman is injured in the normal course of things, in going to or from his work or place of employment, that is the result of general hazards which all must meet and assume and is not in the course of his employment. *Denver & Rio Grande Western R. Co. vs. Industrial*

Commission, 72 U. 199, 269 P. 512, 62 ALR 1436; *Fidelity & Casualty Co. vs. Industrial Commission*, 79 U. 189, 8 P. 2d. 617; *Greer vs. Industrial Commission*, 74 U. 379, 279 P. 900. Such is what may be called the plant rule where the employee does not attach himself to his employment until he arrives at the plant or locus of his work, and he is not in the employment after he leaves the plant or situs of his work.

The nature of the hazard involved in the case now being considered in the deceased traveling to and from his place of employment is one which is common to all persons using the highway. Such risk is not one that is peculiar to the employment of the deceased.

Plaintiffs raise the point that the deceased had with him some articles used in his business. This Court has considered this problem in the past.

In *Fidelity & Casualty Co. vs. Industrial Commission*, 8 P. 2d. 617, 79 U. 189, the Court had before it a case in which, at the time of his death, Edwin J. Shufelt was employed by Walgreen Company and among the things that he was required to do was ride a bicycle to make deliveries of Kodak films. His duties required him to call each morning, except Sunday, at the Semloh Hotel and pick up film to take to the plant of his employer. On the morning of his death he left his home riding the bicycle. The accident occurred about 3 miles from the Semloh Hotel and about 1½ blocks from where he resided. He had with him a bag furnished by Walgreen Company for

the purpose of carrying the film. The Court said at 619 P. 2d.:

Under the facts in this case we are unable to perceive of any reason why the general rule, that an employee on his way to work is not within the protection of the Workmen's Compensation Act, does not apply. The mere fact that Edwin was required to remain at the Semloh Hotel only long enough to pick up films does not justify the conclusion that he was under the protection of the act when he was about three miles from the hotel on his way to work.

In considering the whole problem the Court had this to say at 618 P. 2d.:

The troublesome question presented by this record is: Did the injuries which caused the death of Edwin J. Shufelt arise out of or in the course of his employment? It is a general rule of law that an injury sustained by an employee while going to or returning from his place of work upon his own initiative in a conveyance of his own choosing and on his own time is not an injury arising out of or in the course of his employment and hence an injury thus sustained is not compensable under Workmen's Compensation Acts. This court is committed to such doctrine. *North Point Consol. Irr. Co. v. Industrial Commission*, 61 U. 421, 214 P. 22; *Greer v. Industrial Commission*, 74 U. 379, 279 P. 900; *Denver & Rio Grande W. R. Co. v. Industrial Commission*, 72 U. 199, 269 P. 512, 62 ALR 1436; *Covey-Ballard Motor Co. vs. Industrial Commission*, 64 U. 11, 227 P. 1028. There are some exceptions to the general rule. One of such

exception is where an injury results because of a danger or peril incident to the use of a particular method or means of approach to the place of work. *Cudahy Packing Co. v. Industrial Commission*, 60 U. 161, 207 P. 148, 28 ALR 1394; *Bountiful Brick Co. v. Industrial Commission*, 68 U. 600, 251 P. 555. It is clear that this case does not fall within that exception. Another exception to the general rule is where an employee while going to or from work on his own time or that of his employer is engaged, when injured, in some substantial mission for his employer growing out of his employment. *Kahn Bros Co. v. Industrial Commission*, 75 U. 145, 283 P. 1054.

In the case of *Greer v. State Industrial Commission of Utah*, 74 Utah 379, 279 P. 900, a carpenter foreman was injured shortly before 8:00 a.m. as he was on his way to work, when he was struck by an automobile as he was crossing over from the crosswalk to enter an automobile driven by a fellow workman. At the time of his injury he was carrying a saw which he had taken home the night before to sharpen as one of his duties required him to keep the saws sharpened. The Commission denied compensation, and in affirming the order the Court said at page 279 P. 901:

Under the facts in the instant case, it is clear that the deceased was not upon any special mission for his employer at the time of the accident. There was nothing that he was doing for his master at the time which exposed him to the perils of the street. He was merely going from his home to his place of employment. The fact that he was carrying the saw

was merely incidental. The employee did not come within any of the exceptions to the general rule.

The Court in the *Greer* case went on to say:

In this case the deceased was not injured while sharpening the saw at his home. The accident did not occur while he was actually engaged in the performance of a duty for the employer. *The dangers of the street between his home and the stockyards were not incident to his employment, but were dangers common to all.* (emphasis ours)

Under the facts in the instant case it is clear that the deceased was not upon any special mission for his employer or in connection with his employment at the time of the accident. There was nothing he was doing in connection with the operation of the service station at the time which exposed him to the perils of the street. He was merely going from his home to his place of employment. The accident did not occur while he was actually engaged in the performance of a duty related to the operation of the service station. The dangers of the street between his home and the service station were not incident to his employment, but were dangers common to all as the Court said in the *Greer* case and the fact that he was carrying the saw was incidental.

It was incidental in the case now before the Court that the deceased was wearing his service station attendant's uniform, that he had a brief case in the vehicle he was driving, that he carried the keys

to the station and that the automobile was, on occasion used in the service station business.

The author of Workmen's Compensation Law (Larson) has this to say at Page 251:

The mere fact that the claimant is, while going to work, also carrying with him some of the paraphernalia of his employment does not, in itself, connect the trip into part of the employment. For example, a teacher, after setting out on her way to school, remembered that she needed a kettle to be used in a school pageant. She went back, got the kettle and fell while she was on the steps of her home.

Citing *Industrial Commission vs. Harshdrader*, 52 Ohio APP. 76, 3 N.E. 2d 61, the Court held in that case that even though the claimant was carrying some equipment which might be used at her place of employment, this did not bring her within the Workmen's Compensation Act.

Counsel for the Plaintiffs (PB 3) states that in the past the Commission has seen fit to award compensation to those who were employees in the strict sense for injuries occurring off the actual plant premises of the employer.

The following cases which are cited therein we feel should be discussed briefly:

Bountiful Brick Company vs. Industrial Commission, 68 U. 600, 251 P. 555:

In this case the deceased employee was killed while crossing a railroad track when he was within

thirty feet of an opening in the employer's fence. This entrance to the employer's place of business was stated by the Court to amount to an invitation to the employees to use the entrance in order to enter the place where they worked. The Court in this case followed the holding in *Cudahy Packing Co. vs. Industrial Commission*, 60 U. 160, 207 P. 148, in which case an employee was struck and killed while necessarily crossing a railroad track on his way to work, and just before he reached his employer's premises. The Court held that the Bountiful Brick case was within the principle decided in the Cudahy Packing Co. case. The injury in both cases resulted because of a danger or peril incident to the approach or entrance to the place of work.

Kahn Bros. vs. Industrial Commission, 75 U. 145, 283 P. 1054 is also cited by Plaintiff's counsel. In this case the Applicant was struck by an automobile as he was walking northerly across Fifth South Street on the east side of Main Street. The Industrial Commission gave an award to the Applicant and the Supreme Court sustained the award and stated that they were of the opinion that the Applicant was on his way to the post office in the performance of a special mission for his employer at the time that he was injured. The Court stated the rule as follows at 283 P. 1054:

It is a general rule that injuries sustained while an employee is traveling to and from his place of employment are not compensable. An exception to this rule, however, is where an employee, either on his employer's or on

his own time, is upon some substantial mission for the employer growing out of his employment. In such cases the employee is within the provision of the Act. The mission for the employer must be the major factor in the journey or movement and not merely incidental thereto.

The Kahn case then clearly is a case where the employee was on some special mission for his employer. Such is not the case in the instant case now before this Court, as there is no indication in the evidence that there was any special mission being performed at the time of the accident.

New York Casualty Company vs. Wetherell, 193 F. 2d. 881, Fifth Circuit, is also cited by Plaintiffs.

In that case Wetherell was employed on continuous duty at the Schill Plant from Saturday noon until 7:30 a.m. Monday morning. In accordance with the terms of his contract he was allowed to go home each Sunday to eat a hot breakfast and to pick up his lunch. On September 11, 1949 he was struck by a railroad train and killed.

The claim was held to be compensable but that case is easily distinguished from the instant case. At 193 F. 2d. 881 at Page 882 the Court cited the Texas statute, which is broader than the Utah statute, as follows:

Injuries sustained in the course of employment *** shall include all other injuries of every kind and character having to do with

and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or the business of his employer whether upon the employer's premises or elsewhere.

The Court stated the general rule as follows:

It is the general rule, established by the great weight of authority, that where an injury occurs at a time not within a contractual exception, employees may not recover compensation for injuries received while going to and from the place where they are to perform labor for the employer.

The Court reasoned that:

***the danger Wetherell encountered was peculiar to the long period of uninterrupted duty and the necessity of going home to secure nourishment.

Such danger was incidental to his long period of employment, and the trip home was within his contract of hire.

In *Kobe vs. Industrial Accident Commission*, 35 Cal. 2d. 33, 215 P. 2d. 736, certain employees were employed to repair the roof of a county courthouse. The terms of their agreement provided that they would work nine hours a day and should receive ten hours pay. The extra hour being paid for travel time. While they were returning from work in an automobile driven by one of the men, the car was struck by a locomotive, all of the men being injured, one fatally. The Court in this case recognized the

general rule that the injuries sustained by an employee going to or coming from work are not compensable, but pointed out that an employer may agree, either expressly or impliedly, that the relationship of employer and employee shall continue during the period of coming and going from work.

The facts in the case now before this Court are entirely different from the facts in the *Wetherell* and the *Kobe* cases. The deceased was not acting under any kind of special contractual arrangement with an employer, but he was merely going from his home to his place of employment at the time the accident occurred.

Plaintiffs rely most heavily upon *Morgan vs. Industrial Commission*, 92 U. 129, 66 P. 2d. 144. We submit that this case is not helpful to the Plaintiffs inasmuch as the Plaintiff in the *Morgan* case was found by the Supreme Court to be on a special mission for his employer at the time the accident occurred. The Court said in the majority opinion at 66 P. 2d. 145:

After reaching the building he could not proceed further with his task because the office key had been left home. If he had not left the key at home he would have completed his work before returning home for lunch. His return home was for the purpose of getting the key, not the purpose of eating lunch or entertaining visitors. After reaching home, however, his errand on behalf of the purpose for which he left the school building was interrupted. The continuity of the trip was

broken by the eating of lunch, entertaining of visitors, and doing the other things mentioned. He resumed his errand, however, when he finally left home with all the keys in his possession intending to go to the schoolhouse and finish the work that night. Under the holding of this Court in the case of *Sullivan v. Industrial Commission*, 79 U. 317, 10 P. 2d. 924, Plaintiff would not have been in the master's business in doing any of the personal things at his home but would again attach himself to the master's mission or errand when he left home to travel toward the school. This, of course, on the assumption that the errand home was a substantial one for and in the interest of the employer. The fact that there was a break in the continuity of the errand does not change its purpose if, after Plaintiff stepped aside to do personal acts, he again resumed the errand. *There is an entire absence of anything in the evidence from which it could be inferred that Plaintiff made the trip from the school to his home or again from his home to the school, for any personal reason or purpose.* (emphasis ours)

And again at 66 P. 2d. 145 at Page 146:

We conclude therefore that Plaintiff was on an errand in the business of the master when he left the school building for the purpose of procuring his key which he had previously left home, and on his return from home to the school building. The fact that the journey was interrupted does not change the purpose of the errand. (emphasis ours)

Deceased in this case now before the Court was on his way to work and was not on a special

mission in the performance of the operation of the service station.

POINT II

THE PROVISIONS OF SECTION 35-1-43, U.C.A. AS AMENDED DO NOT BRING DECEASED WITHIN THE COURSE OF HIS EMPLOYMENT.

This section above mentioned provides in part 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.

It appears that Plaintiffs' counsel believes that this section, particularly the words *devoting full time* means something different than what is usually meant by such term and that by reason thereof the deceased was covered from the time he left his home. The ordinary understanding of the words *devoting full-time* means to include those who are working at a normal full-time occupation rather than one working on a part-time basis. Certainly it cannot be construed to mean that this statute was intended by the Legislature to mean that because an indi-

vidual employer elects to come under the Workmen's Compensation Act that he is covered all the time. Can it reasonably be argued that he is covered for a greater period of time or under circumstances other than for which his employees are covered? This would be stretching the words of the statute far beyond their natural and usual meaning. It would be an extension of the coverage contemplated by the Workmen's Compensation Act as it had been interpreted by this Court.

It is the Defendants' contention that the above mentioned statute as amended does not extend to an employer or sole proprietor or a partner any benefits over and beyond those benefits which have over the years been afforded to employees covered under the Workmen's Compensation Act of this state.

It is asked in Plaintiffs' Brief (P.B.5) :

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?

These propositions are not the same. Certainly a judge would not be covered if he met with an accident while on his way to where he regularly held court, but if he was injured while traveling to some other place to hold court he would be covered. The same is true of the Commissioner he would not be covered while journeying to the State Capitol Building where he regularly holds hearings, but he would

be covered while he traveled to some other part of the state to engage in the business of the Industrial Commission.

The concept presented by Plaintiffs' Brief would make the coverage afforded to an individual proprietor the same as that afforded under an accident policy. We have no quarrel with the proposition that an individual employer may come and go as he pleases and that he will be covered when he is at his place of employment, or on a special mission, but we do contend that he is not covered while he is traveling to and from his home, with no special mission intervening.

POINT III

THE COMMISSION WAS NOT ARBITRARY.

Plaintiffs, in their brief, state that the Commission disallowed the introduction in evidence of the briefcase together with the records contained therein, and that this action was arbitrary, and harmful to Plaintiffs. We cannot see how the Plaintiffs were in any way damaged or prejudiced in presenting their case inasmuch as the record (R-17) contains the testimony of the witness, Mrs. JoAnn L. Bailey, that the deceased had his briefcase in the automobile at the time of the accident, and that the briefcase contained certain records which pertained to the station (R-18). No useful purpose would have been served to have had the briefcase itself in evi-

dence. The Commission was fully informed as to the presence of the briefcase and papers.

Plaintiffs object also to the ruling of the referee that the witness could not testify as to the habits of the deceased on previous occasions (R-27). Defendants' counsel took the position that what was before the Commission was what occurred on the morning of the fatal accident. The evidence was clear that deceased was on the direct route from his home to his station at the time his motor vehicle collided with the concrete pillar on the overhead bridge on Interstate 15, then under construction (R 45, 46). There was no reason to speculate that deceased was doing other than driving from his home to his work.

We believe that the Plaintiffs were not in any way precluded from presenting their case.

The Industrial Commission's Order (R-56) finds as follows:

No evidence was presented by Applicants to prove that deceased was in the course of his employment as a self-insured owner and operator of his business. In fact, the evidence is undisputed and conclusive in our opinion that the deceased was going to work when he was fatally injured and not on a special mission.

The Industrial Commission has the duty to make findings of fact and conclusions of law and will not be disturbed unless the Commission arbitrarily and capriciously disregards the evidence.

In the case of *Park Utah Consolidated Mines Company vs. The Industrial Commission*, 84 Utah 481, 36 P. 2d. 979, the Court said in part at 36 P. 2d. 982:

***in the determining of facts the conclusions of the Commission are like a verdict of a jury, and will not be interfered with by this Court when supported by some substantial evidence.

In a recent case, *Burton vs. Industrial Commission*, 13, Utah 2d. 553, 374, P. 2d. 439, this Court said at 374 P. 2d. 439:

In order to reverse the finding and order made, the Plaintiff must show that there is such credible uncontradicted evidence in her favor that the Commission's refusal to so find was capricious and arbitrary.

We submit that in view of the evidence submitted, and under the provisions of Section 35-1-85 U.C.A., 1953 and the cases above cited that the Industrial Commission's Findings of Fact are conclusive and final and should not be interfered with by the Court.

CONCLUSION

We submit that the Industrial Commission properly conducted its proceedings in the matter,

and from the evidence reached the correct conclusion. The decision and Order of the Commission should be affirmed.

Respectfully submitted,

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