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Gladys F. Lundberg, Widow and Richard F. Lundberg, Jerold Neal Lundberg, Pauleen Lundberg and David Wilson Lundberg, Minor Dependent Children Of Leo Lathum Lundberg, Deceased v. Industrial Commission of Utah, Cream O'Weber/Federated Dairy Farms, Inc., and Liberty Mutual Insurance Company : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

GLADYS F. LUNDBERG, Widow and RICHARD F. LUNDBERG, JEROLD NEAL LUNDBERG, PAULEEN LUNDBERG and DAVID WILSON LUNDBERG, minor dependent children of LEO LATHUM LUNDBERG, Deceased,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH, CREAM O'WEBER/FEDERATED DAIRY FARMS, INC., and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

Case No. 11663

BRIEF OF APPELLANTS

Appeal from Award of the Industrial Commission of the State of Utah Denying Compensation Death Benefits to Appellants.

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STATEMENT OF KIND OF CASE

This is a claim against the defendant Cream O'Weber Dairy/Federated Dairy Farms, Inc., and its insurer, Liberty Mutual Insurance Company, under the

Workmen's Compensation Laws of the State of Utah, for payment of death benefits to the appellants as a result of the death of Leo L. Lundberg.

DISPOSITION BELOW

A Hearing was held before Robert J. Shaughnessy, Hearing Examiner for the Industrial Commission of Utah, after which an Order was entered denying the claim of the applicants on the ground that the deceased Leo L. Lundberg "was not at the time in the course of, nor did the accident arise out of his employment." Appellants filed a Motion for Review which was granted. Subsequent to said review, the Examiner entered Findings of Fact and Conclusions of Law and Judgment that Leo L. Lundberg at the time of his death was not in the course of his employment nor did his death arise out of his employment inasmuch as his vehicle was not required (company cars being available), and did not serve a substantial function in the company's business. Appellants thereafter filed a Motion for Review by the entire Commission, which Motion was denied, and the present appeal was initiated.

RELIEF SOUGHT

Appellants seek to have the Court hold as a matter of law that the deceased Leo L. Lundberg was at the time of his death, acting within the scope and the course of his employment and/or that his death arose out of

his employment, and order the Industrial Commission to enter appropriate Orders entitling the appellants to death benefits provided by law.

STATEMENT OF FACTS

The facts are essentially uncontroverted. The deceased Leo L. Lundberg was killed August 31, 1965 in a car-train collision at Second West and 3900 South, Salt Lake City, Utah, at approximately 7:30 o'clock a.m.; at his death, he was the husband of the appellant Gladys F. Lundberg, and the father of four minor children, Richard F. Lundberg, age 17; Jerold Neal Lundberg, age 14; Pauleen Lundberg, age 11; and David Wilson Lundberg, age 5 (R-73). The deceased was employed as a wholesale sales manager for Cream O'Weber Dairy and had been employed with the dairy for approximately thirty years in various positions. As wholesale sales manager, he was paid $1,000.00 per month and had general responsibilities for the wholesale sales operation (R-111). His duties were many: Supervising the wholesale deliverymen and their supervisors, calling on the restaurants, cafes, stores, and other outlets promoting new sales and protecting existing sales by assisting in promotions, pricing and spacing, and by socially entertaining the owners and executives of his customers (R-34, 78, 111, 124).

In addition to his regular duties, he would often receive phone calls from customers at night and on weekends and it would be his responsibility to satisfy

the particular problem as soon as practical (R-119, 121). He also delivered dairy products in his car to customers on occasion, such as holidays and weekends when the regular deliverymen were not available (R-81).

To facilitate the successful execution of these duties, the company provided to the deceased a membership to Willow Creek Country Club and the Towne House Club, paying his monthly dues and paying that portion of the expenses incurred as a result of business entertainment (R-166, 152). The purpose of these clubs was to entertain customers and were used during business hours, at night, and on weekends, whenever socializing the customer could be accomplished. The extent of his socializing on company business is shown by the expense vouchers attached to the record, which average out at about $85.00 every two weeks.

The deceased was also an active participant in the Grocers' Association where he acted as Golf Tournament Chairman (R-22) and frequently played golf with his customers at Willow Creek Country Club. Having been blessed with a magnetic personality and gregarious nature, he was particular adept at cultivating the friendships and favor of his customers (R-184). He was so effective in his job that one customer referred to him as "Mr. Cottonwood Dairy" (R-132).

Essential to his duties was the use of an automobile, inasmuch as approximately 50% of his work was away from the company offices (R-47, 162) and often involved transporting to grand openings and other pro-

motion events, dairy employees, dairy products, promotion supplies and equipment, and transporting customers for business and social purposes (R-77). On occasions he would be transporting large items such as posters and other paraphernalia used in the promotions and grand openings (R-105). The company required him to use an automobile in his duties, either his own or one of the company automobiles (R-155, 187). It mattered not to the company what car was used, in fact the company never requested him to use the company vehicles (R-164), but merely advised him that they were available for his use. The company had a panel truck and two Volkswagens stationed at the plant for use by the deceased and other supervisory employees during business hours (R-156); however, these automobiles were unavailable on weekends or after hours, and inasmuch as they were subject to use by other supervisory employees (R-187), it may be inferred that on occasions they may not be available to deceased.

The deceased rarely used the company vehicles (R-28), preferring to use his own nine-passenger station-wagon, it being more spacious and apparently, in his opinion, better suited for his duties (R-183). The company policy regarding the employees' use of their own vehicles was set up to comply with the auditing requirements of the Internal Revenue Service (R-164), and thus eight cents per mile was paid for mileage incurred during business hours (R-47), but excluded mileage from home to the office or the first stop, and from the last stop or the office to home at night, and also excluded

mileage incurred after hours for business entertainment and other business purposes (R-148). The company provided an expense account to the deceased which honored entertainment expenses incurred at any time, night or day (R-152, 153). Thus, the mileage policy was more restrictive than the expense account in order to comply with the Internal Revenue Service (R-148, 164).

The deceased owned two vehicles, however, he kept his stationwagon available for company business at night and on weekends (R-79). He rarely let his family use it, explaining to them that he might need it for a customer (R-79).

On the day of his death, he had previously scheduled an 8 o'clock a.m., breakfast appointment with a customer (R-137); however, a meeting with his wholesale routemen concerning wages and route changes required him to reschedule the breakfast appointment for 10 o'clock a.m., that same day. The meeting with the routemen was to be at 8 o'clock a.m., at the company office at 2500 South Second West. He left his house earlier than usual that morning and was on a route not usually taken by him to the office (R-101). He normally would take a route along State Street to 2735 South and then turn west to the dairy (R-101). On the day of his death, he was driving his stationwagon and proceeding north on Second West and while crossing the railroad tracks at 3900 South, he was struck by a train and killed.

ARGUMENT

POINT I

THE COMMISSION ERRED AS A MATTER OF LAW IN CONCLUDING THAT DECEASED'S DEATH DID NOT ARISE OUT OF HIS EMPLOYMENT OR WITHIN THE COURSE OF HIS EMPLOYMENT.

The sole issue herein is whether or not the death of Leo L. Lundberg occurred in the course of, or arising from, his employment, which issue this Court has held to be a question of law and the conclusion of which, by the Industrial Commission, is not binding on this Court. *Goodyear Tire and Rubber Company v. Industrial Commission,* 100 Utah 8, 110 P.2d 334, (1941). This Court is well acquainted with the "Going and Coming Doctrine" which is an accepted doctrine excluding Workmen's Compensation Coverage to an employee traveling to and from his home to his place of employment. This doctrine, however, has been circumscribed with several exceptions, See *Vitagraph, Inc., v. Industrial Commission of Utah,* 96 U 190, 85 P.2d 601 (1931). This Court in two recent cases considered and rejected application of the "Going and Coming Doctrine" and instead applied the so-called "Instrumentality and Substantial Service" exception. In *Bailey v. Utah State Industrial Commission,* 16 Utah 2d 208, 398 P.2d 545 (1965), the deceased was the owner of a service station, but under Utah Law was treated as an employee of the business. He was killed while driving

his stationwagon to the business from his home. In discussing the role of the stationwagon, the Court said:

> "It is undisputed that the stationwagon involved was used by the deceased in his business, and somewhat necessary thereto. He used it for emergency calls at all hours, carried in it some necessary tools and implements to service or repair customer's automobiles and permitted customers to use it while their car was being serviced at his station. . . . " (Supra, page 546).

The Court concluded after discussing the case of *Davis v. Bjorenson,* 293 N.W. 829, Iowa (1940), that the stationwagon was an instrumentality of the business and that it was an element of the deceased's duties to take the vehicle to the station in the morning for its use in the business, and in so providing the vehicle, he was performing a substantial service required by the business.

Likewise, in the *Davis* case, an employee of the service station, as part of his duties, provided his vehicle for outside service calls and other work, and in addition, was required to use the vehicle for emergency calls after hours. He was injured while driving the vehicle to the station one morning. The award to applicant was affirmed.

This Court in discussing *Davis,* deemed as the important elements: The instrumentality of the car in the business at all hours of the day and night, that it was the employee's duty to have a vehicle in the execution of his duties, and in so providing his vehicle, he was perform-

ing a substantial service required by his employer. Using similar elements and reasoning, this Court concluded that Bailey was acting in the course of his employment, and the denial of an award by the Industrial Commission was reversed.

Subsequent to the *Bailey* case, this court decided the case of *G. B. Moser v. Industrial Commission of Utah, et al.,* 21 U.2d 51, 440 P.2d 51 (1968), wherein the claimant was injured while trying to start a truck-tractor which was a leased vehicle under the control of his employer. Employee was a truck driver and worked when a trip was available. He was allowed to drive the truck-tractor to his home and back. The Court, in concluding that the injuries sustained were in the course of his employment, again applied the Bailey test; i.e., was the vehicle committed to use as an instrumentality within the employer's business and did it serve a substantial fuction in that business. If so, efforts to make it available to the employer were within the scope of the employment. The Court specifically noted the fact that the employee derived benefit for himself; i.e., transportation to his employment, however, such dual purpose did not negate application of the exception.

The appellant submits that the *Bailey* and *Moser* cases properly confine their inquiry to whether the duties of the employee required the use of an automobile as an instrumentality to perform a substantial function in the business. There is no dispute that such is true in the present case. The problem arises from the Commis-

sion's misconstruction of *Bailey* and *Moser* and the "Instrumentality and Substantial Service Exception."

A cursory examination of the Findings of Fact show that the Commission erred in its final formulation of the test. On the second page of the Findings of Fact and Conclusions of Law (R-232), the Commission concludes from the *Bailey* case a necessity that the employer require the employee to bring *his* vehicle for use during business hours; and in regards to *Moser,* the Commission properly restated the requirement therein, that the vehicle be a tool or instrumentality in the employer's business, which in order to continue its function must have been driven to the employer's terminal. However, the Commission then summarily concludes such is not the case here. On the third page of the Findings of Fact and Conclusions of Law (R-233), the Commission formulates the exception requirement as being "the burden is on the employee to establish the requirement of the car being on the job to be used during working hours." From these inconsistent bases, the Commission concluded that the "Going and Coming Doctrine" applied.

Appellant submits that the Industrial Commission has completely misconstrued and misapplied the *Bailey* and *Moser* cases. The essential points in both cases are present in this case: The vehicle was committed to use as an instrument in carrying out the deceased's required duties by deceased's permissible election as to which vehicle he used; that the use of said vehicle was clearly a substantial function of employer's business; and that

Lundberg's driving said vehicle from home to work, admittedly a dual purpose, arose out of his employment, or was in the course of said employment. To apply the rationale of the Industrial Commission would lead to a logical absurdity; that is, where an employee is required to use a vehicle in executing his duties, however, because he is a trusted and valuable employee it is left to his discretion and judgment as to what vehicle he uses, and there being no requirement as to any specific vehicle being used, he would not be within his employment in driving it from home to work. Thus, under the Commission's rationale, even had Lundberg been driving a company vehicle from his home to his office the morning he was killed, he would not have been within his employment, because that vehicle was not specifically required.

Surely, Lundberg is not to be treated differently from Moser and Bailey merely because his employer, as an expression of confidence gave him discretion as to what vehicle he used in his required duties. It is clear from the facts that Lundberg made an election as to which vehicle he felt was best suited for the carrying out of his numerous duties and had, in fact, committed his vehicle as an instrumentality performing a substantial function in his employer's business.

Cases from other jurisdictions clearly sustain the position above elucidated. A case directly in point is that of *King v. State Industrial Accident Commission,* 315 P.2d 148, Ore., (1957). There, the deceased employee,

King, was employed in the construction of a floating log boom, on a large body of water. His employer, who had no contractual obligation to provide transportation to the place of employment, had, nevertheless, made available a company-owned boat for use of the employees in transporting themselves to the place of employment and then for use in their duties of constructing the log boom. On the day that King was killed, he had elected to take his own boat, which he had done on other occasions, and to use the same in performing his duties on the boom construction site. His employer did not pay him for expenses incurred in driving his boat to the place of employment. The lower court affirmed the State Industrial Accident Commission's denial of compensation to King's widow, holding that the accident did not arise out of, or in the course, of his employment. The appellate court reversed that conclusion and held, as a matter of law, that under the facts, King was acting within the course of his employment. In doing so, the Court relied upon the following elements:

1. A boat was essential to King's duties at the construction site.

2. That King had used his own boat on the day of the accident because he felt it was better suited for the job to be done that day.

3. That the boat served a dual purpose, that is, in providing transportation of King to the work site, and as an instrumentality in the performance of his duties thereat.

The Court then made a scholarly study of cases and other works relating to exception to the "Going and Coming Doctrine" and concluded:

> "We conclude that the act of King in bringing the boat across the bay served the interests of the employers and was of direct benefit to them. . . . " (Supra, page 155).

The Court treated the boat as a vehicle and as an essential tool or instrument of King's employment, and the fact that the employer had a boat available was of no consequence. In fact, it appears there, as in the present case, that the employee, in using his own vehicle, was exercising discretion permitted by the employer to make possible completion of his duties in a more satisfactory and efficient manner.

The Oregon Court also referred to the *Davis v. Bjorenson* case, and as in the *Bailey* case, directed its attention to the fact that the vehicle constituted an instrumentality performing a substantial service for the employer. The Oregon Court also discussed a Texas case directly in point: *Jones v. Texas Indemnity Insurance Company,* Tex. Civ. App., 223 S.W.2d 286 (1961). Here, the employee was a serviceman for a household equipment company. His duties required the use of an automobile during business hours and also for emergency calls after hours. He was paid five cents per mile for mileage incurred on the company business. The employee was injured driving from his home to the store one morning. The Court held that the use of the auto-

mobile served a substantial function in his employer's business, and thus his transferring the automobile to the place of business was an activity within the course of his employment.

Other cases to this same effect are: *Smith v. Workmen's Compensation Appeals Board,* 447 P.2d 365, 73 Cal. Rpt. 253 (1968). There, the deceased was a social worker killed driving his vehicle to work one morning. The application for death benefits was denied. The Court reversed that denial. The Court first discussed the "Going and Coming Rule" and the various exceptions to it; however, it limited its holding to the single exception of an employee bringing his car to his place of employment where the vehicle's function is required in the employee's employment. The county had cars available for the use of the social workers, however, the deceased had never availed himself of their use, although he had discretion in that regard. The California Court then discussed the prior California case, *Postal Telephone Cable Company v. Industrial Accident Commission,* 37 P.2d 441, 1 Cal. 2d 730 (1934), wherein the Court had given wide rein to the "Going and Coming Rule." The Court concluded that the necessity of the "Going and Coming Rule" had changed with modern times. The Court made the following statement in rejecting *Postal Telegraph*:

> "Postal Telegraph must be overruled because it does not recognize an important limitation upon the going and coming rule. That limitation arises from the principle that an employee is per-

forming service growing out of and incidental to his employment when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer. Suspension of the employment relation and consequent noncoverage of the employee is incompatible with performance of service required by the employer. Hence, the employer's requirement that the worker furnish a vehicle of transportation on the job curtails the application of the going and coming rule." (Supra, page 368-369).

The Court then went on to explain that the requirement for an automobile did not have to be express or even implied in the employment contract, but was required in this context if an automobile was required in the performance of the employee's duties, and thus driving a vehicle to work to perform those duties was inferred.

The California Court also directed itself to the old Utah cases of *Denver-Rio Grande Western Railway Company v. Industrial Commission,* 72 Utah 199, 269 P 512 (1928), and *Fidelity and Casualty Company v. Industrial Commission of Utah,* 79 U 189, 8 P.2d 617 (1932), which cases had been previously cited in the *Postal Telegraph* case. The Court distinguished the *Denver* case on its facts, and in regard to *Fidelity Casualty* noted that it had been rejected and overturned by this Court's *Bailey* decision.

The Court then concludes:

"We conclude that the decisional basis of Postal Telegraph has been eroded, that the case

does not represent the trend of authority, and that it must be overruled. Surely, in this day of a highly motorized society, we cannot case the going and coming rule as a protective cloak over the shoulders of the employer, who, for his own advantage, demands that the employee furnish the car on the job. Smith's obligation reached out beyond the employer's premises, in driving his car to and from there, he did no more than fulfill the conditions and requirements of his employment." (Supra, page 373).

"Since Postal Telegraph, however, the trend has been decidedly in favor of recovery, and Professor Larson regards this treatment as the better rule. 1 The Law of Workmen's Compensation, Section 1750. . . ." (Supra, page 372).

The Court also noted that since *Postal Telegraph*, ten cases have arisen in other jurisdictions wherein injuries or death were incurred while driving a vehicle required in the employee's duties, to or from work. Seven of those ten jurisdictions allowed recovery under the Workmen's Compensation Laws: *State Department of Highways v. John,* 422 P.2d 855, Alaska, (1967); *Bailey v. Utah State Industrial Commission,* 16 U.2d 208, 298 P.2d 545 (1965) *Willis v. Cloud,* 151 S.2d 369 (La.App.); *Pittsburgh Testing Laboratory v. Kiel,* 167 N.E.2d 604, Ind.; *King v. State Industrial Accident Commission,* 315 P.2d 148, Ore.; *Borak v. H. E. Westerman Lumber Company,* 58 N.W.2d 567, Minn.; *Davis v. Bjorenson,* 293 N.W. 829, Iowa (1940).

Borak v. H. E. Westerman Lumber Company, supra, is another case directly in point with the present

appeal. There Borak was a manager of a lumber yard. It was his duty to supervise the men at the yard and on various jobs outside the yard, and in addition, made small deliveries of merchandise and other errands for his employer. The use of an automobile was expected in connection with his duties as manager and he was paid seven cents per mile while using his automobile on company business, except when driving to and from work. It was also established in that case that Borak used his car in performing these duties except on occasion when he would use a company car or truck. The Court concluded that Borak's car was "customarily used" in the business, which finding the Court held was determinative. The facts there showed that Borak had customarily taken his car to work for the use in his duties as manager. That on the morning of his death, in attempting to start the car in his garage, he was asphyxiated. The employer attempted to distinguish this case from a prior case in Minnesota where the car was being prepared for an immediate outside errand. The Court said in response:

> " . . . However, that difference in itself is not sufficient to warrant denying compensation where there is a reasonable inference that decedent was trying to start his car in order to take it to his place of business to be ready for use, if necessary. Neither can compensation be denied under the facts and circumstances here because on the particular day of decendent's death, his work probably would have been confined to work in the office on invoices, etc. Inasmuch as it had been his custom for years to have the car at the lumber

yard for company use when required." (Supra, page 571).

Although there are numerous other cases, included in which are some Utah cases, which talk generally on the use of vehicles, it appears that the *Bailey* and *Moser* cases represent the present position of the Utah Law in regards to the facts of this case. A careful reading of the *Bailey* and *Moser* cases, and comparable cases in other jurisdictions, clearly shows that the Industrial Commission erred in failing to conclude that Lundberg's death arose out his employment or occurred within the course of his employment, for it is without serious dispute that his car was essential to the performance of his numerous duties as wholesale sales manager; that although a company vehicle may have been available on given days, he obviously concluded that his was more available and better suited to performing his duties, which election was permitted by his employer; and that by driving his vehicle to work the day he was killed, he was carrying out a substantial function of his employment, and was of direct benefit to his employer.

CONCLUSION

The Commission, in denying appellants claim, acted arbitrarily and contrary to law. To find under the present facts, as the Commission did, that the deceased's vehicle was not an instrumentality in, and necessary to the company's business, is clearly unsupportable in fact or

law. Equally unsupportable in law is the Commission's demand that the vehicle in which Lundberg was killed be *the* required vehicle. Deceased's duties required an automobile. Clearly, he elected to use his own vehicle in order to maximize his efficiency and ability in his many-faceted duties. To now penalize his dependents for serving his employer so well is contrary to the law and the spirit of Utah Workmen's Compensation.

Respectfully submitted,

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