1969

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 Respondents

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 RESPONDENTS

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

MOFFAT, IVERSON AND TAYLOR
1311 Walker Bank Building
Salt Lake City, Utah
Attorneys for Respondents

DRAPER, SANDACK AND SAPERSTEIN
606 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for Appellants

VERNON G. ROMNEY
Attorney General of the State of Utah
Attorney for Industrial Commission of Utah
State Capitol Building
Salt Lake City, Utah 84114

TABLE OF CONTENTS

AUTHORITIES CITED

STATUTES

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 RESPONDENTS

STATEMENT OF KIND OF CASE

The Appellant's made claim under the Workmen's Compensation Laws of the State of Utah against Federated Dairy Farms, Inc., and Liberty Mutual Insurance Company, its insurance carrier, for recovery of

death benefits allowed by said laws, based upon the death of Leo L. Lundberg.

DISPOSITION BELOW

After the initial hearing below, before Robert J. Shaughnessy, Hearing Examiner for the Utah Industrial Commission, an Order was entered finding that the decedent was not in the course of, nor did the accident arise out of his employment. A Motion for Review was filed by Appellants which was granted and pursuant thereto an additional hearing was held. Thereafter, the same Hearing Examiner prepared and entered Findings of Fact and Conclusions of Law and a Judgment to the effect that the Appellants were not entitled to death benefits as Leo L. Lundberg, the decedent, was not in the course of his employment at the time of his death nor did his death arise out of his employment. A motion for review by the Commission as a whole was filed by Appellants, which motion, after consideration by the Industrial Commission, was denied and the Appellants then brought this Appeal.

RELIEF SOUGHT

Respondents seek to have the Court affirm the decision of the Industrial Commission.

STATEMENT OF FACTS

The Respondents agree in general with the Statement of Facts set forth by the Appellants and do not

contend that any statements contained therein are inaccurate. However, the Statement of Facts by the Appellants tends to overstate the requirements of the employer in regard to entertainment and other extraneous activities that the decedent engaged in and for that reason, with the understanding that the statement contained herein is to amplify the statement of the Appellants, a short statement of additional facts will be added.

First, it should be noted that the Appellant was Wholesale Sales Manager for the employer only in Salt Lake County and his duties did not involve any activities in any other area (R110, 167-168, 120-121). The statement of the Appellants regarding the fact that his duties included the entertaining of owner and executives of his customers is somewhat in conflict with the facts as stated by his supervisors in the company. They stated that on numerous occasions, the Appellant had been warned that he was doing too much entertaining and that the company did not require many of the things he was doing. In fact, he was told that, among other things, he was spending too much time on the golf course (R17, 21-22, 154-155, 176-178). In fact, the decedent had been criticized for not spending enough time doing company work and for spending time on the golf courses (R186).

Insofar as the Appellant's statement that the decedent received some phone calls from customers at night and on weekends and his responsibility in relation thereto, it should be noted that normally, because he was the Wholesale Sales Manager for Salt Lake County, those calls were referred to subordinates of the decedent

known as Supervisors or were deferred for handling until the next day (R31-50, 122, 158) and in fact, one of the Supervisors testified that he did not know of an instance when the decedent went out of his home to personally take care of a complaint he received after hours (R49-50). The decedent was paid .08c per mile for the use of his vehicle when he was on company affairs, excluding mileage from his home to the office or to his first call in the morning, or from the office or his last call in the evening back to his home. In spite of the fact he was entitled to mileage, the mileage records practically uniformly reveal an exclusion of mileage that was being charged to the Company by the decedent of approximately 13 miles each evening and, in fact, the undisputable testimony of one of the witnesses who examined the mileage records that are a part of the record on file herein, is that he found no indication at all of any mileage being charged during any evening. (R 152)

In relation to the memberships at the Willowcreek Country Club and the Towne House Club, it should be noted that the employer only paid a portion of the monthly expenses incurred at those establishments with the decedent paying the balance (R 153). In addition, the decedent had a membership in a club known as the Yacht Club for which no payment was made by the company, either on the initial membership or the expenses incurred for entertainment at that club (R 153). However, he did entertain at such club and had a membership there (R 78, 125-126, 132-133).

There is no dispute that the use of an automobile was essential to the duties required of Mr. Lundberg

However, as noted by the Statement of Facts by the Appellants, approximately 50 per cent of his work was at the company offices (R 47, 162). It should be further noted that there were always at least three vehicles available to the decedent for his use at the company office (R 156) and that the company felt that the vehicles available for his use at the office were perfectly satisfactory and that, in fact, other employees used those vehicles and did an effective job (R 187).

There was no requirement as to the size, age or condition of the automobile that Mr. Lundberg used (R159), in fact, one of his supervisors, on many occasions, discussed with him his using the company's cars (R181-182). The deceased on many occasions asked the company to furnish him an automobile for his own use twenty-four hours a day and was refused (R179).

The Appellants contend that on the date of the decedent's death, he had left his home at a time earlier than usual to in order to arrive at the company office for an 8 a.m. meeting. However, the undisputed testimony is that it was not unusual to have an 8 o'clock meeting at the company offices and that 8 o'clock was the normal beginning time for the work day (R174). Eight o'clock meetings at the office with Mr. Lundberg were held continually (R191). Insofar as the Appellant's assumption that the decedent was taking a route to work that morning other than his normal route, is based upon testimony of his son who rode to work with the decedent while he was employed by the employer for about a month and a half in the summer of 1965 and is solely an assumption (R171-172).

ARGUMENT

POINT I

THE REVIEWING COURT MUST AFFIRM THE COMMISSION'S DECISION UNLESS THERE IS CREDIBLE EVIDENCE WITHOUT SUBSTANTIAL CONTRADICTION WHICH POINTS SO CLEARLY AND PERSUASIVELY IN CLAIMANT'S FAVOR THAT FAILURE TO MAKE AWARD WOULD JUSTIFY CONCLUSION THAT THE COMMISSION ACTED ERRONEOUSLY, ARBITRARILY OR UNREASONABLY IN DISREGARDING OR REFUSING TO BELIEVE THE EVIDENCE.

Section 35-1-85, UCA (1953) reads in part as follows:

> "After each formal hearing it shall be the duty of the Commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission. . . "

There has been a multitude of cases that have followed from and interpreted the above quoted statute. This point No. I is found in and was taken from *Vause vs. Industrial Commission of Utah,* 17 Utah 2nd, 217, 407 Pac. 2nd 1006 (1965). This case, as with the whole line of cases preceding it and those which followed it

affirm the position that the reviewing court must affirm the Commission's decision unless the evidence, without substantial contradiction, clearly points to the conclusion that the Commission in failing to give an award to the applicant acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe that evidence. The cases found in the footnotes to Section 35-1-85 above cited clearly point out the same rule. No further citations need be given as this point of law is so well established.

It should also be noted in the *Vause* case (supra) that the reviewing court must look at the record and the evidence before it in the light most favorable to the Industrial Commission's finding. It was there said at page 1007 as follows:

"Our statutory and decisional law require us to look at the evidence in the light most favorable to the Commission's finding and it is the obligation of the parties involved to so present the matter to the court."

Thus, if evidence is present in the instant case to support the findings of the Commission, even though contradicted or in conflict, the court must find in favor of the defendants and against the plaintiff and affirm the decision of the Industrial Commission.

POINT II

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING OF FACT AND ITS CONCLUSION OF

LAW THAT THE DEATH OF DECEDENT DID NOT ARISE OUT OF HIS EMPLOYMENT OR WITHIN THE COURSE OF HIS EMPLOYMENT.

It would appear that the sole issue in this case is whether or not the decedent, Leo L. Lundberg, died as the result of an accident that occurred in the course of or arising out of his employment. The Commission both in the original order and in the order after the matter was reopened found as follows:

> "The Hearing Examiner finds that the use of the car was essential to the day to day business of the deceased. However, no finding can be made that it was *required*. The evidence shows that there were, in fact, company cars available for day to day use of the deceased, if he so desired." (R.206).
>
> "However, it must also be noted that the employed had available at all times a company owned vehicle that could be used by the deceased at no cost to him. Granted, the vehicles were to remain on the premises after closing hours, but there is nothing to indicate that these would not be available during the day . . .
>
> The record is clear also that the fatal injury occurred in the morning while the applicant was 'on the way to work'. It did not happen after hours, during the entertainment of customers, or on an emergency call or any other time in which the car would be used for the exceptional use rather than the use of going to work. . .
>
> The Hearing Examiner agrees that the real issue becomes one of 'was the employee perform-

ing a substantial function or special missions for the employer?' The Hearing Examiner believes he was not at the time of the accident. The only mission apparent was the physical transportation of himself to the place of business." (R232).

"Giving the most liberal possible interpretation to the facts, the Hearing Examiner must conclude that the 'going to and coming from' work exception in the compensation law was in effect at the time of the fatal accident to the decedent." (R233).

The evidence upon which the above quoted findings was made is very clear. His direct supervisor, Winston J. Fillmore, testifies upon his deposition as follows:

On direct examination by appellant's attorney:

Q. "Was there other transportation available he could have used?"

A. "We have trucks that are there he could have used. That means more of a sedan delivery type. We did have some available Volkswagons that were there for salesmen that he could have used."

Q. "Was he ever requested to use these vehicles rather than his own private automobile?"

A. "I don't think I ever requested him to use them".

Q. "Would you have expected him to have used these automobiles rather than his own private automobile?"

A. "I think that was up to him to make that decision".

Q. "Say, for example, he was going out for a grand opening or a special event in which it was quite a well known fact that he was going to use this particular automobile in transporting a customer or client. Would you have wanted him to make this appearance in a Volkswagon?"

A. "That would have been perfectly all right with us. We have other people doing similar work using similar automobiles. It would have made no difference to us what he would have used." (R19-20).

Vear L. Jensen, another supervisor of the decedent stated in response to questions by the defendant's attorney at the original hearing in this matter as follows:

Q. "Now, was there an extra vehicle available at the office at the time of Mr. Lundberg's death? That is, I'm talking about the month preceding or for some period of time preceding that? Was there an extra vehicle available there for him for his use?"

A. "We had two Volkswagons and there was also a panel truck that were used by supervisory people."

Q. "Was it available for his use?"

A. "Yes." (R156)

The above quoted testimony in both instances is absolutely uncontradicted and points out clearly the fact that the decedent was not required by the employer to furnish his own automobile for use in the course of his employment but that other vehicles were available to him to be used at any time he wished to avail himself

of them. There had been a conversation on several occasions between the decedent and his supervisor, Winston J. Filmore, regarding his use of a company car. Mr. Filmore testified that he had talked with the decedent many times about his using the company car during the day and leaving it at the company office at night. Mr. Filmore further testified that was the reason the automobiles had been purchased and were at the company office and that they were available for decedent's use (R 181-182).

Thus it can clearly be seen that there was no requirement that the decedent bring his car to work for his use during the course of a day, and there is no evidence of any requirement or contractual arrangement between the employer and the decedent to have the car available during the course of any given day. The mileage records prepared by the decedent which were used for the purpose of paying him his mileage and other out-of-pocket expense, are a part of the record herein and show a uniform exclusion of between 13 and 15 miles from the close of one day to the morning of the next day. (R 150-151). At the original hearing of this matter, Mr. Vear L. Jensen produced these records and testified that he found no evidence of any mileage being charged at night from an examination of those records (R 152). Thus, by inference, it can be concluded that the decedent, himself, did not think that he had any obligation to bring his automobile to the employer's place of business each and every day of his employment. Had he felt such an obligation, he would have charged mileage for the bringing of the automobile. The Appellant's have stressed the need of the de-

cedent to have an automobile during the course of his work day. It is admitted that an automobile was required to perform the work that the decedent was engaged in. However, it should be noted that decedent spent approximately 50 percent of his working time in the company office and was out of the office approximately the other 50 percent of the time (R 47, 162). It is also a fair conclusion to be drawn from the evidence that some of the time when he was out of the office, he was not strictly engaged in company business and definitely not engaged in business of which the company approved. His supervisor, Mr. Filmore, testified on cross-examination by plaintiff's attorney, as follows:

> Q. "Leo was never criticized for not spending enough time doing company work, was he?
>
> A. "Yes, he was criticized many times for not spending more time there. He was criticized for spending time on the golf course." (R 186)

Thus, it can fairly be said from the evidence in the record that not all of the time that the decedent was away from the company office was he engaged in the company's business and on business of which the company approved. This would tend to reduce even more the percentage of use of the vehicle in the course of his employment.

The Appelant's have cited numerous cases in their brief by which they hope to persuade the Court that the Commission erred as a matter of law in finding that the death of the decedent did not arise out of or in the course of his employment. However, the Appellant's have in-

need strained the interpretation of the cases they have cited and if the cases were fairly quoted in Appellant's brief, they, in fact, would support the position of the Commission. There are two Utah cases that are most recent: *G. B. Moser vs. Industrial Commission of Utah, et al,* 21 Utah 2nd 51, 440 Pac. 2nd 23 (1968), and *Bailey vs. Utah State Industrial Commission,* 16 Utah 2nd 208, 398 Pac. 2nd 545 (1965). Both are distinguishable from the facts that we presently have under consideration. In the Bailey case the decedent was a service station operator and was self-employed. Thus, he was both employer and employee under the Workmen's Compensation Act. His death occurred one morning while driving an automobile registered in his name to the service station that he operated. The court held that in this instance, Bailey as the employee, was performing a substantial service for Bailey as the employer in bringing the car to work and thus, fit into an exception to the going an coming rule. However, the court based its decision upon the facts of that case which revealed that the station wagon was used for emergency calls at all hours and carried in it necessary tools and implements to service or repair customer's automobiles. The decedent, in that case, also permitted customers to use the car while their cars were being serviced at the decedent's service station. The decedent in the Bailey case also carried the station wagon upon the books as a business asset and the oil and gas which it used was charged as a business expense.

Thus, in effect, the car in question in the Bailey case was a company car and the cases are quite clear that when an employee is driving a company car to work for

use by the company, the employee is covered under Workmen's Compensation. In the Bailey case the automobile was used primarily for the benefit of the business. Others were allowed to drive it and it was considered as business property by Bailey.

In the instant case before the court, Lundberg was the exclusive user of his automobile and the car was in no way company property. As is noted previously in this brief, the automobile was not driven to the company office for use by the company, but only as a means of transportation by the decedent to the company office because from that point on during the course of the day, other vehicles were available for the decedent's use. Thus, there was no requirement that the Lundberg automobile be brought to the company place of business for the company's use.

In the most recent Utah case, *G. B. Moser vs. Industrial Commission of Utah, et al,* (Supra), it is clearly shown that more is needed to come within an exception to the going and coming from rule than merely driving one's car to work for the convenience of oneself. In the Moser case the plaintiff was injured while trying to start a truck and drive it to his employer's place of business. As stated by the decision in that case:

> "Under their arrangement, the plaintiff owned the truck but leased it to the company by an agreement which gives the latter the full right of possession, use and control of it."

Under these circumstances, the court granted relief emphasizing the effect of the lease agreement and saying as follows:

"Inasmuch as under the lease the truck was committed to be used in defendant's business with the full right of possession and control, the effect as related to the issue here is the same as if the truck belonged to the company, and it makes no difference who the owner was. Though it was parked in a lot near the plaintiff's home, in order to continue its function in the defendant's business it was necessary that someone take it down to the defendant's terminal."

This obviously is not the situation in the case at bar there being no contractual obligation of the decedent to bring his automobile to the place of employment for the use of the employer in the employer's business. In the Moser case, it appeared that the court felt it was perhaps reaching the outer limits of recovery and felt that further facts other than the lease agreement may be needed to justify granting recovery therein and the court said as follows:

"Coupled with the above are the further significant facts that the problem of the truck stalling had been reported to the manager; and that he had given directions to the plaintiff who was in the process of carrying this out when he was injured."

The Appellant's cite the ***Davis vs. Bjorenson,*** 293 N.W. 829, Iowa, (1940). However, this case can be differentiated from the present facts on the same basis that the Bailey case can be differentiated; to wit, the employee was *required* to bring the automobile to work in the morning by his employer for the use by the company. In the Davis case the automobile for all intents

and purposes was treated as a company car and was used as such. The following quotation makes it very clear that the situation in Davis is very different from the facts presently at bar:

> "Under the employment agreement, the claimant regularly furnished his automobile to the employer for the use in the business as a service car. At night the car was kept at the claimant's home where he was subject to emergency service calls requiring its use. During regular working hours the car was kept at the employer's place of business for use in the business, *not only by the claimant, but also by the employer and by other employees.* Thus the car was an instrumentality of the business at all hours of the day and was subject to that use at night. . . . It was his duty and this duty was regular and definite, to take the automobile to the employer's shop for its use in the business, by others as well as claimant. In so doing, he was performing for his employer a substantial service required by his employment at the place and in the manner so required. In the language of the able trial court, 'claimant had no selection of his mode of travel to work, that he was required under the terms of his contract to drive his own car from his home to the shop where it was available to his employer for use in the employer's business.' " (Emphasis added)

The Appellants cite ***King vs. State Industrial Accident Commission,*** 211 Or. 40, 315 Pac. 2nd, 148, Oregon (1957), as being directly in point. However, in that case, the employee was killed while riding in his own boat across a bay in order to aid in the construction of a log

boom. The decedent and other employees would drive, or by other means, arrive at the dock on the edge of the bay. From there they had to cross a two mile bay to reach the site of construction. The employer furnished a boat for the use of the employees but on this particular occasion, the decedent used his own boat and took along with him three other men who were employees of the employer. The Appellants, in their brief, at page 12 state as follows:

> "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 their use in the duties of constructing the log boom."

The opinion in this case states at page 154, Supra, as follows which is clearly contrary to the statement that the Appellants have inserted their brief:

> "We believe that the record warrants a belief, as we have stated before, that the employers were under an implied obligation to furnish a means whereby the men could cross the bay. *In short, they rendered the tugboat available to the men as an incident of the contract of employment.* (Emphasis added)

Thus, it can clearly be seen that the employer had provided transportation from the edge of the bay which would be the point at which the employees arrived at their place of employment to the log boom that they were working on. In this particular case, the decedent,

in effect, had arrived at work and was using his own boat directly in the employer's business. In the case at bar the accident occurred, and the Commission so found, prior to the time that the Appellant had arrived at his place of employment. Appellants also cite *Jones vs. Texas Indemnity Insurance Company,* Texas Civil Appeal, 223 South West 2nd, 286, (1961). Which case can be readily distinguished. In that case Jones was required to use his own car on the job and drive it from place to place servicing household equipment. He was reimbursed for these trips, including his trips to work. He also transported all of the company tools which he used in performance service for the employer in the car and was doing so at the time of the accident. In that case the court stated as follows:

> "In the case we have here, the employee, Jones was at the time of his injury, engaged in the performance of the duty of his employment. He was doing what his contract of employment either expressly authorized him to do or required him to do. *He was driving the automobile from a place he had taken same in the authorized prosecution of his employer's business to be further used in the prosecution of that business at another place . . .*" (Emphasis added)

The last major case cited in the Appellant's brief is *Smith vs. Workmen's Compensation Appeals Board,* 447 Pac. 2nd, 365, 73 Cal. Reports 253, (1968). The Appellants representation of this case is erroneous and, in fact, is directly contrary to what the case holds. In this case the decedent worked for the county as a social worker and was killed on his way to work one morning.

The major issue upon which the decisions of both the Commission and the Court were based was whether he could use the county car on the job. The Appellant state at page 14 of their brief:

> "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."

This is clearly contrary to the court's findings. The Commission found that substantial evidence indicated that county cars were available for Smith's use during the day and based their denial of recovery on this evidence. The Commission in the Smith case as the Commission did in the present case before the bar reasoned that since these automobiles were available for the employee's use, he was not required to drive his own car and thus he was subject to the going and coming rule. The court, in the Smith case in granting the recovery based its holdings strictly on its own determination that Smith *was* required to furnish his own car and could not use the county car. That this is true under the facts of that particular case is supported by the following quotations:

On page 369 of the opinion the court states:

> "Hence the employer's *requirement* that the worker furnish a vehicle of transportation on the job curtails the application of the going and coming exclusion."

On page 370:

> "Surely in this day of a highly motorized society we cannot cast the going and coming rule as

> a protective covering over the shoulders of the employer who, for his own advantage, *demands* that the employer furnish the car on the job. (Emphasis added)

It is thus quite clear that the court in the Smith case determined that it was demanded by the employer or required by the employer that a vehicle be furnished by the employee. The Commission, in the instant case, found quite to the contrary; to wit, that no requirement that an automobile be furnished could be found from the evidence. Under the general rule regarding the Findings of Fact being exclusively the province of the Commission and under the substantial evidence supporting that finding the decision of the Commission must be affirmed.

CONCLUSION

There is substantial evidence to support the Findings of Fact of the Commission, some disputed and some not disputed, but in either event, the findings drawn from said evidence are reasonable. With the Findings of Fact being reasonable and based upon substantial evidence, the Conclusion of Law drawn therefrom is the only conclusion that could be reached; to wit, that the

the death of the decedent, Leo L. Lundberg, did not arise out of or in the course of his employment and the decision of the Commission should be affirmed.

Respectfully submitted,

MOFFAT, IVERSON & TAYLOR

By: Richard H. Moffat
1311 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Federated Dairy Farms, Inc. and Liberty Mutual Insurance Company

VERNON G. ROMNEY

Attorney General of the State of Utah and Attorney for Industrial Commission of Utah

State Capitol Building
Salt Lake City, Utah 84117