1965

Joann L. Bailey et al v. Utah State Industrial Commission et al : Defendant's Petition for Rehearing and Supporting Brief

Utah Supreme Court

Charles Welch, Jr.; Phil L. Hansen; Attorneys for Defendants;
Heber Grant Ivins; Attorney for Plaintiff;

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,

vs.

UTAH STATE INDUSTRIAL COMMISSION and UTAH STATE INSURANCE FUND,
Defendants

Case No. 10148

DEFENDANT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

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Utah State Industrial Commission and Utah State Insurance Fund, the Defendants in the above entitled matter, by and through their attorney of record herein, pursuant to Rule 76(e), Utah Rules of Civil Procedure, respectfully petition this Honorable Court for a rehearing in the above entitled cause upon the following grounds:

1. The decision negates the long established rule of this Court that one coming and going from

work is not covered by the Workmen's Compensation Act of the State of Utah.

2. The decision constitutes "judicial legislation" and, in effect, extends the coverage afforded self-employed persons far beyond the coverage afforded to the employed workmen.

3. The decision is erroneous in that it failed to sustain the finding of the Industrial Commission which was supported by competent testimony that the accident which resulted in the death of Frank Dee Bailey did not occur in the course of his employment.

WHEREFORE, Defendants request that a rehearing be granted, that the Court re-examine the facts and the law and that the decision of the Industrial Commission of the State of Utah be affirmed.

Dated this 10th day of March, A.D., 1965.

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CERTIFICATE OF COUNSEL

I hereby certify that I am the counsel for the Defendant, Utah State Insurance Fund, Petitioner herein, and that in my opinion there is good cause to believe the decision objected to is erroneous and

that the case ought to be re-examined as prayed in the Petition, and that this Petition is not filed for the purpose of delay or to otherwise hinder the prosecution of this action.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THE DECISION NEGATES THE LONG ESTABLISHED RULE OF THIS COURT THAT ONE COMING AND GOING FROM WORK IS NOT COVERED BY THE WORKMEN'S COMPENSATION ACT OF THE STATE OF UTAH.

The opinion of the Court rendered in this case said:

> "This Court has ruled on numerous occasions that accidents occurring to the employee while going to and from work, in the absence of a special mission, are not compensable because they did not occur or arise out of the course of employment."

In support of this statement the Court cited the following cases with which we agree, and which we feel clearly, are controlling in this case, and establish the rule that one going to or from work is not covered under the Workmen's Compensation

Act of the State of Utah: *Covey-Ballard Motor Co. v. Industrial Commission*, 64 U. I, 227 P. 1028; *Wilson v. Industrial Commission*, 116 U. 46, 207 P. 2d. 1116; *Fidelity & Casualty Co. v. Industrial Commission*, 79 U. 189, 8 P. 2d. 617.

The decision of this Court goes on to say that there are exceptions to the foregoing stated general rule and cites the case of *Vitagraph Company v. Industrial Commission*, 96 U. 190, 85 P. 2d. 601 in support of this proposition. However, we would like to point out that in the *Vitagraph* decision the Court stated the following:

> "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."

After citing cases the Court went on to say:

> "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."

We concede that the law of this state is that if an employee is injured while actually on a special mission for his employer, and which required him to deviate somewhat from the course of his travels while on his way to work that the

employee would be covered under the Workmen's Compensation Act of the State of Utah. We submit, however, that the burden of proof in this case rested with the Applicant to show that the deceased, after he left his home was actually engaged in or was on his way to engage in some work connected with the operation of the service station other than merely traveling to his place of work. The evidence presented to the Industrial Commission was clear that all Mr. Bailey was doing at the time the accident happened was traveling direct from his home to his place of employment.

On direct examination Mrs. Bailey, the widow, was asked by her counsel,

> "Q. Now can you tell the Commission what Mr. Bailey's general habits were in opening the station in the mornings?
>
> A. Well, he opened. He always did the opening of the station. He left the house between 5:00 and 5:30 usually, and went directly to the station.
>
> Q. Calling your attention to the 23rd of September, 1963, do you know, Mrs. Bailey, what Mr. Bailey was doing at the time he was proceeding towards Lehi and met his death?
>
> A. He was going to open the station.
>
> Q. Now was he in his uniform, that he wore in the station, at the time of his death?
>
> A. Yes.
>
> Q. What type of uniform is that?
>
> A. It's a standard American Oil uniform.

Q. And it is a blue type uniform?
A. The blue and white-stripe pants, with a white shirt, and their emblem on it.

Q. He was wearing that at the time of the accident?
A. Yes.

Q. Did he ever wear this uniform when he went out, when he was engaged in other activities?
A. No.

Q. Can you tell us approximately what time he left his home on the morning of the accident?
A. I can't say definitely, but it would have been between 5:30 and 6:00." (R15-R-16).

The above testimony is the entire testimony as to what Mr. Bailey was doing the morning of the accident. There was no room for speculation on the part of the Industrial Commission, nor would it have been proper for the Commission to have speculated or to have guessed that the deceased man was doing anything except traveling direct from his home to his place of business at the time the accident occurred.

In the case of *Wherritt v. Industrial Commission*, 110 P. 2d. 374, 100 Utah 68, the question was whether Dr. Barton H. Wherritt was in the course of his employement and was covered under the Workmen's Compensation Act when his car went over the embankment in City Creek Canyon

at about 12:00 midnight resulting in his death. The Court, in rendering its opinion, had the following to say at 376 P. regarding the burden of proof:

> "The burden of proof is upon Applicant to establish her claim for compensation. *Higley v. Industrial Commission*, 75 U. 861, 285 P. 306; *Bingham Mines Co. v. Allsop*, 59 U. 306, 203 P. 644.
>
> The fact finder is not always required to believe the uncontradicted evidence of a witness. *Gagos v. Industrial Commission*, 87 U. 101, 48 P. 2d. 440, nor is it bound to adopt the theory of applicant for which there may be supporting evidence or inference. *Sugar v. Industrial Commission*, 94 U. 56, 75 P. 2d. 311.
>
> The duties of this court are limited to a determination of questions of law. We may interfere with the commission's findings of fact * * * where an award is denied against uncontradicted evidence without any reasonable basis for disbelieving the same. In such cases a question of law is presented for determination; otherwise, the findings of the commission must be affirmed: *Russell v. Industrial Commission*, 86 U. 306, 43 P. 2d. 1069, 1072."

The Court went on to say:

> "Our duty is to examine the record and, unless we can say that as a matter of law the conclusion of the Commission on the question of "course of employment" was wrong because only the opposite conclusion could be drawn from these facts, to affirm."

In *General Mills, Inc. et al. v. Industrial Commission*, 120 P. 2d. 279, 101 U. 214 the Court in citing another case stated that "mere surmise, conjecture, guess, or speculation" is insufficient. And the Court further said, "Further, the burden is on the complainant to prove that the injury is compensable." 120 P. 2d. at page 280.

The testimony relating to the fact that the deceased was wearing an American Oil uniform at the time the accident occurred appears to us to be entirely immaterial. Most persons who are employed wear the clothes required by their employment during the time that they travel to and from work. An office worker wears a business suit while he is traveling to and from his work and while he is working. Other persons wear various types of clothing.

To further substantiate the fact that Mr. Bailey was doing nothing other than traveling to his place of employment is the fact that Mrs. Bailey indicated that he left home between 5:30 and 6:00 in the morning (R-16). The accident happened prior to a quarter to six as Fred Nakagawa, the operator of a garage who was called to the scene of the accident by the Highway Patrol Dispatcher, testified that he arrived at the scene of the accident at approximately fifteen minutes to six on the morning of the accident. Therefore, there appears to be no possibility for speculation that Mr. Bailey was doing anything other than traveling directly from his home to his

place of employment at the time the accident occurred.

POINT II.

THE DECISION CONSTITUTES "JUDICIAL LEGISLATION" AND, IN EFFECT, EXTENDS THE COVERAGE AFFORDED SELF-EMPLOYED PERSONS FAR BEYOND THE COVERAGE AFFORDED TO THE EMPLOYED WORKMAN.

We submit that the decision rendered by this Court should be again carefully reviewed because of what we believe will be a very great extension of the coverage afforded under the Workmen's Compensation Act to those who are self-employed over and beyond the coverage afforded those who are not self-employed. We feel that the decision rendered herein as to self-employed persons, to all practical effects abrogates and sets aside the general rule that one coming to and going from his place of employment in the absence of a special mission is not covered by the Workmen's Compensation Act.

The Court bases its decision upon the sole point that the station wagon involved in the accident was carried as a company asset and was used in connection with the service station business. In most businesses operated by a self-employed individual proprietor, an automobile is either wholly or partially charged to the operation of the business. This is true with lawyers, physicians, accountants, and persons operating service establishments of all kinds.

If the doctrine stated in the decision is carried to its logical conclusion, then an individual proprietor who is injured while driving an automobile which is either wholly or partially charged off as a business asset would be afforded coverage each day from the time he left his home until he arrived back home at night after completing the day's work. It often happens that doctors or lawyers are called out at night. To afford coverage because of the possibility that there might be a night call is an unwarranted extension of the coverage. Such a conclusion would afford the sole proprietor coverage far in excess of the coverage afforded to his employees under the decisions of this Court.

This extension of coverage was certainly not in the contemplation of the Legislature when the act was amended in 1963 to permit sole proprietors to take advantage of the Workmen's Compensation Act. The intent of the Legislature was to give to sole proprietors, if they wished to pay the premium, the same benefits afforded their employees.

The decision of the Court indicates that there was some weight placed on the fact that the deceased used the automobile for emergency calls at all hours. The decision also states that he carried some necessary tools and implements to service and repair customers' automobiles. The only tool mentioned was a starter cable which Mrs. Bailey testified she had seen her husband carry in the vehicle. This cable was not found at the scene of the accident although a search was made. (R-41, 42). The automobile was also used on occasion by customers when they left

their automobile to be serviced. Certainly the same conditions might be found to exist in connection with a doctor's automobile, and even, in some cases, a lawyer's automobile, both of whom, at times, are called out on emergencies and both of whom will at at times carry some of the necessary implements of their professions in their automobiles. But these facts alone should not insure a doctor or a lawyer under the Workmen's Compensation Act from the time he leaves his home unless he is then upon some special mission. And then under the previous decisions of this Court the coverage is limited. See *Fidelity & Casualty Co. v. Industrial Commission*, 8 P. 2d. 617, 79 U. 189.

The decision of the Court states that:

> "There are cases in authority to the effect that, when an employee is required by his employer to bring his own vehicle to the place of business for use, the employee is covered while going to and from work in the vehicle."

There should be a distinction made between those cases in which an employer requires an employee to bring a vehicle to work and the instant case. In the former case the employee could have taken some other means of transportation to come to or go from his place of employment. However, in the instant case the deceased, of his own choosing, drove the vehicle involved in the accident back and forth from his place of employment the same as a lawyer, doctor, adjuster or any other type of self-employed person would do.

An enlightening case which discusses a fact situation such as we have here in which the injured man was driving his own vehicle and carrying business items is *Philpott v. State Industrial Accident Commission*, 234 Ore. 37, 379 P. 2d. 1010 (1963). The court in that case quoted the following from *Larsen, Workmen's Compensation Law, Vol. I*, Sec. 18.24, page 251, as follows (1014 P. 2d.):

> "The mere fact that claimant is, while going to work, also carrying with him some of the paraphernalia of his employment does not, in itself, convert the trip into a part of the employment."

In the *Philpott* case the owner of a truck agreed to haul logs to a lumber mill at the rate of $6.00 per thousand board feet. The owner paid all expense incurred in the operation of the truck. He kept the truck at his home, and used it to drive to the job site. As he was about to leave for work one morning he discovered that he had forgotten his lunch. He was injured as he jumped from the truck.

It was argued that it benefited the employer for the plaintiff to drive his truck to and from work, as it saved time. It was argued also that as the truck was a necessary piece of equipment in the work of hauling logs, and that the plaintiff should be regarded as "rendering a service" to his employer by "carrying employment impedimenta to and from work." (279 2d. 1013).

The Orgeon court then quoted the statement from *Larsen's Compensation Law*, Section 18.24 as

above set forth; and held against the plaintiff. The Court said:

> "To allow the present claim would be to sanction an unjustifiable departure from controlling precedents."

Because of the very broad and serious extension of the coverage under the Workmen's Compensation Act to a very limited number of persons by the decision rendered in this case it is important and desirable that the Court again review the case and its decision in the light of its past decisions and the apparent legislative intent.

POINT III.

THE DECISION IS ERRONEOUS IN THAT IT FAILED TO SUSTAIN THE FINDING OF THE INDUSTRIAL COMMISSION WHICH WAS SUPPORTED BY COMPETENT TESTIMONY THAT THE ACCIDENT WHICH RESULTED IN THE DEATH OF FRANK DEE BAILEY DID NOT OCCUR IN THE COURSE OF HIS EMPLOYMENT.

It has been established by numerous decisions of this Court that it is the exclusive prerogative of the Industrial Commission to appraise the evidence and make findings of fact, which findings must not not be disturbed if there is reasonable evidence to support them.

This finding of the Commission in part reads:

> No evidence was presented by Applicant to prove that deceased was in the course of his employment as a self-insured owner and operator of the 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.

This finding was based upon the clear and conclusive evidence presented in this case and the decision of the Industrial Commission should be affirmed by this Court. See *Kent v. Industrial Commission*, 89 U. 331, 57 P. 2d. 724.

The only states which have optional coverage for partners and individual proprietorships are the states of Colorado, North Dakota, Oregon and Utah. As far as we have been able to learn there have been no decisions rendered in any of the states on the point involved in this case. We, therefore, believe that our state should not extend the coverage under the Workmen's Compensation Act beyond that which has been previously accepted and defined by this Court.

CONCLUSION

It is respectfully submitted that on the law and the facts, the decision of the Industrial Commission should be affirmed.

Respectfully submitted,
CHARLES WELCH, JR.
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Mailed a copy of the foregoing Defendant's Petition for Rehearing and Supporting Brief to Heber Grant Ivins, Attorney for Applicant, 75 North Center Street, American Fork, Utah, and to Phil L. Hansen, Attorney General, Attorney for Defendant, Utah State Industrial Commission, Attorney General's Office, State Capitol Building, Salt Lake City, Utah, this ..... day of March, A.D., 1965.

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Charles Welch, Jr.